

Improving Legislative Protection for Whistleblowers of Corruption in South African Municipalities

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Abstract

Whistleblowing is widely recognised as a critical mechanism for preventing and combating corruption in South African municipalities. However, whistleblowers often face severe retaliation, creating a climate of fear that discourages reporting and ultimately undermines anti-corruption efforts. This article explores how legislative protections for whistleblowers can be strengthened to enhance accountability and transparency in local governments. Using a doctrinal research approach, the study identifies essential components of an effective whistleblowing framework and critically evaluates existing South African legislation governing whistleblowing on corruption in municipalities. The analysis reveals significant gaps in legal protection, which demands urgent reform. To address these shortcomings, the article proposes nine key elements that should be incorporated into South African whistleblowing legislation to ensure a robust and secure reporting system.

Keywords: corruption; local government; municipal governance; whistleblower protection; whistleblowing



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Introduction

Whistleblowers and whistleblowing have received a lot of attention in the South African media and global scholarship over the past year.¹ The murder of whistleblower Babita Deokaran, allegedly motivated by her reports of corruption² in the Gauteng Provincial Government Department of Health, has contributed to this media coverage. According to media reports, the murder of Deokaran is not an isolated case, and many whistleblowers, including those who reported corruption in municipalities,³ have met the same fate across the country. Furthermore, Transparency International's latest Corruption Perceptions Index shows that South Africa's Corruption Perceptions Index dropped from 44 in 2020 to 41 in 2024.⁴ This means that South Africa is perceived to be more corrupt today than in years past.

It has been proven that whistleblowing significantly improves transparency at all levels of government and helps to curb corruption.⁵ However, if whistleblowers report corruption, they make themselves vulnerable to retaliation from those involved in the corruption.⁶ Fear of retaliation has discouraged the public from reporting corruption, thus reducing the possibility of exposing corruption.⁷ Steps should therefore be taken to

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- 1 RM Dhewi, 'Mapping of Whistleblowing and Fraud Reporting Research: A Forty-Year Bibliometric Analysis' (2022) 60 Hong Kong Journal of Social Sciences 104 <<https://doi.org/10.55463/hkjs.issn.1021-3619.60.11>>; I Castuera, 'Whistleblowing: How One Man Tried To Stop a Famous Cancer Center From Suppressing an Effective Treatment' (2022) 81(4) American Journal of Economics and Sociology 701 <<https://doi.org/10.1111/ajes.12480>>; S Aneja, 'Corporate Good Governance and Whistleblowing in India: A Critical Analysis' (2022) 1(3) Indian Journal of Legal Review 39; P Gill, 'Intelligence, Oversight and the Ethics of Whistleblowing: The Case of Witness K' (2022) 28(2) Australian Journal of Human Rights 206–224 <<https://doi.org/10.1080/1323238X.2022.2145834>>; Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>> accessed 16 February 2023 (EU Directive).
 - 2 JS Wright, 'Legal Perspectives on the Prevention and Minimisation of Corruption for Sustainability in South African Municipalities' (PhD thesis, North-West University 2021) 82. Corruption can be viewed as abusing a position of power to obtain an advantage to which a person is not normally entitled by violating the formal and informal rules governing the institution concerned.
 - 3 Moss Phakoe blew the whistle on corruption that allegedly took place in the Rustenburg Municipality. A Tilley, 'The Price of Speaking Out as a Whistleblower in South Africa is High' *Daily Maverick* (Cape Town, 27 August 2018).
 - 4 Transparency International 'Corruption Perceptions Index' (*Transparency International*, 2024) <<https://www.transparency.org/en/cpi/2020?>> accessed 5 March 2025.
 - 5 OECD, *G20 Anti-corruption Action Plan: Protection of Whistleblowers* (OECD 2014) 4; art 5(5) of the African Union Convention on Preventing and Combating Corruption (2004) 43 ILM 1 <<https://doi.org/10.1017/S0020782900009724>> (AUCPCC); art 4(e) of the SADC Protocol Against Corruption (2001) <<https://bit.ly/2VFRigI>> accessed 16 March 2025; arts 8(4), 32 and 33 of the United Nations Convention Against Corruption (2003) 43 ILM 5 (UNCAC).
 - 6 Art 5(5) of the AUCPCC (n 5); art 4(e) of the SADC Protocol Against Corruption (n 5); arts 8(4), 32 and 33 of the UNCAC (n 5).
 - 7 UNDP, *Institutional Arrangements to Combat Corruption: A Comparative Study* (UNDP 2015) 80.

protect whistleblowers, witnesses to corruption and any other person who, in good faith, provides information about corrupt acts.⁸

Previous studies on whistleblowing have investigated issues such as the motivation for whistleblowing and how whistleblowing can prevent corruption and other financial crimes. The role of ethical leadership and good corporate governance in combating corruption has also been examined. Although previous studies have looked at the phenomenon of whistleblowing, very few have focused on the protection of whistleblowers as such, especially in literature about South African local government.⁹

The research problem is, therefore, how South Africa can improve its legislative protection to whistleblowers to increase transparency and combat corruption. This article examines this question, specifically as it relates to South African municipalities. The article focuses on municipal officials (also referred to as city officials), who are particularly vulnerable when they become whistleblowers. Many organisational roles in municipalities are standardised, which means it is easy to identify who is privy to what information. Municipal politics in South Africa is also fiercely contested: KwaZulu-Natal has witnessed a high number of councillor killings in the past years.¹⁰ Furthermore, many offices and internal structures are tasked by legislation with conducting regular audits and report certain activities, with no guarantee of their safety. According to Corruption Watch, local government has remained one of South Africa's top three most corrupt institutions since 2018.¹¹

This article constitutes a formal doctrinal study consisting of a desktop review of existing literature. Although other disciplines will be consulted, the article will mainly use legal literature. South Africa's legal protection for whistleblowers has been identified as inadequate; therefore, a key component of the methodology is to consult scholarship and legal texts beyond South Africa. This will provide a theoretical background for the many opportunities a government can use to protect whistleblowers.

8 Art 5(5) of the AUCPCC (n 5); art 4(e) of the SADC Protocol Against Corruption (n 5); arts 8(4), 32 and 33 of the UNCAC (n 5); art 9 of the Civil Law Convention on Corruption (1999) EUR/TS/174.

9 MA Ramadhani and S Trisnainingsih, 'Analysis of the Role Whistleblowing System for Fraud Prevention: Theory of Planned Behavior' (2023) 3(1) International Journal of Management Science and Information Technology 16 <<https://doi.org/10.35870/ijmsit.v3i1.860>>; Aneja (n 1) 39; Gill (n 1) 206; M Kun-Buczko, 'Poles' Attitudes to the Concept of Whistleblowing: Historical and Present Background' (2022) 4(27) Bialystok Legal Studies 121 <<https://doi.org/10.15290/bsp.2022.27.04.08>>; C Clyde and IA Hanifah, 'The Effect of Whistleblowing Systems Toward Fraud Prevention: Mediation of Forensic and Investigative Audit' (2022) 5(2) Accounting and Financial Review 97 <<https://doi.org/10.26905/afr.v5i2.7530>>; H Wulfekühler and A Andrason, "'We Don't Need Another Hero!': Whistleblowing as an Ethical Organisational Practice in Higher Education' (2023) 55(7) Educational Philosophy and Theory 844-854 <<https://doi.org/10.1080/00131857.2022.2152672>>.

10 S Rood, 'Killing Councillors', *News24* (Cape Town, 30 December 2023) <<https://specialprojects.news24.com/killing-councillors/index.html#group-section-Fighting-the-scourge-Q9EtMa7nb0>> accessed 1 October 2024.

11 Corruption Watch, *Changing the Landscape* (Corruption Watch 2023) 20.

The South African legal framework for whistleblowing is critically analysed against this background, focusing only on those legislative measures specifically designed for whistleblowers. Therefore, general South African laws that guarantee freedom of expression or freedom of speech and labour law are not part of this analysis. As this article specifically focuses on whistleblowers of corruption in municipalities, Acts such as the Nuclear Energy Act 46 of 1999 and the Companies Act 71 of 2008 do not form part of this analysis.

In the literature review in the first section, the concepts ‘whistleblower’ and ‘whistleblowing’, as well as the types of retaliation against whistleblowers, are explored. The article then critically investigates scholarship and sources of international, regional and foreign law to identify options that South African legislators could consider to improve the protection offered to whistleblowers in municipalities. South African national legislation that applies to reporting corruption in municipalities is critically assessed against these options. The aim is to determine (1) where legal protection can be improved and (2) whether these options are suitable for the South African context. The article concludes with some recommendations and questions for future research.

Literature Review

What Do ‘Whistleblowing’ and ‘Whistleblower’ Mean?

