

# FACT SHEET

## THE PROTECTED DISCLOSURES ACT

OBLIGATIONS AND IMPLICATIONS FOR SOUTH AFRICAN EMPLOYERS



## INTRODUCTION

It may be one of the most important contributions that Human Resource Professionals can make to the sustainability of the organisations that they serve, and in turn to the socio-economic well-being of society. It is a responsibility too often approached in an ad-hoc, reactive and reluctant manner. It is the effective management of whistleblowing.

This responsibility involves the provision, promotion and safeguarding of policies, systems and a conducive culture that make it likely that those who know of or suspect unethical activity will bring it to the attention of the appropriate leaders and that their disclosures will be managed in a way that promotes ethical workplace practices.

Fulfilling this role requires our understanding of three distinct but inter-related areas of competency:

- Compliance with the relevant legislation
- The application of best practices to the management of reporting methods and report handling
- The creation of a what is commonly referred to today as a speak-up culture.

Through this Fact Sheet, we aim to support competent application and compliance with the obligations conferred on employers by South Africa's Protected Disclosures Act (PDA), first enacted in 2000 and subsequently amended in 2017. It will be followed in time by Fact Sheets covering best practices in the management of whistleblowing systems and reports, and the creation of an organisation culture conducive to employee reporting.

Being a guide to the key elements and principles contained in the legislation, this Fact Sheet is not a reprint or exhaustive explanation of the Protected Disclosures Act. We recommend that readers access the legislation from the Department of Justice and Constitutional Development at [www.justice.gov.za](http://www.justice.gov.za), and refer to it as they proceed through the Fact Sheet.

Typically, the employment legislation that the Human Resource professional is responsible for is supported by rich sources of interpretative and application guidance in the form of codes of good practice and case reports. This is not yet the case with the amended Protected Disclosures Act. For these reasons, we urge Human Resource Practitioners to seek expert legal opinion to support their policy development and case management.

While we will focus on South Africa's Protected Disclosures legislation, the principles described are echoed in similar laws in other countries. This means that our colleagues in Southern Africa and abroad will also find value in this Fact Sheet.



## THE NEED FOR WHISTLEBLOWING LEGISLATION

From Australia to Namibia, from Kosovo to Rwanda and throughout the European Union, the implementation of legislation encouraging whistleblowing and protecting whistleblowers is a global priority.

Around the world, social stability and socio-economic status is threatened by failures in governance and the often-catastrophic effects of corruption. Within businesses, between businesses and between businesses and governments, unethical conduct jeopardises organisational sustainability, national service delivery and socio-economic development.

This significant social risk is particularly well described in the Preamble to South Africa's Protected Disclosures Act No 26 of 2000:

*"Criminal and other irregular conduct in organs of state and private bodies (is) 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."*

The preamble goes on to emphasise the need to *"promote the eradication of criminal and other irregular conduct in organs of state and private bodies"*.

When one reads these words in light of the subsequent governance failures in South Africa's private and public sector in the years subsequent to the Act's promulgation, they carry an even deeper significance than when originally published in 2000. Corrupt activity has indeed endangered economic stability and caused social damage.

In the years since 2000, the speed at which information that can ruin individual and organisational reputations spreads has increased with the widespread use of social media. While some will celebrate the demise of a business intent on success by dishonest means, there are always innocent victims – employees who lose their jobs and investors who lose retirement savings.

Even organisations that are genuinely committed to ethical conduct have found themselves compromised by the exposure of unethical conduct by rogue employees within their ranks or blindsided by fraud and theft.

Small businesses without dedicated compliance resources can be especially hard hit by employee wrongdoing, possibly unable to recover from a single large fraud incident. Even well-resourced, large organisations with multiple operating locations lack the line of sight necessary for unethical conduct to be quickly detected.

What is generally true is that wherever wrongdoing has been taking place, it is likely that at least one other employee, if not many, knew what was happening - but said nothing. For numerous and often complex reasons, employees can be reluctant to disclose information about a threat to their employer, starting with a lack of awareness of their legal obligation to do so.

