Whistle-blowing

A Guide for Public Sector Managers

Promoting Public Sector Accountability

Implementing the Protected Disclosure Act

Will you be ready when the whistle blows?

Foreword

Foreword by the Chair of the Public Service Commission, Prof Stan Sangweni

Since February 2001 South Africa has had legislation which protects employees in the public and private sector from occupational detriment, should they blow the whistle.

As it potentially affects you and everyone who works with you, I do hope you find the time to read this publication.

Understood and applied effectively this legislation will help you as managers to identify and manage risk and protect your reputation and the reputation of the public service. A key part of the national strategy to fight corruption in the public sector, is to encourage ethical individuals within the service to raise their concerns in a responsible manner.

This brochure has been prepared by the Institute for Security Studies (with generous funding from AUSAID) in association with the Open Democracy Advice Centre and the Public Service Commission. Further information about these organisations is set out at the end of this document.

As the Commission, we are pleased to co-operate in this venture in order to promote an ethical organisational culture premised on openness and accountability. This is a challenging process and we trust that this brochure will help prepare public sector managers for when the whistle blows.

Yours sincerely

Prof Stan Sangweni

Contents

This public information brochure should be seen as complementary to the official guidelines which the Minister of Justice is responsible for compiling in terms of the Protected Disclosures Act.

Introduction

Since February 2001 South Africa has had the most far-reaching "state of the art" whistle-blowing legislation in the world. Understood and applied effectively, the new legislation known as the Protected Disclosures Act no 26 of 2000 will help to deter and detect wrongdoing in the workplace, acting as an earlywarning mechanism to prevent impropriety and corruption within the public sector. Essentially the law harnesses a common interest between responsible individuals who raise concerns they may have in the workplace with accountable organisations and managers prepared to respond to the bona fide concerns of their employees.

This guide is targeted at public sector managers in order to prepare them to be able to respond adequately when the whistle blows. As such this guide is divided into three main sections:

1. Whistle-blowing in the South African context - this deals with what is whistle-blowing as well as how it can be a key risk management tool and encourage effective communication within organisations.
2. Understanding the Act - the South African legislation on whistle-blowing, the Protected Disclosures Act, is explained in an accessible way.
3. Implementing a whistle-blowing policy - guidelines for developing a comprehensive whistle-blowing policy within organisations are discussed with key pointers and an action plan.

A copy of the Protected Disclosures Act is enclosed (pg 20) for easy access as well as information for public sector managers on further resources available (pg 27) to assist in developing whistle-blowing policies for the public sector.

Section 1:
Whistle-blowing in the South African Context

South Africa's transition to democratic rule has been characterised by high levels of crime, including widespread corruption. Several initiatives have been undertaken to promote accountability and fight corruption within the public sector. These efforts include legislation such as the Promotion of Access to Information Act and the Protected Disclosures Act, as well as hosting anti-corruption conferences (in November 1998, April 1999 and October 1999). Resolutions taken at the National Anti-Corruption Summit in April 1999 made specific reference to "developing, encouraging and implementing whistle-blowing mechanisms, which include measures to protect persons from victimisation where they expose corruption and unethical practices". During February 2001 the Protected Disclosures Act which protects bona fide whistle-blowers came into force.

One of the key obstacles faced in the fight against corruption is the fact that individuals are often too intimidated to speak out or "blow the whistle" on corrupt and unlawful activities they observe occurring in the workplace, although they may be obliged to in terms of their conditions of employment. Under the Public Service Code of Conduct, public servants in the course of their official duties shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest.

Often those who do stick their necks out are victimised and intimidated and until recently have had little recourse. A large cause of the problem is that in South Africa whistle-blowers can be confused with "impimpis" - apartheid era informants who informed on their comrades with often devastating consequences. This historical context has unfortunately allowed some to stigmatise whistle-blowing as an activity to be despised rather than encouraged.

What is whistle-blowing?

Understood correctly, whistle-blowing is not about informing in the negative, anonymous sense but rather about "raising a concern about malpractice within an organisation". The bravery of being prepared to blow the whistle is directly related to the cultural resistance in many organisations to

transparency and accountability. Whistle-blowing is therefore a key tool for promoting individual responsibility and organisational accountability. Whistle-blowers act in good faith and in the public interest to raise concerns around suspected impropriety within their place of employment. However, they often risk victimisation, recrimination and sometimes dismissal.

Why is whistle-blowing important to you?

Whistle-blowing is an early warning system to avert possible risks to the organisation. An effective policy to encourage whistle-blowing enables employers to find out when something is going wrong in time to take necessary corrective action.