‘Whistleblowing’ is a complex concept and its scope goes further than just protecting witnesses during legal proceedings.¹² Many studies have been conducted to define the term. When examining these definitions, one finds that all of them are unique and reflect the purpose for which the term ‘whistleblowing’ is used.¹³ Organisations, companies,

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- 12 IG Bron, ‘Square Peg in Round Hole? Three Case Studies into Institutional Factors Affecting Public Service Whistleblowing Regimes in the United Kingdom, Canada, and Australia’ (PhD thesis, Carleton University 2022) 37; UNODC, *Resource Guide on Good Practices in the Protection of Reporting Persons* (UNODC 2015) 9; Aneja (n 1) 40; Kun-Buczko (n 9) 121; A Salauddin and AT Ayinde, ‘Whistle Blowing Policy in Nigeria: Concerns for Organization Ethical Values’ (2022) 58(320) *Discovery* 936.
 - 13 MF Da Costa Fernandes, ‘Whistleblowing Disclosure in Leading Sustainable Corporations: A Content Analysis of Whistleblowing Policies’ (Master’s dissertation, Catholic University of Portugal 2022) 7; OECD (n 5); HB Yanti, V Djaja and D Heny, ‘Determinant Factors of Whistleblowing Intention’ *3rd Borobudur International Symposium on Humanities and Social Science* (Atlantis Press 2022) 768 <https://doi.org/10.2991/978-2-494069-49-7_129>; Dhewi (n 1) 105; EN Yunus and YA Kemalasari, ‘Should I Blow the Whistle? An In-depth Study Towards Revealing Determinants of Whistleblowing’ *4th Asia Pacific Management Research Conference* (Atlantis Press 2022) 444 <https://doi.org/10.2991/978-94-6463-076-3_34>; P Gottschalk, ‘Suspicion of White-collar Crime: A Case Study of Retaliation Against Whistleblowers’ (2022) 32(4) *International Criminal Justice Review* 457 <<https://doi.org/10.1177/1057567718814286>>; MM Kang and EV Rubin, ‘The Efficacy of Protection: The Effects of the Whistleblower Protection Enhancement Act of 2012 on the Transportation Security Administration’ (2022) 26(5) *International Public Management Journal* 649 <<https://doi.org/10.1080/10967494.2022.2124336>>; JGJ Nortje, ‘The Protection of Whistleblowers

governments and legislators have tailored the term ‘whistleblower’ or ‘whistleblowing’ to their respective needs. Despite the uniqueness of these definitions, many of them seem to be adaptations of the following:

[Whistleblowing is] the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to affect action.¹⁴

It can be stated that a definition of ‘whistleblowing’ should include at least the following elements: a disclosure, the reporter making the disclosure, a relationship between the reporter and the subject of the report, and to whom the report is made.¹⁵

The nature of the disclosure is perhaps the most controversial element in the definition of ‘whistleblowing’. Disclosures may vary from ‘actual or suspected wrongdoing’,¹⁶ ‘illegal activities’,¹⁷ ‘unprocedural conduct’,¹⁸ ‘wasteful conduct’,¹⁹ ‘immoral or unethical practices’²⁰ to ‘gross misconduct’.²¹ The nature of the disclosure seems to depend on the activities that the particular organisation, government or legislature sought to prevent.

Scholars disagree about who can make disclosures and then be considered a whistleblower.²² Many definitions presuppose some kind of employment relationship between the whistleblower and the subject of the report, while others do not.²³ In this context, ‘employment’ is interpreted broadly and would include current, prospective

in South African Criminal Cases’ (2022) 30(6) Journal of Financial Crime 1444 <<https://doi.org/10.1108/JFC-09-2022-0234>>.

- 14 YM Walle, ‘A Conceptual Framework of Digital Government for the Success of Whistleblowing in Public Organizations’ (PhD thesis, Sudan University of Science and Technology 2022) 18; UNODC (n 12) 9.
- 15 Walle (n 14) 18; Da Costa Fernandes (n 13) 10; L Jerrold, ‘Whistleblowing’ (2022) 163(2) American Journal of Orthodontics and Dentofacial Orthopedics 285; Nortje (n 13) 1444; Yunus and Kemalasari (n 13) 444; Dhewi (n 1) 105; T Vian, B Agnew and DK McInnes, ‘Whistleblowing as an Anti-corruption Strategy in Health and Pharmaceutical Organizations in Low- and Middle-income Countries: A Scoping Review’ (2022) 15(1) Global Health Action <<https://doi.org/10.1080/16549716.2022.2140494>> 2140494; Salauddin and Ayinde (n 12) 936; J Kostić and MM Bošković, ‘Recommendations for Overcoming Challenges of Whistleblowing in Public Procurement Procedures’ (2022) 15 Journal of the University of Latvia Law 58 <<https://doi.org/10.22364/jull.15.05>>.
- 16 Da Costa Fernandes (n 13) 10; Nortje (n 13) 1444; Vian and others (n 15) 2140494.
- 17 Walle (n 14) 18; Yunus and Kemalasari (n 13) 444; Dhewi (n 1) 105.
- 18 Walle (n 14) 25. Unprocedural conduct refers to acts such as the violation of the formal rules of an organisation.
- 19 Walle (n 14) 25. Wasteful conduct refers to activities where the resources of an organisation are spent in a wasteful and fruitless manner.
- 20 Walle (n 14) 18; Yunus and Kemalasari (n 13) 444; Dhewi (n 1) 105.
- 21 Salauddin and Ayinde (n 12) 936.
- 22 See note 13.
- 23 Da Costa Fernandes (n 13) 11; Walle (n 14) 19.

and former employees, contractors, suppliers, clients, patients (if a health facility) or consumers.²⁴ Other definitions exclude employees whose job it is to expose illegal activities, such as auditors and accountants, but organisations such as the Organisation for Economic Co-operation and Development (OECD) consider them to be whistleblowers. However, there is a consistent approach to include natural and juristic persons as whistleblowers.²⁵

It can be argued that it is unnecessary to limit the application of ‘whistleblowing’ to the pre-existence of a relationship between the reporter and the subject of the report. The fact that the reporter made a disclosure to a specified institution should be sufficient to classify such a reporter as a whistleblower. This is because, irrespective of a relationship between the reporter and the subject of the report, the reporter makes a disclosure that may have serious consequences for their life and livelihood.²⁶ It should therefore come as no surprise that police informants, journalistic sources, self-incriminating witnesses, witnesses, auditors and accountants may also qualify as whistleblowers in the appropriate circumstances.²⁷

The final element in the definition is to whom the report is addressed. As with the other elements of the definition, this element reflects what the organisation that created the definition is trying to achieve. Some definitions are very explicit about who the report must be made to in order for a reporter to be considered a whistleblower.²⁸ A good approach would be to require that a report be made to an organisation or person in the position to effect change or take remedial action.²⁹ In the South African context, this could include any of the institutions referred to in Chapter 9 of the South African Constitution, as well as the South African Police Service (SAPS), a Member of the Executive Council (MEC) and the media.³⁰

Why Do We Need Whistleblowers?

Studies have shown that the risk of public sector corruption increases significantly where whistleblowing is not encouraged and where whistleblowers are not supported.³¹

24 Yunus and Kemalasari (n 13) 444; Jerrold (n 15) 285; Vian and others (n 15) 2140494; Salauddin and Ayinde (n 12) 936; Kostić and Bošković (n 15) 58; OECD, *Committing to Effective Whistleblower Protection* (2016) 41. More people that could be included are distributors, consultants, investors, auditors, industry regulators or shareholders.

25 See note 13.

26 Da Costa Fernandes (n 13) 10.

27 Nortje (n 13) 1444; Dhewi (n 1) 105.

28 Preamble of the EU Directive (n 1); Dhewi (n 1) 106; JVC dos Santos, ‘EU Considerations on New Protection of Whistleblowers’ (2022) 15 *Journal of the University of Latvia Law* 248 <<https://doi.org/10.22364/jull.15.17>>.

29 Yunus and Kemalasari (n 13) 444; Dhewi (n 1) 105; Vian and others (n 15) 2140494.

30 Chapter 9 of the Constitution of the Republic of South Africa, 1996: ‘State Institutions Supporting Constitutional Democracy’.

31 Walle (n 14) 36; Gill (n 1) 207; Clyde and Hanifah (n 9) 97; Gottschalk (n 13) 457; M Bernasconi, L Carazzini and T Medda, ‘Whistleblowing and Tax Evasion: Experimental Evidence Whether

It is also accepted that whistleblowing is more effective than internal or external audits and other governmental control systems.³² Whistleblowing can be seen as a method to increase trust in a municipality's ability to perform its duties. Plus, it can prevent activities that are detrimental to that municipality's development and contrary to good local governance.³³ This is because whistleblowers are one of the few sources from which to learn about wrongful activities, such as corruption, which may involve powerful private or political interests in municipalities.³⁴

Whistleblower reports enhance an ethical work environment, local government integrity³⁵ and accountability.³⁶ They also help to protect the rights and interests of citizens and provide an opportunity to contribute to justice by redressing wrongful conduct.³⁷ Finally, they can reveal systemic or procedural weaknesses in a municipality.³⁸

Certain organisational behaviours, such as corruption in municipalities, can have serious adverse consequences. These include a loss of public legitimacy and the occurrence of protests. It would therefore make sense for municipalities to strive for increased preventive measures, which should include whistleblowing.³⁹ Whistleblowing offers the opportunity to uncover misconduct at an early stage.⁴⁰ This allows for timely investigations that facilitate the proactive management of wrongdoing. The municipality can then avoid reputational costs such as public embarrassment, national and/or provincial government investigations and interventions, other penalties (eg adverse audit opinions) and judicial action.⁴¹

Whistleblowing Reduces Tax Evasion' (2022) 11(3) Economic and Political Studies 316 <<https://doi.org/10.1080/20954816.2022.2130065>>; Vian and others (n 15) 2140495.