Prior to the introduction of the Protected Disclosures Act in 2000, there were no statutory guidelines for the making of disclosures or the protection of those who do so from reprisal. By introducing this legislation, the South African government provided us with a profoundly important foundation for the timely identification and correction of harmful practices in the workplace.

Regardless of where they work, the Human Resource Professional must serve as a knowledgeable, committed and vigilant custodian of employee disclosures and their correct handling.



## HISTORY AND KEY CONTENT

South Africa's Protected Disclosures Act was first promulgated in Act No 26 of 2000 and subsequently amended by Act No 5 of 2017.

As a basis for our later discussion of the key content of the Act, the minimum knowledge of its content required by the Human Resource practitioner is as follows:

### Scope of application

The 2000 Act set out procedures for employees, excluding independent contractors, to disclose information about unlawful or irregular conduct by their employer or other employees at their workplace. In 2017 its application was extended to former employees and 'workers' – people employed by a temporary employment service or third party who are or have been deployed in a role of service to your organisation.

### Definition of a disclosure in terms of the Act

The original Act detailed the categories of information that, if reported by an employee, would constitute a disclosure in terms of the Act. In 2017 the Act was amended by the addition of a further category: information suggesting a likely or actual non-compliance with Chapter II of the Employment Equity Act or the Promotion of Equality and Prevention of Unfair Discrimination Act.

### Reprisal, recourse and remedies

The original Act provided for the protection from reprisal of employees making disclosures, unless the employee was legally prohibited from doing so. The amendment clarified that no legal provision, such as an employment contract, confidentiality or non-disclosure agreement, can be used to prevent someone exercising their rights under the Act. The routes to recourse were clarified and more specific remedies were set out in the amendment.

### Communication obligations

Two significant communication obligations on employers were introduced by the 2017 amendments:

- A requirement that procedures for internal reporting are made available to employees and workers in writing.
- A duty to inform a whistleblower in writing, according to specific time-frames, of the receipt of the report, and what action if any is being or has been taken in response.

### Deterrence of false claims

In 2017 the Act was amended to make the provision of false information an offence and penalties for doing so were specified.

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Every employer, employee and worker 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 and workers who disclose such information are protected from any reprisals as a result of such disclosure.

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## WHAT TYPE OF INFORMATION CONSTITUTES A DISCLOSURE?

The Protected Disclosures Act does not apply to every report alleging wrongdoing in the workplace.

At first glance, it might appear that the types of information defined as disclosures in terms of the Act are quite specific and that the list limits the application of the Act. Upon careful consideration, one realises that by incorporating into the definition of a disclosure any information relating to failure to comply with a legal obligation, the scope is in fact extremely broad.

The Human Resource Professional needs to determine and advise whether a given report attracts rights and obligations in terms of the Act. In some instances, a defensible interpretation may require expert legal advice.

It may be easily determined that reports suggesting the endangerment of health and safety or a breach of environment regulations would classify as disclosures. But what of a report complaining about a given supervisor's management style? The behaviour described may be unlikeable but not illegal, or it may be unlikeable and a legal compliance failure that would make it a disclosure.

Consider the situation in which a reporter labels the supervisor's behaviour as favouritism, with an allegation that this is in favour of team members of a particular race or gender?

South Africa has well-developed and wide-ranging legislation applicable to the employment relationship that at its essence requires that all employees be treated fairly and with human dignity. In effect, there are very few reports alleging wrongdoing that arise in the workplace that will not fall within the ambit of the Act.

### WHAT MAKES A DISCLOSURE 'PROTECTED'?

Whether the disclosure is legally protected or not depends upon whether it is made:

- according to a substantively correct procedure
- not for purposes of personal gain
- without committing a criminal offence
- in good faith and is reasonably believed by the whistleblower to be true
- to the right authority (see sections 5 – 8 of the Act and the Regulations Relating to Protected Disclosures, 14 September 2018, Government Gazette No. 41904).

