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PROJECT 123

PROTECTED DISCLOSURES

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INTRODUCTION

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are —

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Advocate JJ Gauntlett SC
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PREFACE

This discussion paper has been prepared to elicit responses from interested parties and to serve as a basis for the Commission's deliberations. Following an evaluation of the responses and any final deliberations on the matter, the Commission may issue a report on this subject which will be submitted to the Minister of Justice for tabling in Parliament.

The views, conclusions and recommendations in this paper are not to be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents unless representations are marked confidential. Respondents should be aware that under section 32 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) the Commission may have to release information contained in representations.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **31 August 2004** at the address appearing on the previous page. Any requests for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Miss LJ Jankie.

This document is also available on the Internet at: www.law.wits.ac.za/salc/salc.html

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SUMMARY OF PROVISIONAL RECOMMENDATIONS

1. The ambit of the Protected Disclosures Act (the PDA) should be extended beyond the strict employer/employee relationship to include independent contractors, consultants, agents and other such workers. This would considerably extend the legal environment in which disclosures may safely be made (para 4.17). Comment is invited on the further extension of the protection of the Act to all persons, ie the introduction of what is provisionally termed *citizens' whistleblowing*.
2. It is recommended that the definition of 'employee' be amended to bring it in line with the extended PDA. Further, it is proposed that the word 'employee' be changed throughout the Act to 'worker' (para 4.20).
3. It is proposed that the definition of 'employer' be amended. Further, since the concept of a 'client' features in the proposed new definition of a 'worker', it seems necessary to insert a matching reference of an 'employer' (para 4.21).
4. The list of forms of victimisation should be left open-ended to allow additional forms, bearing in mind that any form of victimisation suffered by a whistleblower will inevitably have to be shown to be related to an act of whistleblowing. Further, the definition of 'occupational detriment' should be extended to include reprisals such as defamation actions; suits based on the alleged breach of a confidentiality agreement or duty; and the loss of a contract or the failure to acquire a contract (paras 4.24 – 4.25).
5. The list of persons to whom disclosures may be made should be extended, allowing for greater flexibility in this regard (para 4.26).
6. The PDA should provide for the exclusion of criminal and civil liability on making a protected disclosure (para 4.51).
7. Where the identity of a whistleblower is known, it should as far as possible be kept confidential and protected (para 4.52).
8. Section 4 of the PDA should be amended to provide expressly for claims for damages with no ceiling; and courts and tribunals should be directed to take into account the actual loss suffered by a claimant when awarding damages (para 4.74).
9. It is proposed that, without reducing the existing flexibility of section 4 of the Act, the PDA should expressly provide for specific remedies such as interdicts, including mandatory interdicts (para 4.76).
10. The concept of punitive damages is foreign in South African law and ought not to be introduced into the PDA (para 4.77).
11. An employee's or worker's actions should not be criminalised where he or she knowingly makes a false disclosure (para 4.94).
12. The PDA should not make it an offence to subject an employee or a worker to an occupational detriment (para 4.95).

13. Section 5 of the PDA should be amended to include a requirement of good faith and/or to include protection of disclosures made to a trade union representative (para 4.96 – 4.97).

CHAPTER 1: INTRODUCTION

1.1 The South African Law Reform Commission is currently involved in an investigation dealing with the Protected Disclosures Act 26 of 2000 (the PDA). The main focus of the investigation is the possibility of extending the ambit of this statute beyond the purview of the employer/employee relationship.

1.2 The PDA was derived from Part 5 of the Open Democracy Bill [B67-98], which contained a chapter on the protection of whistleblowers. When the Portfolio Committee on Justice and Constitutional Development reported to Parliament on the Bill it stated that while all parties were unanimously of the view that this legislation was vital for the fight against crime, it was not appropriate to include a chapter on the protection of whistleblowers in legislation dealing with the right of access to information. Parliament thus embarked on a process of redrafting the chapter into separate legislation, the Protected Disclosure Bill [B30-2000]. The Bill was presented to Parliament and later enacted as the PDA. The main reason for enacting this statute was that South African common law and statutory law failed to deal effectively with the disclosure of information by an employee relating to corruption, crime, maladministration and other improper conduct in public and private bodies.[1]

1.3 Whistleblowing generally entails that employers facilitate disclosures by employees concerning wrongdoing in the workplace. This is often done by making available to employees a dedicated telephone number or other mechanism to be used in the event of the employees having knowledge of criminal or other wrongful conduct within the organisation. Employees are often in the best position to detect criminal activities and irregular conduct at work. However, without any legislative protection an employee's disclosure may simply be exacting too high a sacrifice. Thus whistleblowing legislation generally aims to protect employees from retaliation and other detrimental conduct.

