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MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC) ON ITS INVESTIGATION INTO PROTECTED DISCLOSURES (PROJECT 123)

The SALRC releases its Report on Protected Disclosures for general information. The Report contains the final recommendations of the SALRC regarding its investigation into protected disclosures (commonly referred to as whistleblowing) and a draft Amendment Bill which embodies proposed amendments to the Protected Disclosures Act 26 of 2000 ('PDA').

The investigation into Protected Disclosures was included in the SALRC's programme pursuant to deliberations before the Parliamentary Portfolio Committee on Justice and Constitutional Development on the Open Democracy Bill and the subsequent promulgation of the PDA.

The remedies presently provided for in the PDA are confined to the relationship between an employer and employee in the public and private sectors. With the notable increase in the use of part-time and temporary workers coupled with the trend of outsourcing the restricted definition of employee in the PDA excludes a growing number of people from protection if they should make a disclosure regarding improprieties in the work arena. This and a number of related matters have received the attention of the Commission in the course of this investigation.

The SALRC *inter alia* recommends as follows:

- The widest possible protection should be afforded to any person functioning or having functioned within the workplace, e.g. independent contractors, persons employed by temporary employment services, former employees, pensioners receiving pensions from their former employers and those who function within the workplace but who do not generate an income from within the work environment, i.e. volunteers. A new definition for 'worker' is proposed.
- The designation 'employer' should be retained. The definition of 'employee' and 'worker' make it clear that for the purposes of the PDA, 'employer' encompasses the hirers of services and is not confined to employers as defined in the Labour Relations Act. Consequently for the purposes of the PDA an employee or worker who is rendering services to a client will have two 'employers'.
- There is merit in holding the employer in the strict or traditional sense and the employer in the expanded sense jointly and severally liable where the former employer, on the express or implied instructions of the latter employer, subjects an employee or a worker to an occupational detriment.

- In order to encourage and facilitate compliance with the Act an extended list of persons or bodies to whom one may disclose in terms of section 8 should be provided for in regulations.
- That the PDA not be extended to include whistleblowing by members of the general public in respect of public bodies or officials. The view is held that extending the PDA by duplicating existing remedies and protection already available to the general public, with regard to disclosures of improprieties of public bodies or officials, would not enhance such remedies or protection.
- That the need to protect certain information either in the national interest of the country or in the interest of the livelihood of an employer by way of confidentiality or secrecy agreements militates against granting blanket immunity from liability for disclosures relating to all improprieties provided for in the PDA. It is of the view that exposing an employer to such risk would only be justified where the content of the disclosure is sufficiently serious i.e. where the disclosure relates to the commission of a criminal offence. It is also of the opinion that immunity from civil and criminal liability should not be automatic but should be granted subject to the discretion of the court in which the action is brought.
- A whistleblower should not be enabled to circumvent her criminal and civil liability arising out of her participation in the wrongdoing by reason of making a disclosure. The PDA should be amended to clearly reflect that immunity from liability is not granted in relation to a disclosure which relates to criminal conduct or participation in criminal conduct by the whistleblower.
- That the guidelines which have been developed and issued in terms of section 10 of the PDA should be amended to specifically address the issue of confidentiality and to remind employers of the right to privacy which is inherently attached to all personal or identifying data pertaining to the whistleblower and anyone identified in terms of the protected disclosure.
- Express provision must be made that the actual damage suffered by a whistleblower may be claimed. Further that as whistleblowing is essentially a public duty which may attract detrimental financial and private consequences and that at the very least whistleblowers should be able to, in one action, remedy the harm they have been subjected to.
- Given the particular vulnerability of whistleblowers who disclose in compliance with the PDA, the Department of Justice and Constitutional Development should consider extending the provision of legal aid assistance in civil matters to whistleblowers.
- Application for redress should be able to be made for those whistleblowers that are unable to do so in their own name. In order to avoid possible abuse or institution of proceedings where a whistleblower is opposed to it, the Commission recommends that an application may only be brought on behalf of a whistleblower with his or her written consent.

- Where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalised.
- That the adoption of the Practical Guidelines for Employees which was referred to the National Council of Provinces on the 31st May 2006 by the Portfolio Committee on Justice and Constitutional Development will ameliorate a number of the problems which have experienced in practice thus far.
- That the PDA be amended to include a duty to investigate and a duty of notification. It also recommends that the practical guidelines issued in terms of section 10 of the PDA should be amended to include an obligation on employers to have appropriate internal procedures in operation for receiving and dealing with information about improprieties.

The Report will be made available on the Internet at: <http://salawreform.justice.gov.za/>

ISSUED BY THE SECRETARY: S A LAW REFORM COMMISSION, PRETORIA

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