
GOVERNMENT NOTICE

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**No. 702****31 August 2011****PRACTICAL GUIDELINES FOR EMPLOYEES IN TERMS OF SECTION 10(4)(a) OF
THE PROTECTED DISCLOSURES ACT, 2000 (ACT NO. 26 OF 2000)**

Under section 10(4)(a) of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), I, Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, after consultation with the Minister of Public Service and Administration, hereby publish the Practical Guidelines for Employees, as approved by Parliament in terms of section 10(4)(b) of the Act, in the Schedule.

J. T. RADEBE**MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

SCHEDULE**PRACTICAL GUIDELINES FOR EMPLOYEES****THE PROTECTED DISCLOSURES ACT, 2000 (ACT 26 OF 2000):
PRACTICAL GUIDELINES FOR EMPLOYEES****INTRODUCTION**

By remaining silent about corruption, offences or other malpractices taking place in the workplace, an employee contributes to, and becomes part of, a culture of fostering such improprieties which will undermine his or her own career as well as be detrimental to the legitimate interests of the South African society in general.

Every employer and employee has a responsibility to disclose criminal and other irregular conduct in the workplace.

Every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.

PART I**1. Purpose of the Protected Disclosures Act, 2000¹**

The purpose of the Protected Disclosures Act, 2000, is to provide **procedures** and to offer **protection**. The Act provides—

¹

These guidelines are issued by the Minister of Justice and Constitutional Development in terms of section 10(4) of the Protected Disclosures Act, 2000 (Act 26 of 2000). They are aimed at providing employees, who wish to disclose certain information, with a short summary of the Act, but do not deal comprehensively with all the provisions of the Act. The provisions of the Act are reflected at the back of the guidelines.

- * **procedures** in terms of which any employee may disclose information relating to an offence or a malpractice in the workplace by his or her employer or fellow employees; and
- * **protection** for an employee, who has made a disclosure in accordance with the procedures provided for by the Act, against any reprisals as a result of such a disclosure.

2. How the Act works

No employee may be victimised or penalised by his or her employer as a direct or indirect result of having made a disclosure in accordance with any one of the **procedures** provided for by the Act².

These **procedures** can be described as **routes** that can be followed in order to disclose information which show or tend to show one or more of the following—

- * that a criminal offence has been, is being or is likely to be committed;
- * that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- * that a miscarriage of justice has occurred, is occurring or is likely to occur;
- * that the health or safety of an individual has been, is being or is likely to be endangered;
- * that the environment has been, is being or is likely to be endangered;
- * unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- * that any matter referred to above has been, is being or is likely to be deliberately concealed.

²

Sections 2 and 3 of the Act.

The Act was **implemented** on 16 February 2001, and is applicable to any disclosure that was made after 16 February 2001 (it does not matter when the relevant impropriety took place, as long as the disclosure was made after 16 February 2001).

It is **important** to note that no provision in a contract of employment or other agreement which applies to an employer and employee may attempt to exclude any provision of the Act or—

- * attempt to prevent an employee; or
- * discourage an employee,

from making a protected disclosure. Such provision (in a contract of employment) or agreement (between an employer and employee) has no legal effect.

3. How do I make a disclosure?

If an employee decides to “blow the whistle” on criminal conduct or malpractices in the workplace, he or she may disclose that information to—

- * **a legal representative (route 1);**
- * **his or her employer (route 2);**
- * **a Minister or a Member of the Executive Council of a province (MEC) (route 3);**
- * **a specified person or body (route 4); or**
- * **any other person, under certain circumstances (route 5).**

Any **route** may be used to “blow the whistle”, but take note that each **route** has certain **requirements** which must be complied with.

LEGAL REPRESENTATIVE: (ROUTE 1)³

In many instances an employee will first wish to obtain legal advice regarding the making of the disclosure in terms of the Act and, in this process, make a disclosure to the legal adviser concerned.

Requirements:

- * The person being consulted by the employee must be a legal representative whose occupation must involve the giving of legal advice (for example, an attorney or legal representative of the employee's labour union).
- * The information must be given for the purpose of obtaining legal advice.

EMPLOYER (ROUTE 2)⁴

An employee can make a disclosure to his or her employer.

