



**Address by Public Protector Adv Thuli Madonsela during the Open
Democracy Advice Center (ODAC) Conference on whistle-blowing held
in Johannesburg, Wednesday, 17 November 2010**

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**Programme Director;
Distinguished guests;
Members of the media;
Representatives of government present;
Ladies and gentlemen;**

It is a great honour and privilege for me to address you on this important occasion. I must congratulate ODAC for bringing us together to discuss the important matter of whistle blowing. I am also encouraged by the existence of this very forum of whistleblowers.

The timing of this conference is particularly significant. This year is the 10th anniversary of the Protected Disclosure Act . This is the key legislation that solidified our country's commitment to the protection of whistleblowers as one of the anchors of open and accountable democracy.

Incidentally, I have just returned from the 6th Biennial Conference of the Caribbean Ombudsman Association whose theme was Integrity as the foundation of Good Governance. In that conference, the responsibility of oversight agencies such as the Public Protector (Ombudsman), regarding the protection of whistleblowers was a central part of the dialogue. While I personally touched on this subject in my paper titled "Making Integrity Real: Lessons of Experience", whistle blowing was discussed more specifically and discussed in two papers that focused on Confidentiality and Fraud.

One of the lessons I took back and which has implications for whistle blowing, was a revelation from a global study on fraud that that auditing identifies only about 5% of fraud in organizations, including organs of state. The study further revealed that most fraud detection is achieved through tip-offs. If we accept the findings of this study, there should be no doubt in our minds that whistle blowing should be one of the strategic focuses of our efforts on promoting good governance, incorporating zero tolerance for corruption.

When we met as oversight bodies at a conference on Good Governance that had been organized by my office a month ago, we also highlighted the centrality of transparency to good governance and the role of whistle blowing in this regard. My team and I also emphasized the

importance of whistle blowing in our outreach work. The encouragement of whistle blowing was accordingly part of the key messages from my office during our inaugural Public Protector Good Governance Week in October this year.

Programme Director

Over the next two days we will discuss among others, the meaning of whistle blowing, the place and value of whistle blowing in our democracy, the responsibilities of various role-players with regard to encouraging whistle blowing and protecting whistle blowers. We will also discuss gaps and lessons learned in the last ten years and proposals for addressing the gaps.

I note with a sense of discomfort that one of the conference speakers is Mr Mike Tshishonga, who unsuccessfully approached the Public Protector, before my time, for relief regarding an occupational detriment following his whistle blowing while working as a senior public official. His complaint was not upheld by the Public Protector and eventually got such relief from a court of law after a costly and lengthy litigation process.

Currently my office is dealing with more than ten cases that raise various dimensions of whistle blowing. These include the following:

1. Ms M (Is a whistleblower protected from occupational detriments in the workplace if she first discloses alleged illegal or irregular conduct by senior managers through an anonymous tip-off and a protected disclosure following disciplinary action that is seemingly unrelated to the disclosure)
2. Mr V (The socio-economic perils of being on a witness protection programme following workplace related whistle-blowing. What happens when the witness protection programme abruptly drops you and say you are no longer in danger without a job, resources or social network?)
3. Mr VM (What if the procurement of the disclosed information may be through an unlawful act by whoever gave it to the person seeking to disclose it to the Public Protector as a protected disclosure?)

Ladies and Gentlemen,

This brings me to the mandate and role of my office and the relevance of whistle blowing to this constitutional office. As you all know, the Public Protector is an independent constitutional officer established and appointed under sections 181-2 of the Constitution. Ranked at the level of a Supreme Court of Appeal Judge, the Public Protector is appointed by the President following a 60% vote in the National Assembly. The Public Protector is independent, impartial and accountable only to the Constitution and the law.

