Commission for Gender Equality
A society free from gender oppression and inequality

# SUBMISSION: PROTECTED DISCLOSURES BILL, 2026

*Commission for Gender Equality*

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## 1. Introduction

The Commission for Gender Equality (CGE) wishes to express its gratitude for the opportunity to respond to the invitation to make written representations regarding the Protected Disclosures Bill, 2026.

The CGE, as an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution), is mandated to promote and protect gender equality in government, civil society, and the private sector.

The Commission for Gender Equality Act 39 of 1996 (the CGE Act'), gives the CGE the power to:

- monitor and evaluate policies and practices of organs of the State at any level;
- monitor and evaluate statutory bodies and functionaries;
- monitor public bodies and authorities and private businesses, enterprises, and institutions to promote gender equality; and
- make any recommendations that the CGE deems necessary.

This submission is informed by our constitutional and legislative mandate. More particularly, it is informed by our constitutional power in terms of section 187(2) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') to investigate issues concerning gender equality, read with sections 11(1)(e) and section 12(1) of the CGE Act.

## 2. Background

Currently, disclosure of information by employees regarding the unlawful or irregular conduct of their employers is regulated by the Protected Disclosures Act 26 of 2000 ('the Act'). However, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption, and Fraud found several issues and shortcomings with the Act, ultimately concluding that it did not give whistleblowers sufficient protection when disclosing unlawful or irregular conduct.

In light of these insufficiencies, the Bill seeks to repeal the current Act and provide strengthened protection to whistleblowers. Considering this, the CGE sets out its comments on the Bill below.

## 3. The CGE's submissions on the draft regulations

### 3.1 *Encroachment on powers of CGE*

Section 1 of the Bill defines a 'disclosure' as 'disclosing of information regarding improper conduct with regards to an employer or employee in the public or private sector.'



The definition of 'improper conduct' in turn includes 'a criminal offence that has been committed'; 'that a person has failed … to comply with any legal obligation to which that person is subjected'; 'that a miscarriage of justice has occurred'; 'that the health or safety of an individual has been … endangered'; or 'unfair discrimination as contemplated in … the Employment Equity Act, 1998 [EEA] … or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000' [PEPUDA].

Section 4 (d) provides that a disclosure to a body contemplated in Section 9 would constitute a 'protected disclosure'. Furthermore, section 1 defines 'protected disclosure' as a disclosure contemplated in section 4'. Section 9(c) of the Bill lists the CGE as one such contemplated body. As a result, a disclosure made to the CGE would automatically constitute a 'protected disclosure', bringing the handling procedures provided for in the Bill into effect.

However, many complaints received by the CGE, and which it has investigated in terms of section 11(1)(e) of the CGE Act, would fall within the definition of 'improper conduct'. Many of these complaints relate to the workplace and were made by employees of the persons against whom the complaint is directed. As a result, the laying of the complaint by these employees would fall within the Bill's definition of 'disclosure'. The effect of section 4 (d) of the Bill, which automatically renders such disclosure to the CGE as a 'protected disclosure', means the CGE would be obliged to investigate the complaint in the manner provided for in the Bill.

The Bill sets out the specific procedure that the CGE would be obliged to follow when investigating a complaint falling with the Bill's definition

of 'protected disclosure'. Section 11 provides that the disclosure should be made 'in the prescribed manner'. Section 14 sets out the procedure the CGE would have to follow in handling such protected disclosure, with subsection 14(2) providing that the protected disclosure 'must be dealt with and investigated in the prescribed manner'.

However, as stated, the CGE's power to investigate is a constitutional power conferred on it by section 187(2) of the Constitution. Section 187(3) further provides that the CGE will have any further powers conferred on it by national legislation. Section 12(1) of the CGE Act empowers the CGE to determine its own processes regarding conducting of an investigation. This it has done in compiling and publishing its own Complaints Handling Manual in the *Government Gazette*.[1]

However, much of the CGE's autonomy to determine its own procedures and handle a complaint in a manner it deems fit, which it is constitutionally mandated and empowered to do, is constrained by the provisions of the Bill. Many of the complaints received by the CGE would fall within the definition of 'improper conduct'. Many of these complaints are made by employees against employers and would thus fall within

[1] See *Government Gazette* 52459 (4 April 2025).

the definition of 'disclosure'. And the effect of section 9 of the Bill means that the laying of the complaint to the CGE would render the disclosure a 'protected disclosure'. The consequence of this is that the provisions of the Bill encroach significantly on the CGE's powers as a Chapter 9 institution to investigate complaints and determines its own procedures in doing so.