A positive whistle-blowing culture is a critical element in the success of any risk management system. By promoting better risk management, it can also help you prevent the need for more regulation and intervention by regulators and legislators.

An organisation that positively encourages whistle-blowing stands a far better chance of demonstrating that it is properly run and managed. The existence of a working whistle-blowing policy can be pivotal in legal proceedings. This is because, in determining liability and in setting the penalties, the courts may well take account of whether a whistle was blown and, if not, why not.

Why don't people blow the whistle?

While employees are usually the first to know of wrongdoing, many will feel they stand to lose the most by speaking up. Those who genuinely suspect that something may be going seriously wrong in the workplace usually face an acute dilemma. They can stay silent and look the other way, they can raise the matter with the employer, or they can take their concerns outside the organisation.

The fear of being labelled a "sneak" or a troublemaker, the fear of "breaking ranks" and appearing disloyal to colleagues, and the fear of being required to provide irrefutable evidence are powerful disincentives to speaking up. For generations, playground culture has dictated that we do not "tell tales".

The distinction is not always drawn between those who wantonly betray trust and those who act - often irrespective of their own immediate interests - to protect others and the interests of their employers. A good policy encourages and protects responsible whistle-blowing. Those individuals who think they ought to resist the social pressure to look the other way and recognise that the matter should be looked into by those in

charge must consider their own position. Might they be disadvantaged, disciplined or even dismissed for speaking up? Press reports, which focus on whistle-blowers who find themselves out of a job or out of a career, only fuel these fears.

In such circumstances, it is not surprising that most employees who find themselves in this position speak only to friends or family - rather than to their employer, the person best able to look into the issue.

The result of this communication breakdown is that the employer loses a valuable opportunity to avert what might become a damaging crisis or to reassure employees that their concerns are mistaken, and also loses access to a valuable pool of information.

Why aren't grievance procedures enough?

While employers increasingly recognise that it is in the organisation's interest to encourage staff to raise concerns, many still have provisions and procedures which actually compound the problem. This is because rules designed to deal with the disaffected and disloyal will never reassure the silent majority of the workforce that it is safe to raise a concern about wrongdoing.

The commonplace assumption that a concern is no different from a grievance suggests that the employee should pursue the concern through an adversarial procedure. This can give the impression that it is for the employee to prove that the department is being defrauded, or that a safety hazard is present.

The inclusion of all-embracing confidentiality clauses in contracts sends a strong message that staff should keep quiet, both in and outside the workplace.

Rigid line management, without a whistle-blowing system, risks giving middle management a monopolistic control over the information that reaches those in charge. Like any monopoly, this control can offer real temptations to the lazy, the incompetent and the corrupt.

Properly understood and applied, a whistle-blowing policy will help you break this cycle of silence and inaction and prevent corruption in the public sector.

Whistle-blowing has been promoted by the Public Service Commission through provincial workshops and has been recognised as an important corruption prevention tool by a number of public sector departments. Before February 2001, public servants who raised concerns in the

workplace would have had limited protection in terms of the Labour Act and Public Service regulations. With the introduction of the Protected Disclosures Act all public service employees who raise their concerns, in line with their duty under the Public Service Code of Conduct to report impropriety, will be protected.

The next section will explain how new legislation protects whistle-blowers who make disclosures. Organisational policies, which are in line with the Act, to support and encourage employees to raise the whistle, will also be discussed

Section 2:
Understanding the Act

In South Africa the Protected Disclosures Act (no 26 of 2000) makes provision for procedures in terms of which employees in both the public and private sector who disclose information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment.

This law is to encourage honest employees to raise their concerns and report wrongdoing within the workplace without fear. This law should be welcomed as a crucial corporate governance tool to promote safe, accountable and responsive work environments.

The South African law draws heavily on the UK's Public Interest Disclosure Act. This Act was introduced following a number of high profile disasters and scandals which claimed hundreds of lives. The public inquiries, which were established to uncover the facts behind these catastrophes, showed time and again that such incidents could and should have been prevented. People who worked there had known about the dangers before any damage was done, but had:

- been too scared to sound the alarm
- spoken to the wrong people, or
- raised the concern, only to be ignored.

The Protected Disclosures Act 2000

The Protected Disclosures Act sets out a clear and simple framework to promote responsible whistle-blowing by:

- reassuring workers that silence is not the only safe option
- providing strong protection for workers who raise concerns internally
- reinforcing and protecting the right to report concerns to public protection agencies such as the Public Protector and Auditor-General, and
- protecting more general disclosures provided that there is a valid reason for going wider and that the particular disclosure is a reasonable one.

