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Promoting human rights and democracy through the media since 1993

15 August 2023

FOR THE ATTENTION OF:

Director-General: Department of Justice and Constitutional Development (“DoJ”)
c/o: Adv T. Nkabinde: whistleblowingreforms@justice.gov.za

SUBMITTED BY:

Director: Media Monitoring Africa (“MMA”)
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PROPOSED REFORMS FOR THE WHISTLEBLOWER PROTECTION REGIME IN SOUTH AFRICA
SUBMISSION BY MEDIA MONITORING AFRICA ON THE PROTECTION OF THE MEDIA

INTRODUCTION

1. MMA welcomes the opportunity to make this submission to the DoJ on its proposals seeking to reform the whistleblower protection framework in South Africa. The need for reform is both urgent and well overdue, and MMA therefore urges the DoJ to move this process forward with urgency to ensure that whistleblowers are safeguarded by an effective and meaningful protection regime. Whistleblowers are essential to a properly functioning democracy founded on the principles of openness, transparency and accountability, and must be recognised and protected as such.
2. By way of background, MMA was established in 1993 and has evolved since then from a purely monitoring-based project to an innovative organisation that implements successful media strategies for change using technology, social media and data tools to enhance efficiency and effectiveness. MMA’s vision is to create a responsible, quality media that enables an engaged and informed citizenry in Africa and the world. Moreover, MMA promotes ethical and fair journalism, as well as democracy and a culture where the media and the powerful respect human rights to encourage a just and fair society. For more information about MMA, please visit: <https://www.mediamonitoringafrica.org/>.
3. In the light of MMA’s work and expertise, this submission focuses primarily on the need for journalists and members of the media to also find protection and support within the whistleblower regime. Journalists are critical actors in this context: journalists are often at the frontline in publishing information received from whistleblowers in the public interest;

journalists themselves can be whistleblowers through the course of investigations and the compiling of evidence; and while the right of source protection for journalists has long-since established, greater certainty is needed to understand how the exigencies of these protections apply when the source in question also meets the defined tenets of a whistleblower. Amidst all this, journalists often face threats, harassment, legal action and other reprisals in an effort to intimidate them or deter them from publishing the information at hand.

4. In practice, investigative journalists and media organisations are often approached by whistleblowers, particularly in circumstances where the whistleblower does not trust or is in fear of reprisal from the perpetrator. This is an important mechanism through which pertinent information can be made public and wrongdoers brought to account. However, this in turn calls for the media to be positioned to receive such disclosures, protect both the whistleblower and the information received, and perform its constitutional duties as contemplated in section 16(1) of the Constitution. There are innumerable examples globally of journalists working together with whistleblowers to expose some of the most egregious acts of corruption, criminality and human rights violations, many of which would have been unlikely to come to light if it hadn't been for the media organisation involved. This likewise places those journalists at similar risks to the whistleblowers themselves, and likewise demands protection for their safety and protection.
5. There can no longer be any doubt that the whistleblower protection regime in South Africa has been ineffectual and has led to whistleblowers losing their jobs, means, reputations and even their lives. Being a whistleblower in South Africa demands an inordinate toll on not only the particular individual but also their families who are placed at constant risk and in fear of their safety. This is utterly intolerable and cannot be allowed to persist, all the more so in a country like ours where whistleblowers and journalists are integral to the fight against the scourge of corruption with which we are faced. Given the self-evident synergies between the role of the media and that of whistleblowers, it follows that so too must the media be afforded the necessary protections as part of the overarching whistleblower protection regime if they are to be able to continue to fulfil this role going forward.
6. For this, it demands *inter alia* that journalists are free from harassment, threats and frivolous claims; that lawsuits such as those commonly known as 'SLAPP suits' (i.e. strategic litigation against public participation) can be dealt with swiftly; that the right to privacy is safeguarded, included privacy over electronic communications and prohibitions against unlawful surveillance; that training, resources and support are readily available and on offer as may be needed; and that there are effective recourse and accountability measures where journalists are unlawfully or unconstitutionally impeded from performing their duties. This is certainly true when reporting on or engaging with whistleblowers, but it is also a reflection of the broader media landscape. For the media to be vibrant and thrive in South Africa, there is no greater need than for media organisations – across different sizes, geographies, languages, areas of focus and views – to be properly resourced, shielded against any attempts at undue interference or coercion, and fully capacitated to perform its constitutional duties to the highest standards expected from the profession.