The effect of the above would create a number of further issues when read with other provisions of the Bill, such as the following:

3.1.1 Once the CGE receives the complaint, the Bill obliges the CGE to investigate. However, the CGE has a very specific mandate relating to gender equality and cannot investigate a complaint that does not fall within this mandate. Furthermore, in determining its own procedures, the CGE has identified other kinds of complaints that it will not investigate.[2] However, when identifying the CGE as an 'authorised person', the Bill takes none of this into account.

3.1.2 Section 11 of the Bill provides that the disclosure may be made 'in the prescribed manner'. This will presumably be a form determined by the Minister of Justice & Constitutional Development ('the Minister'). However, the CGE already has its own complaints form which it has determined for complaints to be made to it.

[2] See paragraph 3.2 of the CGE's Complaints Handling Manual.

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3.1.3 Subsection 14(1) of the Bill provides that a disclosure made to an authorised person must be investigated 'in the prescribed manner'. Again, this prescribed manner will be presumably determined by the Minister. As stated, the CGE already has its own investigation processes, which it is statutory empowered to determine for itself. The effect of subsection 14(1) however, is that the manner in which a Chapter 9 institution investigates certain complaints would be determined by a member of the executive arm of government. This would mean there would be two different processes for handling complaints received by the CGE, depending on whether the nature of the complaint falls within the Bill's definition of 'protected disclosure'.

3.1.4 The Bill provides that once the 'authorised person' has concluded their investigation and made their recommendation, section 17 empowers the 'authorised person' to apply to a High Court for the enforcement of recommendations as set out in the report. However, there is no power to apply to the Labour Court, or the Equality Court, despite the definition of 'improper conduct' over which the disclosure is made including unfair discrimination under the EEA and PEPUDA. In the case of the former, the ordinary High Court is excluded from dealing with such matters as the matter must be heard by the Labour Court. In the latter, the Equality Court is the most appropriate forum to deal with the complaint. Furthermore, the CGE is specifically given *locus standi* in the Equality Court in terms of PEPUDA. And, while the High Court may sit as an Equality Court, the provisions of the reference to the High Court specifically refers to the governing legislation i.e. Superior Courts Act, 2013.

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3.2 *Offences*

Section 18 refers to convicting an employer 'of improper conduct in terms of this Act', but the Bill does not contain any provisions criminalising an act of 'improper conduct', as defined in section 1. Furthermore, the definition of 'improper conduct' in section 1 contains both references to what already constitute offences under other statutes or refers to conduct in a very generalised way. This effectively means that there would be duplication of offences on the one hand, and the creation of offences that are vague on the other.

3.2 *Exclusion of public sector employee*

It is generally accepted that there is a very high level of corruption and criminal activities within the public sector. However, section 18(2)(a) excludes of public sector employees from receiving a monetary award for their protected disclosure, which other employees would be entitled to be awarded.

Whistleblowers in the public sector often place themselves at risk of significant risk of harm when making a protected disclosure. Despite this, the provisions of section 18(2)(a) mean that any incentive for a potential public sector whistleblower to come forward is removed.

## 4. Conclusion

While the CGE recognises the importance of the Bill, and the need to better regulate protection of whistleblowers and handle their disclosures, the effect of the definitions of 'improper conduct', 'disclosure', and 'protected disclosure' means the Bill significantly encroach on the CGE's constitutional mandate and statutory powers to determine its own processes, including investigations of complaints. The CGE is therefore of the view, that theses definitions ought to be redrafted in a manner that would eradicate this effect.

**END**