**SUMMARY OF SUBMISSIONS TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE PROTECTED DISCLOSURES AMENDMENT BILL [B 40 OF 2015] AND RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**Table 1 reflects general recommendations and the DOJCD’s response**

**Table 2 provides a clause by clause summary of the submissions and the DOJCD’s response**

**TABLE 1**

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| **NAME OF DEPARTMENT/INSTITUTION** | **COMMENTS/RECOMMENDATIONS** | **DOJCD RESPONSE** |
| **Banking Association South Africa (BASA)** | (a) Supports the Bill. | (a) Noted.  |
| (b) The Bill introduces the concept of “ex-employee” and “ex-worker” which is “indefinite in time, which may have unintended consequences as evidence, memories, persons, etc, change over time”. Recommends that a specific period e.g. 3 years be introduced to the application of “ex-employees” or “ex-workers”.  | (b) Proposal is not supported. Not clear why a limitation of this nature should only apply in respect of “ex-employees or workers”. A restriction of this nature may have the unintended consequence of placing a restriction on the provisions of other legislation, for example, section 18 of the Criminal Procedure Act, 51 of 1977, which deals with the prescription of the right to institute prosecutions.The Department is of the view that the proposed restriction is not in the interest of disclosing improprieties in the workplace. An employee or worker should not be prevented from making a disclosure merely because there may be a possibility that the matter cannot be investigated due to a lack of evidence. |
| **Cape Bar (GCB Parliamentary Committee) (GCB)** | (a) The proposed amendments, insofar as “workers” are concerned, provides adequately for workers who make protected disclosures. | (a) Noted. |
| (b) The proposed provision dealing with the joint liability of employers and their clients “… are unambiguous and uncontentious.”. | (b) Noted. |
| **Commission for Gender Equality (CGE)** | Supports the Bill. Supports the extension of the ambit of the Act to include independent contractors, consultants, agents and persons who worked for an employer. | Noted. |
| **Congress of South African Trade Unions (COSATU)** | Welcomes and supports the Bill, especially―(i) extension of ambit to include “workers” and “temporary employment services”;(ii) synchronisation of the term “unfair discrimination” in the Act with other legislation dealing with unfair discrimination;(iii) the proposed inclusion of “being threatened or subject to civil claims” for making disclosures;(iv) joint liability of the employer and client;(v) the introduction of the provision providing workers with the right to seek relief from any court;(vi) duty to inform; and(vii) exclusion of civil and criminal liability. | Noted. |
| **Corruption Watch (CW)** | (a) Welcomes the proposed extension of the ambit of the Act. | (a) Noted. |
| (b) Recommends that sanctions should be included in the Act in respect of employers who do not comply with the provisions of the Act. Personal liability should be considered where employers do not comply with the provisions of the Act. | (b) The SALRC recommended that it would not be appropriate to create an offence in respect of an employer who subjects an employee to an occupational detriment.The aim of the PDA is to protect employees from being subjected to occupational detriment, and if they are subjected to provide them with certain remedies. The Bill aims to extend the remedies that are available to employees who have been subjected to occupational detriment. Since the remedies that are available are to be extended it is not clear what benefit the introduction of a criminal offence will bring. The purpose of an offence or any other sanction is to merely punish the employer without any reference to personal circumstances of the employee. In conclusion it is argued that the available civil remedies are regarded as sufficient measures to protect the interests of employees.  |
| **Open Democracy Advice Centre (ODAC)** | (a) The extension of protection to workers and those in temporary employment services is absolutely necessary. | (a) Noted. |
| (b) Section 10 guide does not provide enough practical advice to employers on how the Act can be implemented. The guide should be revised. | (b) The guide will, among others, as a result of the amendment of the Act have to be revised. The proposal will receive the necessary attention during that process. |
| (c) Financial incentives: Persons who make disclosures should be proactively protected by means of financial compensation. The G20 supports such an approach. The making of disclosures can have certain financial burdens, such as occupational detriment and difficulty in establishing re-employment. Recommends the inclusion of a provision which is similar to the one reflected in the National Environmental Management Act: **Award of part of fine recovered to informant** **34B.** (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. | (c) Section 61 of the Marine Living Resources Act, 18 of 1998 (Annexure “A”), section 60 of the National Forest Act, 84 of 1998 (Annexure “B”), and section 34B of the National Environmental Act, 107 of 1998 (Annexure “C”), contain reward provisions. These Acts are restricted in their application to environmental matters. The ambit of the PDA, on the other hand, is much larger and the application of the Act extends to each and every employer and employee relationship. The inclusion of a reward system in the PDA may give rise to certain negative consequences. It may leave institutions vulnerable to information peddling, especially with regard to sensitive information. There may also be a shift in emphasis from disclosures being made in the public interest to disclosures that are made solely for purposes of financial gain. The provisions of the PDA are based, among others, on the principle that every employer and employee has a responsibility to disclose criminal and every other irregular conduct in the workplace. The objects of the PDA are therefore in line with the National Development Plan which, among others, with regard to fighting corruption calls for public servants to maintain a high standard of professional ethics. The concern is that the introduction of a reward system will bring about a shift in the emphasis of the PDA from disclosure of improprieties in