A disclosure is not protected if the report fulfils an existing duty of the employee. For example, an auditor cannot claim rights under the Protected Disclosures Act for making observations in the fulfilment of the normal audit scope of work.

### The Definition of a Disclosure

A disclosure refers to any information about any conduct by an employer or an employee of that employer that intends to show that

- a criminal offence has, is or is likely to be committed
- there has, is, or is likely to be a failure to comply with a legal obligation
- A miscarriage of justice has, is or likely to occur
- The health and safety of a person has, is being or is likely to be endangered
- The environment has been, is being or is likely to be damaged
- Unfair discrimination is taking place (either in terms of Chapter II of the Employment Equity Act or the Promotion of Equality and Prevention of Unfair Discrimination Act)
- That any matter related to the above list has, is or is likely to be deliberately concealed.



## UNDERSTANDING WHO YOU HAVE A RESPONSIBILITY TO

Human Resource Professionals tend to use the terms employee and worker interchangeably, but in the amended Protected Disclosures Act the term 'worker' extends your responsibilities well beyond your own workforce.

### Another key omission in the original PDA – former employees

As the original Act spoke only of employees and not former employees, a very important group of potential whistleblowers were inadvertently excluded from its protection: those who had already left an organisation's employment.

Given the fear of retaliation and anticipation of an intolerable working environment once a report is made, it is not uncommon for people to secure alternative employment before speaking out. Others find themselves 'worked out' and those who can may decide to retire. In all these cases, former employees with valuable information previously found themselves without protection in terms of the Act.

Today not only your current but your former employees and workers have rights under the Act.

While employees have been protected from retaliation and 'occupational detriment' for blowing the whistle since the Act was first enacted, it did not extend to those who work in your service but who are not direct employees. Think of the window into your business held by your contractors, consultants and agents, let alone workers contracted through a temporary employment service. Now consider that they also need the right and responsibility to report wrongdoing if the Act is to achieve its objectives.

These workers may be employed by your suppliers, but you have the power to cause them occupational detriment if you indirectly or directly threaten your supplier's continued contract unless their employee who has blown the whistle on you is redeployed.

Throughout the Amended Act, the words '*...and workers*' now follows the word 'employees,' broadening the scope of individuals who have rights and who cannot suffer occupational detriment in terms of the legislation.

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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

3A of the amended Protected Disclosures Act

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### Important to know

The Act applies to the disclosure of an impropriety regardless of whether it takes place in South Africa or elsewhere. This means that employees and workers of South African organisations at their operations in other countries, regardless of their citizenship, are protected by the Act. What's more, legal compliance disclosures would encompass both laws of South Africa and the laws of the country in which their employee or worker is located.

## OBLIGATION TO PROVIDE WRITTEN INTERNAL PROCEDURES

Some organisations have well-developed procedures readily available to all employees, while others rely on informal approaches to matters such as whistleblowing. We have all had the experience of assuming that information is easily accessible, only for employees to claim they are unaware of its existence. Even procedures agreed and supported at the highest management level do not always filter down through layers of supervision or out into satellite operations.

The amended Act requires every employer to establish and effectively communicate internal procedures for the reporting of impropriety and to communicate these to employees and workers. It is no longer sufficient to bring employees' attention to the contents of the Act. You must set out in writing how disclosures will be managed in your organisation.

You will need to dust off existing procedure documents, ensure their compliance with the amendments to the Act, make them accessible to all and provide education to ensure they are understood. The revised procedures should be a part of your new employee take-on and induction process. What's more, you need to apply your mind to how you are going to communicate your procedures to *all workers* as defined in the amended Act.

