

Submission by COSATU on the Protected Disclosures Amendment Bill 2016

14 September 2016



Submitted to the
Portfolio Committee on Justice and Correctional Services
National Assembly
Parliament

1. Introduction

The Congress of South African Trade Unions (COSATU) strongly welcomes and supports the Department of Justice and Correctional Services' Protected Disclosures Amendment Bill 2016.

COSATU believes that this Bill will strengthen the Act through various amendments to address existing gaps in the law and its implementation as well as to ensure that the Act remains relevant to the evolving nature of the work place. COSATU welcomes the proposed clauses to further protect whistle blowers who expose themselves to possible victimisation at their work places when exposing possible criminal activities.

However whilst supporting this necessary and progressive bill, COSATU is concerned about a proposed clauses that it fears may have unintended consequences of weakening whistle blowing employees and workers' labour protection and conditions of service.

COSATU also believes that the proposed clause addressing false disclosures needs to be further tightened to avoid possibly intimidating whistle blowers.

2. Areas of Support

The Protected Disclosures Act is one of South Africa's most important and progressive laws seeking to entrench and protect our hard won democracy. COSATU applauds the Department's tabling of this critical bill that seeks to further strengthen and empower this important Act, and to further improve its day to day practical implementation. The Bill's clauses which seek to empower, assist and protect whistle blowers are strongly welcomed.

2.1 Employees and Workers

Economies continuously evolve. The nature and form of the work place has undergone massive changes in the past two decades. COSATU welcomes and supports the various amendments to the Act which provide for both employees and workers to enjoy the full protections and rights afforded in the Act.

2.2 Employers and Contractors

COSATU equally welcomes the Bill's clauses which provide for equal responsibility for both the employers and any contractors who perform a temporary function at a work place. Both clauses are critical due to the rapidly evolving nature of South Africa's work places.

2.3 Unfair Discrimination

COSATU welcomes and supports the synchronisation of the Act with the Promotion of Equality and Prevention of Unfair Discrimination Act's definitions of unfair discrimination. These are progressive definitions and require continuous reinforcement in our legal system in order to assist thousands of ordinary South Africans who still experience numerous and wide ranging instances of unfair discrimination on a daily basis.

2.4 Occupational Detriment

COSATU strongly supports the inclusion of being threatened or subject to civil claim for disclosing confidential information during the course of whistle blowing as an occupational detriment. This is an important fear that many workers experience when considering whistle blowing. Its inclusion will further protect workers who may be victimised by their employers in their work place and through civil claims. It will also further guide and capacitate the CCMA and courts to protect whistle blowing workers and their rights.

The provision for joint liability for both the employer and the client is progressive, important and precedent setting. COSATU strongly supports this.

COSATU further strongly welcomes the provision guaranteeing the right of workers to seek relief from any court for any occupational detriment that may have suffered as a result of a protected disclosure.

2.5 Duty to Act and Inform

COSATU welcomes the Bill's various clauses binding the persons to whom the protected disclosures have been submitted to, to take the appropriate action and to communicate that to the whistle blower. We believe that will help to instil confidence in ordinary citizens that their actions, taken at great risk to themselves, will help to

see illegal and immoral activities dealt with. All too often ordinary citizens lose hope that South Africa's many progressive laws will be enforced.

2.6 Exclusion of Civil and Criminal Liability

COSATU strongly supports the Bill's provisions to provide for the exclusion of civil and criminal liability whose protected disclosures assist in exposing criminal activities. This is a fundamentally important and empowering clause to ordinary citizens who seek to play their role in preventing criminal activities.

3. Areas of Concern in the Bill

3.1 Section 4 of Act (Clause 5 (c) (a) of the Bill States:

“(a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal [**must**] may follow the procedure set out in Chapter VIII of that Act or any other process to recover damages in a competent court; and”

COSATU is worried that replacing the binding and compulsory “must” with the non-binding and voluntary “may” may inadvertently weaken the rights, protection and access to legal recourse of workers. Workers are all too often over whelmed, ill prepared, under resourced and ill informed of the various legal rights. COSATU would not support any possible watering down of workers' hard won rights to be protected. COSATU thus requests the Committee to rescind the Bill's proposed replacement of “must” with “may”.

COSATU supports the proposed inclusive approach to definitions in the Bill and appreciates that the list can never be fully comprehensive.

3.2 Section 4 of Act (Clause 5 (d) (a) of the Bill States:

“(d) by the substitution for subsection (4) of the following subsection:

“(4) The terms and conditions of employment of a person transferred in terms of subsection [(2)] (3) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.”.”

COSATU would remain strongly opposed to any worker suffering a deterioration in terms and conditions by any worker, more so when that is as a result of their having undertaken a protected disclosure. Providing for workers to agree to such a roll back of their conditions of service in writing will easily be taken advantage of by unscrupulous employers and agreed to by workers petrified of losing their jobs in an economy with 36% unemployment levels.

Workers should not be punished for doing the right thing, upholding the law and for being poor. This clause may lead to many workers being in effect punished for blowing the whistle. COSATU thus urges the Committee to remove this clause from the Bill and the Act.

3.3 Disclosure of False Information

COSATU understands the need to manage persons who deliberately and with malicious intent disclose false information to harm others. However COSATU is deeply concerned that the current wording in clause 9B is too vague and may easily have the unintended consequence of intimidating future whistle blowers with its threat of fines and prison sentences.

COSATU thus proposes that this clause be further clarified and strengthened with the need for the employee or worker to:

- have failed to have undertaken reasonable steps to verify the validity of the information;
- have made the disclosure knowing the information to be false;
- have done so with malicious intent; and
- that the affected party suffered verifiable quantifiable harm or damage as a consequence.

COSATU strongly believes that including to that effect would bring this clause in line with laws providing for libel whilst continuing to strengthen and protect the rights of persons who make protected disclosures with the best of intentions.

4. Conclusion

In conclusion, this Bill is a welcome amendment to further strengthening a critical and progressive Act. COSATU strongly supports its various progressive amendments and new clauses and urges the Committee to support them as well.

However COSATU equally implores the Committee to consider its proposed amendments to the Bill to prevent the unwanted possible unintended consequences.

COSATU strongly urges the Committee to adopt its proposals on the three clauses dealing with compulsory recourse to relief in court, deteriorating conditions in service and the disclosures of false information. COSATU believes that this progressive Bill will be invaluable strengthened if these three important areas of concern are addressed.

Thank you.

Kind regards,

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