Requirement:

- * An employee must act **in good faith** when he or she discloses the information ("good faith" means that the employee must act in a responsible and honest manner without any motives to gain any personal advantages from making the disclosure).

Take note that:

- * An employer may decide to lay down certain procedures in terms of which disclosures must be made, even that a disclosure must be made to a person other than the employer (a disclosure of this nature will also be regarded as a disclosure to the employer).
- * Many employers have established anti-corruption hot-lines which employees may use to report crime in the workplace (ask your employer whether he or she has established such a hot-line).

³ Section 5 of the Act.

⁴ Section 6 of the Act.

MINISTER OR MEC OF A PROVINCE: (ROUTE 3)⁵

An employee can make a disclosure to a Minister or an MEC of a province.

Requirements:

- * The employee must act in good faith when he or she discloses the information.
- * This procedure only applies if the employee's employer is—
 - * an individual appointed by the relevant Minister or MEC in terms of legislation; or
 - * a body (eg a board or other institution) appointed by the relevant Minister or MEC in terms of legislation; or
 - * an organ of state falling within the area of responsibility of the relevant Minister or MEC. An organ of state is any state department or administration in the national or provincial sphere of government or any municipality in the local sphere of government or any other functionary (official) or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any other legislation.

SPECIFIED PERSON OR BODY: (ROUTE 4)⁶

An employee can, at this stage make a disclosure to the **Public Protector** or **Auditor-General**.

The **Public Protector** is a high level independent official who receives complaints against government agencies or officials and investigates improper prejudice suffered by a complainant for example as a result of abuse of power. Maladministration, dishonesty or improper dealings with regard to public money,

⁵ Section 7 of the Act.

⁶ Section 8 of the Act.

improper enrichment and receipt of improper advantages can also be investigated. (For contact details see Part III.)

The **Auditor-General** who is also a high level independent official must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, all municipalities and any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General. (For contact details see Part III.)

Requirements:

- * The disclosure must be made in good faith.
- * The employee must reasonably believe that the impropriety which he or she wants to disclose, relates to matters that in the ordinary course are dealt with by the Public Protector or Auditor-General; and
- * that the information and allegations contained in the disclosure are substantially true.

GENERAL DISCLOSURE: (ROUTE 5)⁷

An employee can even make a disclosure to any person, for example, a member of the press (people working for radio and television stations or newspapers), a police official of the South African Police Service or a person working for an organisation which keeps watch over the public or the private sector.

Requirements:

- * The employee must act in good faith.
- * The employee must reasonably believe that the information is substantially true.

⁷

Section 9 of the Act.

- * In all the circumstances of the case, it must be reasonable to make the disclosure, taking into account—
 - * the identity of the person to whom the disclosure is made;
 - * the seriousness of the impropriety;
 - * whether the impropriety is continuing or is likely to occur in the future;
 - * whether the disclosure is made in breach of a duty of confidentiality of the employer towards another person;
- * The employee must not make the disclosure for personal gain, unless for a reward payable in terms of a law.
- * One or more of the following must apply—
 - * The employee must believe that he or she will be subjected to an occupational detriment (see paragraph 4 for more information) if the disclosure is made to the employer; or
 - * the employee must believe that the employer will conceal or destroy evidence relating to the criminal offence or malpractice if the disclosure is made to the employer; or
 - * no action was taken in respect of a previous disclosure of substantially the same information to the employer; or
 - * the criminal offence or malpractice is of an exceptionally serious nature.

4. Against what am I protected?

The Act prohibits an employer from subjecting an employee to what is called an “occupational detriment”. An occupational detriment occurs when an employee is—

- * subjected to any disciplinary action;
- * dismissed, suspended, demoted, harassed or intimidated;
- * transferred against his or her will;
- * refused transfer or promotion;

- * subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
 - * refused a reference, or is provided with an adverse reference;
 - * denied appointment to any employment, profession or office;
 - * threatened with any of the actions referred to above;
 - * in any other manner adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security,
- as a direct or indirect result of having made a protected disclosure.

5. What do I do if I am victimised as a result of making a disclosure?⁸

An employee who has been subjected, is subject or may be subjected to an occupational detriment as a result of making a disclosure may approach any court having jurisdiction for protection.

