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**NATIONAL ASSEMBLY**

**QUESTION FOR WRITTEN REPLY**

**PARLIAMENTARY QUESTION NO.: 448**

**DATE OF QUESTION: 26 FEBRUARY 2016**

**DATE OF SUBMISSION: 10 MARCH 2016**

**PROTECTED DISCLOSURES ACT, 2000 (ACT 26 OF 2000)**

**QUESTION: 448.   Mr M G P Lekota (Cope) to ask the Minister of Justice and Correctional Services:**

“Whether, in view of the fact that the fiscus was severely constrained and that every single rand for the public good had to be protected from being corruptly siphoned off as has been happening for a long time, the Government was taking very urgent and decisive steps to enhance protection and encouragement to a considerable level for whistleblowers to lift the lid on corruption and allow no opportunity for corrupt politicians, officials and individuals to escape exposure and rapid prosecution; If not, why not; if so, what are the relevant details?”

**REPLY:**

1.1 The Protected Disclosures Act, 2000 (“the Act”), aims to protect employees from being subjected to occupational detriment on account of having made protected disclosures. The Act also establishes procedures in terms of which employees may disclose information regarding workplace improprieties. The Protected Disclosures Amendment Bill, 2015 (“the Bill”), which was introduced into Parliament on 8 December 2015 aims, among others, to extend the ambit of the Act beyond the traditional employer and employee relationship and to grant an employee who makes a protected disclosure immunity from criminal and civil liability.

1.2 The proposed amendment of section 1 of the Act aims to bring about an extension of the ambit of the Act. The ambit of the Act is determined in terms of the definition of “employee” which essentially restricts the application of the Act to the traditional employer and employee relationship. Independent contractors are expressly excluded from the provisions of the Act. Since there is a notable increase in the use of part-time and temporary workers coupled with the trend of outsourcing, the restricted definition of “employee” excludes a growing number of people from the ambit of the Act. The aforementioned category includes independent contractors, persons employed by temporary employment services and former employees.

1.3 The proposed new sections 3A and 3B aim to introduce joint liability and a duty to inform employees who make disclosures whether such disclosures will be investigated or not. As far as joint liability is concerned the introduction of the definition of “worker” gives rise to the situation that a worker who is rendering services to a client will have two ‘employers’. This will mean that if a protected disclosure is made by a worker who is employed by an agency to either the agency or to the institution where he or she works and the entity to which the disclosure has been made meets the disclosure with an occupational detriment, the worker will be entitled to the remedies provided in terms of the Act.

1.4 A number of employees who make protected disclosures experience difficulties where they, in the absence of an obligation to give feedback or to be notified, are not notified of a decision not to investigate the disclosure or of a decision to refer the matter to another body to investigate, or the outcome of an investigation. The proposed new section 3B aims to give effect to the aforementioned.

1.5.1 The restrictive nature of the remedies currently provided for in terms of section 4 will also, in view of the proposed extension of the ambit of the Act, receive attention. The section 4 remedies, read with the Labour Relations Act, 1995 (Act No. 66 of 1995), are limited to “employees” in the strict sense and do not cater for independent contractors, consultants and agents. The proposed amendment of section 4 therefore aims to ensure that workers (independent contractors, consultants and agents) will also be enabled to exercise certain remedies if they are subjected to occupational detriment as a result of having made protected disclosures.

1.5.2 The proposed new section 4(1B), for example, will make it clear that a court may order an employer to pay compensation or actual damages to an employee or worker and further provides that a court may issue an order directing an employer to take steps to remedy the occupational detriment.

1.6 Clause 10 of the Bill aims to introduce a new section 9A in the Act which deals with the exclusion of civil and criminal liability. Since the Act does not protect persons from criminal or civil liability, it is argued that the introduction of such protection would help achieve one of the aims of the Act, namely, to facilitate and encourage disclosures. It should be noted that the new provision does not introduce blanket immunity. The need to protect certain information either in the national interest of the country or in the interest of the livelihood of an employer militates against granting blanket immunity from liability for disclosures relating to all improprieties provided for in the Act. Exposing an employer to such a risk would only be justified where the content of the disclosure is sufficiently serious, namely, where the disclosure relates to the commission of an offence. Immunity from civil and criminal liability will, in terms of the proposed new section 9A, not be automatic but will be granted subject to the discretion of the court in which an action is brought.

In recognition of Government’s initiatives to protect whistle blowers, the Office of the Chief Justice (OCJ) has adopted a Whistleblowing Policy (the Policy) that complies with the provisions of the Protected Disclosures Act, 2000 (Act No. 26 of 2000).

This Policy has been widely distributed to all officials in the OCJ and is also available on the departmental intranet. It is aimed at, amongst others, encouraging employees to report and blow the whistle on fraud and corruption by following the established channels; and also enjoins OCJ officials with the responsibility to disclose any matters that are related to fraud and corruption in the workplace. Additionally, the Policy provides that the OCJ is committed to take all necessary steps to ensure that OCJ employees who disclosed fraud and corruption allegations are protected from any reprisals or fear of suffering any occupational related detriment as a result of such disclosure.

OCJ employees may report anonymously any allegation of fraud and corruption to any member of the management of the OCJ, the Fraud Auditing Unit, the Audit and Risk Committee or to the National Anti-Corruption Hotline 0800 701 701 managed by the Public Service Commission. All reported fraud and corruption cases are recorded in the OCJ Fraud Register which is monitored by the Audit and Risk Committee and may, following an investigation, be escalated either to the OCJ’s corporate services branch, the South African Police Services or other relevant law enforcement agencies.