32 Dhewi (n 1) 105; Vian and others (n 15) 2140495; Salaudinn and Ayinde (n 12) 938; S Lubisi and H Bezuidenhout, 'Blowing the Whistle for Personal Gain in the Republic of South Africa: An Option for Consideration in the Fight Against Fraud?' (2016) 18(1) Southern African Journal of Accountability and Auditing Research 52.

33 Dhewi (n 1) 105.

34 Vian and others (n 15) 2140498.

35 Walle (n 14) 20; Salaudinn and Ayinde (n 12) 938.

36 Walle (n 14) 20; Dhewi (n 1) 105.

37 Walle (n 14) 20.

38 Vian and others (n 15) 2140495.

39 Da Costa Fernandes (n 13) 15.

40 Walle (n 14) 20; Nortje (n 13) 1444; Yanti and others (n 13) 768; Salaudinn and Ayinde (n 12) 938.

41 Walle (n 14) 20; D El-Bassiouny, A Kotb, H Elbardan and N El-Bassiouny, 'To Blow or Not to Blow the Whistle? An Islamic Framework' (2022) 187(2) Journal of Business Ethics 385 <<https://doi.org/10.1007/s10551-022-05274-z>>.

Forms of Retaliation

Previous studies show that it is necessary to protect whistleblowers.⁴² One justification is that whistleblowers often provide information that is in the public interest.⁴³ Whistleblower reports offer a chance for a positive change in municipalities, despite potential resistance from municipal leaders who are prioritising their own interests.⁴⁴

Reporting may involve a very high professional or personal cost for the whistleblower.⁴⁵ Salauddin and Ayinde⁴⁶ summarise the reality of a whistleblower as follows: ‘[R]egardless of whether the whistleblower is motivated by altruistic or selfish concerns, the act is not without risks.’⁴⁷

These individuals are vulnerable to a range of retaliations from the organisation that is the subject of the report (eg a particular government institution), members of that organisation and even the public.⁴⁸ Retaliation can range from job loss; the inability to find employment; physical, psychological and verbal harassment; pay cuts; denied promotions; defamation; public humiliation; coercion to retract allegations; and false criminal charges to physical harm and death.⁴⁹ It is clear, then, that retaliation goes beyond occupational or employment detriment. The target of the retaliation is not limited to the whistleblower, but may also include their family, friends or those who facilitated⁵⁰ the report. In some cases, whistleblowers are even labelled as ‘traitors’ and seen as committing ‘a politically hostile act that is inconsistent with the role of a civil servant’.⁵¹ As a result, a whistleblower’s reputation is often irreparably damaged. The whistleblower can also be driven into isolation, have their professional and personal life changed for the worse, or even lose their life.⁵²

Legal Approaches to Protect Whistleblowers

This section explores legal options that can help to protect whistleblowers, in particular the principles that should underpin the protection of whistleblowers. The measures that

42 Aneja (n 1) 40; Castuera (n 1) 702; Dos Santos (n 28) 246; I Nurhayati, VY Putri, RF Farida and V Susanti, ‘Legal Protection for Whistleblowers in the Perspective of the Law on the Protection of Witnesses and Victims in Indonesia’ *International Conference on Applied Science and Technology on Social Science* (Atlantis Press 2022) 694 <https://doi.org/10.2991/978-2-494069-83-1_120>; Kang and Rubin (n 13) 16; Nortje (n 13) 1444; TV Eato and MD Akers, ‘Whistleblowing and Good Governance’ (2007) 77(6) *The CPA Journal* 66.

43 Kostić and Bošković (n 15) 64.

44 Bron (n 12) 47.

45 Walle (n 14) 36.

46 Salauddin and Ayinde (n 12) 937.

47 *ibid.*

48 *ibid.*

49 Walle (n 14) 32; Dhewi (n 1) 105; Vian and others (n 15) 2140494; Salauddin and Ayinde (n 12) 397.

50 See subsection ‘Forms of Retaliation’.

51 Bron (n 12) 44.

52 Dos Santos (n 28) 246.

can be taken to protect the information and the whistleblower, and the authorities that should be involved in the protection of whistleblowers, are also examined.

Structuring Whistleblower Systems

According to Walle,⁵³ the purpose of any legal framework that establishes a whistleblower system should be to facilitate the *bona fide* reporting of certain wrongdoing. This framework should preserve confidentiality and give protection against adverse consequences that may follow.⁵⁴ However, other scholars argue that the main aim of whistleblowing should be to provide an opportunity to correct wrongdoing rather than attack the wrongdoer.⁵⁵

Municipalities often align their activities with principles such as the promotion of human rights, accountability and transparency.⁵⁶ These principles must be documented in laws and policies and guide the interpretation and application of the legal framework for whistleblowing.⁵⁷ Apart from these principles, the practical application of the whistleblowing framework should also be considered. This means that when developing the framework, one should ensure that it is easy to understand, apply and enforce.⁵⁸

Transparency International points out that a legal framework for whistleblower systems should at least include procedures to be followed for whistleblowing, methods to improve an ethical culture and measures to protect whistleblowers.⁵⁹ One could also make a case for including an education component in the legal framework. This would make it mandatory for the organisation, or in this case municipalities, to provide training for their employees and conduct community education programmes on whistleblowing systems ‘because whistleblowers are not protected by any law if they do not know it exists.’⁶⁰

Whistleblowing procedures should at least provide information to the potential whistleblower about the types of reports that can be made under the relevant legal framework. They should also outline who can make those reports, how the whistleblower should make the reports, and to whom the reports should be made.⁶¹

53 Walle (n 14) 34.

54 *ibid.*

55 El-Bassiouny and others (n 41) 385.

56 Bron (n 12) 46; Kostić and Bošković (n 15) 58.

57 *ibid.*

58 Walle (n 14) 34.

59 Walle (n 14) 29 and 34.

60 Walle (n 14) 38; art 13 of the EU Directive (n 1).

61 El-Bassiouny and others (n 41) 385; Kostić and Bošković (n 15) 62; art 13 of the EU Directive (n 1).

A legal framework for whistleblowing ought to contain a component that promotes an ethical culture because then governance concerns are addressed instead of buried.⁶² This means that it should establish some core values, set up an ethics programme and designate ethical leadership.⁶³ In addition, the legal framework could include measures to improve communication between the different levels of management in government, increase employee or public participation and clarify the leadership commitment of top management.⁶⁴ Because this article is specifically dedicated to improving the protection of whistleblowers, it will not consider these components in depth.

The protection component of any whistleblowing system should (1) make clear a strong leadership commitment to protecting and supporting whistleblowers at all stages of the process; (2) commit to keeping all whistleblower reports confidential; (3) explain how whistleblowers' identities and other personal information will be protected and that reports can be made anonymously; and (4) clearly set out the extent and nature of whistleblower protection afforded to the reporter.⁶⁵

Although it is not possible to find the best practices for each different context, some protection methods are universal.⁶⁶ As Bron⁶⁷ shows, these include protection of free expression, the broad application of whistleblower laws (ie broad definitions of 'whistleblower' and 'retaliation'); independent structures to receive and resolve disclosures; methods to ensure confidentiality and facilitate anonymity; and measures to protect whistleblowers, their families, friends or facilitators.⁶⁸

Defining 'Whistleblower' and 'Whistleblowing'

As explained above, the terms 'whistleblower' and 'whistleblowing' can be defined differently, which can lead to different implications, such as what the scope of whistleblower protection will be. To effectively implement a legal framework for whistleblowers, these terms need a clear definition.⁶⁹ This will allow potential whistleblowers to ascertain whether they qualify as a whistleblower and what kind of protection they are entitled to before making the decision to blow the whistle.

In tailoring these definitions, policymakers and legislators, among others, must decide whether the definition of 'whistleblower' will include natural and juristic persons;

62 Walle (n 14) 29; Salaudiddin and Ayinde (n 12) 936; Vian and others (n 15) 2140494; Yunus and Kemalasari (n 13) 445; Da Costa Fernandes (n 13) 16; Yanti and others (n 13) 770; El-Bassiouny and others (n 41) 385; Wulfekühler and Andrason (n 9) 4.