7. In what follows, **ANNEXURE A** to this submission sets out certain key points with reference in particular to chapter 10 of the discussion document. This is by no means a finite list, but rather MMA's initial input on the preliminary proposals being put forward by the DoJ. There can be no gainsaying that whistleblower protections are imperative to the fulfilment of democratic principles and good governance, and must be dealt as a matter of significant priority. In recognising this, so too must the role of the media and investigative journalists, without whom many disclosures may never be made known to the public and those empowered to hold the wrongdoers to account.
8. MMA reiterates its appreciation at the opportunity to provide this submission and looks forward to engaging with the DoJ and other stakeholders as this process moves forward, including the opportunity to make oral submissions on the points highlighted. Please do not hesitate to contact us if we can provide any further information.

Yours faithfully,

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** This submission was prepared with the assistance of Avani Singh
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ANNEXURE A:

SUBMISSIONS BY MEDIA MONITORING AFRICA

<u>Reference</u>	<u>Key submission</u>
Expansion of definitions (s 1; p85)	<ul style="list-style-type: none">• MMA supports the expansion of the definitions contained in the Protected Disclosure Act 26 of 2000 (“PDA”):<ul style="list-style-type: none">○ The whistleblower protection regime should properly afford the widest possible protections to whistleblowers and other relevant role-players if it is to meet its objects, and must offer a framework in which whistleblowers can trust and that encourages them to come forward without undue fear or risk.○ Within this broadened scope, MMA submits that journalists and media bodies – be them whistleblowers themselves or publishers of information disclosed by whistleblowers – must also properly be contemplated within this regime given the critical role they play in investigating disclosures, publishing evidence of wrongdoing and ensure accountability in the public interest.• In terms of the proposed amendment:<ul style="list-style-type: none">○ MMA broadly agrees with the provisions set out under ‘qualifying disclosure’ and ‘improper conduct’. In particular, MMA supports the express reference to constitutional violations being explicitly recognised in this context.○ Moreover, MMA’s submission here is that due consideration should also be given to the protections required by journalists when receiving information of the nature contemplated, as well as the different forms and outputs that journalists may produce.○ In considering a further definition for the term ‘discloser’, MMA reiterates here that this definition must be aligned with the other definitions and overall framework to include the protection of journalists as ‘disclosers’ of information received from whistleblowers through the process of their investigation or publications, and for there to be appropriate safeguards in place to protect journalists as would be the case with other so-called disclosers.

Confidentiality

(new section, p 88)

Anonymous disclosures

(new section, p 90)

- Protecting the privacy of whistleblowers' identities can be a crucial element of protecting the whistleblower overall. This too impacts the media when publishing information received by the media in circumstances where journalists or media organisations may face undue pressure, threats, harassment, surveillance and other such measures to force them to reveal the whistleblower's identity.
- MMA is concerned though that the new section contemplates that there are circumstances under which a whistleblower's identity can be disclosed, where the whistleblower is only informed *after* this has been disclosed:
 - Firstly, while any disclosure of a whistleblower's identity places that person at risk, this is infinitely more so if the whistleblower is under the impression of his or her identity being confidential when in fact it has been made known even without his or her consent.
 - This is exacerbated by the fact that the provision does not indicate any timeframe whatsoever by which the whistleblower must be informed.
 - Without knowing beforehand, the whistleblower is given no opportunity to put in place necessary security or other measures before this is made public.
 - Added to this, the vague and overbroad bases for disclosing a whistleblower's identity, such as 'to comply with the principles of open justice', are open to misuse without the whistleblower having an opportunity to challenge the disclosure in advance of the identity being revealed.
- This provision appears to be at odds with the proposed insertion allowing for anonymous disclosures, in which instances the law accepts it is permissible for the identity of a whistleblower to remain confidential. These two amendments do not cohere:
 - Given that whistleblowers can retain complete anonymity in making a disclosure, why would whistleblowers who have asked for their identities to be kept confidential not be likewise entitled to the same level of protection as the anonymous person?
 - MMA's submission is accordingly that the provision regarding revealing the identities of whistleblowers should be largely revised to a more consistent consent-based one, and (in line with the submission below) for there to be recourse where any person seeks to coerce or pressure another to reveal the identity of a