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'Every employer must authorise appropriate internal procedures for receiving and dealing with information about improprieties; and take reasonable steps to bring the internal procedures to the attention of every employee and worker'

Protected Disclosures Amendment Act No 5 of 2017

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## THE CONCEPT OF OCCUPATIONAL DETRIMENT

### What actions can constitute 'occupational detriment'?

The Act as amended defines as occupational detriment the threat or the carrying out of any of the following actions having an adverse impact on the employment status of an employee or worker in response to their making a protected disclosure:

- Any disciplinary action
- Dismissal, suspension, demotion, harassment or intimidation
- Transfer against employee's will
- Refusal of transfer or promotion
- Disadvantageous alteration of a term or condition of employment or retirement
- Refusal of or provision of an adverse reference
- Denial of appointment to any employment, profession or office
- Subjection to civil claim for the alleged breach of a duty of confidentiality arising from the disclosure of a criminal offence or a contravention or failure to comply with the law

### AND / OR

'being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services.'

The fear of retaliation for speaking up is one of the greatest deterrents of employee disclosures in the workplace. This is true for workers around the world but is especially the case in environments of high unemployment.

The original Act set out a seemingly exhaustive list of punitive actions by employers that are deemed occupational detriment and prohibited. It set out the many ways in which an employee might suffer adverse consequences affecting their employment status, ranging from dismissal to less severe forms of disadvantage.

However, the Act failed to achieve its full intention due to the exclusion from its definition of a protected disclosure reports that were made in contravention of a legal provision.

This exclusion deterred important reports from being made and allowed for a very real form of undesirable occupational detriment to be metered out. Some employees, particularly in state roles, were constrained by laws that made information disclosure a crime. More common was the reality in which employers used legally-binding confidentiality clauses and agreements to restrain employees from revealing potentially harmful information to third-parties.

What's more, some employers negotiated specific 'anti-whistle blowing' or non-disclosure agreements, sometimes accompanied by a financial settlement, in order to secure the silence of an employee who was raising inconvenient truths.

Until the 2017 amendments, it was possible for employers to take legal action against employees who spoke out in contravention of such an agreement, and this reality had both a deterrent and punitive or retaliatory effect consistent with the concept of 'occupational detriment'.

There are a few reasons why an employer may want to use such an agreement to prevent reporting of internal wrongdoing to third-parties. These include the desire to reduce loss of confidence through reputational harm and the wish to avoid regulatory scrutiny and sanction.





### Did you know

If an employee has made a report and now has reason to fear retaliation in their local workplace, you have an obligation to transfer them to an alternative position if this is something they ask for. What's more, without the employee's agreement, the terms of a transfer cannot be disadvantageous compared to their current employment conditions.

However, from the perspective of government, shareholders and consumers, this defeats the purpose of the legislation.

As can be seen from the revised list of actions that can constitute occupational detriment, the Act as amended now protects a whistleblower from any civil or criminal claim by the employer where the disclosure is consistent with the objectives of the Act but a breach of a confidentiality requirement or non-disclosure agreement.

*Simply put, you can no longer contract out of the Protected Disclosures Act via a secrecy clause.*

Of course, victimisation or retaliation for speaking out is not only suffered through the actions of one's employer. It must be understood that the potential whistleblower may fear being ostracised by colleagues, resulting in social isolation in the workplace – a consequence that legislators can less easily label and sanction.

It is for this reason that employers committed to creating a workplace culture conducive to employee reporting of known or suspected wrongdoing are actively working towards the reframing of the action of speaking up as one of bravery rather than treachery.

### Can someone who makes a protected disclosure still be subject to disciplinary, civil or criminal action?

Yes – if they were involved in the unethical conduct that is the subject of the report, they are not protected from being charged accordingly. Just because you make a disclosure, you are not protected from the reasonable consequences due to you for your participation in any wrongdoing. However, your voluntary admission and co-operation with any ensuing investigation will likely serve in mitigation of any penalty.



## RECOURSE AND REMEDIES

There is a lot at stake for anyone contemplating the disclosure of information that they fear their superiors do not want to hear. Fearing retaliation, an employee needs to have the rights of recourse and remedy, and there need to be deterrents that discourage employers from metering out occupational detriment.

The original Act was not specific on the matter of remedy, stating only that an employee who had suffered occupational detriment had the right to approach the courts for 'appropriate relief'.

The 2017 amendment provides for three types of remedial action in the event of proven occupational detriment: the payment of compensation, the payment of actual damages suffered, and the remedy of occupational detriment suffered by the employee.

