OVERVIEW: PROTECTED DISCLOSURES AMENDMENT BILL [B40-2015]

‘the reality of whistleblowing in South Africa is that it can be a high-risk act with a variety of negative and long-lasting challenges for the lives of the whistle-blower.’

1. INTRODUCTION

One of the key challenges in preventing and fighting corruption is exposing corrupt activities such as bribery, fraud, theft of public funds and other acts of wrongdoing. Whistleblowing is one means of shining a light on such activities. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected.

‘Whistleblowing’ is not a technical term and it does not have a common legal definition, it can, however, be defined as –

‘the disclosure of information (to individuals or entities believed to be able to effect action) relating to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations.’

Although whistle-blower provisions can be found in the various pieces of legislation such as, the Companies Act 71 of 2008, the Public Service Act 1 of 1994 and the National Environmental Management Act 107 of 1998 - the main protection offered to the whistle-blower in South Africa, is contained in the Protected Disclosure Act 26 of 2000 (the “PDA”).

In South Africa new impetus has been given to the issue of whistleblowing by the National Development Plan (NDP) which identifies the protection of whistle-blowers as key to a resilient and strong anti-corruption system. The NDP:

- Notes that while the Protected Disclosures Act 26 of 2000 provides a measure of protection to whistle-blowers, the protection it provides is insufficient, and the legislation has significant weaknesses.
- Recommends that the PDA should be reviewed and regulations developed to strengthen support for whistle-blowers.

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3. Whistleblowing always involves two parties with opposing rights and interests. The whistle-blower has a right to equality, freedom of expression and fair labour practices; while the organisation against which an allegation is made has rights to privacy, security, the right to manage staff, to employee confidence and the right to a reputation. Effective whistleblowing laws need to strike a balance between these competing rights and interests.
5. This paper provides a general overview additional information will be provided.
Specific actions and targets in support of NDP goals are set out in the Governments Medium Term Strategic Framework (MTSF) 2014-2019. Both Outcome 3 (All people in South Africa are and feel safe) and Outcome 12 (An efficient, effective and development-oriented Public Service) commit the Justice Department to strengthening the protection of whistle-blowers by amending the Protected Disclosures Act. (Target: December 2015).

On 8 December 2015 the Justice Department tabled amendments to the Protected Disclosures Act - the Protected Disclosure Amendment Bill [B40-2015].

2. WHAT IS THE PURPOSE OF THE PROTECTED DISCLOSURES ACT 26 OF 2000 (PDA)?

The PDA came into operation on 16 February 2001. The Act is intended to establish procedures to ensure employees who disclose information about unlawful or corrupt practices within the organisation are protected. Employees are vulnerable in the workplace given the power imbalance between employees and the employer and thus the protection afforded by the Act is vital to ensure that employees are able to speak out against improprieties.

The scope of the Act is limited to the employment relationship - it does not provide for ‘citizen whistle-blowers’.

The objectives of the Act are to:

- Provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer;
- Protect an employee, whether in the public or the private sector, from being subjected to an occupational detriment on account of having made a protected disclosure; and
- Provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure.
- Create a culture which will facilitate the disclosure of information.

The following elements of the Act should be noted:

- The PDA applies to employees in both the private and public sectors.\(^6\)
- The PDA definition of an ‘employee’ is narrow and excludes “independent contractors” from coverage.
- Whether a disclosure is protected or not depends on the:
  1. Subject matter of the disclosure,
  2. Procedure followed by the employee in making the disclosure, and
  3. Person/agency to whom or which the disclosure is made.
- Only disclosures which relate to specific categories of information are ‘protected’.\(^7\) A disclosure is defined as any disclosure of information regarding

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\(^6\) In respect of the private sector the King report has strongly encouraged compliance with the PDA and advised in respect of ‘the establishment of easily accessible safe reporting mechanisms.’

any conduct of an employer or employee of the employer made by an employee who has reason to believe that the information concerned shows or tends to show that one of following categories of wrongdoing has occurred, is occurring, or is likely to occur:

i. A criminal offence
ii. Failure to comply with any legal obligation
iii. Miscarriage of justice
iv. Danger to the health and safety of any individual
v. Damage to the environment
vi. Unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discriminations Act 2000
vii. The deliberate concealing of information about any of the above.