The conceptual core

At its heart, the Protected Disclosures Act contains a simple idea: that it is in the common interest of both the employer and

the (responsible, potential whistle-blower) employee to "blow the whistle" internally - within the department - rather than externally, to, for example, the media. Once a disclosure is made externally the stakes are much, much higher - for both the employer and the employee. For the employer it may result in damaging publicity, whether warranted or not. For the employee, it is much more likely that the employer will react negatively to the disclosure, with adverse consequences for the employee and his or her future work prospects.

Protected disclosures

A disclosure is a "protected disclosure" under the Protected Disclosures Act if:

- the disclosure contains information about "impropriety" and
- the disclosure has been made to the right person, according to the scheme established by the Act (see "The Four Doors to Legal Protection", pg 9).

Potential cost to employers

If a disclosure is protected it means that any "occupational detriment" that the employee who made the disclosure subsequently suffers as a result of the disclosure will attract a legal remedy. "Occupational detriment" is very widely defined by the Protected Disclosures Act and includes harassment, dismissal, transfer against the will of the employee, non-promotion, a denial of appointment, or "otherwise adversely affected".

People who are victimised in breach of the Act, whether they are dismissed or not, can refer a dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation and thereafter to the Labour Court. People who are dismissed for making a protected disclosure can claim either compensation, up to a maximum amount of two years salary, or reinstatement. People who are not dismissed but who are disadvantaged in some other way as a result of making a protected disclosure can claim compensation or ask the court for any other appropriate order.

"Impropriety"

The Protected Disclosures Act applies to people at work raising concerns about crime, failure to comply with any legal duty (including negligence, breach of contract, breach of administrative law), miscarriage of justice, danger to health and safety, damage to the environment, discrimination and the deliberate cover-up of any of these. It applies to concerns about past, present and future malpractice.

The scheme created by the Protected Disclosures Act can be likened to a person in a room faced by several exit doors. If you choose the right door, you leave the room with the special protections provided by the Protected Disclosures Act. If you do not choose the right door, you do not have any special protections, but must rely on ordinary labour law, criminal law, etc. to protect your rights if anything happens to you as a result of blowing the whistle.

In the case of door four, there are four good causes recognised in the law.

The four good causes are either:

1. the concern was raised internally or with a prescribed regulator, but has not been properly addressed
2. the concern was not raised internally or with a prescribed regulator because the whistle-blower reasonably believed he or she would be victimised
3. the concern was not raised internally because the whistle-blower reasonably believed a cover-up was likely and there was no prescribed regulator, or
4. the concern was exceptionally serious.

Reasonableness

In deciding the reasonableness of the disclosure the adjudicatory forum will probably consider the identity of the person it was made to, the seriousness of the concern, whether the risk or danger remains, and whether the disclosure breached a duty of confidence the employer owed a third party. Where the concern had been raised with the employer or a prescribed regulator, the tribunal will also consider their response. This means it is not enough to have a whistle-blowing policy only - concerns that are reported must be investigated and action taken as appropriate. Finally protection may be lost if the worker failed to comply with a whistle-blowing policy the organisation had made available.

The Four Doors to Legal Protection

Door One:

Legal advice (Section 5)

The first door is marked "legal advice". A disclosure made by a whistle-blower to someone for the purposes of getting legal advice about the disclosure is a protected disclosure. This would include the employee's attorney or shop steward.

Door Two:

An internal disclosure (Section 6)

The Protected Disclosures Act signals that it is safest if concerns are raised internally. A disclosure to the employer will be protected if the whistle-blower acts in good faith, and follows the process set out for such disclosures by the employer. They should have a reason to believe that there is a problem of some sort, including the law being broken, the health or safety of people being endangered, or discrimination taking place. This is the door that the Protected Disclosures Act wants the potential whistle-blower to walk through, in everyone's interest. But it assumes that the employer will take the disclosure seriously and respond appropriately. The Protected Disclosures Act encourages employers to have in place a whistle-blower policy. A good policy will operate like a bright light on top of the Internal Disclosure door, signalling that this is the first, and best, route for the whistle-blower to take.

Door Three:

Regulatory disclosures (Section 8)

The Act reinforces and strengthens the right to make disclosures to specified regulatory bodies. These currently include:

- the Office of the Public Protector
- the Office of the Auditor-General.

