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Submissions by Corruption Watch: Protected Disclosures Amendment Bill

Introduction

1. Corruption Watch is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption, the abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.
2. Corruption Watch has a vision of a corruption free South Africa, one in which educated and informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice and importantly where public and private individuals are held accountable for the abuse of public power and resources.
3. Corruption Watch welcomes the opportunity to make submissions on the Protected Disclosures Amendment Bill, [B40B – 2015]¹ (“the Amendment Bill”) read in accordance with the Memorandum on the Objects of the Protected Disclosures Amendment Bill, 2015 (“Memorandum on Objects”).
4. We previously made oral submissions during the hearings held on 14 September 2016 and attach a copy of our written submissions made to the Committee for ease of reference. Those submissions are still relevant and important to the finalisation of the Amendment Bill. We also urge the committee to also consider aspects of the G20 Anti-Corruption Action Plan on the

¹ Explanatory memorandum to the Bill published in *Government Gazette* No. 39479 of 4 December 2015.

Protection of Whistle-Blowers² and the UNODC Resource Guide on Good Practices in the Protection of Reporting of Reporting Persons.³

5. While we still applaud the initiative taken by the Department of Justice and Correctional Services (the “Department”) to extend the application of the Protected Disclosures Act, 26 of 2000 (“the Act”) and to strengthen whistle-blower protection in respect of employees and workers, we have concerns about the implementation of the Amendment Bill and certain practical challenges which face employees and workers when making protected disclosures.
6. We note from the Committee deliberations on the Amendment Bill on 8 - 9 November and 15 - 16 November 2016 that a number of our previous submissions were not considered in detail in order to evaluate whether the Amendment Bill does indeed provide for the real and meaningful protection of whistle-blowers. In particular, the rationalisation of the definition of occupational detriment and section 9A which deals with the exclusion of civil and criminal liability still needs to be considered carefully.
7. In these submissions, we restrict our commentary on the following:
 - 7.1. The expanded definition of “occupational detriment”
 - 7.2. Section 9A which excludes civil and criminal liability for protected disclosures;
 - 7.3. The introduction of offences for making disclosures in bad faith;

Definition of occupational detriment and exclusion of civil and criminal liability

² G20 Anti-Corruption Action Plan, Protection of Whistle-Blowers “Study on Whistle-Blower Protection, Frameworks, Compendium of Best Practices and Guiding Principles for Legislation.” <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

³ United Nations Office on Drugs and Crime, The United Nations Convention against Corruption, Resource Guide on Good Practices in the Protection of Reporting Persons, August 2015 https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf

8. We submit that the definition of occupational detriment and the new section 9A which deals with the exclusion of civil and criminal liability needs to be aligned in order to ensure that there are no contradictions and anomalies in the legislation.
9. One of the Amendment Bill's most significant amendments concerns the definition of occupational detriment which is now defined to include "*being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence.*"
 - 9.1. The section protects whistle-blowers from a civil claim where he or she breaches a duty of confidentiality only when disclosing a **criminal offence**. There is no rational basis for restricting this section to the disclosure of a criminal offence and the wording should instead be "**being subjected to any civil claim for the alleged breach of a duty of confidentiality or confidentiality agreement arising out of a protected disclosure.**" The section should be amended in this way to ensure that those who make disclosures that are not criminal offences but general disclosures as defined in the Act, will be protected.
 - 9.2. Section 1(e)(i) provides that "subject to Section 9(A), a protected disclosure does not include a disclosure in respect of which the employee or worker concerned commits a criminal offence by making such a disclosure". We regard this section as being in contradiction to section 9(A) which excludes criminal and civil liability for making protected disclosures. The section essentially curtails the definition of a disclosure thereby curtailing the circumstances under which an employer or worker may be protected from criminal and civil liability. It creates a confusing set of requirements for which civil and criminal liability should be excluded thus resulting in vague and incoherent legislation.
10. The new definition of occupational detriment should be considered together with the new section 9A which states that:

"A court may find that an employer or worker who makes a protected disclosure of information in accordance with paragraph (a) of the definition of disclosure, or (b)

which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur, 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, contract, practise or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.”

11. We note the introduction of section 9A(b) which expands the type of information which may be disclosed beyond criminal offences to now include information which shows or tends to show substantial contraventions of the law. We regard this as a step in the right direction but cannot understand why civil and criminal liability should be excluded only in limited circumstances. We suggest that the section read as follows:

“A court may find that an employer or worker who makes a protected disclosure of information in accordance with paragraph (a) of the definition of disclosure, or (b) ~~which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur,~~ 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, contract, practise or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.”

New offence for the disclosure of false information

12. The offence for the disclosure of false information is likely to deter employees and workers from making protected disclosures since some information may appear to be legitimate but may, after investigation, prove to be false or unreliable. This is the purpose of having the employer investigate the protected disclosure and revert to the employee on the veracity and possible action if proven to be true. In this regard, disclosures are not regarded as being protected, if an employee does not make it in good faith. Employees who make bad faith protected disclosures may therefore not be able to claim that his or her dismissal was automatically unfair, a sanction which already exists in terms of the Act. The introduction of

an offence is therefore unnecessary and may serve to deter employees and workers from making disclosures.

General Commentary

13. Corruption Watch is still deeply concerned about the practical application of the Amendment Bill in light of various anomalies, confusing cross references and vagueness in the drafting of the new sections. We hope that the Committee considers this carefully in order to ensure that both employers and employees or workers are able to understand and apply the Amendment Bill in way which gives rise to the meaningful protection of whistle-blowers. The Amendment Bill still creates loopholes for the employer to exploit in order to threaten or deter employees from making disclosures and still does not create or refer to affordable and accessible mechanisms for employees to effectively seek the protection of this legislation. Recourse must still be had via the Labour Court which may be expensive and subject to numerous delays. Our previous submissions dealt with these arguments and we urge the Committee to reconsider them.

14. Finally, we wish to draw the Committee's attention to training and education aspects related to the implementation of the Amendment Bill. Careful and dedicated attention needs to be paid to ensuring that there is proper training of officials in the public sector on the nature and scope of the amendments, the circumstances under which certain liability may be excluded and the nuanced aspects of the amendments. In this regard, simple, easy to understand training material, guidelines and educational tools will form the backbone of the proper and meaningful implementation of this important piece of anti-corruption legislation and we hope that these factors are taken into consideration when finalising the Amendment Bill.

Submitted by Corruption Watch on 6 January 2017
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