The Act relates to the employer/employee relationship, therefore an employee may also use the provisions of the Labour Relations Act, 1995 (Act 66 of 1995), to protect himself or herself from being subjected to an occupational detriment.

For example:

- * If an employee is **dismissed** as a result of making a disclosure in terms of the Protected Disclosures Act, 2000, that dismissal is deemed to be an "**automatically unfair dismissal**" for purposes of the Labour Relations Act, 1995.
- * All **other forms of occupational detriment** referred to in paragraph 4 above, are deemed to be "**unfair labour practices**" as contemplated in the Labour Relations Act, 1995.

Ask your labour union to advise you on what your remedies are and how you should go about enforcing your remedies.

8

Section 4 of the Act.

An employee may also request, if reasonably possible or practicable, to be **transferred** from the post or position occupied by him or her at the time of the disclosure, to another post or position in the same division or another division or if the employee making the disclosure is employed by an organ of state, to another organ of state.⁹ The terms and conditions of employment of a person transferred, may not without his or her consent be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.

PART II

6. Are there any other procedures to report or remedy an impropriety?

There are other procedures, **in addition to those provided for in the Protected Disclosures Act, 2000**, which are available to employees who wish to report an impropriety in the workplace, namely—

6.1 The Public Service Act, 1994 (Proclamation No. 103 of 1994):

The Public Service Act¹⁰ provides that a complaint or grievance concerning an official act or omission may be investigated by the Public Service Commission. An employee may lodge a complaint or grievance with the relevant executing authority, defined in the Public Service Act¹¹. If that complaint or grievance is not resolved to the satisfaction of the employee, that executing authority must submit the complaint or grievance to the Public Service Commission.

The term "executing authority" means, in relation to—

- (a) the Office of the President, the President acting on his or her own;

9. Section 4 of the Act.

10. Section 35(1) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

11. Section 1 of the Public Service Act, 1994.

- (b) the Office of the Deputy President, the Deputy President;
- (c) a department or organizational component within a Cabinet portfolio, the Minister responsible for such portfolio;
- (d) the Office of the Public Service Commission, the Chairperson of Commission;
- (e) the Office of a Premier of a province, the Premier of that Province acting on his or her own; and
- (f) a provincial department within an Executive Council portfolio, the member of such Executive Council responsible for such portfolio.

After the Public Service Commission has investigated and considered such complaint or grievance, the Commission may recommend that the relevant executing authority acts in terms of a particular provision or provisions of the Public Service Act, 1994, or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a recommendation¹². The latest rules, effective from 19 September 2003, were published in the Government Gazette No. 25209 under Government Notice No. R. 1012 of 25 July 2003. These rules are also available on the website of the Public Service Commission, at the following address.

<http://www.psc.gov.za/docs/pubs/govgazette/25209.pdf>. (See Part III for the contact details.)

The Code of Conduct for the Public Service¹³ also places an obligation on an employee to report on certain matters and provides as follows:

An employee, in the course of his or her official duties, shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence or which is prejudicial to the public interest.

12. Section 35(2) of the Public Service Act, 1994.

13. Regulation C.4.10 of Chapter 2 of the Public Service Regulations, 2001.

An employee who fails to comply with this provision is guilty of misconduct.¹⁴

The above applies to persons who are employed in the public service, namely—

- (a) employees of all national departments, provincial administrations and provincial departments and organisational components listed in Schedules 1 to 3 of the Public Service Act, 1994; and
- (b) employees in the South African Police Service, the South African National Defence Force, Department of Correctional Services, state educational institutions, as defined in the Public Service Act, 1994, the National Intelligence Agency, and South African Secret Service, but only insofar as they are not contrary to the laws governing their employment.

6.2 The Defence Act, 2002 (Act 42 of 2002):

The South African National Defence Force employs two categories of employees, namely persons employed in terms of the Public Service Act, 1994, or in terms of the Defence Act, 2002.

