



**GUIDE ON THE REPORTING OF
UNETHICAL CONDUCT, CORRUPTION
AND NON-COMPLIANCE TO THE
PUBLIC SERVICE ACT, 1994 AND
PUBLIC SERVICE REGULATIONS, 2016
IN THE PUBLIC SERVICE**

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GUIDE ON THE REPORTING OF UNETHICAL CONDUCT, CORRUPTION AND NON-COMPLIANCE TO THE PUBLIC SERVICE ACT, 1994 AND PUBLIC SERVICE REGULATIONS, 2016 IN THE PUBLIC SERVICE

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DEFINITIONS

Disclosure, as defined in section 1 of the Protected Disclosures Act, 2000 (Act No. 26 of 2000) (PDA)— means any disclosure of information regarding any conduct of an *employer*, or of an *employee* or of a *worker* of that *employer*, made by any *employee* or *worker* 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 Chapter II of the Employment Equity Act, 1998 (Act No. 55 of 1998), or 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.

Employee, as defined in section 1 of the PDA, means—

- (a) any person, excluding an independent contractor, who works or worked for another person or for the State, and who receives or received, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer.

Impropriety, as defined in section 1 of the PDA, 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; The law applying to the impropriety in that of the Republic of South Africa or of
- (b) another country.

Occupational detriment, as defined in section 1 of the PDA, in relation to an *employee* or a *worker*, 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 subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of—
 - (i) a criminal offence; or

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- information which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur;
- (ii) occur;
 - (i) being threatened with any of the actions referred to in paragraphs (a) to (h) above; or
 - (j) 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.

Protected disclosure, as defined in section 1 of the PDA— means a disclosure made to-

- (a) a legal adviser in accordance with section 5; an employer in accordance with section 6;
- (b) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
- (c) a person or body in accordance with section 8; or
- (d) any other person or body in accordance with section 9, but does not, subject to section 9A, include a *disclosure*—
 - (i) in respect of which the *employee* or *worker* concerned commits a criminal 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.

Report— means an official or formal statement of facts or proceedings. To give an account of; to relate; to tell or convey information; the written statement of such an account. In the context of this framework, the word “report” includes a disclosure.

Temporary employment service, as defined in section 1 of the PDA— means any person who, for reward, procures for or provides to a client other persons who—

- (a) render services to, or perform work for, the client; and
- (b) are remunerated by the *temporary employment service*.

Worker, as defined in section 1 of the PDA— means

- (a) any person who works or worked for another person or for the State; or
- (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer or client, as an independent contractor, consultant, agent; or
- (c) any person who renders services to a client while being employed by a temporary employment service.

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List of abbreviations

| | |
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| DOJ & CD | – Department of Justice and Constitutional Development |
| DPSA | – Department of Public Service and Administration |
| OECD | – Organisation for Economic Cooperation and Development |
| PDA | – Protected Disclosures Act (Act no 26 of 2000) |
| PRECCA | – Prevention and Combating of Corrupt Activities Act, Act no 12 of 2004 |
| PSA | – Public Service Act, 1994 (Proclamation No.103 of 1994) |
| PSC | – Public Service Commission |
| PSR | – Public Service Regulations, 2016 |
| UNCAC | – United Nations Convention against Corruption |

1. INTRODUCTION

The Public Service Regulations, 2016, herein after referred to as “PSR, 2016”, requires of all employees in the public service to report unethical conduct, corruption and non-compliance to the Public Service Act, 1994 and the PSR, 2016, because it is the right thing to do and is expected of professional public servants. The Protected Disclosures Act, 2000 (Act No 26 of 2000), herein after referred to as “PDA”, further encourages employees in the public service and workers to report the same, but also other improprieties, which is much wider than the ambit of the PSR, 2016.

To support and encourage employees in the public service to report unethical conduct, corruption and non-compliance to the Public Service Act, 1994; departments should put in place systems and procedures to guide reporting and the investigation of wrong-doing and ensure that the protection afforded in terms of the law to those who disclose are made known to employees and workers. These systems and procedures are not only required in terms of the PSR, 2016, but also in terms of section 6(2)(a) of the PDA.

To ensure the implementation of these requirements, the DPSA drafted the *Guide on the reporting of Unethical Conduct, Corruption and Non-Compliance in the Public Service* (the “Guide”). This will create awareness on the reporting obligation imposed by the PDA and the PSR, 2016, and encourage employees to report by explaining the protection afforded to them in terms of the law, and will assist departments to adopt a reporting policy, thereby outlining systems and procedures for reporting, as is required in terms of the PSR, 2016 and the PDA.

