

A CRITICAL ANALYSIS OF THE STATE CAPTURE COMMISSION RECOMMENDATIONS TO PROTECT WHISTLEBLOWERS IN SOUTH AFRICA

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This article critically analyses the whistleblower recommendations of the State Capture Commission and the President of the Republic of South Africa's response to implementing these recommendations. Three recommendations are made: ensuring that whistleblowers receive the protections afforded by art 32(2) of the United Nations Convention against Corruption; possibly awarding whistleblowers a proportion of funds recovered, provided the information disclosed has been material to recovering funds; and affording whistleblowers immunity from criminal or civil action arising from their honest disclosures. This article argues that, although these whistleblower recommendations are laudable and will both protect and incentivise whistleblowers to disclose wrongdoing, South Africa should have a consolidated legislative framework to govern whistleblowing in the various sectors rather than the current approach, which scatters the regulation of whistleblowing across many statutes. The article recommends enhancing the protection of whistleblowers and suggests how to structure South Africa's whistleblower award programme so that it is clear, fair, transparent and efficient. It also argues that to avoid abuse, whistleblowers should not receive blanket immunity from criminal and civil proceedings but that this should be determined on a case-by-case basis.

Whistleblowers – the United Nations Convention against Corruption – Protected Disclosures Act 26 of 2000 – Companies Act 71 of 2008 – Witness Protection Act 112 of 1998

I INTRODUCTION

The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, also known as 'the State Capture Commission' or 'the Zondo Commission' after its chair, Justice Zondo, was established as part of the remedial action contained in the report of the then Public Protector titled 'State of Capture', which was released on 2 November 2016.¹ The State Capture

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¹ The commission was established on 9 January 2018, and it held hearings from 20 August 2018 to 12 August 2021. *The State Capture Commission Reports* relate to an investigation into complaints of improper conduct by the former President of the Republic of South Africa ('South Africa') Jacob Zuma and other state functionaries relating to the influence of the Gupta family in the removal and appointment of Cabinet Ministers and directors of state-owned companies, the awarding of contracts by certain organs of state linked to the Gupta family,

Commission made numerous recommendations, as set out in its reports (*The State Capture Commission Reports*).² On 23 October 2022 the President of South Africa, President Ramaphosa, released his response to the recommendations of *The State Capture Commission Reports* outlining his intentions for executing these recommendations³ ('the President's Response'). A critical facet of the President's Response concerns better protection for whistleblowers in South Africa.

Transparency International defines whistleblowing as

'the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations — which are of concern to or threaten the public interest — to individuals or entities believed to be able to effect action.'⁴

Whistleblowers are vital to exposing corporate crime, corruption, mismanagement and other wrongdoing threatening the rule of law, financial integrity, human rights, the environment, and public health and safety.⁵ In *Tshishonga v Minister of Justice and Constitutional Development & another*,⁶ the court said that whistleblowing is an effective and inexpensive

and the award of benefits linked to companies related to the Gupta family. The implicated state-owned companies include South African Airways SOC Ltd, Eskom Holdings SOC Ltd, Transnet SOC Ltd, the South African Revenue Service ('SARS') and Denel SOC Ltd. The reports are available at <https://www.statecapture.org.za/site/information/reports>, accessed on 3 January 2023.

² The six parts of *The State Capture Commission Reports* were released over a period of six months, with the first report released on 4 January 2022 and the final report released on 22 June 2022. *The State Capture Commission Reports* (see Part 1 vol 1 para 28 and Part 6 vol II para 68) conclude that state capture in South Africa has indeed been established.

³ 'Response by President Cyril Ramaphosa to the Recommendations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud' (23 October 2022). This document is available at https://www.gov.za/sites/default/files/gcis_document/202210/state-capture-commission-response.pdf, accessed on 3 January 2023.

⁴ Transparency International 'A best practice guide for whistleblowing legislation' (2018) 1 at 7, available at https://images.transparencycdn.org/images/2018_GuideForWhistleblowingLegislation_EN.pdf, accessed on 3 January 2023. Transparency International also provides a '[b]road definition of whistleblowing' (ibid), which is stated to be 'the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation; miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest, and acts to cover up of any of these'. Transparency International is a global civil society non-governmental organisation founded in Berlin in 1993 to expose corruption and reduce its harmful effects. On the development of whistleblowing since the 1970s see Thomas Olesen 'The birth of an action repertoire: On the origins of the concept of whistleblowing' (2022) 179 *Journal of Business Ethics* 13.

⁵ Transparency International ibid at 1.

⁶ 2007 (4) SA 135 (LC) para 166.

measure to curb corruption. The President's Response similarly acknowledges whistleblowing as an essential weapon in the fight against corruption.⁷ However, although *The State Capture Commission Reports* emphasised that whistleblowing may be one of the most effective tools to combat corruption, the current system provides no incentives for whistleblowers to 'break cover'.⁸

As that report notes, recent events in South Africa make it the highest priority that a genuine whistleblower who reports wrongdoing should urgently receive effective protection from retaliation.⁹ This article evaluates the State Capture Commission's recommendations and the President's Response on whistleblower protection in South Africa and suggests how these recommendations should be executed. This article does not purport to analyse the regulation of whistleblowing in South Africa in general terms, which falls beyond its scope. Its focus is on the three whistleblower recommendations of the State Capture Commission. This article first provides an overview of the three whistleblower recommendations of the State Capture Commission and the President's Response, followed by a discussion and critical analysis of each recommendation. Suggestions are made to enhance and execute these whistleblower recommendations.

Section 5(2) of the Companies Act 71 of 2008 ('the Companies Act') provides that, to the extent appropriate, a court interpreting or applying the Companies Act may consider foreign law. In *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd*,¹⁰ the High Court observed that company law in South Africa has for many decades tracked the English system and has taken its lead from the relevant English Companies Acts and jurisprudence, but s 5(2) of the Companies Act now encourages our courts to look further afield and to have regard in appropriate circumstances to other corporate law jurisdictions, be they American, European, Asian or African, in interpreting the Companies Act. For this reason, this article examines relevant whistleblower provisions of the Corporations Act, 2001 ('the Australian Corporations Act') and legislation in the United States ('US') and Canada. Australia recently overhauled its corporate whistleblower provisions in the Australian Corporations Act through the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act, 2019 ('the Australian Whistleblower Act'), which took effect on 1 July 2019 and which may yield helpful guidelines for executing the whistleblower recommendations of the State Capture Commission and the President's Response. Notably, Australia did not implement a whistleblower award

⁷ The President's Response op cit note 3 para 5.7.4.

⁸ *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 555.

⁹ Ibid.

¹⁰ 2012 (5) SA 497 (WCC) para 26.

system when it overhauled its whistleblower provisions.¹¹ For this reason, it is useful to turn to the well-established whistleblower award programmes in the US and Canada, as they may provide valuable guidelines for implementing a whistleblower award programme in South Africa, which is one of the recommendations of the State Capture Commission and the President's Response. Consequently, this article will, where relevant and as reinforced by s 5(2) of the Companies Act, refer to the corporate legislation in Australia, the US and Canada in so far as it is relevant to the three whistleblower recommendations in order to ascertain whether useful guidelines in executing these recommendations may be obtained.

II THE WHISTLEBLOWER RECOMMENDATIONS OF THE STATE CAPTURE COMMISSION AND THE PRESIDENT'S RESPONSE

The State Capture Commission recommends that the government should introduce legislation or amend existing legislation to:

- ensure that whistleblowers receive the protections afforded by art 32(2) of the United Nations ('UN') Convention against Corruption;¹²
- authorise the litigation unit of the agency¹³ to incentivise such disclosures by concluding agreements to reward whistleblowers by giving them a percentage of the proceeds recovered on the strength of such information;¹⁴ and

¹¹ Despite a recommendation by the Parliamentary Joint Committee on Corporations and Financial Services to enact a limited system of discretionary rewards for whistleblowers, Australia did not do this but instead improved the compensation for aggrieved whistleblowers in s 1317AE of the Australian Corporations Act (see Parliamentary Joint Committee on Corporations and Financial Services *Whistleblower Protections* (September 2017) recommendation 112 para 11.59, available at https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report, accessed on 5 January 2023). For a comparison of the whistleblower provisions in the Companies Act with those in the Australian Corporations Act, see Rehana Cassim 'A critical analysis of the corporate whistleblowing provisions of the South African Companies Act' (2023) 67 *Journal of African Law* 1.

¹² *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 690. See United Nations: Office on Drugs and Crime 'Convention against corruption' available at www.unodc.org/unodc/en/treaties/CAC/index.html, accessed on 4 January 2023, particularly the book United Nations: Office on Drugs and Crime *United Nations Convention against Corruption* (2004), available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed on 4 January 2023.

¹³ The proposed agency is discussed in part V(c)(vi) below.

¹⁴ *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 690.3.

- authorise the offer of immunity from criminal or civil proceedings if the whistleblower has honestly disclosed information that might otherwise render him or her liable to prosecution or litigation.¹⁵

In reply, the President's Response states that the Department of Justice has begun reviewing the Protected Disclosures Act 26 of 2000 and the Witness Protection Act 112 of 1998 to give effect to the following recommendations:

- ensuring that whistleblowers receive the protections afforded by art 32(2) of the UN Convention against Corruption;
- possibly awarding whistleblowers a proportion of funds recovered, provided that the information disclosed has been material to recovering funds; and
- affording whistleblowers immunity from criminal or civil action arising from their honest disclosures.¹⁶

The whistleblower recommendations of the State Capture Commission are restricted to whistleblowers who disclose wrongdoing relating to corruption, fraud and undue influence in public procurement.¹⁷ One of the key mechanisms of state capture was the strategic positioning of individuals in positions of power through the abuse of the appointment and dismissal process, which positions were used to control and manipulate public procurement, financial and contracting processes for private gain in state-owned entities and the public sector.¹⁸ A key reason for establishing

¹⁵ Ibid para 690.4.