### **How the Protected Disclosures Act integrates with the Labour Relations Act**

- An employee with a claim of occupational detriment in terms of the Act has recourse to any court with jurisdiction, including the Labour Court.
- A dismissal arising from the exercise of rights under the Protected Disclosures Act constitutes an automatically unfair dismissal in terms of the Labour Relations Act.
- Any form of occupational detriment short of dismissal is deemed to be an unfair labour practice.



## DETERRENCE OF FALSE REPORTING

There is one amendment to the Act that employers have widely welcomed: the creation of a new offence of knowingly making a false 'disclosure'. This offence extends to those who 'ought reasonably to have known' that the information they are providing is false.

Where there has been an intention to cause harm, and where harm was suffered, the employee or worker may be liable to a fine, to imprisonment for up to two years, or to both a fine and imprisonment.

While many employers have policy provisions making false accusations a disciplinary offence, it is important for employees to be aware of the criminal penalties they now face.

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It might not happen often, but when it does, false reporting can divert organisational time and effort away from productive activity while unnecessary investigations are undertaken and can cause a cloud of doubt to hang over innocent supervisors and other workers.

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## THE 'DUTY TO INFORM'

It is not unusual for employees who make reports of wrongdoing to describe their efforts as fruitless. Surveys of employee attitudes to whistleblowing typically show that a significant percentage report that the information they provided was ignored. This leads to the general belief that speaking up is not only risky, but pointless.

What are the typical ways in which a report can be handled that reinforces this undesirable perception?

- The report may not be escalated by the first recipient: they may decide that the report has no merit or may have a vested interest in withholding the information from higher authority
- The report may be escalated but then disregarded by the next level recipient: they too may decide the report is without merit or have a vested interest in minimising or ignoring it
- The report may be escalated and investigated, but the ensuing investigation takes considerable time during which the whistleblower concludes it has been ignored
- The report is taken seriously, fully investigated and action taken, but this action is not evident to the whistleblower and the feedback loop is not closed.

In order to overcome these types of problems, a 'Duty to Inform Employee or Worker' was placed upon employers. It is essential that you read the provisions in full, but our quick guide will help you understand these additional responsibilities.





### A Simple Guide to Applying the Duty to Inform Provisions

#### Step One: Determining if you have a duty to inform

You do have a duty to inform if:

- the whistleblower has been employed by you or held a relationship of service to you as a consultant, agent, temporary employment service or employee of such a service provider, and
- they have made their identity known to you. If you do not know their identity it is not possible to fulfil the obligation. You cannot, for example, be expected to provide acknowledgement of receipt and feedback in respect of a report made via an unsigned letter.

#### Step Two: Acknowledging receipt and advising on next steps

You must acknowledge receipt of the report, in writing, as soon as reasonably possible but within 21 days.

You must also advise in this letter which of the following three actions apply:

- An investigation is going to be undertaken, where possible providing an estimated time-frame for the undertaking
- No investigation is going to be undertaken, with an explanation as to why not
- The matter is being referred to another person or body to decide.

In the event that the matter is escalated for a decision, that new authority assumes the obligation to inform and must in turn advise the whistleblower, in writing, as soon as reasonably possible but within 21 days, which of the three above actions has been decided.

After the first 21-day period, if the matter is not referred to another person or party for a decision, or after the second 21-day period if the matter is referred on, the whistleblower needs to be given regular written feedback at no more than two-month intervals until the matter is concluded.

Regardless of the number of escalations involved, the whistleblower must be notified in writing of a decision to investigate their report or not within a maximum of six months.

#### Step Three: Notification on conclusion

- When the matter is concluded, the whistleblower must be advised in writing of the outcome of the investigation including action taken.

If Steps Two and Three above concern you, there is some comfort. You are not required to provide the whistleblower with information that could compromise the ability to prevent, detect or investigate a criminal offence. It is recommended that you seek legal advice in fulfilling your 'duty to report' obligations where doing so might present this type of conflict.