Implementation of this Guide will strengthen the protection of employees in the public service reporting corruption and related offences, unethical conduct, non-compliance and other improprieties, as employees and workers will know that it is safe to report. This will encourage a workplace culture that is conducive to managing ethics in the Public Service.

2. PURPOSE

The purpose of the Guide is to:

- Assist employees and workers to report wrongdoing.
- Assist departments to implement the requirements of the PSR, 2016 and the PDA, as far as reporting is concerned.
- Assist departments to draft a policy for the reporting of unethical conduct, corruption and non-compliance to the Public Service Act, 1994 and the Public Service Regulations, 2016, which will outline systems and procedures for reporting.
- Create an ethical work environment conducive to the reporting of wrong-doing, including criminal conduct.

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- Strengthen the protection of employees in the public service reporting unethical conduct, corruption and non-compliance.

This Guide should be read in conjunction with the relevant legislation and other prescripts that govern the reporting of unethical conduct, corruption and non-compliance in the Public Service.

This Guide deliberately does not refer to the concept “whistle-blowing” or “whistle-blowers”, as these concepts are increasingly found to be counter-productive and outdated. The PSR, 2016 requires employees in the public service to report wrongdoing and South Africa ratified the United Nations Convention against Corruption (UNCAC), which also refer to the reporting of wrongdoing. Given the negative connotation to “whistle-blowers” and “whistle-blowing” in South Africa, this Guide will follow the international trend and use the term “reporting”.

This Guide will be supplemented with practical guidelines on the PDA, which will be issued by the Minister of Justice and Correctional Services.

3. LEGISLATIVE FRAMEWORK

The following legal prescripts regulates the reporting of unethical conduct, corruption and non-compliance in the Public Service.

- **The Constitution of the Republic of South Africa Act, 1996** (“the Constitution”) calls on employees in the public service to maintain a high standard of professional ethics. Chapter 10, Section 195(1)(a) of the Constitution specifically mentions that “a high standard of professional ethics must be promoted and maintained” in the Public Administration.
- This Constitutional imperative is carried through to the **Code of Conduct for employees in the public service, as contained in Chapter 2 of the PSR, 2016**, in that it is expected of these employees to report observed unethical conduct, non-compliance and corruption. PSR, 2016 has two provisions that requires of employees in the public service to report corruption and related offences, unethical conduct and non-compliance:
 - **Regulation 13 (e)** – *Ethical conduct: An employee shall— immediately report to the relevant authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law (including, but not limited to, a criminal offence) or which is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service;*
 - **Regulation 14 (q)** – *Ethical conduct: An employee shall— immediately report any non-compliance of the Act to the head of department.*

- Besides the above requirements to report corruption, unethical conduct and non-compliance, **section 34 of the Prevention and Combating of Corrupt Activities Act, Act No 12 of 2004 (PRECCA)** also requires of employees in the public service (“any person who holds a position of authority”) who know or ought reasonably to have known or suspected that any other person had committed corruption (including theft, fraud, extortion, forgery or uttering a forged document), involving R100 000 or more, to report such to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995 (Act No. 68 of 1995).

- The **PDA** was designed to encourage individuals to report corruption, and other crimes and malpractices. The pre-amble to the Act states:

“...every employer, employee and worker has a responsibility to disclose criminal and other irregular conduct in the workplace.”

- South Africa subscribed to the UNCAC and as such is under obligation to encourage reporting:

Article 8(4)

“Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.” – UNCAC

- On 16 March 2016, the Minister for the Public Service and Administration signed an OECD Anti-Bribery Ministerial Meeting Declaration, signalling South Africa’s commitment to improve the protection of those reporting corruption:

“Il 7. Recognise that whistleblower protection frameworks need to be upheld and enforced to ensure that they provide real, effective protection.”

4. USE OF THE GUIDE

This Guide is intended for use by departments and its employees employed in the public service, as well as members of the services, educators or members of the Intelligence Services only in so far as the provisions of this Guide are not contrary to the laws governing their employment.

5. WHAT IS A REPORT AND HOW DOES IT DIFFER FROM A DISCLOSURE AND A PROTECTED DISCLOSURE?

A report is:

“An official or formal statement of facts or proceedings. To give an account of; to relate; to tell or convey information; the written statement of such an account”

-Dictionary definition

In the context of this Guide, the word report may refer to a disclosure. A disclosure is the reporting on conduct that is wrong or even criminal and is defined in the beginning of this guide:

Sometimes, the conduct of colleagues which a person wants to report on, is of a serious nature. Reporting on it may lead to victimisation, recrimination and sometimes dismissal. It can even endanger one’s life or that of someone else. In these cases, the need for some sort of protection is required. This is where a protected disclosure comes in.