the public good to disclosures for purposes of financial gain. The disclosure of information in the public interest with the view to remedying improprieties remains one of the corner stones of the PDA. This fundamental principle should be retained in our legislation with the view to building integrity which is an essential component of achieving good governance as confirmed in the National Development Plan. It is also crucial to note that the ability to make a protected disclosure may also be abused to stall or circumvent lawful activities of public bodies, such as the procurement of goods or services. Disgruntled service providers may go to great lengths, including attempts to mask their actions as protected disclosures, in order to stall or unduly delay processes which are lawfully executed. It is therefore necessary to create a balance between disclosures which are *bona fide* and those that are not. In view of the aforementioned the Department does not support the introduction of financial incentives. |
| (d) Expansion: The section 8 bodies, namely the Public Protector and Auditor-General, exclude other bodies that are capable of doing something about allegations. Recommends that, among others, SAHRC, CGE, Electoral Commission, Speaker of the National Assembly and Commissioner of SAPS be included in section 8 of the Act. | (d) The Department does not support the proposal that section 8 of the PDA should be amended by including additional entities to which disclosures may be made.The SALRC recommended that it would be preferable to make regulations in terms of section 8 as opposed to amending the PDA. The Department supports the recommendation.The Department is of the view that it will not be feasible to amend section 8 of the PDA by inserting references to certain bodies for a number of reasons, one of them being that it will not be possible to designate them automatically without consulting with the respective bodies in order to determine whether they would be willing to be included in the list and in order to ascertain the different improprieties they would be able to investigate.    This approach would ensure, after a process of consultation has taken place that persons or bodies could be included or excluded from the regulations as the need arises and with relative ease.  |
| (e) Confidentiality: Act contains no express obligation to protect a person’s identity. “Confidentiality being preserved between the two parties as a proactive obligation mitigates against the detriments the Act seeks to avoid. Recommends that a breach of confidentiality should be included in the definition of occupational detriment.  | (e) Disclosure of the identity of a whistleblower is not the only information which could cause harm and is in need of protection. A person identified by a whistleblower also deserves protection from malicious or bona fide but erroneous disclosures. There is a need to treat all information including the subsequent investigation relating to the disclosure of improprieties confidential. Information relating to a protected disclosure should only be discussed or disclosed to a person who has a legitimate right to such information or for the purposes of investigating the disclosure or in order to compile a report or convey a recommendation in connection with the disclosure.The introduction of a blanket prohibition against revealing the identity of a whistleblower is not conducive to the proper investigation of such disclosure. |
| **Public Service Commission (PSC)** | (a) Recommends that employers who subject employees to occupational detriment should be subject to criminal liability. | (a) See paragraph (b) under the response to the comments of CW. |
| (b) The PDA should be amended to ensure that the identity of persons who make disclosures should remain confidential. | (b) See paragraph (e) under the response to the comments of ODAC. |
| (c) A Public Servant Disclosure Protection Tribunal should be created for public servants and must be empowered to―\* impose sanctions where employees are subjected to occupational detriment;\* re-instate suspended officials; and\* award compensation for financial loss and pain and suffering. | (c) The proposal does not take the ambit of the Act, namely being applicable to both public and private sectors, into consideration. The proposed extension of the remedial action that is available to persons who make protected disclosures and the remedies that are available in terms of the existing labour law are sufficient to address those cases of occupational detriment that employees may be subjected to as a result of having made protected disclosures. |
| (d) Employers should be obliged to implement internal procedures which could be used by employees to make disclosures. | (d) The proposed amendment of section 6 of the PDA makes provision for an obligation to introduce internal procedures. |
| (e) Employees who make false disclosures should be subjected to criminal sanction. | (e) The proposed new section 9B gives effect to the recommendation. |
| (f) The Witness Protection Act should be amended to provide for the physical security of persons who make disclosures and investigators who investigate improprieties. | (f) The proposal is not supported. It should be noted that a wide range of disclosures are catered for in terms of the Act, from disclosures relating to cases of discrimination to serious offences. The PDA aims to protect an employee or worker from being subjected to occupational detriment. The Act therefore focuses on an employee or worker and his or her working environment.The Witness Protection Act, 112 of 1998, already provides for persons to be placed under witness protection in cases of serious offences.  |
| (g) Any interference with or intimidation of investigators should be subject to criminal sanction. | (g) The ambit of the PDA is limited to employees and workers and therefore only deals with the protection of employees and workers from being subjected to occupational detriment. Interference with the work of investigators is a matter which is usually dealt with in legislation dealing with the powers, functions and duties of investigators.  |
| (h) The section 8 bodies should be extended to include all those that have been mentioned by the SALRC, including the Public Service Commission. | (h) See paragraph (d) under the response to the comments of ODAC. |