Disclosures to these bodies will be protected where the whistle-blower makes the disclosure in good faith and the employee reasonably believes the Public Protector or Auditor-General would usually deal with the kind of problem that the whistle-blower wants to talk about. There is no requirement that the concern should first have been raised with the employer.

Door Four:

Wider disclosures (Section 7 and 9)

Workers can also be protected under the Act if they make wider disclosures (eg, to the police, MPs, and even the media). This is known as a general protected disclosure. This protection applies where the whistle-blower honestly and reasonably believes that the information and any allegation contained in it are substantially true and that the disclosure is not made for personal gain. Crucially, to be protected there must also be a good cause for going outside and the particular disclosure must be reasonable. There are four good causes recognised in the law (see pg 8).

Confidentiality clauses

Confidentiality clauses in workers' contracts and severance agreements are ineffective insofar as they conflict with the Act's protection.

You can make a protected disclosure to one of the following people provided you meet the requirements as set out in the Act.

(Clause 5)

To a legal practitioner or person whose occupation involves the giving of legal advice the requirements are:

- seek advice about concern and how to raise it
- Good faith is not a requirement •

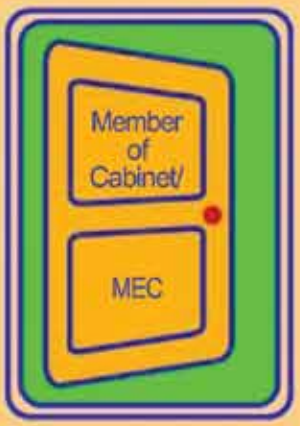
All advice is confidential

(Clause 6)

To an employer the requirements are:

- In good faith
- Substantially in accordance with any prescribed procedure

What should I do?
Who should I talk to?



(Clause 7)

To a member of cabinet or executive council the requirements are:

- Good faith
- Your employer must be:

1) an individual or body appointed in terms of legislation by a member of cabinet or executive council, (eg. National Directorate of Public Prosecutors)

2) an organ of state falling in the area of responsibility of the member concerned

(Clause 8)

To regulatory bodies the requirements are: • Good faith

- Public Protector or Auditor-General
- Reasonable belief that the concern falls within the mandate of these bodies
- Information and allegations are substantially true

As public sector managers you will need to be prepared for when the whistle blows

A good whistle-blowing policy will prepare you for when the whistle blows

(Clause 9)

For General Protected Disclosure the requirements are:

- Good faith
- Reasonable belief that the information disclosed and allegations contained in it are substantially true, and
- Allegations are not made for personal gain (excludes rewards payable in terms of law, eg. Police, South African Revenue Services)
- Reasonable to make the general disclosure under the circumstances
- And that one or more of the following conditions are met:
  1. the impropriety is of an exceptionally serious nature
  2. the disclosure has been made to the employer and no action has been taken within a reasonable period
  3. the employee has reason to believe that the evidence will be concealed or destroyed if the disclosure is made to the employer and there is no regulatory body prescribed
  4. the employee has reason to believe that s/he will be subjected to occupational detriment

Section 3:
Putting a whistle-blowing policy in place

Action plan

You will want:

- Employees to tell you about any suspected impropriety or corruption
- Your employees to raise concerns with you directly
- Employees and all levels of management to understand and accept that it is safe for staff to raise concerns internally
- Managers to deal with concerns properly

You will not want:

- Unnecessary wider, public disclosures
- A whistle-blower being victimised in breach of the Act
- To expose your department to a substantial claim for damages
- To invite an inappropriate investigation by regulators
- The risk of damaging your department's reputation

Remember

A whistle-blowing policy ought not to be seen as merely a means of complying with yet another piece of employment legislation. If it is to help you create an environment where the staff understands their responsibilities and management demonstrates their accountability, it will not be enough to introduce a good policy only to file it away. You must take action and actively implement the policy. It is important to ensure that workers are left in no doubt about the avenues open to them.

Ten points to consider when putting a whistle-blowing policy in place

1. Make it clear, through a consultative process, to management and workers alike that it is both safe and acceptable for workers and management to raise concerns about wrongdoing. Display this consensus-based policy in writing.
2. Review procedures and rules on reporting concerns. If you have none, use a consultative process to generate these rules and procedures. Remember that if employees reasonably believe they will be victimised, protection for a wider public general disclosure is triggered.
3. Where concerns are raised by workers, respond within agreed time frames (and be able to demonstrate a response) to the message. Do not shoot the messenger!
4. Where a protected disclosure has been made, take all reasonable steps to try to ensure that no colleague, manager or other person under your control victimises the whistle-blower. If you need to keep the identity of the whistle-blower confidential, then use all reasonable means to do so.
5. Check the confidentiality clauses in contracts of employment.
6. Evaluate your organisational structure and decide on a senior person in the department to whom confidential disclosures can be made. This person must have the authority and determination to act if concerns are not raised with - or properly dealt with by - immediate line management.
7. Publicise your success stories.
8. Ensure managers understand how to act if a concern is raised. Ensure that they understand that employees have the right to blow the whistle.
9. Consider whether you need to make use of an independent advice centre in understanding and using this legislation.
10. Introduce and promote a whistle-blowing policy.