6. WHAT IS THE DIFFERENCE BETWEEN A GRIEVANCE AND A REPORT?

A grievance differs from a report in the sense that it deals with a problem experienced by an employee, where a report or disclosure is about reporting wrongdoing that is taking place at work. Examples of a grievance may be: problems with leave calculations, pension, behaviour of a colleague, etc.

Confusion about the difference usually sets in with a misunderstanding of the grievance procedure. For instance, the grievance procedure may stipulate that a grievance must be reported to one’s manager. This does not apply to the reporting of wrongdoing, where your supervisor is the one you want to report for wrongdoing. In terms of the PDA you are allowed to bypass the chain of seniority when reporting wrongdoing. In certain instances you may even report the wrongdoing to outsiders.

7. WHO SHOULD REPORT WRONGDOING?

All employees in the public service should report wrongdoing, as is required in terms of the PSR, 2016.

PSA, Section 8: Composition of public service

- “(1) The public service shall consist of persons who are employed-
- (a) in posts on the establishment of departments; and
 - (b) additional to the establishment of departments.
- (2) Subject to the prescribed conditions, any person referred to in subsection (1) may be employed permanently or temporarily and in a full-time or part-time capacity.
- (3) For the purpose of this Act, in relation to employment-
- (a) The word ‘permanent’, in respect of an employee, means an employee to whom a retirement age referred to in section 16 applies; and
 - (b) The word ‘temporarily’ or ‘temporary’, in respect of an employee, means not permanently employed.”

With the amendments to the PDA, the definition of “employee” was amended and two new definitions introduced: namely, that of “worker” and “temporary employment service” as defined in the beginning of this guide.

This means that in terms of the PDA, for purposes of reporting only, the definition of an employee is extended to include workers: temporary workers, independent contractors, agents and consultants. This would include interns, security personnel, cleaning personnel, and other service providers. This extension implies that this broader group of employees would be protected under the PDA if they were to report wrongdoing.

Regulation 22 (c) of the PSR, 2016, encourages and allows employees and citizens to report allegations of corruption and other unethical conduct and such systems shall provide for a confidentiality of reporting.

8. WHY SHOULD I REPORT WRONGDOING?

An employee in the public service should report wrongdoing, as it is the right thing to do in terms of the Constitution and is required by law.

There is a legal obligation on employees in the public service to report wrongdoing. As indicated, the PSR, 2016 has two provisions that requires of employees in the public service to report corruption and related offences, unethical conduct and non-compliance:

- **Regulation 13 (e)** – *Ethical conduct: An employee shall—*

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immediately report to the relevant authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law (including, but not limited to, a criminal offence) or which is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service;

- **Regulation 14 (q)** – *Ethical conduct: An employee shall—immediately report any non-compliance of the Act to the head of department.*

Besides the obligation stated in the PSR, 2016, there is also a legal requirement in terms of **section 34 of the PRECCA** that “any person who holds a position of authority” who know or ought reasonably to have known or suspected that any other person had committed corruption (including theft, fraud, extortion, forgery or uttering a forged document), involving **R100 000 or more**, report such to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995.

In terms of the PRECCA, “people in positions of authority” include:

- The Director-General, Head or equivalent officer of a national or provincial department.
- A person in the Senior Manager Service of a public body.
- The Chief Executive Officer (or person holding a similar position) of any structure, institution or body set up by law.
- Anyone appointed on the above list who has been appointed in an acting or temporary capacity.

Apart from the above, there may also be an obligation on employees in the public service in terms of a department’s anti-corruption strategy to report corruption.

9. WHAT WILL HAPPEN IF I DO NOT REPORT WRONGDOING?

While the PDA does not oblige anyone to reveal wrongdoing, there are laws and regulations that create a duty to disclose certain types of information.

Employees employed in the public service, the South African Police Service, the South African National Defence Force and the State Security Agency, are obliged in terms of the Code of Conduct for the Public Service to report corruption and unethical conduct, as well as non-compliance to the Public Service Act, 1994 and the PSR, 2016. Not reporting these are a contravention of the Code of Conduct and should be treated as misconduct. If employees are aware of wrongdoing, but choose to ignore it, it is in itself a criminal offence.

Any person who fails to comply with the duty to report corruption to a value of R 100 000, 00 and more as stipulated in section 34 of the PRECCA, is guilty of an offence.

