

**NOTE: PORTFOLIO COMMITTEE: PROTECTED DISCLOSURES AMENDMENT BILL, 2015**

**False disclosures:**

1.1 Offence: The principal Act places a high premium on the responsible manner in which employees must disclose information regarding improprieties. The Act only deals with one consequence of a false disclosure, namely, that such a disclosure does not qualify as a protected disclosure and therefore do not attract the remedies that are available to a person who in a responsible and *bona fide* manner has disclosed information of a workplace impropriety.

1.2 The disclosure of information, for example, in public by a person who claims to disclose such information under the provisions of the principal Act is generally accepted as information which is not false. It may in many instances be a time consuming process before the veracity of such information can be tested in an appropriate forum. In the interim an innocent person or institution may suffer different forms of detriment which could be very similar to those that are currently defined in the Act as “occupational detriment”.

2. Other remedies: An “injured” employer or employee who is the subject of a false disclosure may institute civil proceedings in respect of *crimen injuria*. The criminal law also presents a solution to the extent that a person who discloses false information may be prosecuted for having committed defamation or fraud.

3. Commentators: Those persons or institutions who have submitted comments to the Committee are generally not in support of the introduction of an offence. However, the Banking Association of South Africa commented that “civil remedies are available to address damage caused by a false disclosure, but processes are expensive and drawn out.”. The Association supports the introduction of an offence and even recommended that “any damage to an entity or person should be taken into account as an aggravating factor in sentencing.”.

4.1 Australia: Section 11 of the Public Interest Disclosures Act, 2013, read with sections 137.1 and 137.2 of the Criminal Code provides for criminal liability in respect of “false or misleading information” and “false and misleading documents”, respectively.

4.2.1 Kenya: Section 65 of the Anti-corruption and Economic Crimes Act provides that no action or proceeding, including a disciplinary action, may be instituted against a person in respect of assistance given by the person to the Anti-Corruption Commission or an investigator or a disclosure of information made by the person to the Commission or an investigator. (It appears as if the provisions of the Act dealing with the Commission have been deleted from the Act).

4.2.2 Section 66 of the Act, among others, provides that a person who makes false accusations to the Commission or a person acting under the Act, is guilty of an offence and is, among others, liable to imprisonment for a term not exceeding five years, or to both.

4.3 Namibia: Section 52 of the Anti-Corruption Act, 2003, deals with the protection of informers and information. Section 29 of the Act provides that a person who knowingly provides false information to an authorised officer of the Anti-Corruption Commission, is guilty of an offence and is liable, among others, to five years imprisonment.

4.4 New Zealand: The Protected Disclosures Act, 2000, reflects no provision dealing with the false disclosure of information qualifying as a criminal offence.

4.5 India: Section 17 of the Whistle Blowers Protection Act, 2011, provides that any person who makes any disclosure in a *mala fide* manner and knowing that it was incorrect or false or misleading, is guilty of an offence and is liable upon conviction with imprisonment for a term of up to two years.

5. Summary: The following may be mentioned:

- (i) The principal Act requires that disclosures of workplace improprieties should take place in a responsible manner;
- (ii) employees are required to, for example, in terms of section 9 of the Act, disclose information under certain circumstances in good faith where they reasonably believe that the information disclosed, and allegation contained in it, are substantially true and who does not make the disclosure for purposes of personal gain (excluding a reward payable in terms of any law);
- (iii) the principal Act only deals with one consequence of a disclosure of false information (which leads to the commission of a criminal offence), namely, that it does not attract any protection in terms of the Act because it does not qualify as a protected disclosure;

- (iv) once information has been disclosed under the Act it is generally accepted that the information that has been disclosed is true and that the person who has made the disclosure is a *bona fide* whistleblower;
- (v) generally it may take some time before the veracity of the disclosed information can be tested in an appropriate forum notwithstanding the fact that irreparable damage may have already been suffered by an innocent party or institution;
- (vi) the disclosure of false information have a negative impact on resources that are aimed at investigating mproprieties in any workplace; and
- (vii) the principal Act should therefore stipulate clearly and unambiguously that the disclosure of false information cannot be tolerated.