**TABLE 2**

| **CLAUSE****PROVISIONS** | **NAME OF DEPARTMENT/****INSTITUTION** | **COMMENTS/****RECOMMENDATIONS** | **DOJCD RESPONSE** |
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| **1. Clause 1: Amendment of section 1 of Act 26 of 2000** |
| *(c)* by the substitution for the definition of ‘‘*employee*’’ of the following definition:‘‘ ***‘employee’*** means—*(a)* any person, excluding an independent contractor, who works or worked 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 or assisted in carrying on or conducting or conducted the business of an *employer*;’’;*(d)* by the substitution for the definition of ‘‘*occupational detriment*’’ of the following definition:‘‘ ***‘occupational detriment’***, in relation to **[the working environment of]** an *employee* or a *worker*, 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 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;**[*(h)*]** *(i)* being threatened with any of the actions referred to in paragraphs *(a)* to **[*(g)*]** *(h)* above; or**[*(i)*]** *(j)* being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, **[and]** work security and the retention or acquisition of contracts to perform work or render services;’’;*(f)* by the insertion of the following definition after the definition of ‘‘*protected disclosure*’’:‘‘ ***‘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)* are remunerated by the *temporary employment service*;’’;*(g)* by the insertion of the following definition after the definition of ‘‘*this Act*’’:‘‘ ***‘worker’*** means—*(a)* any person who works or worked for another person or for the State; or*(b)*  any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an *employer* or client, as an independent contractor, consultant, agent; or*(c)* any person who renders services to a client while being employed by *a temporary employment service*.’’. | **BASA** | (a) The term “temporary employment service” should not be repeated in the definition itself. Recommends that paragraph *(b)* be amended as follows: “*(b)* are remunerated by the **[temporary employment service]** person who procured the service or work to be rendered and not the client.”(b) Paragraph (c) should, in view of proposal regarding “temporary employment service, be amended as follows: *“(c)* any person **[who renders services to a client while being]** employed by *a temporary employment service*.’’. | (a) The proposal is on a technical level sound. However, section 198(1) to (3) of the Labour Relations Act (Annexure “D”) already defines what temporary employment services are. For purpose of consistency the definition should be retained as it is reflected in the Labour Relations Act.(b) For purpose of consistency the definition should be retained as it is. |
| **CGE** | (a) Supports reference to the Employment Equity Act, 1998, and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, in the definition of “disclosure” to the extent that any discrimination on the basis of gender is prohibited.(b) Definition of “occupational detriment” (clause 1*(d)*). Recommends that an additional detriment, namely “the imposition of any unfair restraint of trade on an employee or former employee” be included in the definition. | (a) Noted.(b) The definition of “occupational detriment” is wide enough to include “the imposition of any unfair restraint of trade” to the extent that the definition concerned provides, among others, that an occupational detriment manifests where a person is “adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security” as a result of having made a protected disclosure. The proposal is not supported. It is submitted that the definition is an open-ended one to cater for all instances where a person is subjected to any form of detriment as a result of having made a protected disclosure. |
| **ODAC** | (a) “In view of the proposed new section 9A, section 1(d) [the definition of “occupational detriment”] which excludes those who have committed an offence, should include the caveat “subject to section 9A”, in order to avoid circularity.”(b) “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 the 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.”. | (a) The Department is of the view that the definition of “protected disclosure” read with the proposed new section 9A is clear. However, the Department will consider the matter further and provide the Portfolio Committee with feedback during its deliberations on the Bill.(b) The wording of the proposed new paragraph (h) is clear to the extent that the definition refers to a “criminal offence” only, i.e. an offence in terms of the criminal law. The wording of paragraph (h) cannot be interpreted to include so-called “workplace offences”. |
| **South African Reserve Bank (SARB)** | (a) The term “employer” is defined as follows in the principal Act:**'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;The SARB expressed the view that an employee who works for a subsidiary of a holding company who makes a protected disclosure about the holding company to the subsidiary will not be entitled to exercise remedies in terms of the Act, if the subsidiary subjects him or her to an occupational detriment under the express or implied authority of the holding company. Recommends that the definition of “employer” be amended by including a reference to “any person affiliated with the persons defined in (a) and (b)” of the definition of employer. (b) Recommends that the words “or received” in paragraph *(a)* of the definition of “employee” be inserted after the words “or is entitled to receive”. | (a)The proposal is not supported.  It is not clear whether a disclosure to a subsidiary in respect of a holding company will serve any useful purpose.  It is doubted whether a subsidiary will be able to address an impropriety that takes place in a holding company.  An employee or worker will, under the circumstances, probably have to decide between a disclosure in terms of section 8 of the PDA or a general protected disclosure in terms of section 9 of the Act in order to address the impropriety. (b) Proposal is supported. |