10. WHAT WRONGDOING SHOULD BE REPORTED?

The PSR, 2016 requires employees in the public service to report unethical conduct, corruption and non-compliance to the Public Service Act, 1994 and the PSR, 2016.¹ This represents an important shift away from only reporting on corruption.

The PDA requires employees in the public service and workers to report corruption. However, the scope of the PDA is wider than the PSR, 2016, in that it also requires employees in the public service to report improprieties. Improprieties include crime, failure to comply with any legal duty (including negligence, breach of contract, and breach of administrative law), miscarriage of justice, danger to health and safety, damage to the environment, discrimination and the deliberate cover-up of any of these. It also applies to concerns about the past, present and future malpractice. Improprieties in its widest sense therefore constitute unethical conduct and should be reported in terms of the PSR, 2016 as unethical conduct.

The reporting of non-compliance to the Public Service Act, 1994 and the PSR, 2016 is new. This would include the reporting on any breach of the Act, such as non-compliance to appointment procedures, but also breaches of the PSR, 2016. Breaches to the PSR, 2016 will include reporting on colleagues not disclosing gifts, employees not obtaining permission to perform other remunerative work outside the employee's employment, and colleagues conducting business with an organ of state. In all cases the wrongdoing would be known to the person reporting it, either by observing it, or being told about it.

11. WHAT DO I DO IF I AM AFRAID TO REPORT?

Employees reporting wrongdoing in the public service are in a better position than employees in the Private Sector reporting same, as all reports made by employees in the public service have to be treated confidentially. Regulation 22(c) of the PSR, 2016 provides for a head of department to establish a system that encourages and allows employees and citizens to report allegations of corruption and other unethical conduct, and that such system provide for "(i) confidentiality of reporting." In the Private Sector, an employee has to state that they wish their identity to remain confidential. This provision places an onus on public service departments to take active steps to keep the identity of the reporter confidential and only to reveal their identity with the necessary permission of the person who reported the wrongdoing. This provision aims to allay fears for victimisation and to encourage employees to report wrongdoing.

However, if an employee in the public service is afraid to report wrongdoing of a serious nature, which may lead to victimisation, dismissal, threats etc., there are two options to consider:

- 1) One option is to **report anonymously**. As it may be difficult for investigators to follow up on these reports, the report must be as comprehensive as possible, with all possible

¹ The DPSA is in the process of finalising a guide to explain the concepts unethical conduct and corruption.

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evidence attached (photos, copies of tenders, etc.). Usually an electronic system is used for reporting. In these cases a number may be allocated to the person making the report, so that it is possible for the person to update his/her report at a later stage.

- 2) A person may also opt to make a disclosure so that the PDA will protect you. As indicated before, a report or disclosure is a “**protected disclosure**” under the PDA, if:
- The disclosure contains information about “impropriety” and
 - The disclosure has been made to the right person, according to the scheme established by the PDA, and
 - The disclosure has been made by an employee or a worker.

The scheme created by the PDA to make a protected disclosure can be likened to a person in a room faced by several exit doors. If you choose the right door, you leave the room with the special protection provided by the PDA. If you do not choose the right door, you do not have any special protections, but must rely on ordinary labour law, criminal law, etc. to protect your rights if anything happens to you as a result of reporting corruption.

The five main doors you can take in making a disclosure so that the PDA will protect you are:

- Door 1: Legal advice (Section 5 of the PDA). A disclosure made to someone for the purposes of getting legal advice about the disclosure, is a protected disclosure. This would include the employee’s attorney or shop steward.
- Door 2: An internal disclosure (thus, your employer, Section 6 of the PDA). The PDA signals that it is safest if concerns are raised internally. A disclosure to the employer will be protected if the reporter acts in good faith, and follows the process set out for such disclosures by the employer. An employee should have a reason to believe that there is a problem of some sort, including the law being broken, the health or safety of people being endangered, or discrimination taking place, when making a report. This is the door that the PDA wants the potential reporter to walk through, in everyone’s interest. But it assumes that the employer will take the disclosure seriously and respond appropriately.
- Door 3: Disclosure to member of Cabinet or Executive Council (Section 7 of the PDA). A disclosure may be made by an employee to a member of Cabinet or to the Executive Council of a province, if that employee’s employer is:
 - an individual appointed in terms of legislation by a member of Cabinet or of the Executive Council of a province,
 - 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
 - an organ of state falling within the area of responsibility of the member concerned.