	whistleblower including by means of targeting a journalist or media organisation that may have been contacted by a whistleblower.
Prohibition against force or coercion (new section, p 89)	<ul style="list-style-type: none"> • MMA welcomes this insertion prohibiting the use of force, coercion and so on with the intent to prevent that person from, or to influence the person to refrain from, making any disclosure. • MMA submits that this prohibition should further make clear that this includes where acts of force or coercion are being targeted at members of the media where it has become known or suspected that they have received information from a whistleblower, are investigating a matter and/or intend to disclose certain evidence in the public interest.
Protected disclosures to certain bodies or persons (section 8, p 91)	<ul style="list-style-type: none"> • For present purposes, MMA simply notes here that consideration should be given to a disclosure regime wherein disclosures are made to members of the media in the public interest who in turn investigate and take other steps following from these disclosures. This is raised here only as a point of consideration to be discussed further as this process moves forward, including appropriate safeguards (such as a requirement that the media organisation be a member of a regulatory body such as the Press Council of South Africa). • In the interests of clarity, MMA’s submission is by no means for the current provision to be applied to the media without more in the same way as it does to the listed organs of state, including for reasons of the media not being properly resourced as private actors to engage in this manner. However, MMA raises this here as the notional thinking underpinning this provision also has bearing on the role of the media as well.
Oversight mechanisms (new section, p 92)	<ul style="list-style-type: none"> • MMA notes the consideration given in the discussion document to what type of body or oversight mechanism would be best-suited to matters relating to whistleblowers and protected disclosures. Here, MMA makes the following submissions: <ul style="list-style-type: none"> ○ With regard to the consideration given to the role of the South African Human Rights Commission (“SAHRC”), MMA is concerned that the SAHRC’s existing mandate and powers may be too narrow to address the full array of matters arising in the context of whistleblowing and whistleblower protections.

	<ul style="list-style-type: none"> ○ While there is certainly scope for the SAHRC to play a role as well, MMA’s view at this stage presently supports the establishment of a new Chapter 9 constitutional body that is created with a tailored and specific mandate that is focused in line with the purpose of its establishment. ○ While the specifics of the particular oversight body will be discussed further through this process, be it in the form of an existing or newly-created one, it is critically important to ensure that the body has a clear and firm empowering mandate in line with the Constitution, is properly resourced to perform its functions meaningfully and effectively, and is able to fully operate independently and impartially.
<p>Legal funding (new section, p 97)</p> <p>Fund for whistleblowers (new section, p 99)</p>	<ul style="list-style-type: none"> ● MMA welcomes the provision of financial and other support to be afforded to whistleblowers. It is well-accepted that whistleblowers require far more than assistance with day-to-day expenses; rather, this includes psycho-social support, security, legal fees and various others for them and their families. ● However, MMA is concerned that the discussion document gives little to no information of how these funds would be operated or allocated. For instance, which criteria would be applied, what mechanism would be established to disburse funds, who would be required to report on the allocation of funds, how will it be ensured that these funds are distributed fairly and impartially? While the finer details may be refined down the line, it is nonetheless important for key tenets to be made clear in order for an informed position to be taken on the proposal. ● Following from this, it is likewise important that the framework for these funds also contemplate support to be provided to journalists and media organisations for recourse faced resulting from disclosures of information received by whistleblowers. As in other instances, journalists too face, for instance, interdicts, threats of prosecution and other forms of recourse in an attempt to silence them from publication, which in turn render it critical for them to also have the necessary resources if they are to defend themselves and continue their work without intimidation as they are constitutionally mandated to do.