| **CW** | (a) Is concerned that individuals who occupy positions of authority and governance are not regarded as being in an employment relationship. Members of school governing bodies, members of boards who are responsible for trusts, companies and voluntary associations should be included within the definitions of the employment relationship for purposes of the Act.(b)(i) Definition of occupational detriment – “being subjected to any civil claim”. Restriction to disclosures of criminal offence is too narrow. Employees and workers should be protected when making disclosures about procurement irregularities, breach of legal obligations and other information referred to in definition of “protected disclosure”.(ii) Definition of occupational detriment should include prohibition on initiating criminal proceedings against employees and workers. The restriction to civil liability reduces the protection offered to employees and workers.(iii) Definition of “protected disclosure”: Employees or workers may be subjected to occupational detriment for breaching legislative prohibitions on disclosing information. Most legislative prohibitions create offences which will exclude employees and workers from section 1(e)(i) of the Act. For example, section 22 of the Financial Services Board Act, 97 of 1990, provides limited circumstances under which information that has been obtained in the performance of any power or function under the Act or under sections 45 and 45B of the Financial Intelligence Centre Act, 38 of 2001, may be utilized or disclosed by board members, employees and other recipients of information. Section 27 of the FSB Act provides that a person who contravenes section 22 is guilty of an offence. An employee who discloses information in violation of section 22 of the FSB Act commits an offence and cannot be protected from occupational detriment.(iv) In deciding the reasonableness of a general protected disclosure in terms of section 9(3), consideration may be had to whether the disclosure was made in breach of a duty of confidentiality of the employer towards any other person. The provision is at odds with the proposed amendment of the definition of “occupational detriment” which aims to protect employees and workers who breach confidentiality agreements when making a protected disclosure. | (a) Persons who occupy positions of authority and governance “assist in carrying on or conducting the business of an employer”. The phrase is included in the definition of employer and it is submitted that persons who, for example serve on school boards, are already included within the ambit of the Act.(b)(i) The proposal is not supported. Any breach of confidentiality is a serious matter. The disclosure of a criminal offence is of a serious enough nature to justify the alleged breach of confidentiality. (ii) The definition of “occupational detriment” is wide enough to include “initiating criminal proceedings against employees or workers” to the extent that the definition provides, among others, that an occupational detriment manifests where a person is “adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security” as a result of having made a protected disclosure. The proposal is not supported. It is submitted that the definition is an open-ended one to cater for all instances where a person is subjected to any form of detriment as a result of having made a protected disclosure.However, it is unlikely that an employer will succeed in initiating criminal proceedings against an employee or worker to the point where a prosecution is instituted against the employee or worker. Only the Prosecuting Authority decides whether to institute a prosecution or not. (iii) The examples referred to do not fall within the ambit of the PDA. Restrictions in other legislation with regard to the disclosure of information relate to the powers that are exercised by employees. These powers generally relate to investigations conducted by statutory bodies. It stands to reason that information obtained during an investigation falls in a different category than knowledge of any impropriety in an employee’s own work environment. (iv) The proposed amendment of the definition of occupational detriment is limited to those instances where a disclosure of a criminal offence has taken place. The requirement is not at odds with the provisions of section 9(3) of the PDA. The disclosure of an offence in breach of a confidentiality agreement is only one of a number of factors that a court has to take into consideration, on a case by case basis, in order to determine the reasonableness of a disclosure that has been made under section 9. |
| **Clause 4: Insertion of sections 3A and 3B in Act 26 of 2000** |
| **Joint liability****3A.** Where an *employer*, under the express or implied authority or with the knowledge of a client, subjects an *employee* or a *worker* to an *occupational detriment*, both the *employer* and the client are jointly and severally liable. | **CGE** | Supports proposed new section which will ensure that employers and contractors do not escape liability by “shifting blame in the event of contraventions”. | Noted. |
| **Duty to inform employee or worker****3B.** (1) Any person or body to whom a *protected disclosure* has been made in terms of section 6, 7 or 8, respectively, must, subject to subsection (3), as soon as reasonably possible, but in any event within 21 days after the *protected disclosure* has been made—*(a)* decide whether to— (i) investigate the matter or not; or (ii) refer the *disclosure* to another person or body if that *disclosure* could be investigated or dealt with more appropriately by that other person or body; and*(b)* in writing acknowledge receipt of the *disclosure* by informing the *employee* or *worker* of the decision— (i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; (ii) not to investigate the matter and the reasons for such decision; or (iii) to refer the *disclosure to* another person or body.(2) The person or body to whom a *disclosure* is referred as contemplated in subsection (1)*(a)*(ii) must, subject to subsection (3), as soon as reasonably possible, but in any event within 21 days after such referral—*(a)* decide whether to investigate the matter or not; and*(b)* in writing inform the *employee* or *worker* of the decision— (i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; or (ii) not to investigate the matter and the reasons for such decision.(3) The person or body, referred to in subsection (1) or (2), who is unable to decide within 21 days whether a matter should be investigated or not, must—*(a)* in writing inform the *employee* or *worker*— (i) that he, she or it is unable to take the decision within 21 days; and (ii) on a regular basis, at intervals of not more than two months at a time, that the decision is still pending; and*(b)* as soon as reasonably possible, but in any event within six months after the *protected disclosure* has been made or after the referral has been made, as the case may be, in writing inform the *employee* or *worker* of the decision— (i) to investigate the matter, and where possible, the time-frame within which the investigation will be completed; or (ii) not to investigate the matter and the reasons for such decision.