OPEN DEMOCRACY ADVICE CENTRE

TRANSPARENCY IN ACTION

Protected Disclosures Amendment Bill [B 40 – 2015]

Submission of the Open Democracy Advice Centre

Prepared: 18 August 2016

The Open Democracy Advice Centre (ODAC)

ODAC are thought leaders on access to information and whistleblowing, in South Africa and on the continent. We have driven strategic litigation on the Promotion of Access to Information Act and Protected Disclosures Act, and remain at the forefront at parliamentary advocacy on laws relating to transparency and good governance.

Introduction

ODAC welcomes the opportunity to make these submissions. We note that we have participated in all opportunities to comment on the Bill up to this point. It is worth noting that , a public call was made for proposed amendments to the Protected Disclosures Act (PDA) in 2014. ODAC participated in that those submissions.[1] We also made submissions directly to the Department of Justice on a version of this Bill in 2015, and note that only two minor changes have been made since that version.

ODAC believes this amendment Bill is an essential opportunity for remedying some of the defects in the existing law, which we have seen the negative impacts of firsthand in the experiences of our client whistleblowers.[2]

[1] You can review our previous submissions here: http://opendemocracy.org.za/images/docs/ODAC_PDA.pdf.

[2] Many of these can be explored in our publication, Razzano, G (2015) *Heroes Under Fire* (ODAC: South Africa), available here: http://opendemocracy.org.za/images/docs/publications/HeroesUnderFire.pdf.

Specific sections

Amendment of Section 1

ODAC would like to note the extensions of protections to workers and those in temporary employment services as both commendable and absolutely necessary. There are important public interest disclosures that are made outside of the employment relationship, which should also be protected and requires acknowledgment,[3] but this extension of the protection is a significant step forward for the protection of all forms of employees.

We would however like to note two definitional issues that now arise as a consequence of changes. The first is that – given the change made in section 9A addressed below – section 1(d), which exclude those who have committed an offence should include the caveat "subject to section 9A", in order to avoid circularity.

A second consequence of the changes to section 9A, as well as the consequent change to section 1(d)(h), is that "offence" must now be interpreted to mean something other than just a criminal offence given ordinary rules of statutory interpretation. Seemingly unintentionally, this means that employers may argue that a person has failed to make disclosure simply because they have committed some sort of workplace offence. We submit this could not have been the original intention of the drafters.

Amendment of Section 2

While not necessarily an issue for drafting, there is a significant need to broaden awareness of the provisions in 2(3), which make void the validity of provisions in employment contracts if they expressly exclude, or has the effect of discouraging use of, the procedures of the PDA. In this regard, please note our comments on the PDA Guide

[3] See for instance our work on citizen whistleblowing as a legislative gap, in Razzano, G (2014) *Empowering Our Whistleblowers* (Cape Town: Right2Know). See also for context the recommendations by the South African Law Reform Commission (2007) *Protected Disclosures Act: Project 123* (SALRC: South Africa), pp. 29-32.

detailed later.

Insertion of Section 3B

The attempt to create a positive obligation to investigate is commendable, though we note with concern the adjustment from 14 days in the original 2014 draft, to 21 days in this draft Bill before Parliament.[4]

Subsection 3B(3) is a worrying inclusion, rendering the 21 day prescription in (1) and (2) largely superfluous. The provision enables employers to avoid making a decision on whether or not to investigate for an extended period of six months with no need for justification (justifications are only required once a decision is taken). This is particularly worrying given that the definition of what constitutes a 'disclosure' means that a disclosure of certain veracity has been made. We would recommend limiting this cap further, perhaps for instance to 3 months.

In relation to subsection 3B(4), such a conclusion must be provided in writing. This permits the discloser to receive a verifiable answer.

Amendment of section 4

ODAC would like to take the opportunity to commend the expansion of the remedies provided for in 1B, and in particular the inclusion of the potential for payment of "actual damages suffered by the employee or worker". This addresses the concerns we have consistently articulated that relate to existing limits to compensation.[5] We also commend as a whole the consistency with the recommendations made by the South African Law Reform Commission.[6]

Substitution of Section 6

[4] We note positively the consistency of the amendment with our recommendations in Razzano, G (2014) *Empowering Our Whistleblowers* (Cape Town: Right2Know), pp. 38.
[5] See for instance Razzano, G (2014) *Empowering Our Whistleblowers* (Cape Town: Right2Know) pp. 24.
[6] South African Law Reform Commission (2007) *Protected Disclosures Act: Project 123* (SALRC: South Africa), pp. 51.