63 Walle (n 14) 35; Nortje (n 13) 1444.

64 Walle (n 14) 29.

65 Nortje (n 13) 1444; Kostić and Bošković (n 15) 62.

66 Bron (n 12) 50.

67 *ibid.*

68 *ibid.*

69 OECD (n 24) 44.

journalistic informants;⁷⁰ external, internal and media reporters;⁷¹ citizens and third-country nationals; and whether a relationship between the reporter and the subject of the reporting is required.⁷² It is important that the legal framework protects not only those who are considered ‘whistleblowers’, but that third parties associated with whistleblowers are also protected. This may include juristic persons, such as companies in which the whistleblower has an interest, or a company owned by the whistleblower.⁷³

Facilitators, the persons receiving disclosures, should also be protected because they are the ones in possession of the content of whistleblower reports as well as the identities and other personal information of whistleblowers. This can make them a target for retaliators who wish to obtain such information to ‘get even’ with whistleblowers. From this point onwards, when the article refers to whistleblower(s), it includes all the people described in this paragraph.⁷⁴

Policymakers and legislators, among others, need to consider and clearly define what kind of disclosures should be protected.⁷⁵ If the overriding goal is to protect the community, all disclosures containing information that affects the public interest should be protected. In the Republic of Korea, the Protection of Public Interest Whistleblowers Act 10472 of 2011 defines ‘disclosure’ through reference to public interest.⁷⁶ Kostić and Bošković lists the areas of information that may involve public interest as comprising the following: state security, public order and peace, uninterrupted food and energy supply, continuous public services, communications, environmental protection, a functioning economic market, fair competition, personal information, human rights, social development, functioning government, state authorities and the rule of law.⁷⁷ The EU Directive on the Protection of Persons Who Report Breaches of Union Law⁷⁸ adds to this list by including financial products, prevention of money laundering, terrorism financing, product safety, tax benefits, transport safety, food safety, animal health and welfare, public health, security of networks and information systems, and criminal activities.⁷⁹ This shows that even information relating to the private sector, such as consumer protection, fair competition and the regulation of financial services and other business activities, is of public interest and should qualify as a whistleblowing

70 Dos Santos (n 28) 250.

71 Internal reporters are those who make disclosures within the organisation that is the subject of the report. External reporters are those who make disclosures to people or institutions outside the organisation that is the subject of the report, but not to the media. Dos Santos (n 28) 256.

72 Dos Santos (n 28) 247.

73 Dos Santos (n 28) 247; Vian and others (n 15) 2140494.

74 Dos Santos (n 28) 247; Vian and others (n 15) 2140494; OECD (n 24) 41.

75 OECD (n 24) 46.

76 Full Act available at <https://sherloc.unodec.org/cld/uploads/res/document/kor/act-on-the-protection-of-public-interest-whistleblowers_html/Republic_of_Korea_Act_on_the_Protection_of_Public_Interest_Whistleblowers.pdf>; Kostić and Bošković (n 15) 65; OECD (n 24) 47.

77 Kostić and Bošković (n 15) 65.

78 EU Directive (n 1).

79 Dos Santos (n 28) 248.

disclosure.⁸⁰ It is worth noting that those jurisdictions that have defined which disclosures qualify as whistleblowing are not in agreement about the specifics.⁸¹

Nature and Extent of Legislative Protection

A good legal framework should protect whistleblowers against ‘all common scenarios that could have a chilling effect on [the] responsible exercise of free expression rights’.⁸²

It can be said that the protection of whistleblowers includes both the person making the disclosure and the integrity of the information contained in the disclosure. Also, a disclosure is often accompanied by documents, photographs or other media that can be used as evidence to support the allegations made in the disclosure.

Measures to protect the individual can be divided into five categories, namely (1) measures to prohibit retaliation; (2) measures to support the whistleblower during the whistleblowing process; (3) reversal of the burden of proof; (4) immunity from civil and criminal liability; and (5) measures to facilitate confidentiality and anonymity of reports.⁸³ The measures to protect the integrity of the information contained in the disclosure are mostly those designed to preserve evidence.

Measures to Prohibit Retaliation

The first category of legal measures addresses the prohibition of retaliation, along with enforcement mechanisms and remedies against both retaliators and state institutions that fail to uphold whistleblower protection. Legislation must prohibit any retaliation against a whistleblower for disclosing information.⁸⁴ The application of such a prohibition is simplified if the legislation provides a list of different retaliatory measures from which whistleblowers are protected as an interpretive aid.⁸⁵ Such a prohibition may expressly refer to any adverse action that may affect a whistleblower’s present or future employment prospects.⁸⁶ Enforcement mechanisms may take the form of civil or criminal sanctions or a combination of both.⁸⁷ Part of enforcement requires that the legislature establish procedures for investigating and resolving allegations of retaliation against whistleblowers.⁸⁸ Sanctions for committing retaliation must be effective, proportionate and dissuasive.⁸⁹

80 Kostić and Bošković (n 15) 65.

81 OECD (n 5) 45–50. The OECD conducted an extensive content analysis of whistleblower laws across twenty jurisdictions and subsequently compared the definition of what qualified as a ‘disclosure’.

82 Walle (n 14) 38.

83 Walle (n 14) 38; Vian and others (n 15) 2140494.

84 Jerrold (n 15) 285; Dos Santos (n 28) 256; art 21 of the EU Directive (n 1).

85 Vian and others (n 15) 2140494; Dos Santos (n 28) 256.

86 Jerrold (n 15) 285.

87 Bron (n 12) 46; Dos Santos (n 28) 259.

88 Vian and others (n 15) 2140494.

89 Dos Santos (n 28) 259; art 23 of the EU Directive (n 1).

The appropriate remedy must correspond to the ‘type of retaliation suffered and compensation for damages suffered’.⁹⁰ Some civil remedies in favour of whistleblowers against retaliators may include recovery of their salary, punitive damages, injunctive relief, reinstatement and reimbursement of legal costs incurred.⁹¹ One point of discussion remains the question of what remedies should be offered to a whistleblower’s family if the whistleblower was the sole breadwinner of their family and subsequently lost their life as a result of the report.

Support to the Whistleblower

The effective protection of whistleblowers should also provide for social support pending the outcome of investigations and other formal proceedings, such as litigation.⁹² For this reason, the EU Directive and scholars consider that whistleblowers must be provided with support services as part of whistleblower protection. These services may include legal services, counselling and other forms of social support.⁹³

A legal instrument that can be considered in this instance is a whistleblower protection order.⁹⁴ This instrument can have a format similar to an interdict in that it can contain a list of specific actions that certain responsible persons must take. Depending on the legislation providing for this instrument, the protection order may provide for social support services, witness protection programmes and other measures necessary to ensure the physical safety and well-being of the whistleblower. Together, these measures are then considered to be a protection package for the whistleblower. One advantage of this instrument is that it can be tailored to the needs of each individual whistleblower in a particular situation.

Reversal of the Burden of Proof

The third category of legal measures includes measures that improve access to the above enforcement mechanisms and legal remedies. The reality of expensive litigation means that many remedies are too costly for whistleblowers who have suffered losses because of their reports.⁹⁵ Individuals affected by whistleblower reports may be motivated to discredit the whistleblower or the content of the report through litigation, among other means (and in many cases, implicated individuals can afford top quality legal representation).⁹⁶ It is then the difficult task of the whistleblower to prove reasonable grounds for their report or causality between the retaliation and their report.⁹⁷

90 Dos Santos (n 28) 259; UNODC (n 12) 7.

91 Jerrold (n 15) 285; Dos Santos (n 28) 256; arts 21(6) and (8) of the EU Directive (n 1); UNODC (n 12) 7.

92 Vian and others (n 15) 2140494; art 21(6) of the EU Directive (n 1).

93 Vian and others (n 15) 2140494; art 20 of the EU Directive (n 1).

94 Dos Santos (n 28) 259.

95 Dos Santos (n 28) 256; Nortje (n 13) 1444.

96 Nortje (n 13) 1444.

97 *ibid.*

One way to promote access to these remedies is for the legislature to reverse the burden of proof and only require the whistleblower to establish a *prima facie* case of retaliation.⁹⁸ The alleged retaliator must prove, for example, that the action taken against the whistleblower was not motivated by the whistleblower's report.⁹⁹ The legislature may further establish a legal presumption that where a whistleblower has made a report and suffered harm, it is presumed that the retaliatory action that caused the harm occurred because of the report.¹⁰⁰ Another approach could be to provide whistleblowers with default protection if the whistleblower has reasonable grounds to believe that their allegations are true.¹⁰¹ In this case, the degree of protection would depend on the nature of the disclosure and the subjects of that disclosure.

Immunity from Civil and Criminal Liability

The fourth category of legal options involves providing immunity from civil and criminal liability that may result from the whistleblower's report. In certain sectors, it is common for non-disclosure agreements to be signed as part of employment contracts. 'Secrecy laws'¹⁰² also prohibit the release of certain information to the public. In both cases, a person would be held civilly or criminally liable for the disclosure of information that falls within the scope of these legal instruments. The EU Directive requires all European Union member states to enact legislation stating that these 'secrecy' legal instruments cannot prevent the disclosure of information by whistleblowers.¹⁰³ This means that whistleblowers should enjoy a degree of civil or criminal immunity in their disclosures.¹⁰⁴

Where the 'secrecy' instruments concern the security of the state or the protection of the peace, disclosures are not completely prohibited, but a state may require that such disclosures be forwarded to special reporting bodies.¹⁰⁵ States must also ensure that their laws grant the community the right to freedom of expression.¹⁰⁶ Some other immunities may be extended to protect whistleblowers from civil actions based on defamation, copyright infringement, breach of confidentiality, breach of privacy, disclosure of trade secrets or claims for damages under private, public or collective bargaining agreements.¹⁰⁷

98 See the subsection 'Forms of Retaliation' for what constitutes retaliation. Dos Santos (n 28) 257; EU Directive (n 1) para 28.