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- Door 4: Regulatory disclosures (Section 8 of the PDA). Section 8(1)(c) of the PDA makes provisions for persons and bodies to be prescribed by the Minister of Justice for purposes of section 8. This reinforces and strengthens the right of workers to make disclosures to specified regulatory bodies. A list of persons and bodies to be prescribed is in the process of being prepared. The following regulatory bodies are included in section 8:
 - Office of the Public Protector
 - South African Human Rights Commission
 - Commission for Gender Equality
 - Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
 - Public Service Commission
 - Office of the Auditor-General

Disclosures to these bodies will be protected where the reporter makes the disclosure in good faith and the employee or worker reasonably believes the regulatory body would usually deal with the kind of problem the reporter wants to report. In this instance, there is no requirement that the concern should first have been raised with the employer. It would be good practise to attach a list of these regulatory bodies and their mandates/functions to a reporting policy.

- Door 5: Wider disclosures (Section 9 of the PDA). Workers can also be protected under the PDA if they make wider disclosures (e.g. to the police, Members of Parliament and even the media). This is the most complicated way to disclose wrongdoing. This protection applies where the employee reports honestly, and reasonably believes that the information, and any allegation contained in it, is substantially true and that the disclosure is not made for personal gain. Crucially, to be protected, the particular disclosure must not only be reasonable, but there must also be a good cause for going “outside”.

There are four good causes recognised in law:

- the concern was raised internally or with a prescribed regulator, but has not been properly addressed,
- the concern was not raised internally or with a prescribed regulator, because the employee reporting reasonably believed he or she would be victimised,
- the concern was not raised internally, because the employee reporting reasonably believed a cover-up was likely and there was no prescribed regulator, or
- the concern raised was exceptionally serious.

In deciding the reasonableness of the disclosure, the adjudicatory forum will probably consider the identity of the person it was made to, the seriousness of the concern, and whether the disclosure breached a duty of confidentiality the employer owed a third party. Where the concern had been raised with the employer or a prescribed regulator, the tribunal will also consider their response.

This means it is not enough to have a disclosure policy only – concerns reported by workers must be investigated and action taken must be appropriate.

Finally, protection may be lost if the employee or worker failed to comply with a reporting policy the organisation had made available.

12. MUST A DEPARTMENT HAVE A REPORTING POLICY?

Yes. Section 6 of the PDA requires that 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 or worker.

In terms of section 6(2)(a) of the PDA, “Every employer must –

- (i) authorise appropriate internal procedures for receiving and dealing with information about improprieties; and
- (ii) take reasonable steps to bring the internal procedures to the attention of every employee and worker.”

Furthermore, regulation 22(c) of the PSR, 2016 requires of heads of departments to establish a reporting system.

“A head of department shall - establish a system that encourages and allows employees and citizens to report allegations of corruption and other unethical conduct, and such system shall provide for-

- i) confidentiality of reporting; and
- ii) the recording of all allegations of corruption and unethical conduct received through the system or systems;”

13. WHAT SHOULD THE DEPARTMENTAL POLICY ON THE REPORTING OF UNETHICAL CONDUCT, CORRUPTION AND NON-COMPLIANCE TO THE PUBLIC SERVICE ACT, 1994 AND PUBLIC SERVICE REGULATIONS, 2016 COVER?

In drafting a policy, the following elements should be taken into account:

- Advocacy and awareness (including on confidentiality of reporting and the channels and procedures of reporting available)
- Reporting channels (Different channels for reporting unethical conduct, corruption and non-compliance)
- Reporting procedures:
 - Internal and External reporting channels
 - Protection procedures
 - Investigation procedures
 - Procedures for criminal referrals

- Procedures for implementing outcomes and escalating complaints/concerns/disclosures.
- Recording procedures

13.1. ADVOCACY AND AWARENESS

To facilitate a culture where it is acceptable and safe for employees in the public service to report corruption, unethical conduct, non-compliance and improprieties, it is important to raise awareness on the need to report. As such, it is advisable to explicitly state in your policy that any employee or worker, no matter how junior or senior, may disclose their concerns about what they perceive to be unacceptable conduct. The policy should also explicitly state that anyone who makes a disclosure in good faith will be protected against any victimisation or reprisal by any colleague or manager and that any victimisation or attempt to discourage a person from making or wanting to make a disclosure is a disciplinary offence.

Implementation of the policy will be greatly strengthened if leadership advocates for reporting and the Ethics Office(r) implements effective and ongoing awareness programmes. In terms of regulation 23 (a) of the PSR, 2016, Ethics Officers are responsible to promote integrity and ethical behaviour in the department and in terms of regulation 23 (c) of the PSR, 2016, they should identify and report, unethical behaviour and corrupt activities to the head of department. As such, Ethics Officers should take a special interest in the reporting policy and its execution.