In establishing a policy keep these pointers in mind:

Understanding the issue

- Asking your employees to keep their eyes open is a key way to promote, display and ensure good practice. If you successfully involve your employees, it should give a clear message to those who are tempted that they will not get away with it and everyone else will soon see that you are serious about tackling any form of wrongdoing.

- Listen to the employees and to their sense of right and wrong. Explain what fraud in the organisation is, its effect on their jobs and the service they provide. Be as clear about the effects of other forms of serious wrongdoing. Get any staff bodies or union to back and promote this approach.

Ensure employees see the policy in action

- Employees need to know what practices are unacceptable (eg. what is appropriate in terms of hospitality, gifts). They should be encouraged to ask management if something is appropriate before - not after - the event.

- When you find serious wrongdoing (whether by employees, contractors or the public), deal with it seriously. Remember you cannot expect your employees to practise higher standards than those you apply.

Be open to concerns

- Remember - it is never easy to report a concern, particularly one which may turn out to be fraud or corruption.
- Try to ensure that management is open to such concerns before they become part of a grievance and do not let management's lack of action itself become a grievance.
- Make it clear that you will support concerned employees and protect them from reprisals. Do everything you can to respect their confidentiality, if requested.
- Aside from line management, make sure employees have another route to raise a concern. This should be to a senior official such as a Director-General. Tell employees how they can contact that person in confidence.
- Remind employees of relevant external routes if they do not have confidence to raise the concern internally. Reassure them that they can approach other independent organisations for confidential advice (see additional resources, pg 27).

Dealing with concerns

- Remember there are two sides to every story.
- Respect and heed legitimate employee concerns about their own safety or career.
- Emphasise to both management and to staff that victimising employees or deterring them from raising a concern about wrongdoing is a disciplinary offence.
- Make it clear that abusing this process by raising unfounded allegations maliciously is a disciplinary matter.
- Offer to report back to the concerned employee about the outcome of the investigation and, where possible, on any action that is proposed.

Draft Whistle-blowing Policy

Personal note from the Director-General

A personal note from the Director-General (XXX Department) (signed by all A/Dir and upward, conveying management commitment) making it clear that XXX Department is committed to the fight against fraud and corruption in XXX Department whether the perpetrators are internal or external. That the Whistle-blowing Policy and procedure is part of XXX Departments commitment to working towards a culture of openness and transparency. It could be added that confidentiality will be maintained, and that nobody will be penalised for disclosing in good faith, information that might be in XXX Departments interest.

Purpose of this policy

The purpose of this policy is to provide a means by which staff are able to raise concerns with the appropriate line management, or specific appointed persons in XXX Department, where they have reasonable grounds for believing that there is fraud and corruption within XXX Department.

The Protected Disclosures Act, Act 26 of 2000, which became effective in February 2001, provides protection to employees for disclosures made without malice and in good faith, in defined circumstances.

In terms of the Protected Disclosures Act employees can blow the whistle on fraud and corruption in the working environment without the fear of suffering an occupational detriment as defined by the Act. XXX management encourages staff to raise matters of concern responsibly through the procedures laid down in this policy document.

Scope of the policy

The policy is designed to deal with cocerns raised in relation issues relating to fraud, corruption, misconduct and malpractice within XXX Department. The policy will not apply to personal grievances, which will be dealt with under existing procedures on grievance, discipline and misconduct. Details of these procedures are obtainable from the Human Resources Department.

The policy covers all genuine concerns raised including:

- Financial misconduct
- Health and safety risks
- Environmental damage
- Unfair discrimination
- Corruption and misconduct
- Attempts to suppress or conceal any information relating to any of the above

If in the course of investigation any concern raised in relation to the above matters appears to the investigator to relate more appropriately to grievance or discipline, those procedures will be evoked.

Who can raise a concern?

Any member of staff who has a reasonable belief that there is corruption or misconduct relating to any of the protected matters specified above may raise a concern under the procedure detailed.