¹⁶ The President's Response op cit note 3 para 5.7.8. The review is expected to include consultations with stakeholders and the National Anti-Corruption Advisory Council ('NACAC'), and to be completed by the end of April 2023 (the President's Response para 5.7.8). For information about this council, see The Presidency 'President appoints members of the National Anti-Corruption Advisory Council' 29 August 2022, available at <https://www.thepresidency.gov.za/press-statements/president-appoints-members-national-anti-corruption-advisory-council>, accessed on 4 January 2023.

¹⁷ See *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 paras 563–801. Public procurement refers to the purchasing by a government of the goods and services it requires to function and to pursue public welfare (Sope Williams & Geo Quinot 'Public procurement and corruption: The South African response' (2007) 124 *SALJ* 339 at 339). Procurement corruption takes place in the pre-tendering phase (such as procuring goods or services which are not needed and duplication of contracts), the tendering phase (such as abuse of preferential procurement policies and retroactive changes to bid criteria to favour specific bidders), and post award (such as contract variations and expansions without the relevant approvals). A detailed discussion of corruption in public procurement is beyond the scope of this article but see further *The State Capture Commission Reports* Part 1 vol 1 paras 327–416 for details of the patterns of abuse and corruption in public procurement as revealed by the State Capture Commission.

¹⁸ See the President's Response op cit note 3 para 3.2.7.

the State Capture Commission, and one of its core tasks, was to assess the impact of corruption and undue influence on public procurement and to make recommendations to curb irregularities and the corrupt manipulation of the procurement system.¹⁹ It is presumably for this reason that the whistleblower recommendations of the State Capture Commission are restricted to whistleblowers who disclose wrongdoing relating to corruption, fraud and undue influence in public procurement. While this restriction does not appear as clearly from the President's Response,²⁰ it is submitted that the proposed whistleblower recommendations must be extended to include all whistleblowers who disclose wrongdoing. Protecting all whistleblowers in South Africa, no matter the wrongdoing disclosed, is vital. The whistleblower recommendations of the State Capture Commission and the President's Response are canvassed below.

III A REVIEW OF THE PROTECTED DISCLOSURES ACT

The President's Response states that the Department of Justice has begun reviewing the Protected Disclosures Act to execute the relevant whistleblower recommendations. At the outset, it must be noted that whistleblowing regulation is not confined to that Act but is scattered across several other statutes.

The Protected Disclosures Act remains the overarching statute regulating whistleblowing by employees. It aims to protect employees and workers²¹ in the public and private sectors from being subject to an occupational detriment²² because they have made a protected disclosure.²³

¹⁹ *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 paras 331–2.

²⁰ See the President's Response op cit note 3 para 5.7.

²¹ Refer to s 1 of the Protected Disclosures Act for the definition of an 'employee' and a 'worker'.

²² An 'occupational detriment' includes a situation where an employee or worker is subject to a disciplinary action; dismissed, suspended, demoted, harassed or intimidated; transferred against his or her will; subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence or information which shows that a substantial contravention of, or failure to comply with the law has occurred; or otherwise adversely affected in respect of his or her employment, profession or office (s 1 of the Protected Disclosures Act).

²³ A disclosure will be protected if the whistleblower had acted in good faith; had reasonably believed the allegations made and the information disclosed to be substantially true; had not made the disclosure for personal gain, excluding any reward payable in terms of any law; and it had been reasonable to make the disclosure (s 9 of the Protected Disclosures Act). A detailed discussion of the Protected Disclosures Act is beyond the scope of this article, but for such a discussion see Rochelle le Roux 'The Protected Disclosures Act 26 of 2000: Is this as good as it is going to get for whistleblowers? A review of some recent jurisprudence' (2010) 21 *Stellenbosch LR* 508 and S Lubisi & H Bezuidenhout 'Blowing the whistle for personal gain in the Republic of South Africa: An option

The statute's broad purpose is to encourage whistleblowers to come forward in the interests of accountable, transparent governance in both the public and the private sectors.²⁴

The Companies Act is another important statute regulating whistleblowing in South Africa in the corporate sphere. Section 159 governs whistleblowing in all companies registered under the Companies Act — private, public, non-profit, state-owned,²⁵ and external companies.²⁶ Section 159(4) of the Companies Act protects shareholders, directors, company secretaries, prescribed officers,²⁷ employees, registered trade unions representing company employees (or another employee representative), suppliers of goods or services to a company, and their employees. This group is not limited to company 'insiders': it includes outsiders with a commercial relationship with companies, such as suppliers of goods and services to the company and their employees.²⁸

How do these two statutes interact? Section 159 of the Companies Act applies concurrently with the Protected Disclosures Act. As far as s 159 of the Companies Act creates a right or establishes any protection for an employee, this right and protection is in addition to (and does not replace) the right and protection conferred by the Protected Disclosures Act.²⁹ Notably, the Protected Disclosures Act applies to a

for consideration in the fight against fraud?' (2016) 18 *Southern African Journal of Accountability and Auditing Research* 49.

²⁴ *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa & another* 2010 (2) SA 333 (SCA) para 42. See further *Radebe & another v Premier, Free State & others* 2012 (5) SA 100 (LAC) para 16 on the purposes of the Protected Disclosures Act.

²⁵ A 'state-owned company' is defined in s 1 of the Companies Act as meaning an enterprise registered in terms of the Companies Act as a company and either is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act 1 of 1999, or is owned by a municipality in terms of the Local Government: Municipal Systems Act 32 of 2000 and is otherwise similar to such an enterprise.

²⁶ In terms of s 1 of the Companies Act an 'external company' is a foreign company carrying on business or non-profit activities in South Africa.

²⁷ A 'prescribed officer' is a person who is not a director of the company but exercises general executive control over and management of the whole, or a significant portion of the company's business and activities, or regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion of the company's business and activities (ss 1 and 66(10) of the Companies Act read with reg 38 of the Companies Regulations, 2011).

²⁸ For a disclosure to be protected, the whistleblower must act in good faith in making the disclosure, and must reasonably believe at the time of making the disclosure that the information showed or tended to show that the company or a director or prescribed officer of the company acting in that capacity had committed one of the types of wrongdoing listed in s 159(3)(b) of the Companies Act (s 159(3)).

²⁹ Section 159(1)(a) of the Companies Act.

disclosure contemplated in s 159 of the Companies Act by an employee, irrespective of whether the Protected Disclosures Act would otherwise apply to that disclosure.³⁰ If s 159 of the Companies Act and the Protected Disclosures Act are inconsistent, both apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the other.³¹ As far as this is impossible, the Companies Act prevails.³² Employees in corporate environments must thus refer to both these statutes when disclosing any wrongdoing — a challenging task, given the different requirements for disclosures to qualify for protection. Increasing this complexity is the Companies Act replicating only some of the categories of the disclosable matters mentioned by the Protected Disclosures Act.³³

These two statutes are not the only ones regulating whistleblowing in South Africa. Others include the Constitution of the Republic of South Africa, 1996,³⁴ the Labour Relations Act 66 of 1995 ('the LRA'),³⁵ the Prevention and Combating of Corrupt Activities Act 12 of 2004,³⁶ the Financial Intelligence Centre Act 38 of 2001,³⁷ the National

³⁰ Section 159(1)(b) of the Companies Act.

³¹ Section 5(4)(a) of the Companies Act.

³² Section 5(4)(b)(ii) of the Companies Act. See further Farouk H I Cassim (man ed) et al *Contemporary Company Law* 3 ed (2023) 7–8.

³³ The categories of disclosable matters under the Protected Disclosures Act that are replicated in the Companies Act are that: (i) a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; (ii) the health or safety of an individual has been, is being or is likely to be endangered; (iii) the environment has been, is being or is likely to be damaged; and (iv) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The categories of disclosable matters in the Protected Disclosures Act that have not been replicated are that: (i) a criminal offence has been committed, is being committed or is likely to be committed; (ii) a miscarriage of justice has occurred, is occurring or is likely to occur; and (iii) any matter referred to in the above categories has been, is being or is likely to be deliberately concealed.

³⁴ See ss 9 (right to equality); 10 (right to human dignity); 11 (right to life); 12 (right to freedom and security of the person); 14 (right to privacy); 16 (right to freedom of expression) and 23 (right to fair labour practices and other rights in labour relations).

³⁵ See ss 185 (right not to be unfairly dismissed or subject to unfair labour practices); 186(2)(d) (occupational detriments under the Protected Disclosures Act); 187(1)(h) (automatically unfair dismissals under the Protected Disclosures Act); 188A(11) (inquiries under the Protected Disclosures Act); 191(13) (disputes about occupational detriments under the Protected Disclosures Act) and 194 (limits on compensation).

³⁶ See ss 18 (offences of unacceptable conduct relating to witnesses) and 34 (duty to report corrupt transactions).

³⁷ See ss 28 (reporting cash transactions above prescribed limit); 29 (reporting suspicious and unusual transactions); 37 (reporting duty and obligations to provide

Environmental Management Act 107 of 1998,³⁸ the Pension Funds Act 24 of 1956,³⁹ the Local Government: Municipal Finance Management Act 56 of 2003,⁴⁰ and the Public Finance Management Act 29 of 1999.⁴¹ The Competition Commission also encourages whistleblowing on cartels involved in, among other things, price fixing and collusive tendering, and adopted a Corporate Leniency Policy in 2008⁴² under s 49E of the Competition Act 89 of 1998 to regulate this. While some of these statutes protect individuals in the context of whistleblowing, others encourage whistleblowing or place an obligation on persons in positions of authority to report wrongdoing of which they know or ought reasonably to have known or suspected.