1.4 'To tackle the numerous occurrences of corruption and the varying unacceptable and illegal practices in society, we need information on their occurrences.'[2] Whistleblowing should not be

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1 David Greybe 'Whistleblower Law Will Be Retrospective' *Business Day* (Johannesburg) March 8, 2000, also available online on Hhttp://allafrica.com/stories/200003080211.htmlH accessed 08-02-2002.

2 BJ da Rocha Institute of Economic Affairs, as quoted by Musah Yahaya Jafaru 'Interim Disclosures Bill Adopted' *Accra Mail* November 16, 2001, also available online on Hhttp://allafrica.com/stories/ printable/200111150442.htmH, accessed 08-02-2002.

regarded as 'telling tales' or informing in a negative, anonymous and underhand sense. Rather, it has to do with raising a concern about malpractice within an organisation. As such, whistleblowing is a key tool in promoting individual responsibility and organisational accountability. A recent survey conducted by the Institute for Security Studies among an expert panel of people confirms the importance attached to whistleblowing as an effective tool in the fight against corruption.[3] In short, whistleblowing leads to accountability and openness. It

> empowers people to make rational and intelligent decisions and it is a key value for a democracy to thrive….the Protected Disclosures Act 2000 will go a long way towards eradicating corruption, increasing accountability and encouraging openness.[4]

1.5 It stands to reason that by remaining silent about corruption, offences or other malpractices taking place in the workplace, an employee necessarily contributes to, and becomes part of, a culture of fostering such improprieties. This is obviously detrimental to the legitimate interests of South Africans in general.

1.6 The South African Law Reform Commission published an Issue Paper in January 2003 which was distributed to a broad spectrum of interested persons, organisations and institutions, both governmental and non-governmental. The Issue Paper briefly canvassed the extension of the ambit of the PDA in various respects. Areas highlighted for discussion were:

- extension of the PDA so that a person other than an employee in the strict sense is able to make a protected disclosure concerning wrongdoing in the workplace;
- the exclusion of criminal and civil liability upon making a protected disclosure;
- the creation of a new remedy for an employee who has been victimised by an employer in contravention of the PDA;
- whether such remedy should be aimed at the person who acted in contravention of the PDA or at both the employer and such person;
- whether such remedy should introduce the concept of punitive damages into our law;
- creation of offences within the PDA in terms of which
  - an employer would be committing an offence by unlawfully subjecting an employee to an occupational detriment; and
  - an employee would be committing an offence by making a false disclosure not knowing or believing it to be true.

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3 Lala Camerer 'Protecting Whistle Blowers in South Africa: The Protected Disclosures Act, No 26 of 2000' Occasional Paper No 47-2001, Pretoria, Institute for Security Studies 2001.

4 Justice Minister Penuell Maduna, Speech at KPMG/BDFM and Resolve Crime and Security Solutions Conferences, *Business Day* September 6, 2001, also available online on Hhttp://allafrica.com/stories/printable/200109060462.htmlH, accessed 08-02-2002.

1.7 In compiling this Discussion Paper, the South African Law Reform Commission (the Commission) had due regard to the views expressed by and comments received from a diversity of respondents.[5]

1.8 The Commission recognised the National Economic Development and Labour Council (NEDLAC) as an organisation with a particular interest in the legislation[6] and offered it an opportunity to contribute to the Discussion Paper. The comments ultimately submitted by NEDLAC were made in response to a draft Discussion Paper rather than to the Issue Paper. Separate sets of comments were submitted by the Business Unit and the Labour Unit.

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5 See Annexure A for a list of respondents who commented on Issue Paper 20.

6 See section 5 of National Economic, Development and Labour Council Act 35 of 1994.

CHAPTER 2: THE PRESENT POSITION IN SOUTH AFRICA

Objects of the PDA

2.1 The purpose of the PDA is to provide for procedures and to offer protection to employees who blow the whistle on their employers. It aims to put in place a mechanism through which persons can make disclosures in the public interest that are protected, and therefore to prevent any person from being subjected to victimisation or occupational detriment as a result of the disclosure.[1] The PDA was enacted with a view to creating a culture in which employees may in a responsible manner disclose information of criminal or other irregular conduct in the workplace 'by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures'.[2] Another aim of the statute is to 'promote the eradication of crime and misconduct in organs of state and private bodies'.[3]

2.2 The objects of the PDA are threefold.[4] It aims to:

- provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer;
- protect an employee, whether in the public or the private sector, from being subjected to an occupational detriment on account of having made a protected disclosure; and
- provide for certain remedies in connection with any occupational detriment suffered as a result of having made a protected disclosure.