99 Walle (n 14) 41; Dos Santos (n 28) 257; art 21(5) of the EU Directive (n 1).

100 Art 21(5) of the EU Directive (n 1).

101 Vian and others (n 15) 2140494.

102 These are instruments which include legislation and contracts that require certain persons to refrain from making specified information public.

103 Walle (n 14) 38; arts 21(3), (4) and (7) of the EU Directive (n 1).

104 Arts 21(3) and (4) of the EU Directive (n 1).

105 The rationale behind this exception is that sensitive information should often be withheld from the public domain to ensure state security.

106 Dos Santos (n 28) 256.

107 *ibid.*

Measures to Facilitate Confidentiality and Anonymity of Reports

The fifth category of legal options concerns preserving the confidentiality and anonymity of whistleblower reports. Measures to achieve this usually involve ensuring that the identity of the whistleblower and the content of the disclosure are not disclosed outside the reporting system without the whistleblower's consent.¹⁰⁸ Legislation should prohibit the disclosure of a whistleblower's identity and the contents of the disclosure to actors who are not involved in resolving the disclosure.¹⁰⁹ As with other protections, these must be accompanied by an appropriate enforcement mechanism to ensure the confidentiality of the report and a penalty if confidentiality is breached.¹¹⁰

Legislators should also design reporting channels to prevent unauthorised personnel from gaining access to whistleblower reports. This will increase confidentiality. Those designated to receive whistleblower reports also have an implied responsibility to ensure that adequate safeguards are in place to securely store all related information (eg encrypted cloud storage options).¹¹¹

Both the *identity* of the whistleblower and the *content* of the report should be confidential, as the identity of the whistleblower can often be inferred from the circumstances and content of the report.¹¹² Moreover, a report may contain information about third parties (such as the identification of other witnesses) that could put them at risk.¹¹³ During the Zondo Commission¹¹⁴ investigation into state capture, for example, the identity of a key witness, Mr X, was deduced and revealed by Dudu Myeni, former South African Airways Chair, endangering the life of the key witness and others.¹¹⁵ It appears that Myeni was able to establish the identity of Mr X by reading a copy of a file containing information about the disclosure made.

If it is necessary to disclose the identity of the whistleblower to adequately resolve the complaint, the whistleblower should be informed *before* their identity is disclosed.¹¹⁶ This should only be done under strict controls to ensure that the identity of the whistleblower and the contents of the report are disclosed only to the minimum number of external actors necessary to adequately resolve the report.¹¹⁷

108 Walle (n 14) 38; Vian and others (n 15) 2140494; Dos Santos (n 28) 252; art 16 of the EU Directive (n 1).

109 Art 16 of the EU Directive (n 1); OECD (n 24) 64.

110 Walle (n 14) 38; Vian and others (n 15) 2140494; OECD (n 24) 65.

111 Dos Santos (n 28) 250; art 18 of the EU Directive (n 1).

112 Walle (n 14) 41; art 16 of the EU Directive (n 1).

113 Dos Santos (n 28) 252.

114 The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, GeN 396 (9 February 2018) in GG 41436.

115 L Sidimba, 'Dudu Myeni Reveals Identity of Secret State Capture Witness Mr X, Stunning Justice Zondo' *Independent Online* (Cape Town, 5 November 2020).

116 Dos Santos (n 28) 252; arts 16(2) and (3) of the EU Directive (n 1).

117 Art 16(2) of the EU Directive (n 1).

Safeguards must also be in place to ensure continued confidentiality when records are seized under subpoena from the organisation receiving whistleblower reports.¹¹⁸ One way to ensure the confidentiality of whistleblower reports in such cases is for the legislature to introduce a legal privilege for these reports.¹¹⁹ Such privilege may operate in a manner similar to other legal privileges, such as attorney-client privilege.

Anonymous reporting channels are highly advocated in various jurisdictions and by scholars to protect whistleblowers.¹²⁰ However, the identity of a whistleblower often receives more attention than the content of the disclosure when reports are made anonymously.¹²¹ This is particularly the case when the credibility of a report is attacked by those about whom the disclosure is made.

Limits to Whistleblower Protection

Even though many scholars and best practices show that legislation should be broad to provide maximum protection to whistleblowers,¹²² the law must also provide for measures to prevent the abuse of whistleblower protection mechanisms.¹²³ Limiting whistleblower protection is necessary to prevent malicious, frivolous or abusive whistleblower reporting. This would ensure that individuals who intentionally make erroneous or misleading reports do not enjoy whistleblower protection and/or can also be subject to civil or criminal liability.¹²⁴

Legislators should also consider whether additional evidence should accompany the report for whistleblowers to be entitled to whistleblower protection and what stance they would take towards hearsay reports.¹²⁵ Would a whistleblower be entitled to protection if their report comprises allegations told to them by a colleague who had heard these allegations from someone else? The rationale advanced for requiring additional evidence is to verify and substantiate the allegations in a whistleblower's report.¹²⁶ In some jurisdictions additional evidence is required; in others the whistleblower is required to be as certain as possible of the truth of the allegations. There are also jurisdictions that require reasonable grounds to believe that the allegations are true.¹²⁷

One can also observe that certain whistleblower systems take a hierarchical approach to where and to whom reports should be made.¹²⁸ These systems are structured in such a

118 Dos Santos (n 28) 252; art 16(3) of the EU Directive (n 1).

119 Dos Santos (n 28) 263.

120 Da Costa Fernandes (n 13) 24; M Saade, 'Women and Whistleblowing' (2023) 34(1) *Hastings Journal on Gender and the Law* 54; Kang and Rubin (n 13) 4; OECD (n 24) 62.

121 Walle (n 14) 41.

122 Walle (n 14) 41; Vian and others (n 15) 2140494; art 6 of the EU Directive (n 1).

123 Dos Santos (n 28) 259; art 6 of the EU Directive (n 1); OECD (n 24) 45.

124 Dos Santos (n 28) 259.

125 El-Bassiouny and others (n 41) 385.

126 *ibid.*

127 El-Bassiouny and others (n 41) 385; UNODC (n 12) 7.

128 Dos Santos (n 28) 247.

way that protection only benefits those who follow these hierarchies.¹²⁹ If it is mandatory, for example, to make reports internally first but the whistleblower makes their first report to the media, such a whistleblower would not be entitled to whistleblower protection. The EU Directive follows this approach, but with a few exceptions.¹³⁰ Where there is a risk of retaliation, of the prospect (however remote) that evidence will be misappropriated or destroyed, or of the possibility that a public authority is in cahoots with the perpetrator or implicated in the breach itself, the reporting hierarchy need not be followed to claim whistleblower protection.¹³¹

Where Should Disclosures Be Made?

Whistleblowers contribute to preventing and combating organised crime, corruption and other wrongful activities, which are often part of extensive networks.¹³² Certain whistleblower channels may have been infiltrated or compromised by these networks. To protect whistleblowers from colliding with these networks, they must have access to adequate alternative reporting channels to make reports within the organisation concerned, to external institutions or to the public (such as the media), depending on the extent of the criminal networks involved.¹³³

To strike a balance between increasing transparency by encouraging whistleblowers and preserving the good functioning of government and municipalities, the EU Directive takes a hierarchical approach to whistleblowing channels.¹³⁴ Whistleblowers must first make reports within their institution (internal reporting channels) or to other designated government authorities (external reporting channels).¹³⁵ Internal and external reporting channels are on equal footing. However, reporting to public platforms such as the media is considered a subsidiary reporting channel and may only be used in special circumstances, for example when internal and external reporting channels have been exhausted.¹³⁶ Another exception is when the report contains information that poses an immediate and obvious threat to the public interest (other exceptions are discussed in the previous subsection, ‘Limits to Whistleblower Protection’). It is important that all available reporting channels are published in a clear and simple manner that enables the community to use them.¹³⁷

Each reporting channel must have a prescribed procedure for receiving and processing whistleblower reports. The EU Directive, for example, requires that all reporting procedures include the sending of an acknowledgement of receipt of a report within

129 *ibid.*

130 Art 15(1) of the EU Directive (n 1)

131 Dos Santos (n 28) 247; art 15(1)(b)(ii) of the EU Directive (n 1).

132 See the subsection ‘Why Do We Need Whistleblowers?’.

133 Walle (n 14) 42; Bron (n 12) 51; arts 7 to 12 of the EU Directive (n 1); OECD (n 24) 52.

134 Dos Santos (n 28) 249; arts 7, 10 and 15 of the EU Directive (n 1).

135 Dos Santos (n 28) 249.

136 *ibid.*

137 *ibid.*

seven days.¹³⁸ In addition, the facilitator receiving the report should be mandated to maintain communication with the whistleblower until the report is resolved.¹³⁹ This means that the facilitator should request additional information as needed and provide feedback on the status of the investigation throughout the process. Ultimately, legislation should prescribe a reasonable period (shorter than or equal to three months) within which such regular feedback should be provided.¹⁴⁰ Continuous feedback and quick responses to whistleblower reports have been proven to increase and maintain the confidence of whistleblowers during investigations.¹⁴¹ In addition to establishing external, internal and general reporting channels, legislation should also prescribe the format in which these reports are accepted. This could include written reports, hotlines and personal reports.¹⁴²