During planned advocacy and awareness sessions (including posters and newsletters), as part of the work of the Ethics Office, the following should be explained to **employees and workers** (including service providers):

- That the reporting system provides for the **confidentiality of reporting**.
- The **reporting obligation** that is imposed on employees in the public service in terms of regulation 13 (e) and 14 (q) of the PSR, 2016 and section 34 of the PRECCA, as well as what it entails.
- To explain when a disclosure is considered to be a **protected disclosure**. This would include an explanation of the scheme established under the PDA, and the type of protection that would be provided to employees and workers, such as: protection of anonymity, protection against victimisation, etc.
- To provide information on what an **occupational detriment** is and the forms of harm that an employee or worker may be subjected to as a result of having made a protected disclosure. It may be dismissal, job sanctions, punitive transfers, harassment, and the loss of status and benefits. The PDA introduced two additional forms of occupational detriment, namely,

- (i) reprisals such as defamation suits and suits based on the alleged breach of a confidentiality agreement or duty, and the loss of a contract or the failure
- (ii) to be awarded a contract (a specific form of detriment typically experienced by contract workers).
- The **legal remedies** that an employee or worker can take when occupational detriment is experienced should also be explained. When experiencing occupational detriment, an individual may approach a court having jurisdiction (including Labour Court) for appropriate relief or may follow any other process allowed or prescribed by law, such as:
 - An employee who is dismissed for making a protected disclosure can claim either compensation for loss of salary or reinstatement.
 - An employee who is disadvantaged in some other way (than dismissal) as a result of making a protected disclosure can claim compensation or ask the court for any other appropriate order.

These remedies under the PDA also apply to contractors, consultants and agents who are defined in the PDA as “workers”. The PDA makes 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.

- Awareness should also be raised on what **malicious reporting** is and what the consequences for it will be. Section 9B of the PDA provides that employees or workers who make false disclosures are guilty of an offence. This provision sets a high threshold for a person to be convicted of an offence. Section 9B requires that an employee or worker must have disclosed false information intentionally—
 - (i) knowing that the information is false or ought reasonably to have known that the information is false; and
 - (ii) with the intention to cause harm to the affected party and where the affected party has suffered harm as a result of such disclosure.

The PDA furthermore provides for the exclusion of civil and criminal liability. This does not mean a blanket immunity, as immunity from civil and criminal liability will not be automatic, but will be granted subject to the discretion of the court in which an action is brought and in those cases where the disclosed information—

- (i) shows or tends to show that a criminal offence has been committed, is being committed or is likely to be committed; or
- (ii) shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur.
- The internal and external **reporting channels and procedures** for receiving and dealing with reports should also be promoted among employees, workers and citizens, as this is a requirement in terms of the PDA and PSR, 2016.

- An explanation of the procedures for implementing outcomes and **escalating** complaints/concerns/reports. This should cover internal escalation procedures (for example to the Ethics Committee, head of investigation, etc.), but also (where relevant) escalation to relevant external entities, such as the Office of the Public Service Commission (OPSC).

13.2. REPORTING CHANNELS

As previously indicated, the PDA requires of departments to establish reporting channels. This requirement resonates with regulation 22(c) of the PSR, 2016: “A head of department shall - establish a system that encourages and allows employees and citizens to report allegations of corruption and other unethical conduct, and such system shall provide for-

- i) confidentiality of reporting; and
- ii) the recording of all allegations of corruption and unethical conduct received through the system or systems;”

The policy should set out to whom a report should be made, e.g. by providing a template, which contains the contact details of the person that the employer has authorised to receive a disclosure.

Reporting channels consist of persons (or a person) or a body (or bodies) identified in a departmental policy for reporting purposes, to be contacted by employees and citizens, service providers and private companies when reporting wrongdoing. The names and contact numbers of these contacts may be posted on the departmental website.

Depending on the wrongdoing, an appropriate reporting channel must be identified. For instance, corruption and related offences could be reported to those who are involved in anti-corruption work, whereas unethical conduct and improprieties can be reported to those involved in the ethics field. Non-compliance on the other hand, as indicated in the PSR, 2016, should be reported to the head of the department (or delegated official).

All of these reporting channels form part of the system alluded to in regulation 22 (c) of the PSR, 2016, which requires cooperation of all designated role-players to record and share information on corruption and unethical conduct. For this reason, the Ethics Committee, or a similar committee, may be the ideal body to centrally record the allegations and, where appropriate, to exercise the necessary oversight.