2.3 The PDA purports to protect employees from victimisation by employers, and is thus confined to the relationship between employer and employee in both the public and private sectors. Before the statute was enacted the Justice Portfolio Committee considered the possibility of extending the ambit of the PDA beyond the purview of the employer/employee relationship. It also considered

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1 BJ da Rocha Institute of Economic Affairs, as quoted by Musah Yahaya Jafaru 'Interim Disclosures Bill Adopted' *Accra Mail* November 16, 2001, also available online on Hhttp://allafrica.com/stories/printable/200111150442.htmH, accessed 08-02-2002.

2 Preamble to the PDA.

3 Ibid.

4 Section 2(1).

various other extensions of the PDA. However, the Justice Portfolio Committee felt the extension of the PDA would require comprehensive and comparative research, and that the South African Law Reform Commission would be best placed to undertake research in this regard.

Employment

2.4 The PDA defines an employer[5] as any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person, or 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. The PDA defines an employee[6] as 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, and any other person who in any manner assists in carrying on or conducting the business of an employer, whether in the public or private sector. In terms of the PDA, employees who make disclosures are protected from occupational detriment as a result of having made such disclosures.

Occupational detriment

2.5 The PDA defines occupational detriment, in relation to the working environment of an employee, to mean:[7]

- being subjected to any disciplinary action;
- being dismissed, suspended, demoted, harassed or intimidated;
- being transferred against his or her will;
- being refused transfer or promotion;
- being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- being refused a reference, or being provided with an adverse reference, from his or her employer;
- being denied appointment to any employment, profession or office;
- being threatened with any of the actions referred to above; or
- being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

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5 Section 1(iii).

6 Section 1(ii).

7 Section 1(vi).

Making a protected disclosure

2.6 'Disclosure' is defined in the PDA[8] as any disclosure of information regarding any conduct of an employer, made by an employee who has reason to believe that the information concerned shows or tends to show one of the following:

- that a criminal offence has been committed, is being committed 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 damaged;
- unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No 4 of 2000); or
- that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.

2.7 However, the employee will not be protected by the provisions of the PDA where he or she commits an offence by making the disclosure.[9] Further, an important principle contained in the Act is that disclosures other than those made to a legal adviser must be made in good faith.[10]

2.8 The PDA provides for five different types of protected disclosure. Disclosures may be protected in terms of the PDA if made to a legal adviser; to an employer; to a member of Cabinet or of an Executive Council where the employer is appointed by either of these bodies; to the Public Protector or the Auditor-General in certain circumstances; and, if certain special conditions are satisfied, a 'general' protected disclosure may be made to anyone else (such as the media). Each type of disclosure has its own procedure and requirements. Thus, for instance, a disclosure to an employer must be made in good faith and substantially in accordance with any procedure prescribed by the employer for reporting improprieties. In relation to disclosures to the Public Protector or the Auditor-General, there must be a reasonable belief in the truth of the information disclosed. With regard to general disclosures, the employee must not make the disclosure for the

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8 Section 1(i).

9 Section 1(ix)(e)(i).

10 Sections 6-9.

purposes of personal gain, excluding a reward payable in terms of the law, and it must be reasonable to make the disclosure. In addition, one or more special conditions must apply.[11]

2.9 The PDA seems to encourage a three-stage approach to whistleblowing:

(i) an employee in possession of evidence of wrongdoing may approach his or her employer or immediate supervisor;

(ii) if the employee is not satisfied with the response of the employer, he or she is entitled to approach another body such as the Public Protector, the Auditor-General or any person or body prescribed for the purposes of the PDA;

(iii) if that route fails and the employee is still not satisfied, he or she is justified in taking the matter to the media or Parliament.[12]

2.10 There is no express requirement in the PDA for an employee to make a disclosure to his or her employer in the first instance, although the question whether the disclosure was first made to the employer may be relevant when deciding whether a disclosure to another party was reasonable in the circumstances.[13] However, in effect the PDA encourages people to go to their employers first as the requirements for disclosure to other bodies are more onerous.

2.11 It is in the employer's interests to investigate and to take corrective action where necessary. Calland suggests that

> at the heart of the Act is the notion that prevention is better than cure. It strongly encourages whistle-blowers to disclose first of all to their employers, in order that the employer should have the opportunity to remedy the wrongdoing. Potential whistleblowers need to know that they must first go through this door where the test is that of good faith, rather than making a wider disclosure which would require higher tests.[14]

Remedies

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11 Section 9; Osborne Molatudi 'Busting Workplace Crime' *People's Dynamics* vol 19, No.3, March 2001.

