Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

SUBMISSION

to the

Department of Justice & Constitutional Development

on the

<u>PROTECTED DICLOSURES BILL</u>

14 May 2026

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Introduction

1. The Catholic Parliamentary Liaison Office welcomes this further opportunity to comment on the law relating to protected disclosures. We previously made submissions in August 2023 on the Draft Reforms of the Whistleblower Protection Regime, from which the current Bill has emerged. We commend again the Department for identifying the need for such reforms, and for recognizing that, to quote from the Executive Summary of the earlier discussion document, the Protected Disclosures Act 26 of 2000 (the PDA), "is deficient in many important respects".

2. Since the release of the discussion document and the submission of comments thereon, whistleblowers have continued to suffer for their bravery and integrity. The list of names headed by the likes of Babita Deokaran (the Tembisa Hospital case) and Sikhosiphi 'Bazooka' Rhadebe (the Xolobeni community activist) has grown much longer; it has become commonplace to read about accounting officers, auditors, procurement officials, and other dedicated civil servants being victimized, suspended or dismissed from their jobs, and even murdered, for disclosing corruption and improper conduct of various kinds.

Comments and Submissions

3. We therefore strongly support the measures proposed to strengthen, reform and improve whistleblower protection. The new Bill contains some important improvements on the old Act, which we support, but it also – in our opinion – contains some weaknesses which need to be addressed. We comment as follows on both the positive points of the Bill and on those which we suggest need to be amended or improved:

3.1. Definitions: <u>We support</u> the new definition of 'detrimental action' as well as the retention of the definition of 'occupational detriment'. Both of these are important and together they provide for a broader range of proscribed actions. In particular, <u>we support</u> the inclusion of 'related person' in the definition of 'detrimental action' and the broadening of sub-clause (h) in the definition of 'occupational detriment' – so that the qualifications (i) and (ii) in the old Act are removed.

The new definition of 'disclosure' is an improvement on the previous definition. This, together with the definition of 'improper conduct' is clearer and broader than the corresponding definitions in the old Act.

Note that in sub-clause (b) of the definition of 'occupational detriment' it makes more sense to have 'emotional <u>or</u> psychological trauma' than 'emotional <u>and</u> psychological trauma', and that the word 'psychological' is misspelled.

3.2. Clause 5 – Disclosures not protected: Sub-clauses 5(e), (f) and (h) deal with the motivation behind a disclosure. It is not clear why the motive behind the disclosure should be decisive of whether or not it is protected. For example, why should a disclosure of improper conduct on the part of an employer not be protected simply because the disclosing employee was under threat of dismissal or disciplinary action? Such threat or action might itself be unfair or unlawful, but the wording of this clause would still deprive the discloser of protection.

There was nothing in the old Act that corresponded to these provisions excluding protection on the grounds of questionable motive, and it is submitted that there is no sound reason for including them now. The overriding criterion for protection of a disclosure of improper conduct should be whether or not the disclosure is true.

3.3. Clause 4 read with Clause 10 – Protected disclosures made to other persons, etc.: Clause 4(e) says that a disclosure is protected if it is made to "any person, body or institution to whom a disclosure can be made as contemplated in section 10". This creates the impression that clause 10 will provide an indication of who such persons, bodies or institutions are – but it does not do so. The discloser is left not knowing who they can approach if the conditions set out in 10(2) are present.

Clause 10 is, in addition, too complex and complicated to be useful to an ordinary citizen, especially one who may be of an unsophisticated background. It is unrealistic to expect a potential discloser, who is already grappling with the stress and risk associated with making a disclosure, to navigate their way through the conditions listed in sub-clause (2) and the considerations in sub-clause (4). The net effect of this clause will be to shut down disclosures rather than to facilitate them.

We accordingly submit that clause 10 should be rewritten so that it

(a) provides clear guidance as to who, or which bodies or institutions, disclosures can be made under clause 4(e); and

(b) requires no more than a good faith/reasonable belief test, as is provided for in clause 20, for example.

3.4. Disclosures to the media or civil society organisations: This is a convenient point at which to raise one of the main concerns with the Bill. There is no clear indication of when a disclosure to the media or to a CSO will enjoy protection. Given that, in the nature of things, many potential disclosers will not be comfortable to approach their employer, or their political principal, or a Chapter 9 Institution (as provided for in clause 4) it is to be expected that they may seek the assistance of the media or of a CSO. As already noted, it is far from clear that the media and CSOs are covered by clause 4(e). We therefore strongly submit that either clause 4 or clause 10, or both, should include express reference to 'media practitioners and organisations' and 'civil society organisations' as among the persons and bodies to whom protected disclosures can be made.

3.5. Clause 15 – Application for court assistance: We support the inclusion of this clause.

3.6. Clause 18 – Award to discloser: In principle, we support the idea of an award being made to a discloser when the disclosure leads to a conviction, but the provisions as they stand are too limited. We submit that a better approach would be to establish a fund for the provision of rewards to whistleblowers. Such a fund could be supported by both the Treasury and the private sector, as well as monetary sanctions imposed by the courts as a result of disclosures of improper conduct.

We further question why members of the public service should be excluded from such awards, as provided for by clause 18(2)(a). It is notorious that the public sector is rife with corruption and improper conduct, and it is thus precisely among public sector employees that there need to be incentives to promote disclosures. We strongly urge that clause 18(2)(a) be scrapped.

3.7. Clause 20 – Exclusion of civil and criminal liability: We support this provision and reiterate that this 'reasonableness' approach should be incorporated into clause 10.

3.8. Clause 21 – Protection from occupational detriment or detrimental action: We support the protection offered in terms of clause 21(1) but suggest that it does not go far enough; it fails to cover disclosures made sincerely and in good faith, but which turn out not to qualify as protected disclosures. We submit that a better formulation would be: "…on account of having made a protected disclosure or a disclosure which they reasonably believed [or believed in good faith] to be a protected disclosure."

We strongly support the reverse onus provided for in clause 21(5).

3.8 Clause 23 – Legal assistance: We support the inclusion of this clause.

3.9 Clause 24 – Complaints mechanism: As with clause 21, we support this clause but feel that it does not go far enough. In particular, appointing a single 'retired judge' to deal with complaints arising from protected disclosures seems insufficient, even though provision is made for the judge to be given personnel and resources for the carrying out of his or her duties. A better approach would be to set up a panel of suitably qualified people, who may be retired judges, to deal with these matters. It is important that complaints by whistleblowers be dealt with quickly and efficiently, otherwise all the provisions and incentives that encourage disclosure could be negated.

We also submit that the retired judge, or panel, should report to Parliament and not the Minister; and should obtain their budget directly from Parliament. This would increase their actual and perceived independence.

4. Conclusion

We wish the Department well in its endeavours to improve the legal regime governing protected disclosures, and we look forward to engaging with the Bill again when it is formally tabled in Parliament.

For further information please contact:

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