- A protected disclosure may only be made to a limited number of people, namely; a legal advisor; and (providing it is done in good faith) to the employee’s employer, a member of cabinet or the Executive Council of a province (about an individual, body or organ of state appointed by or falling in the area of responsibility of that member), the Public Protector or the Auditor General or a person or body prescribed by Regulation or a general disclosure (for example to a member of the press or a member of the South African Police Services – providing certain procedural requirements are met, including - it is not done for personal gain, that the information was previously disclosed to the employer and no action was taken and the matter is of a particularly serious nature.)

- A disclosure is only protected if it is:
  (i) made in good faith,
  (ii) founded on information the whistle-blower believes to be substantially true
  (iii) is not made for personal financial gain, and
  (iv) the employee has reason to believe that he or she would be subjected to an occupational detriment and evidence would be concealed or destroyed if disclosure was made to the employer.

- No employee may be subject to retaliation or victimisation – referred to in the Act as an “occupational detriment,” from a protected disclosure.

- The definition of occupational detriment is very broad. It includes being subjected to disciplinary action, being dismissed, suspended, harassed, demoted, intimidated, transferred, refused a reference or otherwise being adversely affected in respect of employment.

- A whistleblowing employee seeking relief because their employer has retaliated with an “occupational detriment” as defined in the Act, or who has been threatened with an “occupational detriment”, or who may be subject to an “occupational detriment”, may approach either the Commission for Conciliation Mediation and Arbitration (CCMA) (where appropriate), the Labour Court or the High Court for appropriate relief. In terms of section 4(2)(a) of the PDA, if a whistle-blower is dismissed, and as such is subjected to occupational detriment in this manner by the employer, on account of or partly on account of having made

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8 Except where made to a Legal Advisor, as this would infringe the principle of legal professional privilege.
9 Under the PDA, for example, damages may not exceed the equivalent of 12 months’ salary for an occupational detriment that amounts to an unfair labour practice, and 24 months’ salary for an automatically unfair dismissal.
a protected disclosure, such a dismissal is deemed to be an automatically unfair dismissal, as provided for in terms of section 187(1)(h) of the Labour Relations Act 66 of 1995 (LRA).

- If the whistle-blower is so dismissed, the procedure provided for in Chapter VIII of the LRA is followed. The employee (whistle-blower) must not only show that he or she was dismissed, but also that he or she was dismissed on account of or partly on account of having made a protected disclosure. It is then for the employer to show that the employee was not dismissed on account of having made a protected disclosure. If the employer is unable to do so, it will be an automatically unfair dismissal.

- In terms of section 4(2)(b) of the PDA, all other forms of occupational detriment (beside dismissal) perpetrated by the employer on account, or partly on account of the whistle-blower having made a protected disclosure, is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 of the LRA. Section 186(2) of the LRA defines an unfair labour practice as including:
  - unfair conduct by the employer regarding the promotion, demotion, probation or training or benefits of an employee;
  - unfair suspension of the employee;
  - any other disciplinary action, short of dismissal of the employee;
  - failure or refusal of the employer to reinstate a former employee in terms of an agreement; and
  - an occupational detriment, besides dismissal, in contravention of the provisions of the PDA as a result of the employee in question having made a protected disclosure.

The PDA also provides for the following:

**PRACTICAL GUIDELINES**

Section 10(4) (a) (b) and (c) of the Act provide that the Justice Minister (after consultation with the Minister of Public Service and Administration) must issue practical guidelines which explain the provisions of the Act and all procedures available in terms of the law to employees who wish to report an impropriety.

These guidelines were approved by Parliament and were published on 31 August 2011.

All organs of state MUST give to every employee a copy of the guidelines or take reasonable steps to bring them to the employee’s attention.