(4) The *employee* or *worker* must, at the conclusion of an investigation, be informed of the outcome thereof.’’. | **Auditor-General South Africa***(comments dated 4/07/2014)* | The proposed new section 3B *(which was circulated for comment in May and June 2014)* creates a peremptory duty to investigate or refer disclosures. The duty is in conflict with section 5(1)(d) of the Public Audit Act, 25 of 2004 which provides as follows:“The Auditor-General may, at a fee, and without compromising the role of the Auditor-General as an independent auditor, provide-   *(a)*   …. *(c)*   *(d)*   carry out an appropriate investigation or special audit of any institution referred to in section 4 (1) or (3), if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request.”.The provision above gives the AG discretionary powers by means of the use of the word “may”. The AG requested that the conflict be addressed. | The comments of the AG were submitted to the Department in response to consultation that was conducted by the Department in May and June 2014.The concern that was expressed was accommodated in the version of the Bill that was introduced into Parliament to the extent that an obligation is placed on the institution concerned to decide whether to “investigate the matter or not” or to “refer the disclosure to another person or body”. |
| **SARB** | The proposed new subsection (4) provides as follows: “(4) The *employee* or *worker* must, at the conclusion of an investigation, be informed of the outcome thereof.”The SARB recommends that the subsection should be amended as follows: “(4) The person or body, referred to in subsection (1) or (2) must **[*employee* or *worker* must,]** at the conclusion of an investigation**[, be informed]** inform the employee or worker of the outcome thereof.” | The proposed amendment is supported. The Department recommends that the Portfolio Committee approves the proposed amendment. |
| **BASA** | BASA, with regard to the duty to revert to the employee or worker, points out that―(i) the terms “employee” and “worker” include ex-employees and ex-workers which may sometimes be difficult to track down. BASA recommends that the phrase “practicable and reasonable steps to be taken to inform the employee or worker” should be inserted in the requirement;(ii) the term “disclosure” includes criminal offences. Duty to revert to employee places an employer in a difficult position to determine when and to what extent such information should be disclosed relating to― \*\* the reasons why the matter is not being investigated (i.e. if banks are involved in sting operations); or \*\* providing feedback regarding the outcome of an investigation, without breaching other pieces  of legislation (i.e. FICA, in terms of tipping off).  | (i) Since there may be circumstances in which it may be difficult to contact the persons who have made a protected disclosure, the proposal appears to be sound. The Department is not opposed to the proposed amendment.(ii) The concerns that have been expressed are noted. The Department is not opposed to including a caveat in the provision to avoid prejudice to the maintenance of the law insofar as the prevention, detection and investigation of offences are concerned. |
| **ODAC** | (a) Recommends that the 21 day period be reduced to 14 days.(b) Expresses concern with regard to the provisions of the proposed new subsection (3) because it renders the 21 day period superfluous. An employer can avoid making a decision for an extended period of six months with no need for justification. Recommends reducing six months to three months.(c) The notice in terms of the proposed new subsection (4) should be in writing. | (a) The Departments submits that 21 days is a reasonable period. It may be that an employee may make a protected disclosure on day one, but the disclosure may only come to the attention of an employer a few days later. It is only fair towards an employer to provide him or her with a reasonable period in order to decide what to do.(b) The requirement is that an employer must decide “as soon as reasonably possible” what to do. In cases where a disclosure reveals information of a clear impropriety in the workplace a shorter period, based upon the facts of the case, will apply, but certain disclosures may involve information that require further preliminary investigations before an employer will be in a position to make an informed decision regarding the way forward. In this regard the Department submits that the period provided for is reasonable.(c) The proposal is not supported. Some employers allow for anonymous disclosures to be made and a requirement of notifying the employee or worker concerned in writing will defeat the purpose of such disclosures. |
| **CW** | (a) The proposed new subsection (3)(b)(ii) should be amended to require “detailed reasons” to be provided to the employee or worker. This is essential to hold the employer accountable for any arbitrary decisions and to ensure that the employee or worker is able to interrogate whether the employer has applied his or her mind.(b) The duty to inform should extend to section 9 situations. Employers should report on steps taken in relation to general protected disclosures. | (a) The procedures provided for by the PDA are conducive to disclosures being made to the employer. Employers who do not act upon disclosures that have been made by their employees or workers do so at their own peril. This is so because an employee or worker is at liberty to make the same disclosure to another body or institution. However, the proposal for reasons to be provided is sound.  The Department recommends that a requirement of “adequate reasons” be included in the provision. (b) In many instances general protected disclosures will be made without the employer knowing the identity of the employee or worker concerned. It will therefore not serve any useful purpose to introduce such an obligation.  |
| **GCB** | Persons who make disclosures can apply to review a government department’s decision taken in accordance with the proposed section 3B(3). Provisions should be made “… to prevent private entities from properly investigating disclosures made to it by providing for its decision to be reviewed/appealed against if and when necessary.”. | The Department does not support the proposed amendment because it stands to reason that if an employee or worker in the private sector has made a disclosure to his or her employer and the employer does nothing about the disclosure that the employee or worker is free to make a wider disclosure in accordance with the provisions of the Act. |