In relation to section 6, we again applaud the requirement that appropriate internal procedures for receiving and dealing with information about improprieties be created.

However, while section 6(2) says all employers *must* take reasonable steps to alert employees to their policies, we would still recommend – for clarity's sake – amending section 6(1) to incorporate consideration of cases where this has not been done, so that employees don't fall within a gap between section 1(a) and (b). In other words, the section could be amended as follows:

"6. (1) Any disclosure made in good faith—

(a) and substantially in accordance with any procedure [prescribed, or] authorised by the employee's or worker's employer for reporting or otherwise remedying the impropriety concerned **if that has been made reasonably known to the employee or worker**; or

(b) to the employer of the employee or worker, where there is no procedure as contemplated in paragraph (a), is a protected disclosure.

Insertion of section 9A

ODAC would like to highly commend the insertion of this section, as it is consistent with the previous recommendations made on the PDA by the South African Law Reform Commission and by ODAC.[7] This will be one of the most significant protections provided for by the Amendment Bill for those that have made protected disclosures in good faith.

However, we would like to raise some concerns about drafting. While the intention of the provision is clearly to protect from criminal liability those whistleblowers that are earnestly seeking to root out malfeasance and corruption, the requirement of attempting to show a "criminal offence" may be unintentionally restricting. There may exist an opportunity to consider the wording incorporated in the Promotion of Access to Information Act 2 of

[7] South African Law Reform Commission (2007) *Protected Disclosures Act: Project 123* (SALRC: South Africa), pp. 37; for instance at Razzano, G (2014) *Empowering Our Whistleblowers* (Cape Town: Right2Know) pp. 43.

2000, such that:

> "9A. (1) Notwithstanding any other provision of this Act a person who makes a disclosure of information which
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> (a) reveals evidence of—
>
> (i) a substantial contravention of, or failure to comply with the law; or
>
> (ii) an imminent and serious public safety or environmental risk: and
>
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated
>
> shall not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.
>
> (2) Exclusion of liability as contemplated in subsection (1) does not extend to the civil or criminal liability of the employee or worker for his or her participation in the disclosed impropriety".

This would then provide the protection we believe the Amendment is seeking to provide, but also present drafting consistency with existing law.

Insertion of section 9B

ODAC would like to raise significant concerns in relation to the inclusion of this provision. For reference, the provision reads:

> "9B. An employee or worker who intentionally discloses false information knowing that information to be false or who ought reasonably to have known that the information is false, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such

imprisonment."

Any falsely laid information could not constitute a disclosure in terms of the Act. Thus, there is little forseeable need to include any criminal provisions around raising concerns where the information on which the disclosure is based is false when considered in terms of the purpose of the PDA.

Such criminal provisions can only discourage people from raising concerns, as they may fear being charged with an offence, particularly for not "reasonably" having known the information they managed to obtain was false. The "chilling effect" exists within a context that already in practice discourages whistleblowing.[8] People already are reluctant to raise concerns – they lose their jobs, and in some case their lives.

The inclusion of such criminal liability is also not best practice. The South African Law Reform Commission has previously noted in this regard:

> South Australia's Whistleblowers Act, the United Kingdom PIDA and the New Zealand Protected Disclosures Act do not provide for criminal offences. In South Australia the opinion is held that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it.
>
> The Commission confirms its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalized. A person who deliberately or recklessly discloses information does not qualify as a whistleblower (except under section 5 of the PDA in its present form) and might also be guilty of criminal defamation, crimen injuria or fraud at common law. There has been no alteration of best practice in this regard, and we do not agree with those that say that this is a way of preventing false claims of wrongdoing.

[8] See for instance Razzano, G (2014) *Empowering Our Whistleblowers* (Cape Town: Right2Know), a copy of which we have attached.

Importantly, this is an Act that has as its objective the protection of whistleblowers, and not the protection of information. The protection of information should rather be left to the other legislative interventions designed for that purpose.[9] Not only does this lead to significant confusion and overlap, but the provision also directly mitigates against the Act's substantive purpose. The provision could create a significant chilling effect on disclosures. There are also less restrictive means of dealing with the concern – such as by leaving such disclosures within the remit of the other existing laws that could adequately deal with such an incident.