As the South African whistleblowing regulation spans several statutes, it is submitted that the Department of Justice must review not only the Protected Disclosures Act to give effect to the protections afforded by art 32(2) of the UN Convention against Corruption, as the President's Response suggests, but also the Companies Act and all the other statutes regulating whistleblowing. Failing to do so would mean that only those whistleblowers who made disclosures under the Protected Disclosures Act — that is, employees in the public and private sectors — would receive the protections under art 32(2) of the UN Convention against Corruption. Other whistleblowers who are not employees, such as shareholders, non-executive directors, and outsiders such as suppliers of goods or services to a company, would then be excluded from these protections — an unfair, untenable outcome.

This dispersed whistleblowing regulation confuses whistleblowers and provides inconsistent protection. The complexity and vagueness may also discourage people from disclosing wrongdoing in their environment. Australia recently jettisoned its statutory patchwork protecting whistleblowers. The Australian Whistleblower Act consolidated whistleblower protection for the corporate and financial sectors⁴³ and created a new

information not affected by confidentiality rules) and 38 (protection of persons making reports).

³⁸ See s 31 (access to environmental information and protection of whistleblowers).

³⁹ See ss 9B (protection of disclosures) and 13B(10) (restrictions on administration of pension funds).

⁴⁰ See ss 32(6) and (7) (reporting by accounting officer of irregular expenditure, theft and fraud) and 102(2) (reporting by the board of irregular expenditure and losses).

⁴¹ See s 38(1)(g) (responsibility of accounting officer to report unauthorised, irregular or fruitless and wasteful expenditure).

⁴² See para 5.8, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf>, accessed on 5 January 2023.

⁴³ The Australian Whistleblower Act consolidates the whistleblower protection under the Australian Corporations Act, the Australian Securities and

whistleblower protection regime in the taxation sector by amending the Australian Corporations Act and the Taxation Administration Act, 1953. This consolidation now protects whistleblowers consistently and introduces a single concept of a protected disclosure, an eligible whistleblower and an eligible recipient.⁴⁴ It is submitted that the South African legislature should similarly enact a consolidated legislative framework governing whistleblowing in the various sectors to ensure clarity, provide consistent protection for whistleblowers across multiple sectors, and make the whistleblowing laws more visible and accessible.

IV ENSURING THAT WHISTLEBLOWERS RECEIVE THE PROTECTIONS AFFORDED BY ART 32(2) OF THE UN CONVENTION AGAINST CORRUPTION

The State Capture Commission recommends that the Government introduce new legislation or amend existing legislation to ensure that whistleblowers receive the protections afforded by art 32(2) of the UN Convention against Corruption.⁴⁵ The President's Response emphasises that whistleblowers must be protected from victimisation, prejudice or harm.⁴⁶ It states that the Department of Justice has begun reviewing the Witness Protection Act to give effect to this recommendation.⁴⁷ It is submitted that, instead of reviewing the Witness Protection Act to give effect to this recommendation, the government should rather implement the State Capture Commission's suggestion of introducing new legislation to ensure that whistleblowers receive the protections afforded by art 32(2) of the UN Convention against Corruption. This suggestion accords with the earlier submission in part III that South Africa should have a consolidated legislative framework governing whistleblowing in the various sectors.

Article 32(2) of the UN Convention against Corruption (which South Africa ratified on 22 November 2004) is not strictly about whistleblowers but provides for protecting witnesses, experts and victims who testify about corruption. Signatory states must establish procedures for physically protecting witnesses, experts and victims.⁴⁸ These procedures could entail

Investments Commission Act, 2001, the Banking Act, 1959, the Insurance Act, 1973, the Life Insurance Act, 1995, the Superannuation Industry (Supervision) Act, 1993, the Taxation Administration Act, 1953, the National Consumer Credit Protection Act, 2009, and the Financial Sector (Collection of Data) Act, 2001. Whistleblowing in the public sector in Australia is regulated by the Public Interest Disclosure Act 2013.

⁴⁴ See Parliament of the Commonwealth of Australia *Revised Explanatory Memorandum to Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill* (2018) para 2.12.

⁴⁵ *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 690.1.

⁴⁶ The President's Response op cit note 3 para 5.7.4.

⁴⁷ Ibid para 5.7.8.

⁴⁸ Article 32(2)(a) of the UN Convention against Corruption.

relocating them or permitting, where appropriate, the non-disclosure of or limitations on the disclosure of information regarding the identity and whereabouts of such persons.⁴⁹ Signatory states must also enact evidentiary rules to permit witnesses and experts to testify in a manner that ensures the safety of such persons, for example, allowing testimony to be given through the use of communications technology such as video or other adequate means.⁵⁰

(a) *Physical protection of whistleblowers*

In recent years, there have been an increasing number of reports of whistleblowers in South Africa who have suffered physical harm or been threatened with physical harm after exposing corruption in the public and private sectors in South Africa. In one example, a whistleblower who testified at the State Capture Commission on high-level corruption that implicated the management consultancy firm Bain & Co (based in the US) in the deliberate destructive reorganisation of SARS was forced to leave South Africa because he feared for his life.⁵¹ Another extreme example is the assassination of the chief director of financial accounting of the Gauteng Department of Health, who exposed corruption linked to Covid-19 personal protective equipment and was gunned down outside her home after facing intimidation and fabricated misconduct charges.⁵² In another example, a whistleblower, Patricia Mashale, claimed her life was in danger after exposing corruption in the police crime intelligence sector.⁵³ She was dismissed from her job in 2021 and has been in hiding after

⁴⁹ Ibid.

⁵⁰ Article 32(2)(b) of the UN Convention against Corruption.

⁵¹ Ray Mahlaka 'Athol Williams: "I will continue whistle-blowing and making the corrupt uncomfortable"' *Maverick Citizen* 28 November 2021, available at <https://www.dailymaverick.co.za/article/2021-11-28-athol-williams-i-will-continue-whistle-blowing-and-making-the-corrupt-uncomfortable/>, accessed on 5 January 2023. Refer to *The State Capture Commission Reports* op cit note 1 Part I vol III chap 3 for a discussion of the testimony given by Williams on state capture of state-owned companies. The National Treasury has banned Bain & Co from tendering for public sector contracts for a period of ten years for engaging in corrupt and fraudulent practices related to its contract at SARS (Jan Cronje 'Treasury bans Bain & Co. from public sector contracts for a decade' *News24* 29 September 2022, available at <https://www.news24.com/fin24/companies/breaking-treasury-bans-bain-co-from-public-sector-contracts-for-a-decade-20220929>, accessed on 5 January 2023).

⁵² Ferial Haffajee 'SIU confirms Babita Deokaran, mowed down after dropping child at school, was a witness in the R332m PPE scandal' *Maverick Citizen* 24 August 2021, available at <https://www.dailymaverick.co.za/article/2021-08-24-whistle-blower-slain-after-dropping-her-child-at-school-siu-confirms-babita-deokaran-was-a-witness-in-the-r332m-ppe-scandal/>, accessed on 5 January 2023.

⁵³ Thabiso Goba 'Resolute SAPS whistleblower says threats to her life linger' *Eyewitness News* 15 November 2022, available at <https://ewn.co.za/2022/11/15/resolute-saps-whistleblower-says-threats-to-her-life-linger>, accessed on 5 January 2023.

two unsuccessful attempts on her life.⁵⁴ The homes of two whistleblowers who had testified at the State Capture Commission about irregularities at SARS were burgled in what was described as deliberate targeting.⁵⁵ Another whistleblower reported that she suffered panic attacks and was diagnosed with depression, post-traumatic stress disorder ('PTSD'), anxiety and insomnia after exposing corporate corruption in state-owned companies.⁵⁶ The repercussions for whistleblowers in South Africa have been severe, as is clear from the reports of whistleblowers who have suffered physical harm, intimidation, loss of jobs, and even the loss of career prospects.

The Office for Witness Protection, established under s 2 of the Witness Protection Act, is tasked with ensuring the safety of witnesses who have reason to believe that their safety or the safety of any family member or person in a close relationship or association with that witness is or may be threatened by any person or group or class of person, whether known or not, because they are a witness.⁵⁷ The protection under that statute may include a witness's relocation or change of identity and other related assistance.⁵⁸ A 'witness' is defined under s 1 of the Witness Protection Act as 'any person who is or may be required to give evidence, or who has given evidence in any proceedings'. 'Proceedings'⁵⁹ means:

- any criminal proceedings in respect of any offence referred to in the Schedule⁶⁰ to the Witness Protection Act;
- proceedings before a commission or a Tribunal;
- proceedings under the Inquests Act 58 of 1959;⁶¹

⁵⁴ Ibid.

⁵⁵ Emsie Ferreira 'SARS whistleblower Van Loggerenberg suffers "suspicious" home invasion' *Mail & Guardian* 18 January 2022, available at <https://mg.co.za/news/2022-01-18-sars-whistleblower-van-loggerenberg-suffers-suspicious-home-invasion/>, accessed on 5 January 2023.

⁵⁶ Sandisiwe Shoba "'Treated like a leper": Mosilo Mothepu relates the cost of being a whistle-blower' *Daily Maverick* 22 April 2021, available at <https://www.dailymaverick.co.za/article/2021-04-22-treated-like-a-leper-mosilo-mothepu-relates-the-cost-of-being-a-whistle-blower/>, accessed on 5 January 2023. For further examples of the retaliation and victimisation faced by whistleblowers see *Tshishonga v Minister of Justice and Constitutional Development & another* supra note 6 and *Magagane v MTN SA (Pty) Ltd & another* (2013) 34 ILJ 3252 (LC).

⁵⁷ Section 7(1) of the Witness Protection Act.

⁵⁸ See the definition of 'protection' in s 1 of the Witness Protection Act.

⁵⁹ Section 1 of the Witness Protection Act.