Persons employed in terms of the Public Service Act, 1994, are subject to the provisions mentioned in paragraph 6.1 above, and persons employed in terms of the Defence Act, 2002, are subject to the Military Discipline Code¹⁵ which, among others, provides for the following:

Section 7: Offences relating to the failure of a person to report activities likely to endanger the safety of the S A Defence Force to his or her superior officer;

Section 21: Any person who is aware of or suspects that an offence in relation to the acquisition or disposal of public property has

14. Regulation B.3 of Chapter 2 of the Regulations.

15. The First Schedule to the Defence Act, 1957 (Act 44 of 1957).

been or might be committed to report it to his or her superior officer without delay;

Section 134: A grievance procedure that has to be followed by a person who is aggrieved by any act or omission of any person subject to the Code.

6.3 The South African Police Service Act, 1995 (Act 68 of 1995):

The South African Police Service Act¹⁶, provides that an employee commits misconduct if he or she "withholds or unreasonably delays any complaint or an adverse communication in connection with another employee or person employed by the Service". The relevant regulation should be read with regulation 18(9) which provides that "[a]n employee commits misconduct, ... if the employee knowingly makes a false accusation against any employer or person employed by the Service, or during an investigation, trial or inquiry makes a false statement or wilfully suppresses or conceals material facts."

The Independent Complaints Directorate¹⁷, investigates complaints in respect of offences and misconduct by members of the SAPS. The Anti-Corruption Command Unit of the Directorate in particular investigates complaints of corruption against members of the SAPS. Another mechanism which is available to address complaints against members of the SAPS is the National Inspectorate.

National Instruction 1 of 1999 deals with special arrangements regarding members who provide information to the Organised Crime unit of SAPS. A member or other employee of SAPS who has provided information to the Organised Crime unit may apply in writing to the Divisional Commissioner: Personnel Management for a temporary or permanent transfer or that

16. Regulation 18(10) of the South African Police Service Discipline Regulations, issued under section 24(1)(g) of the South African Police Service Act, 1995.

17. Established in terms of sections 50 to 54 of the South African Police Service Act, 1995.

such other arrangement concerning the performance of his or her duties or functions be made. The relevant application must be submitted to the Commander: Organised Crime who will make a recommendation to the Divisional Commissioner: Personnel Management regarding the application.

6.4 National Environmental Management Act, 1998 (Act 107 of 1998):

Evidence of an environmental risk may in terms of the National Environmental Act¹⁸, be disclosed to—

- * a committee of Parliament or of a provincial legislature;
- * an organ of state responsible for protecting any aspect of the environment or emergency services;
- * the Public Protector;
- * the South African Human Rights Commission;
- * the National Director of Public Prosecutions.

A disclosure may also be made to one or more news media subject to certain requirements mentioned in section 31.

6.5 The Western Cape Public Protector Act, 1994 (Act 6 of 1994):

The Western Cape Public Protector Law¹⁹, provides that any person (which includes employees of the Western Cape Province) may report any—

- * maladministration in connection with the affairs of government at provincial and local authority level;
- * abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
- * improper or dishonest act or omission or corruption with respect to public money;
- * improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by

18. Section 31 of the National Environmental Management Act, 1998.

19. Sections 4(1) and 5(1) and (2) of the Western Cape Public Protector Law, 1994.

a person as a result of an act or omission in the public administration or in connection with the affairs of government at provincial level or of a person performing a public function;
or

- * act or omission by a person in the employ of government at provincial level, local authority level or a person performing a public function, which results in unlawful or improper prejudice to any other person,

to the Western Cape Public Protector who may endeavour to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation. Where the facts disclose the commission of an offence the matter will be brought to the notice of the relevant Director of Public Prosecutions.

6.6 The following direct, indirect or supporting remedies are also available to public service employees:

(a) Direct remedies:

- * A public service employee may use **labour remedies** regarding official acts or omissions of a labour nature, namely disputes of rights (for example, unfair dismissal or unfair labour practice as described in sections 185 – 188 of the Labour Relations Act, 1995). A dispute can be referred to the relevant bargaining council having jurisdiction, for example the Public Service Co-ordinating Bargaining Council (PSCBC) or one of the sectoral bargaining councils of the PSCBC, for example the General Public Service Sectoral Bargaining Council.
- * A public service employee may also lodge a complaint with a labour inspector concerning any alleged contravention of the **Basic Conditions of Employment Act**.²⁰ An employee may also make a complaint to a trade union representative or trade union official

20. Section 78(1) of the Basic Conditions of Employment Act, 1997 (Act 75 of 1997).

concerning any alleged failure or refusal by an employer to comply with the Basic Conditions of Employment Act.