Concerns must be raised without malice, in good faith and not for personal gain and the individual must reasonably believe that the information disclosed, and any allegations contained in it, are substantially true. The issues raised may relate to a manager,

another member of staff, a group of staff, the individuals own section or a different section/division of XXX Department. The perpetrator can be an outsider, an employee, a manager, a customer or an ex-employee. You may even be aware of a system or procedure in use, which may cause XXX to transgress legal obligations.

Culture of openness

XXX commits itself to encouraging a culture that promotes openness. This will be done by:

- Involving employees, listening to their concerns and encouraging the appropriate use of this policy/ process on whistle-blowing promoted by Senior Management. This policy will be issued to all existing employees and to each new employee
- Educating/training/informing/ explaining to employees what constitutes fraud, corruption and malpractice and its effect on XXX. Promoting awareness of standards of appropriate and accepted employee conduct and establishing a common understanding of what is acceptable and what is unacceptable behavior
- Encouraging unions to endorse and support this approach
- Having a policy to combat fraud
- Annual reporting to XXX on the number of fraud/corruption matters reported and the outcome.

Our assurances to you

Your safety

Management is committed to this policy. XXX will ensure that any member of staff who makes a disclosure in the above mentioned circumstances will not be penalised or suffer any occupational detriment for doing so.

Occupational detriment as defined by the Act includes being dismissed, suspended, demoted, transferred against your will, harassed or intimidated, refused a reference or being provided with an adverse reference, as a result of your disclosure.

If you raise a concern in good faith in terms of this policy, you will not be at risk of losing your job or suffering any form of retribution as a result.

This assurance is not extended to employees who maliciously raise matters they know to be untrue. A member of staff who does not act in good faith or who makes an allegation without having reasonable grounds for believing it to be substantially true, or who makes it maliciously or vexatiously, may be subject to disciplinary proceedings.

Your confidence

In view of the protection offered to a member of staff raising a bona fide concern, it is preferable that the individual puts his/ her name to the disclosure. XXX will not tolerate the harassment or victimisation of anyone raising a genuine concern.

However, we recognise that you may nonetheless wish to raise a concern in confidence under this policy. If you ask us to protect your identity by keeping your confidence, we will not disclose it without your consent. However, we do expect the same confidentiality regarding the matter from you.

If the situation arises where we are not able to resolve the concern without revealing your identity (for example where your evidence is needed in court), we will discuss with you whether and how we can proceed.

Accordingly, while we will consider anonymous reports, this policy is not appropriate for concerns raised anonymously.

How we will handle the matter

Once you have told us of your concern, we will look into it to assess initially what action

should be taken. This may involve an internal inquiry or a more formal investigation. The issue you raise will be acknowledged within 7 working days. If it is requested, an indication of how the organisation proposes to deal with the matter and a likely time scale could be provided. If the decision is made not to investigate the matter reasons will be given. We will tell you who would be handling the matter, how you can contact him/her and whether your further assistance may or will be needed. When you raise a concern, you may be asked how you think the matter might best be resolved. If you do have any personal interest in the matter, we do ask that you tell us at the outset. If your concern falls more properly within the Grievance Procedure we will tell you. While the purpose of this policy is to enable us to investigate possible malpractice and take appropriate steps to deal with it, we will give you as much feedback as we properly can. If requested, we will confirm our response to you in writing. Please note, however, that we may not be able to tell you the precise action we take where this could infringe a duty of confidence owed by us to someone else.

How to raise a concern internally

Step one: If you have a concern about malpractice, we hope you will feel able to raise it first with your manager/supervisor. This may be done verbally or in writing.

Step two: If you feel unable to raise the matter with your manager, for whatever reason, please raise the matter either with: (for example): Human Resources: Assistant Director; Contact details OR (for example): Internal Audit: Assistant Director; Contact details. Please say if you wish to raise the matter in confidence so that they can make appropriate arrangements.

Step three: If these channels have been followed and you still have concerns, or if you feel that the matter is so serious that you cannot discuss it with any of the above, please contact: (for example): Director-General; Contact details. Should you have exhausted these internal mechanisms or where you have substantial reason to believe that there would be a cover-up or that evidence will be destroyed or that the matter might not he handled properly, you may raise the matter in good faith with a member of the Cabinet or Executive Council in this province: Name; Contact details

Independent advice

If you are unsure whether to use this procedure or you want independent advice at any stage, you may contact your personal legal adviser, or your labour organisation, or the independent legal advice centre ODAC on it's toll free helpline on 0800 525 352. Their legally trained staff can give you free confidential advice at any stage about how to raise a concern about serious malpractice at work.