⁶⁰ This schedule lists offences in respect of which a witness or related person may be placed under protection. They include treason, murder, rape, public violence, kidnapping, defeating the ends of justice, perjury, robbery when there are aggravating circumstances or involving the taking of a motor vehicle, and offences under ch 2 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁶¹ This statute provides for the holding of inquests in cases of deaths or alleged deaths occurring from causes which are not natural causes.

- proceedings relating to an investigation conducted by the Independent Police Investigative Directorate;⁶² and
- proceedings referred to in chap 5 and chap 6 of the Prevention of Organised Crime Act 121 of 1998.⁶³

The mandate of the Witness Protection Act is limited to persons who give evidence in court proceedings and does not extend to whistleblowers who are not witnesses in court proceedings. For example, a whistleblower who reports corruption but is not a witness in any subsequent criminal proceedings will not qualify for protection under this Act. This is why the President's Response states that consideration will be given to expanding the Office for Witness Protection mandate to include whistleblowers who are not witnesses.⁶⁴ If the government does not implement the suggestion of the State Capture Commission of introducing new legislation to ensure that whistleblowers receive the protections afforded by art 32(2) of the UN Convention against Corruption, but instead reviews the Witness Protection Act to give effect to this recommendation, it is submitted that consideration must be given to broadening the definition of the term 'proceedings' in this statute so that it includes matters relating to corruption so that whistleblowers who expose corruption in any form, whether or not they provide evidence in court, may fall within the scope of the Witness Protection Act and qualify for protection.

(b) Evidentiary rules to permit witnesses and experts to testify in a manner that ensures their safety

It is vital to protect the identity of whistleblowers in court proceedings. Guidance may be gleaned from s 1317AG(a) and (b) of the Australian Corporations Act. This provision protects whistleblowers' identity in court proceedings in that they need not disclose to a court or tribunal either their identity or information that is likely to lead to their identification, nor need they produce to a court or tribunal a document containing their identity or information that is likely to lead to their identification. The only exceptions are where it is necessary to give effect to the whistleblower regime or where the court or tribunal thinks it is necessary to do so in the interests of justice.⁶⁵ This provision aims to ensure that

⁶² This office is established under s 2 of the Independent Police Investigative Directorate Act 1 of 2011, which provides for the establishment of an independent police complaints body to investigate any alleged misconduct or offence committed by a member of the police service.

⁶³ Chapter 5 of the Prevention of Organised Crime Act 121 of 1998 deals with the proceeds of unlawful activities, and ch 6 deals with the civil recovery of property.

⁶⁴ The President's Response op cit note 3 para 5.7.6.

⁶⁵ Section 1317AG(c) and (d) of the Australian Corporations Act.

the discovery of documents or other processes in the context of court proceedings cannot extinguish the protection of a whistleblower's identity afforded by the law.⁶⁶ It is submitted that besides allowing whistleblowers to testify by using communications technology, rules like those in s 1317AG(a) and (b) of the Australian Corporations Act should be enacted in the consolidated legislative framework in South Africa to protect whistleblowers' identity in court proceedings.

V POSSIBLY AWARDING A PROPORTION OF FUNDS RECOVERED TO THE WHISTLEBLOWER

(a) *Compensation under the Protected Disclosures Act and the Companies Act*
Section 9(1)(b) of the Protected Disclosures Act explicitly excludes protection for a person who makes a disclosure for personal gain unless any reward is payable in terms of any law. It follows that if a whistleblower discloses information for personal gain, an occupational detriment that he or she suffers will not be protected under the Protected Disclosures Act. The term 'personal gain' is not defined in this Act. In *Tshishonga v Minister of Justice and Constitutional Development & another*,⁶⁷ the court held that 'personal gain' should be construed to include any commercial or material benefit or advantage received by or promised to the employee in exchange for the disclosure and any expectation by the employee of a benefit or advantage that is not due in terms of any law. But if the employee benefits incidentally from the disclosure, this will be protected, provided it was not the purpose of the disclosure.⁶⁸

⁶⁶ Parliament of the Commonwealth of Australia *Revised Explanatory Memorandum* op cit note 44 para 2.135.

⁶⁷ Supra note 6 para 209.

⁶⁸ Ibid. In *Tshishonga v Minister of Justice and Constitutional Development & another* ibid the applicant, who was the Managing Director of the Master's Office business unit, argued that certain disclosures he had made to the media relating to alleged improprieties and corruption in the Ministry of Justice and Constitutional Development and in the Department of Justice, together with allegations of corruption and nepotism about the then Minister of Justice, constituted protected disclosures under s 9 of the Protected Disclosures Act and that the consequent disciplinary action against him was an occupational detriment. The respondents argued that the disclosures were not protected because they had been made to the media, and that the applicant had not discharged the onus of proving that the disclosures were made in good faith (para 92). The Labour Court held that the applicant did not bear the onus of proving good faith but this was to be assessed on all the facts (para 205). It ruled that the disclosures were protected since they had been made in good faith, in the reasonable belief that the allegations were substantially true, and for no personal gain (paras 235, 239 and 279). The court found further that the applicant had already disclosed the information to the Public Protector and the Auditor-General and that a reasonable period had lapsed without any action being taken to investigate the complaint (paras 246 and 249). It ruled that the applicant's disclosures to the media had been made in the public

The only compensation that may be awarded to a whistleblower under the Protected Disclosures Act is compensation for automatically unfair dismissals or unfair labour practices as stipulated under the LRA. Under s 4(2)(a) of the Protected Disclosures Act, if a whistleblower is dismissed for making a protected disclosure, the dismissal is deemed to be an automatically unfair dismissal as contemplated in s 187 of the LRA. The compensation for an automatically unfair dismissal should be just and equitable, but the maximum compensation that may be awarded is the equivalent of 24 months' remuneration.⁶⁹ Any other occupational detriment suffered by a whistleblower is deemed under s 4(2)(b) of the Protected Disclosures Act to be an unfair labour practice as contemplated in s 186(2) of the LRA, for which the compensation must be just and equitable but may not exceed the equivalent of 12 months' remuneration.⁷⁰ Thus, a whistleblower's compensation under the Protected Disclosures Act is restricted to loss of income within the LRA framework.

Section 159 of the Companies Act similarly provides no financial incentives to whistleblowers for making disclosures that lead to successful resolutions of matters. The only compensation that may be awarded to a whistleblower is that whistleblowers may claim compensation for any damages they may suffer if, as a result of an actual or a possible disclosure that they are entitled to make, any person engages in conduct with the intent to cause detriment to them and the conduct causes such detriment.⁷¹

(b) Controversy about rewarding whistleblowers

In light of the fact that the Protected Disclosures Act and the Companies Act provide limited financial incentives to whistleblowers for their disclosures, the question arises as to whether this is the correct approach and whether whistleblowers should be rewarded financially for their disclosures that lead to successful resolutions of matters. The President's Response points out that although a policy of financially rewarding whistleblowers has proved very effective in other jurisdictions facing procurement fraud and corruption, the policy risks imputing a motive to the whistleblower, which could prejudice a successful prosecution.⁷² It is controversial whether whistleblowers should be rewarded financially for their disclosures.

On the one hand, as the Australian Parliamentary Joint Committee on Corporations and Financial Services has pointed out, financial awards for whistleblowing may encourage whistleblowers to speak up about corruption

interest as they involved the public service and public officials (para 263). The court awarded the applicant the maximum of 12 months' remuneration for the occupational detriment he had suffered (para 304).

⁶⁹ Section 194(3) of the LRA.

⁷⁰ Section 194(4) of the LRA.

⁷¹ Section 159(5)(a) of the Companies Act.

⁷² The President's Response op cit note 3 para 5.7.7.

and disclose high-quality information that would otherwise be difficult to obtain.⁷³ It also emphasises that an award system may motivate companies to improve their internal whistleblowing systems to deal more proactively with illegal behaviour.⁷⁴ These awards may also reduce the financial risks whistleblowers face by offsetting costs that they may incur in making the disclosure and compensating them if they were to lose their jobs.⁷⁵

On the other hand, financial awards for whistleblowing raise moral and ethical concerns, as well as concerns that whistleblowers will be motivated by gain rather than a desire to help expose wrongdoing.⁷⁶ A counter-argument is that in an environment where corruption is common, the need to expose corruption should trump concerns about whistleblowers' motives.⁷⁷ Because awards to whistleblowers are optional and not forced on them, those with strong moral convictions against being rewarded for disclosing wrongdoing may simply choose not to take the award, as in one case in the US.⁷⁸

Another argument against rewarding whistleblowers financially is that the awards may encourage fraudulent and malicious reporting and false claims.⁷⁹ To overcome this concern, the relevant legislative framework could expressly discourage whistleblowers from such misconduct. In any event, fraudulent reporting remains a criminal offence, which could expose a whistleblower to perjury charges.⁸⁰

⁷³ Parliamentary Joint Committee report op cit note 11 para 11.55.

⁷⁴ Ibid.

⁷⁵ Lubisi & Bezuidenhout op cit note 23 at 52.

⁷⁶ Parliamentary Joint Committee report op cit note 11 para 11.26; Terry Morehead Dworkin & A J Brown 'The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws' (2013) 11 *Seattle Journal for Social Justice* 653 at 702; Lubisi & Bezuidenhout ibid at 53.

⁷⁷ Dworkin & Brown ibid at 668.

⁷⁸ Theo Nyreröd & Giancarlo Spagnolo 'A fresh look at whistleblower rewards' (Working Paper No 56) *Stockholm Institute of Transition Economics* (2021) 1 at 15. In 2016, an employee of Deutsche Bank, who was dismissed after exposing wrongdoing about the bank's inflated valuation of its portfolio of credit derivatives, turned down his share of the US\$8.25 million which he was due to receive and requested that it be given to Deutsche Bank and its shareholders instead. He did this to signal his disappointment with the SEC's investigation, which, in his view, did not do enough to punish the executive directors who were responsible for the bank's wrongdoing. The SEC fined Deutsche Bank US\$55 million but did not penalise the executive directors, who were able to retire with large bonuses based on the misrepresentation of the bank's balance sheet. The employee was the first whistleblower to refuse an award since the SEC's whistleblower programme was launched in 2011 (Jana Kasperkevic 'Deutsche Bank whistleblower rejects award because SEC "went easy" on execs' *The Guardian* 18 August 2016, available at <https://www.theguardian.com/business/2016/aug/18/deutsche-bank-whistleblower-turns-down-award>, accessed on 3 January 2023).

