

12 August 2016

Mr V Ramaano
Portfolio Committee on Justice
and Correctional Services

Doc Ref: MARGUERITEJ/#206710_V1

Your ref:

Direct ☎: 011 645 6707

E-✉: margueritej@banking.org.za

Per email: vramaano@parliament.gov.za

Dear Mr Ramaano

Comments on the Draft Protected Disclosures Amendment Bill 2016 (B40-2015)

With respect to the draft Protected Disclosures Amendment Bill ("the Bill") published for comment, we thank you for the opportunity to comment, and submit the following comments for consideration in the finalisation of the Bill.

1. General Comments

- 1.1 In general, we support the Bill, subject to consideration of the comments noted in this submission.
- 1.2 The Bill moves into the developing and less clear aspects of Labour Law, in that it extends certain traditional employer-employee rights and duties into client-independent contractor-worker relations. It is therefore critical that the various statutory provisions, and specifically concept definitions, are carefully aligned in the various statutes that may apply so as to prevent any unintended interpretation confusions or conflicts. In this regard the following definitions in the Bill need careful scrutiny (e.g. by the State Law Advisor): "**business**", "**employee**", "**temporary employment service**" and "**worker**".
- 1.3 The Bill introduces the concept of *ex-employee* or *ex-worker* (new definitions of "employee" and of "worker"), with consequent statutory duties or rights on the individual and employer/client concerned. As currently phrased in the Bill this statutory provision is indefinite in time, which may have unintended consequences as evidence, memories, persons, etc, change over time. It is recommended that a specific time period be introduced in the Bill relating to its application to ex-employees or ex-workers, say 3 years from becoming an "ex".

2. Specific comment

2.1 Definition of 'temporary employment service'

We suggest that the definition of "**temporary employment service**" should not reference the defined term and hence we suggest that the definition be amended to read as follows:

'temporary employment service' means any person who, for reward, procures for or provides to a client other persons who –

(a) render services to, or perform work for, the client; and

(b) *is remunerated by the person who procured the services or work to be rendered and not the client.*

Sub-section (c) of the definition of “**worker**” should be amended, in light of the definition of temporary employment service, to read:

(c) *any person employed by a temporary employment service.*

2.2 Insertion of clause 3B: Duty to inform employee or worker

This clause introduces an onus on an employer to revert in writing to an employee/worker regarding the outcome of a protected disclosure. We would like to caution

In light of the terms “**worker**” and “**employee**” being amended to cater for previous employees and workers (particularly in instances where at the point of the protected disclosure the person was employed / worked for the employer and at the point of the employer providing feedback, the person is no longer employed with / works for the employer), to what extent is an employer obliged to track down such employee / worker, to provide such feedback? We suggest that wording such as “practicable and reasonable steps to be taken to inform the employee or worker.”

In addition, the defined term “**disclosure**” includes criminal offences. It places an employer (and the like) in a difficult position to determine when and to what extent such information should be disclosed i.e relating to –

- the reasons why the matter is not being investigated, (i.e. if banks are involved in sting operation etc); or
- providing feedback re the outcome of an investigation, without breaching other pieces of legislation (i.e. FICA, in terms of tipping off).

2.3 Clause 9B: Disclosure of false information

We welcome this protection of employers/independent contractors from false information disclosures, although the unspecified fine amount or 2 years’ imprisonment would seem a poor disincentive for false disclosures given the potential damage that such false information could cause. However, the Bill is silent on any possible remedies for the damages that may have been caused to the falsely-maligned entity, from official or public sources (e.g. wrongful investigations or prosecutions, media speculation, reputational damage). While civil remedies are available, these processes are extremely expensive and drawn out, and any possible costs and punitive awards against the individual concerned are highly likely to remain unmet. Perhaps the extent of any damages to the entity should be taken into account by the court as an aggravating factor in the sentencing, as is being provided for in the draft Cybercrime and Cyber Security Bill.

We are at your disposal to discuss our comments and any other matters should it be required.

Regards



Marguerite Jacobs
General Manager: Legislation and Regulatory Oversight