12 David Greybe 'Whistleblower Law Will Be Retrospective' *Business Day (Johannesburg)* March 8, 2000, also available online on Hhttp://allafrica.com/stories/200003080211.htmlH, accessed 08-02-2002.

13 Section 9(3) of the PDA.

14 Richard Calland, Executive Chair of the Open Democracy Advice Centre, as quoted in Lala Camerer 'Protecting Whistle Blowers in South Africa: The Protected Disclosures Act, No 26 of 2000' Occasional Paper No 47-2001, Pretoria, Institute for Security Studies 2001.

2.12 The PDA provides for remedies where an employee has been, is being or may be subjected to an occupational detriment in breach of the Act. Two of the remedies are very general, entailing 'appropriate relief' from a court having jurisdiction, including the Labour Court, and the pursuit of 'any other process allowed or prescribed by any law'.[15] This would seem to include any kind of remedy, including for instance an action for damages in delict. The PDA also deems any dismissal and any occupational detriment in breach of the Act respectively to be an unfair dismissal and an unfair labour practice in terms of the Labour Relations Act 66 of 1995 (the LRA).[16] Finally, the PDA provides for an employee to request a transfer, on equally favourable terms, to another division if he or she reasonably believes that a disclosure will affect him or her adversely. However, whistleblowers who use or intend using the provisions of the PDA to conceal their own involvement in criminal activities are not protected in terms of the PDA.[17] Thus where a law has been contravened, the PDA will not protect the whistleblower from criminal prosecution, civil liability to third parties or prosecution for offences as the case may be.[18]

2.13 The PDA states[19] that any provision in a contract of employment, or in any other agreement between an employer and employee, will be void in so far as it attempts to exclude any provision of the PDA, or attempts to preclude an employee from making a protected disclosure or has the effect of discouraging disclosures.

2.14 The provisions described above seem to be confined to the relationship between an employer and employee in the public and private sectors. The Act expressly excludes independent contractors from its ambit and would seem also to exclude agency workers (that is, employees of a temporary employment service) and other such workers. The rather uncertain definition of ‘employee’ could perhaps be read as including such persons. Failing this, there is no protection against reprisals for an independent contractor who blows the whistle on corruption, and there would seem to be none for a person who loses a lucrative contract on account of whistleblowing.

2.15 Further, the PDA does not protect a whistleblower from criminal prosecution or civil liability to third parties upon making a protected disclosure. It is silent on this subject and many other subjects, including confidentiality. The PDA does not provide for protection of the identity of a whistleblower. The Act does not expressly impose a duty on the person to whom the disclosure is

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15 Section 4 of the PDA.

16 Ibid. See section 187 of the Labour Relations Act.

17 Osborne Molatudi (footnote 11 above).

18 Ibid.

19 Section 2(3).

made to investigate such a disclosure, or treat a failure to investigate as a detriment. The remedies provided by the Act are also somewhat obscure.

2.16 In drafting the legislation, the Justice Portfolio Committee was not persuaded to expand the ambit of the law beyond the strict employer/employee relationship. As noted above, the present investigation is concerned with the possibility of extending the ambit of the PDA in this and other respects.

CHAPTER 3: COMPARATIVE STUDY

3.1 The focus of this comparative study is on the legislation of four countries: the United Kingdom, New Zealand, the United States of America and Australia. The legislation in each of these countries tends to be broader in scope than South Africa's own PDA, and thus the material in this chapter illustrates possible avenues for the extension of the PDA.

United Kingdom (UK)

3.2 The UK Act dealing with the protection of whistleblowers is the Public Interest Disclosure Act, 1998 (PIDA). One of the main inspirations behind this legislation was the realisation, after the occurrence of major disasters in the 1990s, that workers had in many cases been aware of the danger, but had either been too afraid to sound the alarm or had raised the matter in the wrong way or with the wrong person.[1] Rabin-Naicker[2] mentions as examples the Clapham Railway crash, where the inquiry heard that an inspector had noticed the loose wiring but had said nothing for fear of causing trouble; and the Piper Alpha disaster, where the inquiry concluded that workers did not want to jeopardise their employment by 'raising a safety issue which might embarrass management'.[3] The PIDA was hailed as a valuable tool to promote good governance and openness in organisations.[4] Its object is to protect workers[5] from detrimental treatment or victimisation by their employer if, in the public interest, they blow the whistle on wrongdoing.[6]

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1 Guy Dehn 'Public Interest Disclosure Act, 1998 (chapter 23)' *Current Law Statutes* London: Sweet & Maxwell at 23.