⁷⁹ Parliamentary Joint Committee report op cit note 11 para 11.14.

⁸⁰ Nyreröd & Spagnolo op cit note 78 at 19.

A further objection to rewarding whistleblowers financially is that doing so undermines companies' internal compliance efforts.⁸¹ External reporting is also viewed as the whistleblower being disloyal to the company.⁸² However, studies show that whistleblowers who report externally often found the company's internal systems to be unhelpful because the company took no action.⁸³ The argument that rewarding whistleblowers undermines companies' internal compliance efforts assumes that the internal compliance systems are adequate and effective. It is submitted that this is not necessarily the case under the current South African legal provisions governing whistleblowing.

The Protected Disclosures Act requires every employer to authorise appropriate internal procedures for receiving and dealing with information about improprieties and to take reasonable steps to bring the internal procedures to the attention of every employee and worker.⁸⁴ Under the Companies Act, public and state-owned companies must directly or indirectly establish and maintain a system to receive disclosures confidentially, must act on them, and must routinely publicise this system to the eligible class of whistleblowers.⁸⁵ It is submitted that a weakness of these internal compliance systems is that they are not subject to any monitoring or enforcement and do not address the consequences of employers and companies failing to establish and maintain an internal system to receive disclosures and to publicise these procedures to potential whistleblowers.⁸⁶ A further weakness of s 159(7) of the Companies Act is

⁸¹ Nyreröd & Spagnolo *ibid* at 13; Lubisi & Bezuidenhout *op cit* note 23 at 53.

⁸² Lubisi & Bezuidenhout *ibid* at 53.

⁸³ See Nyreröd & Spagnolo *op cit* note 78 at 13.

⁸⁴ Section 6(2)(a) of the Protected Disclosures Act.

⁸⁵ Section 159(7) of the Companies Act. Under reg 131 of the Companies Regulations, 2011, public and state-owned companies are required to display conspicuously a notice about this system at the company's registered office, the principal places of conducting business, any workplace where its employees are employed, on its website, and, if it is a listed company, on any applicable electronic system of the relevant exchange for the communication and interchange of information among companies listed on that exchange.

⁸⁶ If the Companies and Intellectual Property Commission knows of a company's failure to comply with these requirements, it could probably issue a compliance notice under s 171(1) of the Companies Act requesting the company to comply with these requirements (Piet Delpont *Henochsberg on the Companies Act* (SI 28, 2022) 560(20)). In general, the failure to comply with a compliance notice could result in an administrative fine being imposed on the company or a criminal prosecution if the Companies and Intellectual Property Commission refers the matter for prosecution (s 171(7) of the Companies Act). In contrast, under subsecs 13171AI(1), (2) and (3) of the Australian Corporations Act a failure to have a whistleblowing policy that complies with the requirements of s 1317(5) of the Australian Corporations Act (setting out the matters that must be addressed in a whistleblower policy) constitutes a strict liability offence which results in a penalty of 60 penalty units.

that it requires only public and state-owned companies to establish a system to receive disclosures confidentially, act on them and publicise this system. This requirement is problematic because it means that only public and state-owned companies are required to have this internal system, even though the provisions regulating whistleblowing in s 159 apply to all companies. Introducing a whistleblower award system might incentivise companies to strengthen their internal systems to encourage whistleblowers to report wrongdoing internally before reporting it externally, thereby potentially preventing or limiting reputational harm to companies that may result from the information being made public.⁸⁷

The whistleblower award programmes in the US are well-established, and reports show that they have enjoyed much success.⁸⁸ They are found under the False Claims Act of 1986⁸⁹ ('the False Claims Act') and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010⁹⁰ ('Dodd-Frank Act'), which amended the Securities Exchange Act of 1934⁹¹ ('the Securities Exchange Act') by adopting s 240.21F titled 'Securities Whistleblower Incentives and Protection'. Under the False Claims Act,

⁸⁷ Janet Austin & Sulette Lombard 'The impact of whistleblowing awards programs on corporate governance' (2019) 36 *Windsor Yearbook of Access to Justice* 63 at 74. For a further discussion of the internal whistleblower systems under the Companies Act, see Cassim op cit note 11 at 15–18.

⁸⁸ For example, statistics show that in 2019, 72 per cent of fraud recoveries in the US were triggered by whistleblower disclosures, and that by the end of 2019, the US government was able to recover US\$17.3 billion in cases for which there were no whistleblowers, but US\$44.7 billion in cases triggered by whistleblowers (see Stephen M Kohn 'The rise of international whistleblowers: Qui tam rewards for non-U.S. citizens' *Mondaq* 3 February 2020, available at <https://www.mondaq.com/unitedstates/Employment-and-HR/889468/The-Rise-Of-International-Whistleblowers-Who-Tam-Rewards-For-Non-US-Citizens>, accessed on 6 January 2023). According to the SEC Whistleblower Office, in 2022 the SEC awarded approximately US\$229 million in 103 awards, making 2022 the SEC's second-highest year in terms of dollar amounts and the number of awards, and it received over 12 300 whistleblower tips, which is the largest number of whistleblower tips received in a fiscal year (SEC Office of the Whistleblower *Annual Report 2022* (2022) at 1, available at https://www.sec.gov/files/2022_ow_ar.pdf, accessed on 6 January 2023). For a further discussion of whistleblower rewards in the US, see Matthew R Stock 'Dodd-Frank Whistleblower Statute: Determining who qualifies as a "whistleblower"' (2017) 16 *Florida State University Business Review* 131 and Daniel J Hurson 'Sarbanes-Oxley, Dodd-Frank, retaliation, and reward: Representing clients in the age of the whistleblower' (2017) 32 *ABA Journal of Labor and Employment Law* 381.

⁸⁹ Sections 3279–3733 of the False Claims Act, 31 USC (1986).

⁹⁰ Public Law No 111–203, 124 Stat 1376 (2010). Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act established the Security and Exchange Commission's whistleblower programme and added s 240.21F to the Securities Exchange Act of 1934, which provision came into effect on 12 August 2011.

⁹¹ Section 78u–6 of the Securities Whistleblower Incentives and Protection, 15 USC (2012).

whistleblowers are given a percentage of the moneys recovered following a disclosure of fraud perpetrated against the US government.⁹² Section 240.21F of the Securities Exchange Act requires the Securities and Exchange Commission ('the SEC') to pay awards to whistleblowers who provide it with original information about violations of federal securities laws.⁹³ Financial awards for whistleblowing are also used in Canada.⁹⁴

It is submitted that the benefits of a whistleblower award system in South Africa will outweigh its possible disadvantages, given the high level of corruption, particularly in state-owned companies, as documented in *The State Capture Commission Reports*. According to Transparency International, although rewards help to restore a whistleblower's situation, their main aim is to incentivise whistleblowers to come forward.⁹⁵ As reporting rates of wrongdoing in South Africa are low,⁹⁶ whistleblowers urgently need to be encouraged to come forward with high-quality information to curb

⁹² Sections 3729 and 3730 of the False Claims Act. A false claim refers to where a company or a person knowingly presents a false or fraudulent claim for payment or approval to the government. See s 3729(a)(1) of the False Claims Act for a comprehensive definition of the various acts that constitute a false claim.

⁹³ The federal securities laws include the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Sarbanes-Oxley Act of 2002, the Gramm-Leach-Bliley Act of 1999, the Bank Secrecy Act of 1970 and the rules adopted under these statutes by the SEC or the Department of the Treasury.

⁹⁴ A system of rewarding whistleblowers for disclosures relating to securities offences has been introduced under the Ontario Securities Commission, OSC Policy 15-601, *Whistleblower Program* (July 2016) (the 'Ontario Whistleblower Program'). It aims to encourage individuals to report information on serious securities- or derivatives-related misconduct to the Ontario Securities Commission, provide protection to investors from unfair, improper or fraudulent practices, and foster fair and efficient capital markets and confidence in capital markets. See further OSC Notice of Policy Amendment to OSC Policy 15-601 *Whistleblower Program* (October 2018); Notice of Consequential Amendments and Changes to Ontario Securities Commission Rules and Policies (January 2022); Brooke Neal 'Ontario Securities Commission whistleblower protection program' (2016) 22 *Law and Business Review of the Americas* 271; Austin & Lombard op cit note 87 at 63–83.

⁹⁵ Transparency International op cit note 4 principle 1 at 56.

⁹⁶ See Liezl Groenewald *Whistleblowing Management Handbook* (2020) 39–43. The main reasons given for not reporting wrongdoing are the fear of being victimised, the belief that the company will not act on the disclosure, the belief that the disclosure will not be anonymous, the fear of losing one's job, and the lack of knowledge concerning to whom to make the disclosure (David Lewis 'Personal and vicarious liability for the victimisation of whistleblowers' (2007) 36 *ILJ* 224 at 224; Lubisi & Bezuidenhout op cit note 23 at 56–7). There is also a negative perception of whistleblowers in South Africa, which may stem from South Africa's political history. During the apartheid era in South Africa, whistleblowers were associated with informers, known as *impimpis*, which is a derogatory term reserved for apartheid-era police spies who were used by the apartheid-era regime to draw out the identity and location of political activists

corruption, fraud, bribery, tax evasion and money laundering in South African companies, and a whistleblower award system will provide the necessary incentives for them to do so.