| **Clause 5: Amendment of section 4 of Act 26 of 2000** |
| Section 4 of the principal Act is hereby amended—*(a)* by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words: ‘‘Any *employee* who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, or anyone acting on behalf of an *employee* who is not able to act in his or her own name, may—’’;*(b)* by the insertion of the following subsections after subsection (1):‘‘(1A) Any *worker* who has been subjected, is subjected or may be subjected, to an *occupational detriment* in breach of section 3, or anyone on behalf of a *worker* who is not able to act in his or her own name, may approach any court having jurisdiction for appropriate relief.(1B) If the court or tribunal, including the Labour Court is satisfied that an *employee* or *worker* has been subjected to or will be subjected to an *occupational*  *detriment* on account of a *protected*  *disclosure*, it may make an appropriate order that is just and equitable in the circumstances, including— *(a)*  payment of compensation by the *employer* to that *employee* or *worker*; *(b)* payment by the *employer* of actual damages suffered by the *employee* or *worker*; or *(c)* an order directing the *employer*  to take steps to remedy the *occupational detriment*.’’;*(c)* by the substitution in subsection (2) for paragraphs *(a)* and *(b)* of the following paragraphs: ‘‘*(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 *(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]** section 186(2) of that Act, and the dispute about such an unfair labour practice must follow the procedure set out in **[that Part]** section 191: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.’’; and*(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.’’. | **CGE** | Recommends that the following paragraph be inserted after the proposed new subsection(1B)*(c)*:*(d)* Where the cause of action relates to any unfair dismissal then the matter may be treated as urgent. | The proposal is not supported. The proposed extension of the remedies that will be available to employees and workers does not justify preferential treatment in terms of the labour law in comparison to other employees or workers. |
| **ODAC** | Commends the expansion of the remedies provided for in the proposed new subsection (1B). | Noted. |
| **SARB** | Section 4(1) should be amended as follows: “(1) Any *employee* who has been subjected, is **[subject]** subjected or may be subjected, to an *occupational detriment* in breach of section 3, may-“ | The proposed amendment is supported. |
| **COSATU** | Objects to replacing the word “must” in section 4(2)*(a)* with the word “may”. They argue that the word ‘may” weaken the rights and protection of workers. | This is a consequential amendment as a result of the proposed extension of the remedies that are available to employees and workers. |
| **COSATU** | Recommends that subsection (4) be removed from the Act. Is strongly opposed against a worker’s “deterioration in terms of conditions”. Unscrupulous employers may take advantage of the situation to the detriment of workers. | This measure was included for the protection of employees in big organisations who could be transferred to other sections of the organisation concerned. Some employees or workers will be willing to retain employment at less favourable employment in order to avoid being victimised further. |
| **Clause 6: Amendment of section 6 of Act 26 of 2000** |
| **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* or *worker’s employer* for reporting or otherwise remedying the *impropriety* concerned; or*(b)* to the *employer* of the *employee* or *worker*, where there is no procedure as contemplated in paragraph *(a)*,is a *protected disclosure*.(2) *(a)* Every *employer* must—(i) authorise appropriate internal procedures for receiving and dealing with information about *improprieties*; and(ii) take reasonable steps to bring the internal procedures to the attention of every *employee* and *worker*.*(b)* Any *employee* or *worker* 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*. | **CGE** | Recommends that the following be inserted as a new subsection (2)*(c)*:*(c)* Every employer must keep a record of all disclosures made by an employee or worker including what steps were taken in any disclosure which will include steps to protect an employee or worker. | The Department does not support the proposal. The requirement will detract from the proper aim of a disclosure, namely, to report improprieties in the workplace with the objective of ensuring that the employer acts upon the information that has been disclosed. |
| **ODAC** | Recommends, irrespective of the proposed new subsection (2)*(a)*, that subsection (1)*(a)* should be amended to avoid the situation that an employee or worker finds himself or herself in a gap between subsection (1)(a) and (b). The following amendment is recommended: (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*. | The proposal is supported. |
| **Clause 7: Amendment of section 7 of Act 26 of 2000** |
| 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* or *worker’s**employer* is— | **CGE** | Recommends the following amendment:Any *disclosure* made in good faith to a member of Cabinet, any member or Committee of the National Assembly regarding any constitutional institution, or of the Executive Council of a province is a *protected disclosure* if the *employee’s* or *worker’s**employer* is— | The proposed amendment does not fit into the ambit of section 7 of the Act. Section 7 only relates to disclosures that may be made to members of the Executive where employees or workers work for institutions that are accountable to members of the executive. It will serve a better purpose to include a member or Committee of the National Assembly in the regulations to be promulgated in terms of section 8 of the Act. It is also not clear why the proposal is limited to the National Assembly and does not include reference to the National Council of Provinces. These are the matters that could be addressed during the process of consultation with the view to preparing section 8 regulations.It should also be kept in mind that disclosures to members of the National Assembly are not prohibited. Such disclosures are regulated in terms of section 9 of the PDA as general protected disclosures. |
| **Clause 10: Insertion of sections 9A and 9B in Act 26 of 2000** |