The extent of compliance is unclear.

**REGULATIONS**

Section 10(1) of the Act provides that the Minister may (after consultation with the Minister of Public Service and Administration) make regulations:

(i) to expand the list of bodies to whom disclosures may be made;
(ii) for any procedural and administrative matter necessary to give effect to the Act;
(iii) for any other matter.

To date no regulations have been issued in terms of the PDA - consequently a disclosure in terms of section 8 of the PDA may only be made to two specific bodies, namely the Public Protector or the Auditor-General.
3. **CHALLENGES FACING WHISTLE-BLOWERS: IDENTIFYING GAPS IN THE PROTECTED DISCLOSURES ACT**

Certain of the serious shortcomings in the PDA include:

- The protective scope of the Act is too narrow - it is limited to whistle-blowers in a formal employment relationship.
- It **excludes** independent contractors, consultants, agents and other such workers. Also, it excludes ‘former employees, prospective employees, volunteers or company pensioners’. This is in contrast with the Company’s Act which extends whistleblowing protection to (amongst others) suppliers of goods or services to the company, which may then include all types of personal services, irrespective of the classification as employee or independent contractor. Moreover, as the labour market increasingly ‘deformalises’ (for example through outsourcing), it increases the number of persons excluded from the Acts protection.
- The PDA only permits disclosures, under an elevated burden of proof, to two investigative agencies, namely the Public Protector and the Auditor-General. Section 8 of the PDA does indicate that other bodies **may** be prescribed by Regulation. **However, to date no Regulations have been issued in terms of the PDA and consequently the list of qualified recipients remains limited to the Public Protector and Auditor-General.**  

- There is no obligation for companies to take proactive steps to facilitate whistleblowing and to investigate claims by whistle-blowers. (While the Companies Act goes slightly further, its protections are still not adequate to properly and proactively promote whistleblowing.)
- No immunity is provided in respect of civil and criminal liability arising out of a disclosure, even one made in good faith.
- The Act provides limited protection to whistle-blowers that lose their jobs as a result of whistleblowing. All too often the ‘whistle’ gets blown and there is a witch hunt for the whistle-blower.
- All forums for redress in terms of the PDA are court-based – leading to significant costs and time delays. Typical weaknesses of the criminal justice system inefficacies are thus incorporated into the PDA; weaknesses that can be exploited by companies with financial muscle who can tie cases into procedural delays. **A possible solution may be for the PDA to require or permit recourse to alternative dispute resolution mechanisms.**
- Adequate security for whistle-blowers has not been established (for example use of witness protection laws).
- Confidentiality in respect of the identity of the whistle-blower is not protected.
- There is no public body dedicated and able to provide regular advice to the public, to monitor and review whistleblowing laws and practices and to promote public awareness and acceptance of whistleblowing.  

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10 Ibid
12 Ibid
Because the PDA does not require employees to do anything other than not victimise whistle blowers few employers appear to have seen any urgency or imperative to put in place the system of whistle-blower policies or systems that the law envisages.13

4. SOUTH AFRICAN LAW REFORM COMMISSION REPORT ON PROTECTED DISCLOSURES (2007)

In 2007 the South African Law Reform Commission (SALRC or Commission) released a Report on Protected Disclosures which proposed certain amendments to the PDA.

SOUTH AFRICAN LAW REFORM COMMISSION PROCESSES

- **July 2000**: the Minister for Justice and Constitutional Development included an investigation into Protected Disclosures on the South African Law Reform Commission’s (SALRC) programme.
- **January 2003**: the SALRC published an Issue Paper14
- **June 2004**: the SALRC released a Discussion Paper15
- **November 2007**: The SALRC’s published its Report on Protected Disclosures which contained the final recommendations of the Commission and was accompanied by a Draft Amendment Bill.

The SALRC consulted widely during the course of its investigation and solicited comments from a variety of interested parties in the public and private sectors.