The Public Protector is constitutionally mandated to strengthen constitutional democracy through investigating any conduct in state affairs or in the public administration that is alleged or suspected to be improper or result in any impropriety or prejudice, to report on that conduct and take appropriate remedial action. The powers of the Public Protector's are elaborated by several pieces of legislation. Six of these outline the key mandate areas of my office. These are:

- **The Public Protector Act of 1994**, which confers the office with a broad mandate that covers virtually all facets of administrative action by the state in all three arms and levels of government, including State Owned enterprises and other semi-private bodies that are regulated by the Public Finance Management Act (PMFA). The broad mandate focuses on correcting or redressing maladministration, service failure, abuse of power, abuse of state resources or improper conduct and related disputes in all state affairs or public administration on receipt of a complaint or on own initiative, through **investigating, mediation, conciliation, negotiation or any appropriate action, reporting and taking appropriate remedial action**. The only matters excluded from my jurisdiction are court decisions and related judicial matters.

- **Executive Members' Ethics Act 82 of 1998 (EMEA)**

Sole agency mandated by the Executive Members Ethics Act to investigate all alleged violations of the Executive Ethics Code of 2000 on receipt of complaints from the President, a Member of Parliament, a Premier or a Member of a Provincial Legislature and report to the President or a Premier (within 30 days) who must forward the Report to Parliament (within 14 days).

- **Promotion of Access to Information Act (PAIA)**

One of several agencies that are mandated to **resolve disputes regarding access to information requests** through mediation, conciliation or negotiation or any other expedient means necessary or advise any complainant on appropriate remedies.

- **Protected Disclosures Act 26 of 2000 (PDA)**

Together with the Auditor General and several agencies that are yet to be designated, the Public Protector is mandated **to receive and investigate a protected disclosure** under the Protected Disclosures Act. The Act regulates the protection of whistle-blowers. The investigation of Protected Disclosures by the Public Protector is done under the PPA since the PDA is silent on this matter.

- **Prevention and Combating of Corrupt Activities Act (PCCAA)**

Mandated to use powers conferred by the Public Protector Act, to **investigate and resolve allegations of improper or dishonest acts or omissions or offences** under Part 1 to 4 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act of 2004, with respect to public money.

- **Housing Protection Measures Act**

The Public Protector is mandated to review any decision or action of the National Home Builders Registration Council (NHBC), its staff or its agents in accordance Section 22 (4) of the **Housing Protection Measures Act of 1998**, using powers conferred by the Public Protector Act.

Programme Director;

So central is the issue of whistle blowing to the functioning of my office that we have resolved to subject this matter to national symposium in early 2011. Of course the outcome of this Forum

will guide my office regarding the issues to be taken forward.

As may be gleaned from these statutes, the Public Protector and the Auditor General have a responsibility to receive protected disclosures. This places an enormous responsibility regarding confidentiality.

In the deliberations on Integrity as the Foundation of Good Governance, the centrality of trust in the work of the ombudsman was emphasized and confidentiality was seen as central to trust.

Ladies and Gentlemen,

You will agree with me that whistleblowers would not entrust my office with their confidential disclosures if they could not trust my office to keep the information confidential to prevent them from being detected and subjected to occupational detriments as envisaged in the PDA and related regulatory frameworks. The preamble to the Protected Disclosure Act is relevant to my office in this regard. It states that the Act seeks to:

“Create a culture that will facilitate the disclosure of information by employees relating to the criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of their disclosures.”

It further states that the Act seeks to: *“Promote the eradication of criminal and other irregular conduct in organizations of the state and private bodies.”*

The Act protects employees in both public and private sectors from the kind of reprisals by employers that amounts to occupational detriment and identifies the Public Protector as a key recipient of protected disclosures.

My office’s current approach to whistle blowing is informed by the country’s international, constitutional, legal and policy obligations and transcends the provisions of the PDA. Indeed this should be the approach both the state and other actors. In line with my mandate, the work is limited to the conduct of the state.

The international instruments that guide my office’s approach are primarily those that South Africa has ratified or accepted to be regulated by. They include the following:

UN Convention against Corruption, 2003; OECD Convention on the Bribing of Foreign Public Officials; AU Convention on the Prevention and Combating of Corruption Bribery and SADC Protocol against Corruption.