| ‘‘**Exclusion of civil and criminal liability** **9A.** (1) A court may find that an *employee* or *worker* who makes a *protected disclosure* of information in accordance with paragraph *(a)* of the definition of *disclosure* which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed 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*. | **SARB** | (a) Points out that inclusion, in the proposed new subsection (1), of the term “reasonably” in the phrase “reasonably likely to be committed” introduces a different standard to the standard that has been created in paragraph *(a)* of the definition of “disclosure”. (b) The phrase “which shows or tends to show” is already incorporated into the definition of “disclosure”. The two provisions should be aligned as follows: (1) A court may find that an *employee* or *worker* who, in good faith, makes a *protected disclosure* of information in accordance with paragraph *(a)* of the definition of *disclosure* **[which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed]** 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. | (a) The proposed amendment is supported, by deleting the word “reasonably”.(b) The proposed omission of the words is supported. |
| **ODAC** | (a) Supports the proposed new provision.(b) The intention of the provision is to protect persons who disclose improprieties. The requirement that the provisions of the new provision only apply in respect of a disclosure of an offence “… may be unintentionally restricting.”. Recommends that wording similar to the Access to Information Act be used. The following provision is recommended: **9A.** (1) Notwithstanding any other provision of this Act a person who makes a disclosure of information which― *(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 records 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.The above proposal, according to ODAC, will “… present drafting consistency with existing law”. | (a) Noted.(b) The Department does not support the granting of blanket immunity from all categories of protected disclosures. A person may, for example, be subject to a secrecy clause or duty of confidentiality and by making a disclosure may disclose information which may be highly sensitive. The disclosure of certain information may compromise the security of the country or be detrimental to the livelihood of an employer. The substance of the disclosure must be of such a serious nature that it justifies breaching, for example, the secrecy or confidentiality agreement and being granted immunity from liability. The Department is of the view that immunity from liability should only be granted where a criminal offence has or is being committed. The ambit of the PDA differs drastically from that of the Promotion of Access to Information Act. The proposed provision is too wide and extends beyond the disclosure of offences. |
| **CW** | The limitation to disclosures of criminal offences is a significant reduction in protection of whistle-blowers. Recommends that protection should be extended to all aspects referred to in definition of “protected disclosure”. | See response under paragraph (b) to comments by ODAC above. |
| **Disclosure of false information** **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.’’. | **BASA** | Civil remedies are available to address damage caused by a false disclosure, but processes are expensive and drawn out. Recommends that any damage to an entity or person should be taken into account by a court as an aggravating factor in sentencing. | The Department does not support the recommendation. Courts are free to take any factors into consideration in mitigation or aggravation of sentence.Including the proposed factors in the provision concerned might become a determining factor in persuading persons not to make disclosures. |
| **CW** | The sanction that disclosures that are made in bad faith do not qualify as “protected disclosures” already exists in terms of the Act. The introduction of an offence is unnecessary and may deter employees and workers from making disclosures. | The disclosure of deliberately or recklessly false information does not qualify as a protected disclosure in terms of the PDA. The concern in this regard is that this principle is not expressly stipulated in the Act. The principle is captured in the “good faith” requirement which is a pre-requisite for any of the four procedures for a protected disclosure as referred to in sections 6 to 9 of the PDA. These four procedures have been introduced, as stipulated in section 2(1)*(c)* of the Act, to ensure that an employeecan, in a responsible manner, disclose information regarding improprietiesby his or her employer. The PDA places a high premium on the responsible manner in which employees must disclose information regarding improprieties. However, the Act only deals with one consequence of a false disclosure, namely that such a disclosure does not qualify as a protected disclosure. It does not deal with the other more serious consequences of a false disclosure, namely the reputational damage that such a disclosure may cause to an innocent employee or employer.   |
| **COSATU** | Expressed concern that the wording of the proposed new section 9B is too vague and may have the unintended consequence of intimidating future whistleblowers. Recommends that the wording of the provision be strengthened with the need for the employee or worker to:(i) have failed to have undertaken reasonable steps to verify the validity of the information;(ii) have made the disclosure knowing the information to be false;(iii) have done so with malicious intent; and(iv) that the affected party suffered verifiable quantifiable harm or damage as a result consequence. | The proposal, to introduce more stringent requirements for criminal liability, is supported. Criteria as suggested by COSATU will be prepared. Consideration could also be given to include wording dealing with the requirement that a false disclosure has been made with the intention to cause harm. |
| **ODAC** | Disclosure of false information does not constitute a protected disclosure in terms of the Act. A criminal provision will discourage people from raising concerns and will have a “chilling effect” on disclosures.The object of the Act is to protect person who make disclosures and not to protect information. The protection of information should be regulated by other Acts designed for that purpose. “Not only does this lead to significant confusion and overlap, but the provision also directly mitigates against the Act’s substantive purpose.”.The proposed provision contradicts international best practice and the recommendations by the SALRC. | See response to comments by CW above. |