Key recommendations contained in the SALRC Report included the:16

- Extension and amendment of the definition of employee: *The widest possible protection should be offered to any person functioning or having functioned within the workplace.* The scope of the PDA should be extended to include independent contractors, consultants, agents and other workers that fall outside the strict definition of the employer/employee relationship; including the changing of the definition of "employee" to "worker" and the changing of the definition of "employer" in order to cater for the wider scope. (*Proposed amendments contained in the Protected Disclosures Amendment Bill*).
- The definition of disclosure should be expanded to include a reference to Chapter II of the Employment Equity Act 55 of 1998 (“the EEA”). This should be included in the definition of disclosure as it contains a range of grounds considered to be

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14 The purpose of an issue paper is to announce an investigation, to elucidate the aim and extent of the investigation, to point to possible options available for solving existing problems and to initiate and stimulate debate on identified issues by way of including specific questions on relevant issues.
15 Discussion papers, previously referred to as working papers, are documents in which the Commission’s preliminary research results are contained. In most cases discussion papers also contain draft legislation which gives effect to the Commission’s tentative recommendations and proposals. The main purpose of these documents is to test public opinion on solutions identified by the Commission.
16 SALRC (2007)
unfair discrimination within the context of employment policy and practice. *(Proposed amendment contained in the Protected Disclosures Amendment Bill).*

- The list comprising the forms of victimisation (occupational detriment) often encountered by whistle-blowers should be expanded. *(Proposed amendments contained in the Protected Disclosures Amendment Bill).*
- The list of persons/bodies to whom disclosures may be made should be extended beyond the PP and AG.\(^{17}\) This should be provided for in the Regulations. *The Commission noted that the PDA provides for this in the regulations but no regulations have as yet been published by the Justice Department.* The Commission urged that Regulations to the PDA should be developed as soon as possible and government departments must develop policies to implement the Act.\(^{18}\)
- The PDA should provide for indemnity in respect of civil and criminal liability of the whistle-blower where appropriate. *(Proposed amendments contained in the Protected Disclosures Amendment Bill).*
- Provision should be made for an application for redress for those whistle-blowers that are unable to do so in their own name. In order to avoid possible abuse or institution of proceedings where a whistle-blower is opposed to it, the Commission recommends that such an application may only be brought on behalf of a whistle-blower with his or her written consent. *(Proposed amendments contained in the Protected Disclosures Amendment Bill).*

**Additional issues discussed in the SALRC Report include:**

(i) To extend the PDA to make provision for Citizen’s whistleblowing. The Commission, however, was of the view that the PDA is not an appropriate vehicle for ‘citizen’s whistleblowing’ as the Act was designed to govern whistleblowing in respect of events occurring in a ‘captured environment’ namely the workplace. Extending it to cover areas not originally intended by the Legislature could, according to the Commission, result in serious interpretation and implementation difficulties.

(ii) The establishment of an ‘Independent Advisory Body’ or ‘Whistle-blower Protection Authority’. Given the role played by the Public Protector as the South African equivalent of the proposed Ombudsman, the Commission did not support the establishment of an ‘Independent Advisory Body’ or ‘Whistle-blower Protection Authority’.

(iii) A duty to protect the identity of a whistle-blower. The Commission was of the opinion that a blanket prohibition against revealing the identity of a whistle-blower would not be conducive to the proper investigation of such a disclosure.\(^{19}\) Certain records, which may include the identity of the whistle-blower may be relevant to discovering the truth of the case at hand. Persons implicated or identified by a whistle-blower also have a right to be informed of the disclosure with sufficient detail to answer it and in order to do so the right to adduce and challenge evidence. Instead the Commission recommended that the Practical Guidelines

\(^{17}\) Ibid
\(^{18}\) Ibid
\(^{19}\) Ibid
which have been developed and issued in terms of section 10 of the PDA should be amended to specifically address the issue of confidentiality.\(^\text{20}\)

(iv) Compensation and damages. The Commission noted that in practice few if any whistle-blowers are able to afford to launch actions in different forums to remedy the actual damages they have suffered. Whistleblowing is essentially a public duty which may attract detrimental financial and private consequences. At the very least whistle-blowers should be able to, in one action, remedy the harm they have been subjected to. The Commission concluded that there is a need to expressly provide that the actual damage suffered may be claimed

(v) Access to Legal Aid. The Commission requested that given the particular vulnerability of whistle-blowers who disclose in compliance with the PDA, the Department of Justice and Constitutional Development should consider extending the provision of legal aid assistance in civil matters to whistle-blowers.