- * Such employee may bring an alleged contravention of the **Employment Equity Act**²¹ to the attention of another employee, an employer, a trade union, a labour inspector, a workplace forum, the Director-General: Labour or the Commission for Employment Equity. A dispute regarding unfair discrimination in any employment policy or practice, as described in the Employment Equity Act may be referred to the Commission for Conciliation, Mediation and Arbitration²².
- * A public service employee may lodge a complaint with the **South African Human Rights Commission**²³ concerning an official act or omission that is suspected to constitute a violation of or threat to any fundamental right.
- * An employee may use other legal remedies such as the institution of proceedings for the judicial review of an administrative action in terms of the **Promotion of Administrative Justice Act**,²⁴ or seeking an interdict from the relevant court to prevent a contravention or the continuation of a contravention²⁵.

(b) Indirect/supporting remedies:

A public service employee may also request—

- * reasons for an administrative action in terms of the **Promotion of Administrative Justice Act, 2000**²⁶;
- * access to records of a government department or other public body in terms of the **Promotion of Access to Information Act, 2000**²⁷.

21. Section 34 of the Employment Equity Act, 1998.
22. Chapter II of the Employment Equity Act, 1998.
23. Section 8 of the Human Rights Commission Act, 1994 (Act 54 of 1994).
24. Section 6 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).
25. Section 8 of the Promotion of Administrative Justice Act, 2000.
26. Section 5 of the Promotion of Administrative Justice Act, 2000.
27. Section 11 of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

PART III**7. General information****Contact details of the Public Protector**²⁸

National Office:	Private Bag X677 PRETORIA 0001 (012) 366 7000 / 0800 112040 (tel) (012) 362-3473 / 086 575 3292 (fax)
Eastern Cape Office:	P O Box 424 BISHO 5605 (040) 635-1286 (tel) (040) 635-1291 (fax)
North West Office:	P O Box 512 MAFIKENG 2745 (018) 381-1060 (tel) (018) 381-2066 (fax)
Western Cape Office:	P O Box 712 Cape Town 8000 (021) 423 8644 (tel) (021) 423 8708 (fax)

Contact details of the Auditor-General²⁹

P O Box 446

28. For purposes of section 8(1)(a) of the Act.

29. For purposes of section 8(1)(b) of the Act.

Pretoria
0001

Tel: 012 – 4268000
Fax: 012 – 4268333

Contact details of the Public Service Commission³⁰

Head Office: Private Bag X 121
Pretoria
0001
Tel: 012 – 3287690
Fax: 012 – 325 8382

Eastern Cape: P O Box 2167
King William's Town
5601
Tel: 043 – 6434704
Fax: 043 – 6421371

Gauteng: P O Box 8962
Johannesburg
2000
Tel: 011 – 8335721/2/3/4/5/6
Fax: 011 – 8341200

Mpumalanga: P O Box 11303
Nelspruit
1200
Tel: 013 – 7554070

30. For general information.

Fax: 013 -7525814

Limpopo: Private Bag X 9543
Polokwane
0700
Tel: 015 – 291 4783
Fax: 015 – 291 4683

Western Cape: P O Box 2078
Cape Town
8000
Tel: 021 – 421 3980
Fax: 021 – 421 4060

Free State: Private Bag X 20572
Bloemfontein
9300
Tel: 051 – 4488696
Fax: 051 – 4484135

KwaZulu-Natal: Private Bag X 9130
Pietermaritzburg
3200
Tel: 033 – 3451621
Fax: 033 – 3458505

Northern Cape: Private Bag X 5071
Kimberley
8300
Tel: 053 – 8326222
Fax: 053 – 8326225

North West: Private Bag X 2065
 Mmabatho
 2735
 Tel: 018 – 384 1000
 Fax: 018 – 384 1012

Contact details of the South African Human Rights Commission³¹

Private Bag X2700
HOUGHTON
2041
Tel: 011 – 484 8300
Fax: 011 – 484 0582

Contact details of the Commission on Gender Equality³²

PO Box 32175
BRAAMFONTEIN
2017
Tel: 011 – 403 7182
Fax: 011 – 403 7188 / 5609

31. For general information.

32. For general information.

PART IV**PROTECTED DISCLOSURES ACT 26 OF 2000**

[ASSENTED TO 1 AUGUST 2000] [DATE OF COMMENCEMENT: 16 FEBRUARY 2001]
(English text signed by the President)

ACT

To make provision for procedures in terms of which employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of this Act; and to provide for matters connected therewith.