Independent Whistleblowing Authority

It is becoming increasingly popular for governments to establish an external whistleblowing reporting channel through an independent institution.¹⁴³ It is considered good practice to use independent institutions to coordinate and facilitate whistleblowing, including the protection of whistleblowers.¹⁴⁴ This corresponds to the EU Directive, which recommends that member states designate competent authorities to oversee matters relating to whistleblowers.¹⁴⁵

Establishing an Independent Institution

Legislation should ensure that an independent institution is established, and that it has the necessary autonomy to fulfil its mandate. Its reporting and general information channels should be separate from general government communication channels. This will ensure the integrity and confidentiality of whistleblower reports.¹⁴⁶

Independence also means that governments must ensure that independent institutions can carry out their mandate effectively. Independent institutions should therefore have access to adequate staff, equipment, funding and other governmental support. To maintain independence, legislators are well advised to give independent institutions the autonomy to appoint and manage their own staff.¹⁴⁷

At a minimum, any official of an independent institution must be technically capable of providing ongoing advice (legal or otherwise) at all stages of the whistleblowing

138 Arts 9, 11, 13 and 15 of the EU Directive (n 1).

139 Arts 9, 11 and 13 of the EU Directive (n 1).

140 Arts 9, 11, 13 and 15 of the EU Directive (n 1).

141 Dos Santos (n 28) 261.

142 Da Costa Fernandes (n 13) 23.

143 Bron (n 12) 51.

144 Bron (n 12) 46.

145 Dos Santos (n 28) 250; EU Directive (n 1) para 89.

146 Bron (n 12) 47.

147 *ibid.*

process, facilitate reporting and provide regular feedback to whistleblowers.¹⁴⁸ Training should ensure that staff act with a high level of integrity and know how to respond to the report received in a timely manner, while providing maximum protection to the whistleblower.¹⁴⁹

Drawing on the experience of corruption prevention studies, perhaps cross-checks and accountability mechanisms need to be built into the establishment of independent institutions to prevent abuse of power.¹⁵⁰ This could include, for example, that the independent institution only has to report to the legislative power (eg Parliament) in order to maintain independence from the executive.

Mandate and Corresponding Powers

The independent institution should be given a clear mandate and responsibility. All independent institutions should be mandated to receive, process and resolve whistleblower reports.¹⁵¹ As part of this responsibility, independent institutions should also facilitate the protection of whistleblowers, which may involve delegating certain protections to other authorities, such as delegating physical protection to the police.¹⁵² However, legislators must be very careful when allowing independent institutions to delegate certain competencies to external institutions when implementing measures to protect whistleblowers. In South Africa, for example, the key player in protecting the physical safety of whistleblowers is the SAPS, which is also considered one of the most corrupt institutions in South Africa.¹⁵³ The same applies when the law requires cooperation between independent institutions and other government institutions.

The independent institution may be given the authority to seek redress on behalf of whistleblowers who have been subject to retaliation.¹⁵⁴ Independent institutions will also be in a unique position to offer whistleblowers various support services if they are permitted by law to do so. These services may include social services, such as a safe emergency shelter.

Facilitating whistleblower reporting would be another important aspect of an independent institution's tasks. This means that the independent institution must

148 Dos Santos (n 28) 250; art 12 of the EU Directive (n 1).

149 Da Costa Fernandes (n 13) 23.

150 AB Masters and A Graycar, 'Making Corruption Disappear in Local Government' (2016) 18(1) Public Integrity 50 <<https://doi.org/10.1080/10999922.2015.1093400>>; B Michael and S Mendes, 'Anti-corruption Law in Local Government: Legal Issues Related to Ordinance Design and Municipal Level Anti-corruption Agencies in Macedonia' (2012) 54(1) International Journal of Law and Management 27 <<https://doi.org/10.1108/17542431211189597>>; R Tangri and AM Mwenda, 'Politics, Donors and the Ineffectiveness of Anti-corruption Institutions in Uganda' (2006) 44(1) Journal of Modern African Studies 103; UNDP (n 7) 46.

151 Dos Santos (n 28) 250.

152 *ibid.*

153 Corruption Watch, *Annual Report 2021: 10 Years Pushing for Change* (Corruption Watch 2021) 33.

154 Bron (n 12) 46.

establish an external reporting channel and comply with the specifics outlined in the previous subsection, ‘Where Should Disclosures Be Made?’. This includes providing feedback within certain deadlines. Facilitating whistleblowing and receiving reports also imply a duty of confidentiality and a responsibility to store the information in reports securely.¹⁵⁵

Depending on the needs of a particular organisation, the mandate of the independent institution may also include educational, research and awareness-raising tasks. The independent institution can be mandated to establish a comprehensive public information portal or mechanism that would provide, among other things, information on the legal framework and general procedural rules relating to whistleblowing.¹⁵⁶

To properly fulfil its mandate and maintain its independence, an independent institution must be vested with the autonomy and authority to conduct investigations based on reports received. It must also use its own initiative when it comes to matters related to whistleblowers.¹⁵⁷ In many regimes, these investigative powers include the power to search premises, seize evidence and compel testimony.¹⁵⁸ It would make sense to also provide the independent institution with adequate powers to take remedial action in certain circumstances, depending on the needs of individual organisations.

Current South African Legal Framework

Although the terms ‘whistleblower’ or ‘whistleblowing’ are not yet legally defined, South African law and policy provide a degree of protection for witnesses and the integrity of evidence related to corruption and associated offences in municipalities.

Witness protection comprises many components. These include the general duty of the SAPS to protect all residents of South Africa, the right to fair labour practices,¹⁵⁹ and the guarantee of freedom of expression that apply to all.¹⁶⁰ However, this section only highlights the additional protections that apply specifically to whistleblowers of corruption in *municipalities*. The article therefore excludes legislation such as the Companies Act 71 of 2008, the Nuclear Energy Act 46 of 1999, the National Nuclear Regulator Act 47 of 1999 and the Public Finance Management Act 1 of 1999 that might protect other whistleblowers.

155 See the subsection ‘Defining “Whistleblowing” and “Whistleblower”’.

156 Dos Santos (n 28) 250.

157 Bron (n 12) 47.

158 Bron (n 12) 51.

159 Labour Relations Act 66 of 1995; the Basic Conditions of Employment Act 75 of 1997.

160 Sections 11, 12, 14, 16 and 23 of the Constitution of the Republic of South Africa, 1996; the Preamble to the South African Police Service Act 68 of 1995; Bron (n 12) 45.

Prohibition of Retaliation Against Disclosures

The Protected Disclosures Act 26 of 2000 (PDA) prohibits retaliation against employees who disclose information about their employer that indicates or may indicate the existence of a criminal offence, threats to occupational health and safety, a miscarriage of justice, environmental harm or unfair discrimination.¹⁶¹ This protection also applies to public officials who make a protected disclosure to political officeholders.¹⁶²

It is also prohibited to retaliate against whistleblowers who provide information about environmental risks.¹⁶³ The National Environmental Management Act 107 of 1998 (NEMA) specifically lists unfair dismissal, disciplinary action or other prejudice and harassment as retaliation.¹⁶⁴ Also included in this list is the *threat* of retaliation against a person who intends to blow the whistle with the aim of preventing that person from doing so.¹⁶⁵ Interestingly, the NEMA also provides that no one may offer a whistleblower an incentive or advantage to discourage them from making a report.¹⁶⁶ The corresponding penalties for violations of these prohibitions include imprisonment for a maximum of five years and/or a fine.¹⁶⁷

Civil and Criminal Immunity

The NEMA and the PDA contain the only protection against civil and criminal liability that may result from reporting corruption in municipalities.¹⁶⁸ The NEMA gives this immunity only where (1) the disclosure was made in good faith; (2) the disclosure followed the reporting procedure; and (3) the whistleblower reasonably believed at the time of disclosure that they were disclosing evidence of an environmental risk.¹⁶⁹

Remedies for Harm Suffered

Remedies are available only for an occupational detriment suffered because of making a whistleblower report under the PDA.¹⁷⁰ These remedies may include the payment of compensation for damages actually suffered, an interdict or other remedial action.¹⁷¹ If the whistleblower is employed by the state and there are reasonable grounds to believe that they may be disadvantaged, the employee must be transferred to another post

161 Section 1 of the PDA; s 18 of GN R430 (30 May 2014) in GG 37699 (Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 2014)

162 Section 18 of Municipal Regulations on Financial Misconduct (n 161).

163 Section 31(4) of the NEMA.

164 Section 31(4) of the NEMA.

165 Section 31(8) of the NEMA.

166 Section 31(7) of the NEMA.

167 Sections 49A and 49B of the NEMA.

168 Section 31(4) of the NEMA; s 9A of the PDA; s 18 of the Municipal Regulations on Financial Misconduct (n 161).

169 Sections 31(4) and (5) of the NEMA.

170 Sections 2 and 4 of the PDA; Lubisi and Bezuidenhout (n 32) 50.

171 Sections 2 and 4 of the PDA; s 18 of the Municipal Regulations on Financial Misconduct (n 161).

upon request and the new conditions of employment must not be less favourable than before.¹⁷²