(c) *Structuring the whistleblower award programme in South Africa*

Pursuant to the submission made in part III above that South Africa should have a consolidated legislative framework governing whistleblowing, it is submitted that the consolidated framework should incorporate a whistleblower award programme across the various South African sectors under which whistleblowers are to be rewarded for their disclosures in certain instances. Many factors must be considered when structuring a programme to award whistleblowers. The system must be designed in accordance with best practices for South Africa because if it is poorly designed and implemented, its administrative costs may be too high and hence unfeasible. It is also essential to ensure that the time between a whistleblower's submitting a claim for an award and being paid is not too long, as a long delay may deter whistleblowers from disclosing wrongdoing again. It is submitted that, in line with the approach adopted under the Securities Exchange Act⁹⁷ and the Ontario Whistleblower Program,⁹⁸ whistleblowers in South Africa should be rewarded for disclosing not only original information that is not already known but also information derived from a whistleblower's independent, critical analysis of publicly available information if the analysis reveals information not generally known or available to the public. Vital factors to be considered in developing a whistleblower award programme for South Africa are canvassed below.

(i) *Empowering private individuals with enforcement action*

One key factor is whether a *qui tam* approach should be adopted. This is a civil action where the burden of evidence is on a balance of probabilities, and it complements but does not replace the traditional public enforcement of laws.⁹⁹ Private citizens are given the right to enforce their actions independently on behalf of the state and to approach a court to enforce a public law for the state.¹⁰⁰

seeking to overthrow the illegitimate government (*Tshishonga v Minister of Justice and Constitutional Development & another* supra note 6 para 168).

⁹⁷ Section 240.21F-4(3)(b) and (3) of the Securities Exchange Act.

⁹⁸ Section 14(1)(a) of the Ontario Whistleblower Program.

⁹⁹ R Brunette & J Klaaren 'Reforming the public procurement system in South Africa' (2020) *Position Papers on State Reform* Public Affairs Research Institute 1 at 17.

¹⁰⁰ 'Qui tam' is a shortened version of the Latin phrase 'qui tam pro domino rege quam pro se ipso in hac parte sequitur', which means 'he who sues in this matter for the king as well as for himself'.

The *qui tam* approach has been adopted under the False Claims Act and the Securities Exchange Act. Private persons, known as relators, may file suits for violations of the False Claims Act on behalf of the government.¹⁰¹ The *qui tam* complaint is sealed for 60 days, during which the government must investigate the complaint.¹⁰² If the government decides to intervene in the action, it is primarily responsible for prosecuting it.¹⁰³ The relator is then entitled to receive between 15 and 25 per cent of the proceeds of the action or settlement of the claim, provided that the relator's original information leads to a successful prosecution.¹⁰⁴ The award depends on how far the person substantially contributed to the prosecution of the action, and it is paid to the relator only if the case succeeds.¹⁰⁵ If the government declines to take over the action, the relator may pursue it.¹⁰⁶ The relator's share then increases to between 25 to 30 per cent of the proceeds of the action or settlement of the claim.¹⁰⁷ Under the Securities Exchange Act, for the voluntary disclosure of original information from a whistleblower that results in the imposition of monetary sanctions of over US\$1 million, the SEC pays the whistleblower an award ranging from 10 to 30 per cent of the amount collected from those sanctions.¹⁰⁸

The advantages of the *qui tam* approach are that where information is difficult and costly to access, the *qui tam* approach draws out this information and covers for gaps in investigative capacity while incentivising whistleblowers to make disclosures.¹⁰⁹ However, opponents of the *qui tam* approach argue that it encourages unnecessary litigation and there is potential for abuse.¹¹⁰ *The State Capture Commission Reports* oppose introducing *qui tam* provisions to empower whistleblowers to bring civil claims for the recovery of damages suffered by the state as a result of procurement fraud and corruption because of potential complications that may arise

¹⁰¹ Section 3730(b)(1) of the False Claims Act.

¹⁰² Section 3720(b)(2) of the False Claims Act.

¹⁰³ Section 3730(c)(1) of the False Claims Act.

¹⁰⁴ Section 3730(d)(1) of the False Claims Act.

¹⁰⁵ Ibid.

¹⁰⁶ Section 3730(c)(3) of the False Claims Act.

¹⁰⁷ Section 3730(d)(2) of the False Claims Act. In some instances, relators are prohibited from filing *qui tam* actions, such as when they were convicted of criminal conduct arising from their role in the violation of the False Claims Act (s 3730(d)(3)) or when the *qui tam* action is based on information that has already been publicly disclosed (s 3730(e)(4)(A)).

¹⁰⁸ Sections 240.21F-3(a) and 240.21F-5(b) of the Securities Exchange Act. See further Dworkin & Brown on cit note 76 at 672–80.

¹⁰⁹ Jonathan Klaaren & Ryan Brunette 'The Public Procurement Bill needs better enforcement: A suggested provision to empower and incentivise whistleblowers' (2020) 7 *African Public Procurement LJ* 16 at 19.

¹¹⁰ Ibid at 21.

when private individuals are empowered to litigate for personal financial reward in the state's name.¹¹¹

If a *qui tam* approach is rejected, the alternative approach is an administrative system or a 'cash for information' approach, in terms of which the relevant agency exercises a discretion to decide whether the claim should be pursued.¹¹² This seems to be the approach suggested by *The State Capture Commission Reports*¹¹³ and the President's Response,¹¹⁴ which recommend that a fixed percentage of the moneys recovered from the disclosure should be awarded to whistleblowers, provided that the information disclosed was material to the obtaining of the award. Although this latter approach is simpler than the *qui tam* approach, its disadvantage is that it is in the discretion of the relevant agency whether to pursue the matter, failing which the whistleblower would have no option to proceed with an independent enforcement action.

(ii) *Rewarding whistleblowers when no money is recovered from the disclosure*

Another factor to be considered when developing South Africa's whistleblower award programme is whether whistleblowers should be rewarded for their disclosures that lead to a successful sanctioning of wrongdoing but do not lead to a recovery of money from the wrongdoer because either the disclosure involves no monetary sanction being imposed on the wrongdoer or a monetary sanction cannot be collected from the wrongdoer. The approach of *The State Capture Commission Reports* and the President's Response in recommending that a fixed percentage of the moneys recovered from the disclosure should be awarded to whistleblowers (provided that the information disclosed was material to the obtaining of the award) suggests that whistleblowers should be rewarded only when money is recovered from the disclosure.

It is submitted that, contrary to this approach, amid South Africa's high corruption rate and low reporting rate of wrongdoing, South Africa's whistleblower award programme should provide for whistleblowers to be rewarded for information, even if it leads to no financial recovery from the disclosure but at least to a successful criminal prosecution or a successful resolution of the matter. Awards should also be given to whistleblowers in South Africa where the disclosure prevents financial loss to institutions or benefits the public interest. This approach may result in a higher reporting rate of wrongdoing and may stem the rampant corruption in South Africa.

¹¹¹ *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 568. Unlike the position in the US, the Ontario Whistleblower Program does not permit a private right of action for a whistleblower to seek a whistleblower award (s 26 of the Ontario Whistleblower Program).

¹¹² Nyneröd & Spagnolo op cit note 78 at 4.

¹¹³ *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 569.

¹¹⁴ The President's Response op cit note 3 para 5.7.8.

(iii) *The size of the award*

A further consideration in developing a whistleblower award programme for South Africa is the size of the award to be given to the whistleblower. As mentioned earlier,¹¹⁵ under the False Claims Act, whistleblowers receive an award of between 15 to 25 per cent, depending on the quality of the information provided and the extent to which the whistleblower substantially contributed to the prosecution of the action.¹¹⁶ Under the Securities Exchange Act, the percentage of the whistleblower award ranges from 10 to 30 per cent of the monetary sanctions collected.¹¹⁷ The SEC may, in its discretion, increase or decrease the award percentage based on an analysis of various factors.¹¹⁸ Under the Ontario Whistleblower Program, whistleblowers are entitled to an award of between 5 and 15 per cent of the monetary sanctions imposed if the sanctions ordered against the wrongdoers are CDN \$1 million or more, and the award may likewise be adjusted once various factors are analysed.¹¹⁹

In line with the approach adopted in the US and Canada, it is submitted that the percentage of the award to be given to whistleblowers in South Africa should vary based on an analysis of several factors. One relevant factor should be the significance and quality of the information provided by the whistleblower, as well as its truthfulness, reliability and completeness.¹²⁰ The type and severity of the wrongdoing disclosed by the whistleblower should also be considered,¹²¹ and a higher award should be given if the wrongdoing is egregious.¹²² Other factors should be the degree of assistance provided by the whistleblower¹²³ and whether

¹¹⁵ See the text accompanying footnote 104.

¹¹⁶ Section 3730(d)(1) of the False Claims Act.

¹¹⁷ See the text accompanying footnote 108. As part of the Dodd-Frank Act, to ensure that whistleblowers are adequately compensated, the US Congress established a fund at the US Treasury Department called the Securities and Exchange Commission Investor Protection Fund. This fund is required to maintain a minimum balance to ensure the payments required under the law may be paid. If the funding for the Securities and Exchange Investor Protection Fund drops below that balance, the SEC must use the sanctions it obtains from enforcement cases to replenish the fund (s 78u-6(g) of the Securities Whistleblower Incentives and Protection).

¹¹⁸ See s 240.21F-6 of the Securities Exchange Act for the criteria for determining the award amount.

¹¹⁹ Section 18 of the Ontario Whistleblower Program. The whistleblower award is capped, with the maximum award being CDN \$5 million (s 18(3), (4) and (5) of the Ontario Whistleblower Program).

¹²⁰ See s 240.21F-6(a)(1) of the Securities Exchange Act and s 25(2)(b)(ii) of the Ontario Whistleblower Program.

¹²¹ See s 240.21F-6(3)(iii) of the Securities Exchange Act.