**Annexure “A”**

**Criminal Procedure Act, 51 of 1977**

**Prescription of right to institute prosecution**

**18.** The right to institute a prosecution for any offence, other than the offences of―

*(a)* murder;

*(b)* treason committed when the Republic is in a state of war;

*(c)* robbery, if aggravating circumstances were present;

*(d)* kidnapping;

*(e)* child-stealing;

*(f)* rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;

*(g)* the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

*(h)* offences as provided for in section 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013; or

*(i)* using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,

shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

**Annexure “B”**

**Marine Living Resources Act, 18 OF 1998**

**Payment for information leading to conviction**

**61.** The Minister may from money appropriated by Parliament for that purpose and in consultation with the Minister of Finance, pay to any person, excluding a person in the employment of the State or an organ of state who has furnished any information or material of proof which leads to a conviction by a court, a remuneration in cash which, in the opinion of the Minister, is reasonable and fair in the circumstances.

**Annexure “C”**

**National Forests Act, 84 OF 1998**

**Award of part of fine recovered to informant**

**60.** (1) A court which imposes a fine for an offence in terms of this Act, may order that a sum of not more than one-fourth of the fine, be paid to any person whose evidence led to the conviction or who helped bring the offender to justice.

(2) An officer in the service of the State may not receive such an award.

**Annexure “D”**

**National Environmental Management Act, 107 of 1998**

**Award of part of fine recovered to informant**

**34B.** (1) A court which imposes a fine for an offence in terms of this Act or a specific environmental management Act may order that 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.

(2) A person in the service of an organ of state or engaged in the implementation of this Act or a specific environmental management Act is not entitled to such an award.

**Annexure “E”**

**Temporary Employment Services**

**198.** (1) In this section, “temporary employment services” means any person who, for reward, procures for or provides to a client other persons—

*(a)* who perform work for the client; and

*(b)* who are remunerated by the temporary employment service.

(2) For the purposes of *this Act*, a person whose services have been procured for or provided to a client by a temporary employment service is the *employee* of that temporary employment service, and the temporary employment service is that person’s employer.