A whistleblower may approach the court for a protection order in terms of the Protection from Harassment Act 17 of 2011 if they are harassed. This Act defines harassment as actions that may inspire a reasonable belief that physical, economic, psychological or mental harm may be caused to the person being harassed. These actions may include being watched, pursued or engaged in any form of communication.¹⁷³ Protection orders are in the form of an interdict prohibiting the offender from communicating or being in a certain proximity (depending on the specifics of the order) of the complainant. A protection order is usually accompanied by a suspended warrant of arrest for the offender. When the offender violates the order, any SAPS official may immediately arrest the offender. However, as Nortje¹⁷⁴ notes, these remedies can be problematic because whistleblowers must engage in expensive litigation to access them. Furthermore, the remedies are peppered with technical terms.¹⁷⁵

Protection of Physical Safety

Sometimes whistleblowers are required to testify in court as witnesses. In such instances, they may be even more vulnerable to retaliation. The Witness Protection Act 112 of 1998 provides for a witness protection programme for all persons who are required to testify as witnesses in criminal and civil court proceedings.¹⁷⁶ This protection also extends to persons related to the witness who will testify in court, such as family, relatives, close friends or other persons who may be associated with the witness.¹⁷⁷ Witnesses who have reason to believe that their safety or that of a related person may be threatened, may *apply* for protection.¹⁷⁸ Protection of witnesses may include relocation, change of their identity and related support.¹⁷⁹

The application procedure for access to witness protection is cumbersome and technical.¹⁸⁰ It would be beneficial to include provisions requiring that technical assistance be made available to whistleblowers who have difficulty with the application. Another criticism is that the SAPS, the National Prosecuting Authority and other stakeholders are involved in applying for and deciding whether to grant protection to whistleblowers.¹⁸¹ Considering that corruption has infiltrated many institutions in South Africa and that the SAPS is accused of being one of the most corrupt institutions

172 Section 3(4) of the PDA; s 18 of the Municipal Regulations on Financial Misconduct (n 161).

173 Section 10 of the Protection from Harassment Act 112 of 1998.

174 Nortje (n 13) 1444.

175 *ibid.*

176 Sections 1 and 2 of the Witness Protection Act 112 of 1998.

177 Section 7 of the Witness Protection Act (n 176).

178 Nortje (n 13) 1444; s 7 of the Witness Protection Act (n 176).

179 Sections 1 and 4(1) of the Witness Protection Act (n 176).

180 Section 7 of the Witness Protection Act (n 176).

181 Sections 6, 7 and 11 of the Witness Protection Act (n 176).

in the country, it might be advisable to make whistleblower protection decisions regarding corruption in municipalities independent of other government institutions.

Confidentiality of Information

In criminal proceedings, the Criminal Procedure Act 51 of 1977 (CPA) offers possibilities to protect the identity and personal information of a whistleblower testifying in a criminal court.¹⁸² Normally all criminal proceedings must take place in an open court. However, the CPA provides that where a witness may be prejudiced by their testimony in an open court, the court may order that the proceedings be held *in camera* and that the identity of the witness not be disclosed.¹⁸³ The court may also prohibit information on criminal proceedings from being made public in order to ensure the confidentiality of the whistleblower's personal information and the content of the report.¹⁸⁴ Witnesses in criminal proceedings may also testify via closed-circuit television (or similar technology) in order to protect their identity, among other things.¹⁸⁵ It is considered to be in the public interest to protect police informants, therefore their personal information should not be made public.¹⁸⁶

The Consumer Protection Act 68 of 2008 establishes an external reporting channel for whistleblowing in relation to consumers.¹⁸⁷ The Act prohibits any breach of confidence in the disclosure of information made through this reporting channel. The penalty for such a breach is imprisonment for a maximum of ten years and/or a fine.¹⁸⁸

Mandatory Whistleblowing

Generally, whistleblowing is considered voluntary, but there are certain circumstances in which reporting corruption is considered mandatory. The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PreCCA) creates a general obligation for any person who knows or reasonably should have known or suspected that corrupt activities (as described in the PreCCA) are taking place, to report that fact to the SAPS.¹⁸⁹ Accounting officers are required to report all unauthorised, irregular or fruitless and wasteful expenditure and details of the relevant investigation to the MEC for Local Government and the Auditor-General.¹⁹⁰ If there is a suspicion that the expenditure constitutes a criminal offence, the accounting officer of a municipality (also known as the municipal manager) must report this to the SAPS.¹⁹¹ In addition, any reasonable

182 Nortje (n 13) 1444.

183 Nortje (n 13) 1444; s 153(2) of the CPA.

184 Nortje (n 13) 1444; s 154 of the CPA.

185 Nortje (n 13) 1444; s 153 of the CPA.

186 Nortje (n 13) 1444; s 202 of the CPA.

187 Sections 69(c)(iv) and 71(1) of the Consumer Protection Act.

188 Sections 107(1) and 111(1) of the Consumer Protection Act.

189 Section 34 of the PreCCA.

190 Section 32(4) of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

191 Section 32(6) of the MFMA (n 190); s 10 of the Municipal Regulations on Financial Misconduct (n 161).

suspicion of financial misconduct must be reported to the appropriate person (the municipal council or the municipal manager) and to the SAPS.¹⁹² This accusation must also be tabled by the mayor in a municipal council meeting.¹⁹³ A specific format is prescribed for reports to the SAPS on financial misconduct and offences in municipalities.¹⁹⁴ It is worth noting that no special protection is given to those who make the above reports.¹⁹⁵

Protection Against Frivolous and Malicious Reports

Individuals enjoy legal protection from malicious reporting by whistleblowers. It is illegal to deliberately make a false allegation of corruption if one knows it is not true.¹⁹⁶ In certain cases, such an accusation is a punishable offence through a fine and/or imprisonment.¹⁹⁷

Observations or Gaps for Improvement

The National Anti-Corruption Strategy, which pays special attention to whistleblowers and their protection, especially in corruption cases, shows that existing South African law is insufficient. Specifically, ‘protected disclosure’ and ‘whistleblower’ are too narrowly defined.¹⁹⁸ The National Development Plan indicates that a survey conducted on whistleblowing shows that South Africans are generally unwilling to act as whistleblowers when required.¹⁹⁹ It is therefore necessary to point out where South African law and policy can be improved to encourage whistleblowing by prescribing adequate protection measures.

As a point of departure, South African law would benefit from reviewing and amending existing law to establish a complete whistleblowing system. It should not just focus on the protection of whistleblowers alone, which is what the Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa of 2023 did.²⁰⁰ The terms ‘whistleblower’ and ‘whistleblowing’ should be properly defined to establish the scope of application of subsequent whistleblower laws. Whistleblowing channels should then be established and harmonised. Also, the legislature

192 Sections 3 and 9 of the Municipal Regulations on Financial Misconduct (n 161).

193 Sections 3, 9 and 10 of the Municipal Regulations on Financial Misconduct (n 161).

194 Section 14 of the Municipal Regulations on Financial Misconduct (n 161).

195 Nortje (n 13) 1444.

196 Section 9B of the PDA; s 73 of the Competition Act 89 of 1998.

197 Section 9B of the PDA; s 73 of the Competition Act (n 196).

198 National Anti-Corruption Strategy Steering Committee, *National Anti-Corruption Strategy 2020–2030* (South African Government 2021) 9.

199 National Planning Commission, *National Development Plan 2030: Our Future Make it Work* (South African Government 2011) 449.

200 Department of Justice and Constitutional Development, ‘Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa’ (2023) <<https://www.justice.gov.za/legislation/invitations/20230629-Whistleblower-Protection-Regime.pdf>> accessed 11 March 2025.

should consider establishing an independent institution to empower whistleblowers in South Africa.

The Zondo Commission²⁰¹ has made several recommendations for improving existing law and policy to enhance the protection of whistleblowers. These include measures for (1) physical protection, relocation and enhanced confidentiality; (2) protection from potential retaliation and intimidation; (3) provisions to allow whistleblowers to provide evidence without jeopardising their safety; and (4) enhanced civil and criminal immunity.²⁰²

South African law should broaden the prohibition against retaliating against whistleblowers to include a wider range of acts than occupational detriment.²⁰³ Also, this prohibition should not be limited to situations where an employment relationship is present between the whistleblower and the subject of the report, or where an environmental risk is reported.

It is baffling how the legislature could expect mandatory disclosures but not offer adequate protection in return. Although making reports about corruption in a municipality might be part of an official's job description, which means they would not strictly speaking be a whistleblower, some effort should still be made to ensure their safety. In South African anti-corruption legislation, public officials are treated differently to other people who may occupy a position of authority. They are subject to stricter and more comprehensive regulations for publicly reporting personal interests. Should they be found guilty of corruption, stricter penalties apply, including a ban on re-entering public office. If they fail to report suspected corruption, they will be considered equally guilty of this corrupt act and be subject to those stricter penalties. Thus public officials are the first line of defence against corruption. Without a guarantee of their safety (physically and regarding their future career), local government might fail to attract qualified people for these important positions.

Currently, only whistleblowers who report corruption in municipalities that involve environmental risks in terms of the NEMA have civil and criminal immunity. This means that whistleblowers who report on other fronts, such as tender fraud or human rights violations, are vulnerable to retaliation in the form of defamation claims: criminal charges: and claims for the breach of non-disclosure agreements, the disclosure of trade secrets or privileged information, and so on.