¹²² Nyneröd & Spagnolo op cit note 78 at 17.

¹²³ See s 3730(d)(1) of the False Claims Act, s 240.21F-6(a)(2) of the Securities Exchange Act and s 25(2)(c) of the Ontario Whistleblower Program.

the whistleblower's assistance saved time in investigating the matter.¹²⁴ A further factor should be the resources that are conserved due to the whistleblower's assistance.¹²⁵ The size of the award should serve as a motivating factor for whistleblowers to disclose wrongdoing and must therefore not be too low.

A pertinent factor to consider is the unique hardship experienced by the whistleblower due to his or her disclosure.¹²⁶ As discussed earlier, whistleblowers have suffered substantial repercussions for whistleblowing in South Africa.¹²⁷ The whistleblower award must match the financial impact of the disclosure on the whistleblower. A higher personal cost should result in a higher award. For example, the award should cover any loss that a whistleblower might incur from losing his or her job, costs linked to a change of occupation, such as moving expenses or professional training, and any potential loss of career prospects.¹²⁸ The award should also compensate the whistleblower for any social ostracism suffered due to the disclosure and for any emotional or psychological distress, anxiety and retaliation encountered by the whistleblower.¹²⁹

To overcome the concern that whistleblower award programmes undermine companies' internal compliance efforts, provisions should be drafted into the whistleblower award programme to encourage internal reporting. The Protected Disclosures Act adopts this approach by requiring employees to disclose the wrongdoing internally before disclosing it externally if the employer takes no steps after a reasonable period.¹³⁰ It is submitted that it should not be mandatory for whistleblowers in South Africa to report wrongdoing internally to qualify for a whistleblower award, as there may be circumstances when it might not be appropriate for whistleblowers to report the wrongdoing internally.¹³¹ There is also a

¹²⁴ See s 25(2)(d) of the Ontario Whistleblower Program.

¹²⁵ See s 240.21F-6(a)(2)(iii) of the Securities Exchange Act.

¹²⁶ See s 240.21F-6(a)(2)(vi) of the Securities Exchange Act and s 25(2)(h) of the Ontario Whistleblower Program.

¹²⁷ See text accompanying footnotes 51 to 56 in part IV(a).

¹²⁸ Transparency International op cit note 4 principle 1 at 51; Nyneröd & Spagnolo op cit note 78 at 17.

¹²⁹ Ibid.

¹³⁰ Sections 6(2)(a) and 9(2)(c) of the Protected Disclosures Act. The reasonableness of the period must be assessed according to the passage of time, the nature of the disclosure, its seriousness, and the quantity and quality of the investigation it calls for (*Tshishonga v Minister of Justice and Constitutional Development & another* supra note 6 para 247).

¹³¹ Although the Ontario Securities Commission encourages whistleblowers who are employees to report potential violations of Ontario securities law in the workplace through an internal compliance and reporting mechanism in accordance with their employer's internal compliance and reporting protocol, the commission does not make it mandatory for whistleblowers to do so for the reason that there may be circumstances in which a whistleblower may appropriately wish

risk that if mandatory internal reporting is required before a whistleblower may report externally, companies are free to develop substandard internal reporting systems while preventing or delaying the whistleblower from reporting the wrongdoing externally.¹³² Instead, whistleblowers should be incentivised to report internally first, without mandating them to do so, by linking the amount of the award to the efforts of the whistleblower to use internal reporting channels.¹³³ This outcome is shown under both the Securities Exchange Act¹³⁴ and the Ontario Whistleblower Program,¹³⁵ providing a higher award to whistleblowers who used internal channels to disclose the wrongdoing before disclosing it externally.

Along with a whistleblower award, under the False Claims Act,¹³⁶ whistleblowers also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. It is submitted that a similar provision should be incorporated into the whistleblower award programme in South Africa to compensate whistleblowers for any reasonable expenses incurred in making the disclosure and to encourage them to disclose wrongdoing without being deterred by the expenses of doing so.

(iv) *Rewarding whistleblowers who participated in the wrongdoing*

The question arises whether whistleblowers who participated in the wrongdoing should be eligible to receive a whistleblower award for the disclosure. It is submitted that a whistleblower convicted of criminal conduct related to the wrongdoing (for which the whistleblower otherwise could receive an award) should not be eligible to receive an award. This approach is adopted under the False Claims Act¹³⁷ and the Securities Exchange Act.¹³⁸ It is submitted further that if a whistleblower is not convicted of a criminal offence related to the wrongdoing but participated in the wrongdoing or planned and initiated it, the award should be reduced according to the extent of the whistleblower's involvement in the wrongdoing, and whether the whistleblower benefited financially from the wrongdoing.¹³⁹

not to report to an internal compliance and reporting mechanism (s 16(1) of the Ontario Whistleblower Program).

¹³² Austin & Lombard op cit note 87 at 82.

¹³³ Ibid.

¹³⁴ Section 240.21F-6(a)(4) of the Securities Exchange Act.

¹³⁵ Section 25(2)(f) of the Ontario Whistleblower Program.

¹³⁶ Section 3730(d)(1) and (2) of the False Claims Act.

¹³⁷ Section 3730(d)(3) of the False Claims Act.

¹³⁸ Section 240.21F-8(3) of the Securities Exchange Act.

¹³⁹ See s 3730(d)(3) of the False Claims Act, s 240.21F-6(4)(b)(1) of the Securities Exchange Act and ss 17(2) and 25(3)(b) of the Ontario Whistleblower Program, where this approach is adopted.

(v) *Safeguards against malicious reporting*

The South African whistleblower award programme should contain safeguards to protect against malicious reporting and false claims by whistleblowers. The Protected Disclosures Act already has some safeguards against malicious reporting. For example, s 9B of the Protected Disclosures Act provides that if an employee or worker intentionally discloses false information knowing the information to be false (or who ought reasonably to have known this) with the intention to harm the affected party and the affected party suffers such harm as a result of the disclosure, the employee or worker will be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding two years, or to both such fine and imprisonment. The safeguards in the Companies Act against malicious reporting require that a disclosure will be protected only if it is made in good faith¹⁴⁰ and if the whistleblower reasonably believed at the time of making the disclosure that the information showed or tended to show that the company or a director or prescribed officer of the company acting in that capacity had committed one of the types of wrongdoing listed in s 159(3)(b). Moreover, the whistleblower will forfeit the protection of qualified privilege in s 159(4)(a) of the Companies Act if the disclosure is made because of an improper motive or with malice.¹⁴¹

If whistleblowers in South Africa are to be rewarded financially for their disclosures, there must be effective safeguards to protect against malicious reporting and false claims. Under the Securities Exchange Act, a whistleblower who knowingly and wilfully makes any materially false, fictitious or fraudulent statement or representation will not be eligible to be considered for an award.¹⁴² The SEC may also impose a permanent bar on a claimant if it finds that the claimant submitted materially false, fictitious or fraudulent statements in his or her whistleblower submissions. In this event, no further claims will be accepted from that person.¹⁴³ Under the Ontario Whistleblower Program, if whistleblowers make misleading or untrue statements, they may be prosecuted for knowingly providing

¹⁴⁰ Section 159(3)(a) of the Companies Act.

¹⁴¹ One of the protections given to a whistleblower for a protected disclosure under s 159(4)(a) of the Companies Act is that of qualified privilege. The term 'qualified privilege' is not defined in the Companies Act. Under the South African common law, 'qualified privilege' is a provisional defence open to the publisher of a defamatory statement, under which the publication of defamatory words is regarded as being in the interest of public policy, and therefore lawful (*Borgin v De Villiers & another* 1980 (3) SA 556 (A) at 571; *Tuch & others NNO v Myerson & others NNO* 2010 (2) SA 462 (SCA) para 10). The qualified privilege defence may be relied on only if the publisher of the information did not act with malice or with an improper motive (*Joubert v Venter* 1985 (1) SA 654 (A) at 704; *Van der Berg v Coopers & Lybrandt Trust (Pty) Ltd & others* 2001 (2) SA 242 (SCA) para 17; *NEHAWU v Tsatsi* 2006 (6) SA 327 (SCA) paras 10 and 12).

¹⁴² Section 240.21F-8(c)(7) of the Securities Exchange Act.

¹⁴³ Section 240.21F-8(e) of the Securities Exchange Act.

misleading or untrue information, and no award will be provided.¹⁴⁴ Similar provisions should be enacted in South Africa's whistleblower award programme to guard against malicious reporting and false claims.

(vi) *Enforcing the whistleblower award programme*

The State Capture Commission recommended that the state introduce legislation to establish an independent agency against corruption in public procurement, comprising a council, an inspectorate, a litigation unit, a tribunal, and a court.¹⁴⁵ It recommended that the agency be financed from money appropriated by Parliament, fees payable to the agency by all tenderers for public procurement contracts, and money received from other sources.¹⁴⁶ It suggested that one of the functions of the agency's council should be to formulate measures for the making of reports to the agency by whistleblowers and for their protection and incentivisation.¹⁴⁷ It also suggested that the inspectorate should be identified as the channel for disclosures¹⁴⁸ and that its functions should include establishing and maintaining a comprehensive, secure database to receive information from whistleblowers under the procedures mandated by the council, and to provide protection and support to whistleblowers under art 32(2) of the UN Convention against Corruption.¹⁴⁹ The litigation unit of the agency should be authorised to incentivise disclosures by whistleblowers by concluding agreements to reward whistleblowers by giving them a percentage of the proceeds recovered on the strength of such information.¹⁵⁰ The President's Response does not address these specific recommendations but states that they require further consideration in the context of processes already being explored to review and redesign South Africa's anti-corruption architecture.¹⁵¹

It is submitted that, consistent with the recommendations of the State Capture Commission, a dedicated body should be authorised to conclude agreements with whistleblowers to reward them for their disclosures. Having an independent body to perform this function and enforce the

¹⁴⁴ Sections 2(c) and 14(3)(a) of the Ontario Whistleblower Program.