External contacts

Option 1: While we hope this policy gives you the reassurance you need to raise such matters internally, we recognise that there may be circumstances where you can properly report matters to outside bodies, such as regulators or the police. ODAC will be able to advise you on such an option and on the circumstances in which you may be able to contact an outside body safely.

Option 2: While we hope this policy gives you the reassurance you need to raise such matters internally, we would rather you raised a matter with the appropriate regulator than not at all. Provided you are acting in good faith, you can also contact:
The Public Protector; (Contact details)
The Auditor-General; (Contact details)

If you are dissatisfied

If you are unhappy with our response, remember you can go to the other levels and bodies detailed in this policy. While we cannot guarantee that we will respond to all matters in the way that you might wish, we commit ourselves to handle the matter fairly and properly.

By using this policy, you will help us to achieve this.

Section 4:
The Protected Disclosures Act

REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

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THE PRESIDENCY

No. 785. 7 August 2000

It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

No, 26 of 2000: Protected Disclosures Act, 2000.

DIE PRESIDENSIE

No. 785. 7 Augustus 2000

Hierby word bekend gemaak dat die President sy goedkeuring het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:

No. 26 van 2000: Wet

(English text signed by the President.)
(Assented to 1 August 2000.)

ACT

To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

PREAMBLE

Recognising that-

- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duly imposed by the right;
- criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage:

And bearing in mind that-

- neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
- every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;
- every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to-

- create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures; promote the eradication of criminal and other irregular conduct in organs of state and private bodies,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

(i) "disclosure" means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

(a) That a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged;

(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or

(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

(ii) "employee" means-

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer;

(iii)"employer" means any person-

(a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or

(b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer;

(iv) "impropriety" means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of "disclosure", irrespective of whether or not-

(a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere; or

(b) the law applying to the impropriety is that of the Republic of South Africa or of another country;

(v)"Minister" means the Cabinet member responsible for the administration of Justice;

(vi) "occupational detriment", in relation to the working environment of an employee, means-

(a) being subjected to any disciplinary action;

(b) being dismissed, suspended, demoted, harassed or intimidated;

(c) being transferred against his or her will;

(d) being refused transfer or promotion;

(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;

(f) being refused a reference, or being provided with an adverse reference, from his or her employer;

(g) being denied appointment to any employment, profession or office;

(h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or

(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

(vii) "organ of state" means-

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when-

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;

(viii) "prescribed" means prescribed by regulation in terms of section 10;

(ix) "protected disclosure" means a disclosure made to-

(a) a legal adviser in accordance with section 5;

(b) an employer in accordance with section 6;

(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;

(d) a person or body in accordance with section 8; or

(e) any other person or body in accordance with section 9, but does not include a disclosure-

(i) in respect of which the employee concerned commits an offence by making that disclosure; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

(x) "this Act" includes any regulation made in terms of section 10.

Objects and application of Act

2. (1) The objects of this Act are-

(a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure

(b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and

(c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

(2) This Act applies to any protected disclosure made after the date on which this section comes into operation, irrespective of whether or not the impropriety concerned has occurred before or after the said date.

(3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it-

(a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or

(b) (i) purports to preclude the employee; or

(ii) has the effect of discouraging the employee, from making a protected disclosure.

Employee making protected disclosure not to be subjected to occupational detriment

3. No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

Remedies

4. (1) Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may-

(a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No.66 of 1995), for appropriate relief; or

(b) pursue any other process allowed or prescribed by any law.

(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court-

(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 follow the procedure set out in Chapter VIII of that Act; and

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 to that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

(3) Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state.

(4) The terms and conditions of employment of a person transferred in terms of subsection (2) 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.

Protected disclosure to legal adviser

5. Any disclosure made-

(a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and

(b) with the object of and in the course of obtaining legal advice, is a protected disclosure.

Protected disclosure to employer

6. (1) Any disclosure made in good faith-

(a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or

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

(2) Any employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for the purposes of this Act, to be making the disclosure to his or her employer.

Protected disclosure to member of Cabinet or Executive Council

7. Any disclosure made in good faith to a member of Cabinet or of the Executive Council of a province is a protected disclosure if the employee's employer is

(a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;

(b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or

(c) an organ of state falling within the area of responsibility of the member concerned.

Protected disclosure to certain persons or bodies

8. (1) Any disclosure made in good faith to-

(a) the Public Protector;

(b) the Auditor-General; or

(c) a person or body prescribed for purposes of this section; and in respect of which the employee concerned reasonably believes that-

(i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and

(ii) the information disclosed, and any allegation contained in it, are substantially true, is a protected disclosure.