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Example of a reporting channel:

| Type of conduct | Reporting channel (e.g.) |
|--|--|
| Corruption and related offences, improprieties | Head of Legal Head of Security |
| Unethical conduct | Ethics Office (r) Ethics Committee Ethics Champion |
| Non-compliance to the PSR, 2016 and Public Service Act, 1994 | Head of Department (or delegated official, such as Ethics Officer) |

Given the recent introduction of Ethics Officers, the role of the Ethics Office(r) in addressing reports on unethical conduct needs to be institutionalised. In terms of regulation 23 (c) of the PSR, 2016, Ethics Officers should identify and report unethical behaviour and corrupt activities to the head of department. With access to reports, the Ethics Officer will be in a position to assess the ethics climate of a department and to report trends to the Ethics Committee.

All employees designated to receive a disclosure, must honour the confidentiality of reporting (as required in terms of the PSR, 2016) and must have the necessary authority and determination to address concerns arising from reporting. Departments should consider providing training to employees designated to receive reports and possible protected disclosures.

A National Anti-Corruption Hotline (NACH) was introduced to enable employees in the public service to report corruption anonymously. This hotline, in terms of a Cabinet mandate, is managed by the OPSC. The number of the national hotline should be contained in the policy: **0800 701 701**.

The policy must also state that corruption reported involving R 100 000 or more, must be reported to the police official in the Directorate for Priority Crime Investigations referred to in section 17C of the South African Police Service Act, 1995, and it must be indicated who in the department will be responsible to report to and to follow-up with the police.

In terms of regulation 22(e), of the PSR, 2016, the head of department shall “refer allegations of corruption to the relevant law enforcement agency and investigate whether disciplinary steps must be taken against any employee of the department and if so, institute such disciplinary action.”

13.3. REPORTING PROCEDURES

The policy should outline procedures to manage or deal with the information, stating how and in what format a report should be made by employees, workers and citizens respectively, and how the information will be managed.

The following should be addressed:

- How a report should be made, e.g. reporting it to an individual/Ethics Committee, using an electronic system (such as a contact number, an email or a fax number).
- A template or format that should be used for reporting.
- The process to follow, when a concern is to be raised on the handling of a disclosure or outcome or lack of outcome of an investigation into the reported case.
- The process for seeking redress when a report or protected disclosure were perceived not to be handled properly. In this regard, concerns can be raised internally with the ethics officers, chair of the Ethics Committee, ethics champion, human resources professional or legal official and externally with the OPSC and other regulatory bodies, such as the Public Protector.
- The process to address complaints directed by employees and workers against its own departments, especially on the issue of occupational detriment. Employees should be informed that they can address such cases with the OPSC.
- A commitment that the process for protected disclosures should be reviewed regularly, taking into consideration the practical experience of employees reporting an issue.
- An outline of how confidentiality of reports will be managed.
- The investigations process should be outlined with an emphasis on the duty on employers to inform the employee or worker on the outcome of a protected disclosure (as per section 3B of the PDA). It may also be beneficial to attach the Code of Conduct for Investigators to the policy, where their expected conduct are outlined in terms of the Bill of Rights.

In relation to investigations, section 3B of the PDA provides that:

(1) Any person or body to whom a protected disclosure has been made in terms of sections 6, 7 or 8, respectively, must as soon as reasonably possible, but **within 21 days after the protected disclosure has been made—**

- (a) Decide whether to
 - (i) **Investigate** the matter or not or
 - (ii) **Refer** the disclosure to another person or body if that disclosure could be investigated or dealt with more appropriately by that other person or body; and
- (b) In writing **acknowledge receipt** of the disclosure by informing the employee or worker of the decision—

- (i) To investigate the matter, and the time-frame within which the investigation will be completed;
 - (ii) Not to investigate the matter and the reasons for such decision; or
 - (iii) To refer the disclosure to another person or body (e.g. to outsource to a forensic auditor).
- (2) The person or body to whom a disclosure is referred, as in subsection (1)(a)(ii) must, subject to subsection (3), as soon as reasonably possible, but within 21 days after such referral-
 - (a) Decide whether to investigate the matter or not and
 - (b) In writing inform the employee or worker of the decision-
 - (i) To investigate the matter the time-frame within which the investigation will be completed or
 - (ii) Not to investigate the matter and the reasons for such decision.
- (3) The person or body, referred to in subsection (1) or (2), who is unable to decide within 21 days whether a matter should be investigated or not, must-
 - (a) In writing inform the employee or worker-
 - (i) That he/she.it is unable to take the decision within 21 days and
 - (ii) On a regular basis, at intervals of not more than two months at a time, that the decision is pending; and
 - (b) As soon as reasonably possible, but in any event within six months after the protected disclosure has been made or after the referral has been made, in writing inform the employee or worker of the decision
 - (c)
 - (i) To investigate the matter and the time-frame within which the investigation will be completed or
 - (ii) Not to investigate the matter and the reasons for such decision.
 - (d)
 - (i) To investigate the matter and the time-frame within which the investigation will be completed or
 - (ii) Not to investigate the matter and the reasons for such decision.