### **APPLYING THE SPIRIT OF THE 'DUTY TO INFORM' PROVISION TO ANONYMOUS ETHICS HOTLINE REPORTS**

You do not have an obligation to keep an anonymous reporter informed, but there are some circumstances under which you can, and arguably should.

If you have an ethics hotline facility, managed on an in-house or third-party basis, agree with the provider procedures whereby they act as an intermediary, conveying information between the anonymous reporter and the employer, without breaching the whistleblowers confidentiality. Most ethics hotline providers operate a reference number system that enables callers to follow up while maintaining anonymity.

Such procedures hold many benefits. For example, there are always going to be times when there has been a genuine misinterpretation of a situation and following an investigation you wish to put a whistleblowers' mind at rest. You may also have questions for them that would help your investigation of their claim. As the matter is being investigated and when it has been concluded, you can honour the spirit of the amendment Act and advise the whistleblower via the hotline.

## **THE MULTIPLE HUMAN RESOURCE STANDARDS ASSOCIATED WITH THE MANAGEMENT OF WHISTLEBLOWING**

SABPP members well appreciate the foundational role played by the ethics and duty to society pillars of the National HR Competency Model. Encouraging and protecting employees who speak up in the face of improprieties is a role fulfilled through adherence to best practices across multiple HR Standards:

### **Element 1: Strategic HR Management**

The HR element of the organisation's governance, risk and compliance policies, practices and procedures must incorporate the strategic business and legal imperatives of promoting employee disclosures of suspected or known unethical activity in the workplace.

### **Element 3: HR Risk Management**

The entire HR Risk Management standard is applicable to this Fact Sheet's subject, starting with the overall objective of increasing the probability and impact of positive events and decreasing the probability and impact of negative events on the achievement of organisational objectives.

### **Element 5: Learning and Development**

A competent workforce is one that possesses critical knowledge and skills. Everyone in an organisation must have knowledge of the legal compliance obligations and rights that exist under the Act, and skills training to equip managers to handle employee disclosures is essential.

### **Element 9: Employment Relations Management**

Compliance with legislation applicable to the employment relationship necessitates full compliance with the Protected Disclosures Act.

When we focus on the management of whistleblowing systems and the promotion of a speak-up culture in future Fact Sheets, we will see the additional relevance of Element 6 (Performance Management), Element 10 (Organisation Development), and Element 11 (HR Technology).



## CONCLUSION

The future sustainability of the organisations you serve as a Human Resource Practitioner may well depend upon their ability to identify and respond to unethical conduct before it has adverse financial, legal and reputational consequences.

The amendments to the Protected Disclosures Act have introduced obligations and rights that need to be understood and adhered to by all South African employers. The Human Resource Practitioner must accept responsibility for understanding and advising on the application of the Act, in consultation with internal or external legal and compliance advisors.

In future SABPP Fact Sheets, we will discuss:

- best practices for the eliciting, receiving and handling of reports, and
- the promotion of a speak-up culture that encourages all employees to share insights that serve the best interests of both the organisation and society.

## DISCLAIMER

The information contained in this Fact Sheet is written for educational purposes and does not constitute legal advice. Consult an in-house or external South African employment law practitioner for professional advice when applying the provisions of the Protected Disclosures Act.

## REFERENCES

Department of Justice and Constitutional Development (2000), Protected Disclosures Act 26 of 2000, Government Gazette No 41016. <http://justice.gov.za/legislation/acts/2017-005.pdf>

Department of Justice and Constitutional Development (2017), Protected Disclosures Amendment Act 5 of 2017, Government Gazette No 41016. <http://justice.gov.za/legislation/acts/2017-005.pdf>

Department of Justice and Constitutional Development (2018), Regulation 949 Relating to Protected Disclosures, Government Gazette No 41904. [http://www.justice.gov.za/legislation/notices/2018/20180914-gg41904\\_rg10867\\_gon949-PDAregulations.pdf](http://www.justice.gov.za/legislation/notices/2018/20180914-gg41904_rg10867_gon949-PDAregulations.pdf)

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