¹⁴⁵ *The State Capture Commission Reports* op cit note 1 Part VI vol IV para 52.

¹⁴⁶ Ibid para 53.4.

¹⁴⁷ Ibid para 55.4.

¹⁴⁸ Ibid para 690.2.

¹⁴⁹ Ibid para 686.3.

¹⁵⁰ Ibid para 60.3.

¹⁵¹ The President's Response op cit note 3 para 5.2.7. These processes relate to the work being done by the National Anti-Corruption Advisory Council (NACAC) established in August 2022 as an independent advisory body, which is tasked with advising on strengthening South Africa's anti-corruption institutional arrangements (see the President's Response paras 5.29 and 5.2.16). Another process is that the Department of Justice is tasked with researching and reviewing South Africa's anti-corruption architecture (the President's Response para 5.2.10).

whistleblower award programme will ensure that the programme is properly and efficiently executed and will minimise delays in finalising claims from whistleblowers.

VI AFFORDING WHISTLEBLOWERS IMMUNITY FROM CRIMINAL OR CIVIL ACTION ARISING FROM THEIR HONEST DISCLOSURES

The final recommendation of *The State Capture Commission Reports* regarding whistleblowers is that if there has been an honest disclosure of information that might otherwise render the whistleblower liable to prosecution or litigation, he or she should be offered immunity from criminal or civil proceedings.¹⁵² The President's Response accepts this recommendation¹⁵³ and adds that whistleblowers must be protected from retaliatory action (in the form of disciplinary action or criminal charges) by public and private bodies at which corruption has been alleged.¹⁵⁴

The current South African legal framework does not give whistleblowers immunity from civil or criminal liability once they have disclosed information. Under s 9A(1) of the Protected Disclosures Act, an employee or worker who makes a protected disclosure of information that a criminal offence has been committed, is being committed or is likely to be committed, or which shows that a substantial contravention of or failure to comply with the law has occurred, is occurring or is likely to occur, will not be liable to any civil, criminal or disciplinary proceedings because of having made the disclosure if the disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restrict the disclosure of the information concerning a matter. Section 9A(2) makes it clear that this exclusion of liability does not extend to the civil or criminal liability of the employee or worker for participating in the disclosed impropriety.

Similarly, under s 159(4)(b) of the Companies Act, a whistleblower who makes a protected disclosure will be immune from any civil, criminal or administrative liability for that disclosure. For example, immunity from civil liability could mean that a contract to which the whistleblower is a party may not be terminated because the disclosure is a breach of the contract, such as a breach of a confidentiality clause.¹⁵⁵ But no immunity is provided to a whistleblower under s 159 from any civil, criminal or administrative liability revealed by the disclosure — the protection from liability extends only to making the disclosure itself.

¹⁵² *The State Capture Commission Reports* op cit note 1 Part 1 vol 1 para 690.4.

¹⁵³ The President's Response op cit note 3 para 5.7.8.

¹⁵⁴ Ibid para 5.7.5.

¹⁵⁵ This is explicitly stated in s 1317AB(1)(b) of the Australian Corporations Act, equivalent to s 159(4)(b) of the Companies Act.

Similarly, the Ontario Whistleblower Program provides no immunity to whistleblowers. If a whistleblower provides information to the Ontario Securities Commission, the commission will not be precluded from taking enforcement action against the whistleblower for his or her role in violating Ontario securities law.¹⁵⁶ The Australian Corporations Act likewise provides no immunity to whistleblowers from civil and criminal liability. This position is clarified in s 1317AB(1)(c), stating that the protections afforded to a whistleblower do not prevent the whistleblower from being subject to any civil, criminal, or administrative liability for the conduct of the person that the disclosure reveals. But this provision is subject to an exception in s 1317AB(1)(c) that if a disclosure qualifies for protection, the information is not admissible in evidence against the whistleblower in criminal proceedings or in proceedings for the imposition of a penalty, save for proceedings in respect of the falsity of the information.

Although immunity to whistleblowers for their honest disclosures would encourage whistleblowers to disclose information, it is submitted that they should not be granted blanket immunity from criminal and civil proceedings. Doing so could result in abuse by whistleblowers who are involved in the wrongdoing or even planned and initiated the wrongdoing and who then decide to disclose it to avoid being criminally prosecuted or held civilly liable. It is submitted that a whistleblower's immunity from criminal and civil proceedings should be determined on a case-by-case basis. Where appropriate, the repercussions for the crime or civil liability should be mitigated or exempted. It is further submitted that the suggested South African consolidated legislative whistleblower framework (discussed in part III above) ought to incorporate a provision akin to s 1317AB(1)(c) of the Australian Corporations Act to limit the prospects of whistleblowers being subject to prosecution for their involvement in the wrongdoing.

VII CONCLUSION

The recommendations of *The State Capture Commission Reports* and the President's Response to them on enhancing the protection of whistleblowers in South Africa are commendable. They will protect whistleblowers and incentivise them to disclose wrongdoing once implemented. The following series of submissions are suggested to enhance and execute these recommendations.

At the outset, it is submitted that the recommendations of *The State Capture Commission Reports* and the President's Response should be extended to include all whistleblowers who disclose wrongdoing. They should not be restricted to whistleblowers who disclose wrongdoing concerning corruption, fraud, and undue influence in public procurement.

¹⁵⁶ Section 17(5) of the Ontario Whistleblower Program.

In addition, the Department of Justice should review not only the Protected Disclosures Act and the Witness Protection Act to give effect to these recommendations, as the President's Response suggests, but also the numerous other statutes that govern whistleblowing in the South African legal framework. It would be preferable if South Africa had a consolidated legislative framework to govern whistleblowing in the various sectors instead of the current approach scattering whistleblowing regulation across many statutes.

It is imperative in South Africa to provide physical protection to whistleblowers so that they feel safe when making disclosures, particularly in light of recent incidents of intimidation and even the assassination of a whistleblower. It is submitted that the government should introduce new legislation to ensure that whistleblowers receive the protections afforded by art 32(2) of the UN Convention against Corruption, in line with the submission that South Africa should have a consolidated legislative framework governing whistleblowing in the various sectors. If the Government elects instead to review the Witness Protection Act, it is submitted that, besides expanding the mandate of the Office for Witness Protection to include whistleblowers who are not witnesses, the definition of 'proceedings' in the Witness Protection Act must also be broadened so that it includes proceedings relating to corruption so that whistleblowers who expose corruption in any form, whether or not they provide evidence in court, may fall within the scope of the Witness Protection Act and qualify for protection. Besides permitting whistleblowers to give testimony using communications technology to protect their identity, rules like those in s 1317AG of the Australian Corporations Act, which protects the identity of whistleblowers in court proceedings, should be enacted in the consolidated legislative framework in South Africa.

As the US experience shows, if whistleblower award programmes are designed well, they can be very effective in encouraging whistleblowers to expose wrongdoing. For South Africa's whistleblower award programme to succeed, there must be clarity, fairness, transparency and efficiency in assessing potential awards to whistleblowers. Pursuant to the submission that South Africa should have a consolidated legislative framework governing whistleblowing, it is submitted that the consolidated legislation should incorporate a whistleblower award programme across the various South African sectors under which whistleblowers are to be rewarded for their disclosures in certain instances. It is submitted that whistleblowers in South Africa should also be rewarded for information that leads to no financial recovery from the disclosure but leads to a successful criminal prosecution, a successful resolution of the matter, prevents financial loss in public institutions or benefits the public interest. In line with the approach adopted in the US and Canada, the size of the award should vary according to an analysis of various factors, including (i) the significance

and quality of the information provided by the whistleblower; (ii) the truthfulness, reliability and completeness of the information; (iii) the type and severity of the wrongdoing disclosed by the whistleblower; (iv) the degree of assistance provided by the whistleblower; (v) the resources conserved as a result of the whistleblower's assistance; and (vi) the unique hardships experienced by the whistleblower as a result of his or disclosure. Whistleblowers should also receive an amount for reasonable expenses they incur in making the disclosure.

Whistleblowers should be incentivised to report internally first, without mandating them to do so, by linking the amount of the award to the efforts of the whistleblower to use internal reporting channels. If whistleblowers participated in the wrongdoing or planned and initiated it, their award should be reduced, but whistleblowers convicted of criminal conduct related to the wrongdoing should not qualify to receive any award. Safeguards must be incorporated into the South African whistleblower framework to protect against malicious reporting and false claims by whistleblowers. To ensure the effective enforcement and implementation of the whistleblower award programme, South Africa should have an independent body authorised to conclude agreements with whistleblowers to reward their disclosures.

Finally, it is submitted, contrary to the recommendation of *The State Capture Commission Reports* and the President's Response to prevent abuse, that a blanket immunity from criminal and civil proceedings should not be granted to whistleblowers, but rather the question of immunity should be determined on a case-by-case basis, and, where appropriate, the repercussions for the crime or civil liability should be mitigated or exempted. A provision akin to s 1317AB(1)(c) of the Australian Corporations Act, which renders the information of a protected disclosure inadmissible in evidence against the whistleblower in court proceedings, should be enacted in the suggested South African consolidated legislative whistleblower framework to limit the prospects of whistleblowers being subject to prosecution for their involvement in the wrongdoing.

Given the rampant corruption in South Africa, there is an urgent need to protect and encourage whistleblowers to expose wrongdoing in both public and private institutions. Whistleblowing is neither self-serving nor socially reprehensible.¹⁵⁷ It involves a considerable risk for whistleblowers, who render a valuable service to society and who must be protected. It is hoped that the submissions stated above will assist the execution of the whistleblower recommendations of *The State Capture Commission Reports* and the President's Response.

¹⁵⁷ *Tshishonga v Minister of Justice and Constitutional Development & another* supra note 6 para 168.