Preamble

Recognising that—

- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;
- criminal and other irregular conduct in organs of state and private bodies are 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;

And bearing in mind that—

- neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
- every employer and employee 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 who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to—

- create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures;
- promote the eradication of criminal and other irregular conduct in organs of state and private bodies,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
- (i) “*disclosure*” means any disclosure of information regarding any conduct of an *employer*, or an *employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:
- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
 - (d) that the health or safety of an individual has been, is being or is likely to be endangered;
 - (e) that the environment has been, is being or is likely to be damaged;
 - (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
 - (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;
- (ii) “*employee*” means—
- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;

- (b) any other person who in any manner assists in carrying on or conducting the business of an *employer*;
- (iii) “*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;
- (iv) “*impropriety*” means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of “*disclosure*”, irrespective of whether or not—
- (a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere;
- (b) the law applying to the impropriety is that of the Republic of South Africa or of another country;
- (v) “*Minister*” means the Cabinet member responsible for the administration of Justice;
- (vi) “*occupational detriment*”, in relation to the working environment of an *employee*, 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 threatened with any of the actions referred to paragraphs (a) to (g) above; or
- (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;
- (vii) “*organ of state*” means—
- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when—
- (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation;
- (viii) “*prescribed*” means prescribed by regulation in terms of section 10;
- (ix) “*protected disclosure*” means a *disclosure* made to—
- (a) a legal adviser in accordance with section 5;
- (b) an *employer* in accordance with section 6;
- (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
- (d) a person or body in accordance with section 8; or
- (e) any other person or body in accordance with section 9, but does not include a *disclosure*—
- (i) in respect of which the *employee* concerned commits an offence by making that *disclosure*; or
- (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;
- (x) “*this Act*” includes any regulation made in terms of section 10.

Objects and application of Act

2. (1) The objects of *this Act* are—
- (a) to protect an *employee*, whether in the private or the public sector, from being subjected to an *occupational detriment* on account of having made a *protected disclosure*;
- (b) to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a *protected disclosure*; and
- (c) to provide for procedures in terms of which an *employee* can, in a responsible manner, disclose information regarding *improprieties* by his or her *employer*.
- (2) *This Act* applies to any *protected disclosure* made after the date on which this section comes into operation, irrespective of whether or not the *impropriety* concerned has occurred before or after the said date.
- (3) Any provision in a contract of employment or other agreement between an *employer* and an *employee* is void in so far as it—
- (a) purports to exclude any provision of *this Act*, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
- (b) (i) purports to preclude the *employee*; or

(ii) has the effect of discouraging the *employee*, from making a *protected disclosure*.

Employee making protected disclosure not to be subjected to occupational detriment

3. No *employee* may be subjected to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made a *protected disclosure*.

Remedies

4. (1) Any *employee* who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, may—

- (a) approach any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or
- (b) pursue any other process allowed or prescribed by any law.

(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court—

- (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 follow the procedure set out in Chapter VIII of that Act; 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 that Act, and the dispute about such an unfair labour practice must follow the procedure set out in that Part: Provided that if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

(3) Any *employee* who has made a *protected disclosure* and who reasonably believes that he or she may be adversely affected on account of having made that *disclosure*, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the *disclosure* to another post or position in the same division or another division of his or her *employer* or, where the person making the *disclosure* is employed by an *organ of state*, to another *organ of state*.

(4) The terms and conditions of employment of a person transferred in terms of subsection (2) 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.

Protected disclosure to legal adviser

5. Any *disclosure* made—

- (a) to a legal practitioner or to a person whose occupation involves the giving of legal advice; and
 - (b) with the object of and in the course of obtaining legal advice,
- is a *protected disclosure*.