(2) A person or body referred to in, or prescribed in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or prescribed in terms of, that subsection, must render such assistance to the employee as is necessary to enable that employee to comply with this section.

General protected disclosure

9. (1) Any disclosure made in good faith by an employee-

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law; is a protected disclosure if

(i) one or more of the conditions referred to in subsection (2) apply and

(ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection (1)(i) are-

(a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer

(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to-

(i) his or her employer; or

(ii) a person or body referred to in section 8 in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature.

(3) In determining for the purposes of subsection (1)(ii) whether it is reasonable for the employee to make the disclosure, consideration must be given to-

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the impropriety;

(c) whether the impropriety is continuing or is likely to occur in the future;

(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

(e) in a case falling within subsection (2)(c), any action which the employer or the person or body to whom the disclosure was made, has taken or might reasonably be expected to have taken, as a result of the previous disclosure;

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and

(g) the public interest.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2)(c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure.

Regulations

10. (1) The Minister may, after consultation with the Minister for the Public Service by notice in the Gazette make regulations regarding -

(a) for the purposes of section 8(1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;

(b) any administrative or procedural matter necessary to give effect to the provisions of this Act; and

(c) any other matter which is required or permitted by this Act to be prescribed.

(2) Any regulation made for the purposes of section 8(1)(c) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.

(3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the Gazette.

(4) (a) The Minister must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety.

(b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the Gazette.

(c) All organs of state must give to every employee a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every employee.

Short title and commencement

11. This Act is called the Protected Disclosures Act, 2000, and commences on a date determined by the President by proclamation in the Gazette.

Section 5:
Additional Resources

The Open Democracy Advice Centre (ODAC)

The Open Democracy Advice Centre's purpose is to promote open and transparent democracy; foster a culture of corporate and government accountability; and assist people to realise their human rights through supporting the effective implementation of laws which enable access to and disclosure of information.

- We advise individuals who are unsure whether or how to blow the whistle.
- We help organisations to comply with the new law.
- We provide guidance materials on law and practice, and training and consultancy services.
- We work closely with all relevant players to promote responsible whistle-blowing in South African organisations.

Contact details:
Alison Tilley, Project Director of ODAC
6 Spin Street
Cape Town, 8001
Tel: (021) 461 3096
Fax: (021) 461 3021
e-mail: alisont@idasact.org.za
http://www.opendemocracy.org.za

The Institute for Security Studies (ISS)

The Institute for Security Studies is an applied policy research institute with a mission to conceptualise, inform and enhance the security debate in Africa.

Since 1996 ISS has conducted research on whistle-blowing as a corruption prevention tool under the Organised Crime and Corruption Programme. AUSAID funding has enabled the Institute to play a role in the development of and awareness around the Protected Disclosures Act.

Contact details:
Lala Camerer,
Institute for Security Studies
67 Roeland Square, Cape Town, 8001
Tel: (021) 461 7211
Fax: (021) 461 7213
e-mail: lala@iss.co.za
http://www.iss.co.za

The Public Service Commission

The Public Service Commission is an independent and impartial body created by the Constitution to enhance excellence in governance within the public service by promoting a professional and ethical environment and adding value to a public administration that is accountable, equitable, efficient, effective, corrupt-free and responsive to the needs of the people of South Africa.

Contact details:
Public Service Commission
The Secretariat
Professional Ethics and Risk Management
Private Bag X121, Pretoria, 0001
Tel: (012) 352 1000
Fax: (012) 325 8323

The Office of the Public Protector

The Office of the Public Protector is committed to assisting Parliament in strengthening constitutional democracy in South Africa. It strives to achieve this by enhancing fairness and efficiency in the provision of governmental services, by combating injustice and unfairness in public administration, making governmental agencies accountable for their actions and recommending corrective action.

Contact details:
Office of the Public Protector
Private Bag X677, Pretoria, 0001
Tel: (012) 366 7000
Fax: (012) 362 3473

The Office of the Auditor-General

The Office of the Auditor-General is an independent and impartial body created by the Constitution to provide independent and quality audit and related value adding services in the management of resources, thereby enhancing good governance in the public sector.

Contact details:
Office of the Auditor-General
PO Box 446, Pretoria, 0001
Tel: (012) 426 8000
Fax: (012) 426 8240


PUBLIC SERVICE COMMISSION
PSC
Custodian of Good Governance