Compensation (not money rewards as envisaged in the NEMA) for harm suffered as a result of whistleblowing is exclusively offered for reports made under the PDA. This means that, if the whistleblower did not make a report against their employer, they cannot access any compensation for damages suffered. Compensation is limited to

201 GeN 396 (n 114).

202 Nortje (n 13) 1444.

203 National Planning Commission (n 199) 449.

occupational detriment suffered and not for medical expenses that may result from the stress associated with reporting, for example. Moreover, accessing any form of legal remedy comes with all the challenges associated with litigation, not the least of which is time. Thuso Bloem, a former senior manager for the Greater Taung Local Municipality, was unfairly dismissed following a report he made against his municipal manager in 2011.²⁰⁴ By 2021, he was still caught up in litigation and was unable to access any legal relief.²⁰⁵

The legislature could consider implementing a specialised forum to hear whistleblowing-related matters and create procedures to access interim protection or relief pending the finalisation of these matters. This specialised forum might use procedures that are less time consuming than conventional litigation. Another way to ease some of the challenges associated with litigation could be to reverse the onus of proof for whistleblowers. In other words, the retaliator must prove that their actions did not cause harm to the whistleblower and that the harm that occurred was not as a result of the report made.

South African law does not have a complete whistleblower system; it only gives some reports the status of being protected and provides some options of where to make reports. This means guidelines and best practices on issues such as evidence rules, how to deal with reports, how to investigate reports and when to provide feedback are neglected. No legislative duty exists toward the receiver of disclosures to keep the content of the report confidential; it is not enough to keep only the identity of the reporter confidential. Some NGOs, such as Whistleblower House and Corruption Watch, have already done much work in this area and could be provide useful assistance to the legislature when it develops the legal framework for a whistleblower system. Based on the analysis done in the section ‘Legal Approaches to Protect Whistleblowers’, the South African legislature should consider an Act that would deal with the nine key elements set out in Figure 1.

Provided that the *new* definitions of ‘whistleblower’ or ‘whistleblowing’ are sufficiently broad, as recommended in the subsection ‘Defining “Whistleblower” and “Whistleblowing”’, further amendments to the law to improve existing physical safety measures could prove tricky. This is mainly because the true extent of corrupt networks is currently unknown to most in South Africa. It is thus not possible for the legislature to anticipate where the weak links in the current witness protection system are and therefore impossible to know to whom the safety of whistleblowers should be entrusted. A possible solution might be to increase the independence and autonomy of the institution responsible for whistleblowers’ safety. It would also be beneficial to improve

204 C Ryan, ‘Taung Municipality Whistleblower’s 10-Year Battle for Justice’, *MoneyWeb* (Johannesburg, 30 March 2021) <<https://www.moneyweb.co.za/news/south-africa/taung-municipality-whistleblowers-10-year-battle-for-justice/>> accessed 1 October 2024.

205 *ibid.*

access to witness protection by assigning officials to assist whistleblowers with the complex application process.

National Whistleblowing Legislative Framework

1. Establish Definitions		
1.1	Definitions	
1.1.1		‘Whistleblower’ and ‘whistleblowing’
1.1.2		‘Protected disclosure’
1.1.3		‘Retaliation’
1.1.4		‘Intimidation’
2. Establish Reporting Channels		
2.1	General principles	
2.1.1		Each channel must contain adequate safety measures to ensure that unauthorised persons cannot access protected disclosures.
2.1.2		Provisions should specify how reports should be stored and when they should be destroyed.
2.1.3		Reporting should first be done through internal channels before approaching external channels.
2.1.4		Exceptions to paragraph 2.1.3 should be listed, including when there is an imminent threat to public safety.
2.2	Internal reporting channels	
2.2.1		For municipalities, consider creating a reporting channel in structures such as the ethics or internal audit committees.
2.3	External reporting channels	
2.3.1		Establish reporting channels in institutions external to municipalities.
2.3.2		Give details about when a report may be made to the general public through the media or other means.
2.4	Reporting procedures	
2.4.1		Describe the details of how a report should be made and received.
2.4.2		Give the whistleblowers who have made a report a list of protections and support they are entitled to and how to access them.
2.4.3		Detail how investigations should take place and the frequency of regular feedback that should be provided to the whistleblower on such investigations.

3.	Protections Afforded to Whistleblowers
3.1	The system should be one of incremental protection. The legislature should set out all the protections that will be given to whistleblowers and the circumstances in which they will apply. The legislature should consider granting basic protections as a default protection. In other words, a whistleblower will become entitled to these protections on the date that the protected disclosure is made.
3.2	A prohibition should be made against intimidating a person to change or make their protected disclosure.
3.3	There should be a clear prohibition against retaliation.
3.4	Where retaliation has taken place, provision should be made for sanctions and penalties against the retaliator.
3.5	Procedures that enable the enforcement of paragraphs 3.1 and 3.2 must be included. This may encompass investigative powers.
3.6	A legal presumption should be created: Where a whistleblower can <i>prima facie</i> prove that retaliation has taken place, it is presumed that such retaliation is a direct result of the protected disclosure. Causality is presumed, not the guilt of the retaliator.
3.7	Onus: After the whistleblower proves a <i>prima facie</i> case of retaliation, the onus shifts to the retaliator.
3.8	Interlocutory relief should be provided while any matter regarding whistleblowing is being resolved.
3.9	Provision should be made for remedies for whistleblowers when retaliation has taken place, such as compensation or reinstatement.
3.10	A special remedy should be stipulated for a whistleblower's family where loss of life occurred.
3.11	A legal instrument should be established to provide physical, social and economic protection to whistleblowers pending the resolution of the follow-up action of the protected disclosure. This may include providing access to legal services, physical protection or social services. Legislatures should consider the use of a protection order that may provide the list of protections a whistleblower is entitled to.
4.	Protecting the Integrity of Public Disclosures
4.1	Measures should be established that describe aspects such as chain of custody to ensure that any documents or other evidentiary material that accompanied the protected disclosure is kept safe and will comply with the rules of evidence.

5. Accessing Whistleblower Protection	
5.1	Establish a clear and simplified process that whistleblowers can follow to enforce their default protections if such protections were refused or not provided by the state.
5.2	Establish a clear and simplified process that a whistleblower can follow to access additional protections.
6. Legal Immunities	
6.1	Civil immunity from any civil litigation that may arise from the subject matter of the protected disclosure should be provided.
6.2	Criminal immunity from any prosecution that may arise from the subject matter of the protected disclosure should be provided.
6.3	Restraints of trade, non-disclosure agreements or any other similar legal documents may not prevent a person from making a protected disclosure.
7. Confidentiality and Anonymity	
7.1	Create a primary mandate on designated institutions to keep protected disclosures confidential. Create a further mandate on responsible persons to keep protected disclosures confidential.
7.2	Include a prohibition from disclosing a whistleblower's identity and the content of a protected disclosure.
7.3	State exceptions when information as in paragraph 7.2 may be disclosed.
7.4	Stipulate a duty to notify the whistleblower before a disclosure as in paragraph 7.3 is made.
7.5	Include corresponding enforcement mechanisms and penalties to give effect to paragraphs 7.1 to 7.4.
7.6	Define measures that ensure and protect confidentiality where records are seized and premises searched. In this regard, the legislature could opt for creating a legal privilege for protected disclosures.
8. Limitation of Protections	
8.1	No protections are afforded to malicious and frivolous reports.
9. Independent Institution	
9.1	The independent institution should be separate from the executive branch of the government and must function independently and autonomously.
9.2	It should have a clear mandate with corresponding powers.

Figure 1: Nine key elements of a national whistleblowing legislative framework

Conclusion

In a reality where corruption has infiltrated just about all aspects of the public sector, whistleblowing seems to provide a glimmer of hope as one of the methods that could prevent and control corruption in municipalities. This article examined how legal protection can be improved for whistleblowers of corruption in South African municipalities. This question was answered by first exploring a theoretical foundation that consists of defining the terms ‘whistleblower’ and ‘whistleblowing’. The theoretical literature review also discussed the importance of whistleblowers, why they are harmed and what types of retaliation they face. This gave a framework within which legal approaches to protect whistleblowers could be investigated. It was found that whistleblower protection starts with having a good whistleblower system in place. In other words, the term ‘whistleblower’ must be defined in law and the law must make provision for simple and clear reporting channels.

Specific legal measures can be used to protect whistleblowers. These include prohibiting retaliation using mechanisms to enforce the prohibition, and offering the whistleblower corresponding remedies. The confidentiality of reports must be protected. Also, there should be prescribed measures for ensuring physical safety and providing civil and criminal immunity. South African law was measured against the different legal approaches to protect whistleblowers. This analysis showed that the legal protection of whistleblowers can be improved by amending South African law. However, future empirical research could investigate the practical difficulties associated with the implementation of whistleblower protection and how to overcome these difficulties.

Despite arguing for good legal protection in favour of whistleblowers, the role leadership plays in protecting whistleblowers should not be underplayed.²⁰⁶ Many studies show that the ethical climate is set by leadership and that leaders or management is often in a position to provide meaningful support to whistleblowers.²⁰⁷ The success of any law depends on leadership commitment and whether the law is effectively implemented.

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206 Bron (n 12) 42.

207 *ibid.*

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