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 employer* for reporting or otherwise remedying the *impropriety* concerned; or
 - (b) to the *employer* of the *employee*, where there is no procedure as contemplated in paragraph (a),
- is a *protected disclosure*.

(2) Any *employee* 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*.

Protected disclosure to member of Cabinet or Executive Council

7. 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 employer* is—

- (a) an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province;
- (b) a body, the members of which are appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province; or
- (c) an *organ of state* falling within the area of responsibility of the member concerned.

Protected disclosure to certain persons or bodies

- 8.** (1) Any *disclosure* made in good faith to—
- (a) the Public Protector;
 - (b) the Auditor-General; or
 - (c) a person or body *prescribed* for purposes of this section; and
- in respect of which the *employee* concerned reasonably believes that—
- (i) the relevant *impropriety* falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and
 - (ii) the information disclosed, and any allegation contained in it, are substantially true,
- is a *protected disclosure*.

(2) A person or body referred to in, or *prescribed* in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or *prescribed* in terms of, that subsection, must render such assistance to the *employee* as is necessary to enable that *employee* to comply with this section.

General protected disclosure

- 9.** (1) Any *disclosure* made in good faith by an *employee*—
- (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
 - (b) who does not make the *disclosure* for purposes of personal gain, excluding any reward payable in terms of any law;
- is a *protected disclosure* if—
- (i) one or more of the conditions referred to in subsection (2) apply; and
 - (ii) in all the circumstances of the case, it is reasonable to make the *disclosure*.

- (2) The conditions referred to in subsection (1)(i) are—
- (a) that at the time the *employee* who makes the *disclosure* has reason to believe that he or she will be subjected to an *occupational detriment* if he or she makes a *disclosure* to his or her *employer* in accordance with section 6;
 - (b) that, in a case where no person or body is *prescribed* for the purposes of section 8 in relation to the relevant *impropriety*, the *employee* making the *disclosure* has reason to believe that it is likely that evidence relating to the *impropriety* will be concealed or destroyed if he or she makes the *disclosure* to his or her *employer*;
 - (c) that the *employee* making the *disclosure* has previously made a *disclosure* of substantially the same information to—
 - (i) his or her *employer*; or
 - (ii) a person or body referred to in section 8,
 in respect of which no action was taken within a reasonable period after the *disclosure*; or
 - (d) that the *impropriety* is of an exceptionally serious nature.

- (3) In determining for the purposes of subsection (1)(ii) whether it is reasonable for the *employee* to make the *disclosure*, consideration must be given to—
- (a) the identity of the person to whom the *disclosure* is made;
 - (b) the seriousness of the *impropriety*;
 - (c) whether the *impropriety* is continuing or is likely to occur in the future;
 - (d) whether the *disclosure* is made in breach of a duty of confidentiality of the *employer* towards any other person;
 - (e) in a case falling within subsection (2)(c), any action which the *employer* or the person or body to whom the *disclosure* was made, has taken, or might reasonably be expected to have taken, as a result of the previous *disclosure*;
 - (f) in a case falling within subsection (2)(c)(i), whether in making the *disclosure* to the *employer* the *employee* complied with any procedure which was authorised by the *employer*; and
 - (g) the public interest.

(4) For the purposes of this section a subsequent *disclosure* may be regarded as a *disclosure* of substantially the same information referred to in subsection (2)(c) where such subsequent *disclosure* extends to information concerning an action taken or not taken by any person as a result of the previous *disclosure*.

Regulations

- 10.** (1) The *Minister* may, after consultation with the Minister for the Public Service and Administration, by notice in the *Gazette* make regulations regarding—

- (a) for the purposes of section 8(1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;
- (b) any administrative or procedural matter necessary to give effect to the provisions of *this Act*; and
- (c) any other matter which is required or permitted by *this Act* to be prescribed.
- (2) Any regulation made for the purposes of section 8(1)(c) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.
- (3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the *Gazette*.
- (4) (a) The *Minister* must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of *this Act* and all procedures which are available in terms of any law to *employees* who wish to report or otherwise remedy an *impropriety*.
- (b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the *Gazette*.
- (c) All organs of state must give to every *employee* a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every *employee*.

Short title and commencement

11. This Act is called the Protected Disclosures Act, 2000, and commences on a date determined by the President by proclamation in the *Gazette*.