At national level main guidance comes from the founding values in the Constitution and provisions regarding freedom of expression and the media. At the level of legislation, the PDA is the main instrument. Equal importance is attached to PAIA, the PCCA and some the other statutes that seek to promote speaking out as a mechanism for combating corruption, improper conduct and irregular administrative action.

Ladies and Gentlemen

Lessons from the last 15 years of the Public Protector and 10 years of the PDA reveal several challenges regarding the handling of whistle blowing in our country. We receive two types of

whistleblowers. The majority are those that give anonymous tip-offs directly or via the National Anti-corruption Hotline. A few approach with their full identities under the Protected Disclosure Act. The following questions have been drawn from the experiences to date:

1. Are whistle blowers adequately protected from occupational detriments? Specifically, do we have adequate and efficacious remedies for those who suffer occupational detriments even though having complied with the requirements of the PDA in disclosing information?
2. Is the PDA broad enough in terms of persons and circumstances that are covered? In this particular case, we may want to go back to the case of Ms M?
3. Are whistleblowers who become entangled in the criminal justice system, particularly the witness protection programme adequately protected? In this particular case we may want to reflect again on the case of Mr V.
4. Does it matter how the information was obtained. In this regard I would like us to reflect once more on Mr VM's case?
5. Are we doing enough in creating a culture that incorporates the valuing of whistleblowers to address, among others, our history of the vilification of the *Impimpi*, while complying with international obligations?

Ladies and gentlemen;

I cannot in the circumstances ignore the issue of the contested Protection of Information Bill. I have been asked on several occasions, including by the conference organizers, to comment on this bill. The Bill is particularly relevant to today's discussion as it has implications for protected whistle blowing. My take on the Bill has always been that it should be evaluated in terms of its ability to balance the country's (state) security needs against the constitutionally protected value of open democracy and our national commitments to clean and accountable governance.

The original draft bill which restricted the provision of information to the police obviously presented an impediment to the functioning of my office. The draft has been reworked. As we speak, my office is planning a roundtable to discuss the latest draft with a view to assessing its implications for:

- Unrestricted exercise of the mandate of the Public Protector and other oversight agencies;
- Reconcilability with the Promotion of Access to Information Act;
- Implications for the country's obligations under the UN, OECD, AU and SADC conventions that seek to promote transparency as a strategy for fighting corruption
- Proportionality with emphasis on balance struck between state security interests and open democracy
- Benchmark against arrangements other democracies
- Implications for whistle blowing in the broader sense, transcending disclosures protected under the PDA and the Company Act, and incorporating anonymous tip-offs.

Programme Director;

As I draw towards my conclusion, I would like to take this opportunity to assure you and the

public in general that my office fully supports efforts that seek to highlight whistle blowing and to strengthen the protection of whistleblowers. We see whistle blowing as central to accountable governance which in turn is central to good governance. We also view whistle blowing as central to the efficaciousness of my office.

For this and other reasons my office has committed itself to a vision that sees my office as “a trusted, effective and accessible Public Protector that rights administrative wrongs and consistently acts with integrity to ensure fair, accountable and responsive decision-making, service and good governance in all state affairs and public administration in all spheres of government”.

Flowing from this vision, are three specific promises, we have made to the public:

- To be accessible to and trusted by all persons and communities;
- To deliver prompt remedial action; and
- To promote good governance in all state affairs.

In the reorganization of the structure of my office and work flow for effective pursuit of all mandate areas, we have now placed PDA matters under our new *Good Governance and Integrity Unit*. The Unit is one of three specialized units, the others being Early Resolution and Service Delivery.

I would like once again call on all witnesses of corrupt activities in state affairs to trust my office with their disclosures. If you see state activities that you suspect to be illegal or irregular say something and do something. It is all in the interest of our constitutional democracy and developmental objectives.

We have twenty offices spread across the country, where people can report alleged or suspected corruption and other forms of maladministration. Details can be obtained on our website: www.publicprotector.org or our toll free line 0800 11 20 40.

I wish you fruitful deliberations today. My office hopes that this conference will realize what it set out to achieve and eagerly awaits its outcomes.

Thank you.

Public Protector South Africa
Adv TN Madonsela