13.4. PHYSICAL PROTECTION

The protection of employees in the public service reporting corruption and related offences, unethical conduct and improprieties are the main driver for a successful reporting system and to change the culture of keeping silent. For this reason, the PSR, 2016 required the reporting system to ensure confidentiality. The policy must state that everything possible will be done to keep all reports confidential and outline the measures for ensuring that. Employees designated to receive disclosures should know that reports must be kept confidential, and breaches is considered a misconduct. It must also be clearly stated in the reporting policy that the victimisation of employees and workers who make protected disclosures is a serious violation of their rights.

Employees (or the Ethics officer) should consider to report procurement and financial corruption to the internal audit first, who can perform an audit to establish wrongdoing. This practise prevents an individual from giving evidence and as such limits the danger of victimisation.

A department should also consider if physical protection must be arranged in extreme cases to protect an employee reporting corruption or serious wrongdoing. This will depend on the risks inherent to the department and the risk attached to the case, especially if it is life threatening. The Ethics Committee (assisted by the Security Unit) may play a role to identify criteria and to request protection for that employee. In extreme cases, the Office of the Witness Protection Unit (resorting under the National Prosecuting Authority), operating under the Witness Protection Act, may provide protection for individuals that are in life threatening danger.

A department, and especially the Ethics Committee, should consider measures to protect investigators and auditors investigating serious misconduct. This is especially where undue pressure is exerted to stop investigations or to influence the outcome thereof.

13.5. INVESTIGATIONS

A separate policy can be drafted on investigations, and as such it would suffice to indicate that investigations will be performed in terms of the departmental investigation policy, and that all protected disclosures would be investigated according to PDA and the relevant policy prescripts.

13.6. RECORDING

Regulation 22(c) of the PSR, 2016 requires of heads of departments to establish a reporting system that provides for the recording of all allegations of corruption and unethical conduct received through the system or systems.

A departmental policy should therefore explain what information should be recorded, by whom, when and in what format. As such it should include, amongst others: The recording of information/reports received and the format in which it should be received, the recording of cases to be investigated, the recording of referred cases, the recording of the outcome of cases, and the recording of complaints directed against an outcome.

14 CONCLUSION

The reporting of wrongdoing is a key tool for promoting individual responsibility and organisational accountability, thus to build an ethical Public Service. As such, it gives impetus

to the Ministerial Declaration made by the OECD Anti-Bribery Ministerial Meeting and signed by the Minister for Public Service and Administration on 16 March 2016, affirming the need to effectively protect those who report corruption in good faith and on reasonable grounds, so that we can better prevent, detect, investigate and prosecute wrongdoing.

ANNEXURE A

OUTLINE OF A TYPICAL POLICY FOR THE REPORTING OF UNETHICAL CONDUCT, CORRUPTION AND NON-COMPLIANCE TO THE PUBLIC SERVICE ACT, 1994 AND THE PUBLIC SERVICE REGULATIONS, 2016 IN THE PUBLIC SERVICE

Foreword

Definitions and abbreviations

- Code of Conduct
- Corruption
- Disclosure
- Employee
- Fraud
- Impropriety
- Occupational Detriment
- Protected disclosure
- Worker
- Abbreviations such as HOD, NACH, PRECCA, PDA

1. Purpose of the Policy
2. Source of authority
3. Scope of the Policy/Applicability of the Policy
4. Culture of transparency/ Commitment to encourage reporting
5. Who can make a disclosure?
6. Duty to report or make disclosures (The Anti-Corruption Strategy of a department can also require reporting of wrongdoing)
7. Requirements and how to make a disclosure?
 - 7.1 Preferred first step: Internal disclosure
 - 7.2 Disclosure to legal adviser
 - 7.3 Disclosure to a member of Cabinet or Executive Council
 - 7.4 Regulatory Disclosures
 - 7.5 General protected disclosures/wider disclosures
8. Duty to inform employee or worker of steps taken
9. Confidentiality
10. Protection of employees reporting wrongdoing
 - 9.1 Against occupational detriment
 - 9.2 Remedies
 - 9.3 Exclusion of civil and criminal liability
11. Review of the policy
12. Date of commencement