5. THE PROTECTED DISCLOSURES AMENDMENT BILL

The Memorandum on the Objects of the Protected Disclosures Amendment Bill acknowledge that it ‘emanates from the SALRC 2007 Report on Protected Disclosures.’ The Bill relies extensively on the proposed amendments contained in the Draft Amendment Bill prepared by the Commission.

5.1 AMENDMENTS

The Bill proposes the following amendments:

CLAUSE 1 - ‘Definitions’:

a) Expanding the definition of ‘employee’ to include:

(i) any person who works or worked for another person or the State (for example former employees or pensioners)

(ii) any other person who has assisted in conducting the business of the employer

b) Inserting a definition of ‘worker’ to ensure an independent contractor, agent or consultant is included within the ambit of the Act.

c) Inserting a definition of ‘temporary employment service’ to ensure workers who provide such services are covered by the Act.

d) Inserting a definition of ‘business’ to include the whole or part of any business, trade, undertaking or service.

\(^\text{20}\) SALRC (2007) pxv
Comment

- These amendments are in line with the SALRC recommendation that **the widest possible protection should be afforded to any person functioning or having functioned within the workplace**. This would include those who generate an income within the work environment, such as independent contractors, persons employed by temporary employment services, former employees, and pensioners receiving pensions from their former employers. The Auditor General, for instance, indicated in its submission to the SALRC that many valuable sources of information are not persons within the normal employee-employer relationship.

- Will this provision provide protection for those who function within the workplace but who do not generate an income from within the ‘work environment’, i.e. volunteers?

  e) Substituting the definition of ‘disclosure’ to provide for
     (i) the inclusion of a ‘worker’; and
     (ii) to expand the definition to include reference to Chapter II of the Employment Equity Act 55 of 1998 (“the EEA”), which deals with unfair discrimination in the workplace – this refers to family responsibility, HIV status, political opinion and medical and psychological testing as grounds that are considered to be unfair discrimination.

  f) Expanding the definition of ‘occupational detriment’ to include two further types of victimisation:
     (i) Reprisals such as defamation suits and suits based on the alleged breach of a confidentiality agreement or duty.
     (ii) The loss of a contract or the failure to be awarded a contract (typically experienced by contract workers who will now fall within the ambit of the Act).

CLAUSE 2
Provides for technical amendments to section 2 of the Act.

CLAUSE 3
Provides for technical amendments to section 3 of the Act.

CLAUSE 4 – Protection against occupational detriment
Provides for the insertion of two new provisions in section 3 of the Act, relating to:

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21 SALRC (2007)
22 SALRC (2007)
23 SALRC (2007)
(i) **Joint liability.** This is to protect an outsourced worker who makes a protected disclosure - for example a nurse employed by an agency who makes a protected disclosure to either the agency or the hospital where she works and the response is an occupational detriment. The insertion of new section 3A seeks to ensure such workers/employees will be entitled to the remedies provided for in the Act.

(ii) **Duty to inform employee or worker.** In its 2007 Report the SAHRC acknowledged the difficulties experienced by whistle-blowers *given the absence of any provision in the PDA for an employer to acknowledge or give feedback on a protected disclosure.* Consequently, whistle-blowers were not notified by the employer of; (i) a decision not to investigate the disclosure, or (ii) of a decision to refer the matter to another body to investigate, or (iii) of the outcome of an investigation. For workplace protections to be effective they need to be supported by a strong requirement for investigation and feedback in relation to the report of wrongdoing. The Commission recommended that the duty to investigate and to notify the employee or worker of the outcome of the investigation should be included in the Act. The Commission recommended that the Practical Guidelines should be amended to include an obligation on employees to have internal procedures. The proposed new section 3B aims to address this concern. This amendment goes further than the Commission’s recommendation by including timeframes and a mechanism detailing internal procedures for responses to a protected disclosure within the Act itself.