Within the Memorandum to the Act, the drafters themselves note the main motivation relates to a fear of "reputational damage". Given the array of remedies available for reputational damage in existing civil law laws, this cannot justify the inclusion of a provision that contradicts international bets practice and the express recommendations of the South African Law Reform Commission.

Amendment of section 10

While the current amendment of section 10 is a 'consequential' change of the extension of the coverage of the PDA, this presents an opportunity to raise an existing concern: the need to revise the guide to the PDA. As we have reflected on in previous research,[10] the existing guide does not provide enough practical advice to employers on how the PDA can be implemented. Given the new inclusions of a proactive obligation to implement systems, it is an opportune time do this. ODAC have, as a practical step forward in this regard, just completed our own Code of Good Practice that can be downloaded as practical guidance here: http://opendemocracy.org.za/index.php/what-we-do/whistle-blowing/code-of-good-practice.

Lacuna

[9] Primarily the area of the Promotion of Access to Information Act, but also the Protection of Personal Information Act and the Protection of Information Act (or potentially Protection of State Information Act).
[10] Razzano, G (2014) *Empowering Our Whistleblowers* (Cape Town: Right2Know) pp. 32.

There are still several lacuna of relevance to the PDA that have not been dealt with by the Amendments that remain a concern.

Financial incentives

ODAC would submit that specific provision should be made to further proactively protect whistleblowers through the provision of financial compensation outside of a potential labour award. The G20 have expressly recommended that countries, when seeking to protect and promote whistleblowing, should through statute:

> "…Clearly [define] the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and [encourage] the use of protective and easily accessible whistleblowing channels. Examples of best practices in support of this principle could include…[incentives] for whistleblowers to come forward…[and positive] reinforcements, including the possibility of financial rewards for whistleblowing".[11]

Whistleblowing often comes with consequent and direct financial burdens placed upon the whistleblower, not simply because of the potential occupational detriment directly meted out, but also through ripple effects such as difficulties in establishing re-employment, or subsequent business prejudice.[12] We would thus propose a provision similar to that already contained within the National Environmental Management Act, which states:

> *34B. Award of part of fine recovered to informant*
>
> (1) A court which imposes a fine for an offence in terms of this Act or a specific environmental management Act may order 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.

While we understand the extension of the remedies available in the amendments assist in this regard, we would submit this is not sufficient.

[11] Organisation for Economic Co-operation and Development (2011), Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation, available at: http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf, at 33.
[12] See some case studies reflected in Razzano, G (2015) *Heroes Under Fire* (South Africa: ODAC).

Expansion

ODAC has put forward the position for some time that the range of recipients to whom a protected disclosure may be made is too narrow. It excludes bodies and organisations, other than the Public Protector and the Auditor-General, that are capable of doing something about allegations and which are mandated to receive and act on allegations of corruption and irregular conduct. These would include for example organisations such as:

- the South African Human Rights Commission;
- the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- the Commission for Gender Equality;
- the Electoral Commission;
- the Independent Authority to Regulate Broadcasting;
- the Speaker of Parliament;
- the Commissioner of Police;
- an ombudsman;
- an organ of state;
- a Labour Inspectorate; or
- a person or body prescribed for purposes of such a section.

Effective legislative drafting would be able to remove any risk of procedural inconsistencies between the PDA, and the procedural requirements ordinarily required by these additional bodies. This extension is also important for recognition of the broad substantive forms of disclosures the PDA seeks to protect, which include issues around harassment and environmental risks, amongst others.

Confidentiality

There is no express obligation on organisations in terms of the PDA to protect a whistleblower's identity. Confidentiality is not the same as anonymity. Anonymity between discloser and receiver limits to an extent the potential for effective investigation. Confidentiality being preserved between the two parties as a proactive obligation mitigates against the detriments the PDA seeks to avoid. One potential proposal for drafting would be to include the breach of confidentiality, in certain circumstances, as an *additional* form of occupational detriment if consent has not been obtained.

Main Recommendations

- Subsection 3B(3) should be scrapped, or include both a time limit cap and restrictive grounds for when the subsection can be called upon.
- Remove subsection 9B as an unjustifiable limitation on the rights to make a protected disclosure.
- Consider inclusion of the Code of Good Practice, or similar, as a new guide on the PDA.
- Address additional shortcomings in law not addressed currently by the Amendments, such as:
    - The expansion of bodies to which a protected disclosure may be made;
    - The inclusion of financial incentives for the protection of whistleblowers, and
    - The protection of confidentiality for the whistleblower.