**Comment**

- Although the amendment to section 3 of the Act creates a duty to inform the employee/worker about whether the employer will investigate. The timeframes provided for in the amendment may be a concern – for example if the employer is unable to make a decision whether or not to investigate within 21 days, then the matter can be delayed for a further six months. Given that the whistle-blower may be making a protected disclosure about fundamental issues such as a miscarriage of justice, danger to the health and safety of any individual or damage to the environment should an employer not be compelled to respond as quickly as possible?
- Should it not be an offence in the Act for the employer to fail to respond within the required timeframe?

**CLAUSE 5 – Remedies**

Provides for amendments to section 4 of the PDA (*which sets out the remedies available to persons who were subjected to occupational detriment as a result of having made protected disclosures*).
The proposed amendment of section 4(1) aims to ensure that workers (independent contractors, consultants and agents) will also be empowered to exercise certain remedies if they are subjected to occupational detriment as a result of having made protected disclosures. In addition:

- Section 4(1) of the Act provides that an employee who has been subjected, is subjected or may be subjected, to an occupational detriment may approach any court having jurisdiction, including the Labour Court, for appropriate relief. Employees are therefore required to institute proceedings in their own names. However, circumstances may prevail that make it difficult or impossible to do so. The proposed amendment seeks to provide an avenue by which an application for redress can be made on behalf of those employees who are unable to do so in their own name.
- The proposed new subsection 4(1A) aims, in similar fashion to the proposed amendment of subsection (1), to provide that any worker, or anyone on behalf of a worker who is not able to act in his or her own name, may approach any court having jurisdiction for appropriate relief.
- The proposed new subsection 4(1B) makes it clear that a court may order an employer who has subjected an employee/worker to an occupational detriment to (i) pay compensation; (ii) pay actual damages or (iii) direct an employer to take steps to remedy the occupational detriment.

The proposed amendment of section 4(2) of the Act is consequential in nature.

**CLAUSE 6 – Internal procedures**

Provides for an amendment to section 6 of the PDA to compel employers to have appropriate internal procedures in place to receive and deal with information about improprieties.

Notably the Labour Court in the matter of *Tshishonga v Minister of Justice and Constitutional Development and Another* (JS898/04) [2006] ZALC was of the view that while employees have to act in the employer’s best interest, to be loyal and ultimately to preserve its viability, good name and reputation - the duty of confidence and loyalty to the employer is not absolute and it cannot protect an employer or other employees who act wrongfully. In order to manage the conflict between the duty to disclose and the duty of confidence, employers must make effective internal procedures for reporting wrongdoing available and should ensure that the policy on the management of confidential information is clearly and consistently applied.

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24 Currently the section 4 remedies, read with the Labour Relations Act, 1995 (Act No. 66 of 1995), are limited to “employees” in the strict sense and do not cater for independent contractors, consultants and agents.

25 Often whistle-blowers lose their jobs, must pay for protracted and expensive legal proceedings and pay a price in respect of family and personal life.

26 Subsection (2) (b) of the Act currently refers to Part B of Schedule 7 to the Labour Relations Act, 1995. However, the provisions of Part B were repealed in 2002 and, at the same time, inserted in section 186 of that Act. It is therefore necessary to replace the reference to Part B of Schedule 7 to the Labour Relations Act, 1995, in subsection (2)(b) with a reference to sections 186(2) and 191 of that Act.

27 The Commission recommended that the practical guidelines issued in terms of section 10 of the PDA should be amended to include an obligation on employers to have appropriate internal procedures in operation for receiving and dealing with information about improprieties.
Comment

- Should some provision not be made in the Act to make this positive obligation to create internal procedures of real effect, possibly through the imposition of a financial penalty for a failure to create the necessary internal procedures?

CLAUSES 7, 8 and 9
Provide for technical amendments.

CLAUSE 10 – Excluding criminal and civil liability

The SALRC noted that the PDA does not shield whistle-blowers from criminal or civil liability and observed that most respondents favoured the introduction of such immunity, arguing that this would help achieve the main aim of the PDA, i.e. to facilitate and encourage disclosures.28 In line with the SALRC’s recommendation Clause 10 of the Bill provides for a new section 9A to be introduced which deals with the exclusion of civil and criminal liability.

It should be noted that the new provision does not introduce blanket immunity. The Department contends that the need to protect certain information either in the national interest of the country or in the interest of the livelihood of an employer militates against granting blanket immunity from liability for disclosures relating to all improprieties provided for in the Act.29 Exposing an employer to such a risk would only be justified where the content of the disclosure is sufficiently serious, namely, where the disclosure relates to the commission of an offence.

Immunity from civil and criminal liability will, in terms of the proposed new section 9A, not be automatic but will be granted subject to the discretion of the court in which an action is brought.

Clause 10 also aims to introduce a new provision, namely section 9B, in the Act in terms of which employees or workers who intentionally make false disclosures are guilty of an offence and are liable on conviction to a fine or imprisonment for a period not exceeding two years (or both).

28 In South African legislation examples of immunity from civil or criminal liability for making a disclosure are found in section 51(5) of the National Nuclear Regulator Act 46 of 1999 and section 31(4) of the National Environmental Management Amendment Act 46 of 2003 (“the NEMAA”). The NNRA makes the disclosure of any information relating to any nuclear installation or site or vessel or action described in the NNRA an offence. However where a person in good faith reasonably believes that there is evidence of a health or safety risk or a failure to comply with a duty imposed by this Act she will be granted immunity from civil or criminal liability where a disclosure is made to one of, or more than one of the bodies listed in section 51(5)(a) of the NNRA, namely, a committee of Parliament or a provincial legislature; the Public Protector; the Human Rights Commission; the Auditor-General; the National Director of Public Prosecutions; the Minister; or the Regulator. Immunity is also granted where a disclosure is made to the media where the whistle-blower on clear and convincing grounds (of which she bears the burden of proof) believed at the time of the disclosure that the disclosure was necessary to avert an imminent and serious threat to the health or safety of an individual or the public, to ensure that the health or safety risk or the failure to comply with a duty imposed by the Act was properly and timeously investigated or to protect herself against serious or irreparable harm from reprisals; or giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure; or disclosed the information substantially in accordance with any applicable external or internal procedure other than provided in section 51 of the NNRA.

29 Memorandum on the Objects of the Protected Disclosures Amendment Bill, 2015
The SALRC Report and the matter of false disclosures

In its 2007 Report the Commission confirmed its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalised.  

It was the view of the Commission that a person who deliberately or recklessly discloses false information does not qualify as a whistle-blower and might also be guilty of criminal defamation, crimen injuria or fraud at common law.  

Such an employee may also be guilty of misconduct – quite possibly misconduct justifying dismissal.

Comment

- Given the SALRC’s opposition to criminalising a false disclosure why did the Department decide that the ‘blunt instrument of the criminal law’ could be used in such cases? Genuine whistle-blowers are often reluctant to come forward, and this may act as a further disincentive.

CLAUSES 11, 12 and 13
Provide for technical amendments.

CLAUSE 14
Provides for the Short title.

Comment

- Given that the Justice Department relies heavily on the Draft Amendment Bill attached to the SALRC 2007 Report it is unclear why it has taken eight years for the Department to table an amendment Bill to effect changes to the text of the PDA.

- The Department notes that the SALRC consulted widely as part of their investigation and on this basis there does not appear to have been any further consultations. However, the SALRC Report is eight years old – is the Department’s reliance on these previous consultations adequate?

- One of the objectives of the PDA is to: create a culture which will facilitate the disclosure of information. Is the Department of the view that this objective has been achieved? If so, perhaps the Department can elaborate on how this culture has been created, if not, how will the amendments to the Act ensure this important objective is fulfilled.
• Why haven’t Regulations ever been issued in terms of the PDA? This is particularly significant because it is only through the Regulations that the list of persons/bodies to whom disclosures may be made can be extended beyond the PP and AG. The Commission recommended that this list should be expanded, preferably through the Regulations. Given, however, the ongoing delay in publishing Regulations is there not a need perhaps for an expanded list to be included within the statute?

• As part of the fight against corruption should employers be compelled to provide a “Code of Good Practice” that would provide full and considered guidance on processes and procedures in terms of protected disclosures. Although Practical Guidelines were published by the Department in August 2011 (in compliance with section 10(4) of the PDA) - to explain the provisions of the Act and all procedures available in terms of the law to employees who wish to report an impropriety. It is unclear if all organs of state have been providing to every employee a copy of the guidelines or taking reasonable steps to bring them to the employee’s attention – nor is it clear how seriously the private sector has taken the issue of whistleblowing?

• Is there not a need in the legislation to ‘incentivise’ whistleblowing? For example the Ghanaian law states that a whistle-blower whose disclosure results in the recovery of an amount of money shall be rewarded with (a) ten percent of the amount of money recovered; or (b) the amount of money that the Attorney-General shall, in consultation with the Inspector General of Police, determine.

• The SALRC requested that given the particular vulnerability of whistle-blowers who disclose in compliance with the PDA, the Department of Justice and Constitutional Development and Legal Aid South Africa should consider extending the provision of legal aid assistance in civil matters to whistle-blowers. What is the view of the Justice Department on this recommendation?

• Is adequate protection being provided in respect of the physical safety needs of whistle-blowers?

• Should the legislation provide for a duty to protect the identity of a whistle-blower? The SALRC was of the opinion that a blanket prohibition against revealing the identity of a whistle-blower would not be conducive to the proper investigation of such a disclosure. Instead the Commission recommended that the Practical

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32 For example Indonesia law provides for the granting of “tokens of appreciation” to whistle-blowers who have assisted efforts to prevent and combat corruption. This is also the case in South Korea, where its Anti-Corruption Act allows whistle-blowers to recover up to 20% of the recovered amount. In South Africa the National Environment Management Act provides that: (1) a court which imposes a fine for an offence may order that a sum of not more than one-fourth of the fine be paid to the person whose evidence led to the conviction or who assisted in bringing the offender to justice. (2) A person in the service of an organ of state is not entitled to such an award.


34 For example work by the Open Democracy Advice Centre paints a picture of struggle and adversity for whistleblowers seeking to do the right thing in the public interest.

35 The SALRC was of the view that certain records, which may include the identity of the whistle-blower may be relevant to discovering the truth of the case at hand. Persons implicated or identified by a whistle-blower also have a right to be
Guidelines which have been developed and issued in terms of section 10 of the PDA should be amended to specifically address the issue of confidentiality. However, some countries have taken the step of imposing sanctions for disclosing the identity of the whistle-blower; for example, India’s Whistle Blowers Protection Act, 2011 imposes a penalty of imprisonment and fine for revealing the identity of the whistle-blower.\textsuperscript{36}

- Notably, some states have also taken steps to evaluate the effectiveness of their whistle-blower protection system. Japan, for example, expressly makes provision for its evaluation, stating that “approximately five years after this Act comes into force, the Government shall examine the state of enforcement of this Act and shall take necessary measures based upon those results.”\textsuperscript{37}

6. \textbf{CONCLUSION}

Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can help authorities monitor compliance and detect violations of anti-corruption laws. Providing effective protection for whistle-blowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures.\textsuperscript{38}

The protection of both public and private sector whistle-blowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.\textsuperscript{39}

\textbf{Sources}


\textsuperscript{37} Ibid

\textsuperscript{38} Ibid

\textsuperscript{39} Ibid

Protected Disclosures Act 26 of 2000