2 Hilary Rabin-Naicker 'The Protected Disclosures Act: Challenges for Labour Law Jurisprudence' (2002) 6 *Law, Democracy and Development* 139.

3 Ibid 140, quoting Dehn (footnote 1 above).

4 Press release from launch of the Public Interest Disclosure Bill, available online at Hhttp://www.cfoi.org.uk/pidbillpr.htmlH, accessed on 31-01-2002.

5 The term 'worker' has a fairly broad meaning in the context of the PIDA. It is wider than 'employee' in that 'worker' includes both employees and workers who are not necessarily employees, for example, contract workers, homeworkers, agency workers and voluntary workers.

6 The Charity Commission for England and Wales, *Operational Guidance: The Public Interest Disclosure Act 1998,* available online at Hhttp://www.charity-commission.gov.uk/supportingcharities/ogs/p079a001.aspH, accessed on 11-02-2002.

3.3 Disclosures made by public and private sector workers in the public interest may be crucially important in protecting the public from a range of hazards, including injury, risk to life, fraud, financial malpractice and environmental damage. In justifying the PIDA, Cripps suggests that those who make such disclosures deserve legal protection.[7] The Act

> contains safeguards to ensure that organisations are given the opportunity to correct matters internally first and that individuals are not encouraged to disclose information recklessly. It encourages workers to make their disclosures, where possible, within the relevant organisation and to regard disclosures in the first instance to a wider audience as a course to be avoided if a more measured response might avail. In this context, it is important to remember that disclosure within the workplace will not only be less damaging for employers but also for workers, not least in terms of their subsequent appeal to other employers.[8]

3.4 Thus, generally, the PIDA ensures that workers are able to make disclosures about wrongdoing to their employer so that problems can be identified and resolved quickly within the organisation.[9] To facilitate disclosures in terms of the PIDA, many organisations have internal procedures that can be used or adapted. Employers are of course entitled to loyalty and confidentiality in normal circumstances. However, where there is serious malpractice it is vital that people know that the law will protect them if they act responsibly.

3.5 The PIDA protects:

- persons who work under contracts of employment;
- persons who work personally for someone else under a 'worker's' contract but are not genuinely self-employed;
- homeworkers;
- certain agency workers;
- National Health Service practitioners, including general practitioners, certain dentists, pharmacists and opticians; and
- certain categories of trainees.[10]

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7 Yvonne Cripps 'The Public Interest Disclosure Act 1998' in Jack Beatson & Yvonne Cripps (eds) *Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams* Oxford: University Press (2000) 275.

8 Ibid 277.

9 DTI Employment Relations – Guide to the Public Interest Disclosure Act 1998 (PL502) available online at Hhttp://www.dti.gov.uk/er/individual/pidguide-pl502.htmH, accessed on 31-01-2002.

10 Section 43K.

3.6 For a disclosure to qualify for protection, the PIDA names a number of entities to whom disclosures may be made. These are:

- an employer (or other responsible person);[11]
- a legal adviser, if the disclosure is made in the course of obtaining legal advice;[12]
- a Minister of the Crown, if the worker's employer is an individual appointed under any enactment by a Minister of the Crown, or is a body any of whose members are so appointed;[13] and
- a 'prescribed person'.[14]

3.7 In terms of the PIDA, a disclosure qualifies for protection if made:

- either directly to the employer or by procedures authorised by the employer for that purpose;[15] or
- to another person whom the worker reasonably believes to be solely or mainly responsible for the relevant failure;[16]
- (usually) in good faith,[17]
- (in certain cases) with the reasonable belief that the information is accurate,[18] and
- (in certain cases) not for personal gain.[19]

3.8 Where these conditions are met, a person who disclosed information is protected in terms of the PIDA. This entails protection against victimisation and retaliation by an employer.[20]

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11 Section 43C(1).

12 Section 43D.

13 Section 43E.

14 Section 43F, meaning a person prescribed by an order made by the Secretary of State for the purposes of the section.

15 Section 43C(1)(a).

16 Section 43C(1)(b).

17 The requirement of good faith applies except where the disclosure is made to a legal adviser in the course of obtaining legal advice.

18 The requirement of reasonable belief does not apply where a disclosure is made to a legal adviser, an employer or Minister. Where the legislation requires good faith or reasonable belief, the onus of establishing this is on the worker making the disclosure.

19 Section 43G. This requirement applies only to general disclosures, such as disclosures to the media.

20 Section 47B.

3.9 The PIDA protects employees, members of a profession, office-bearers and others who disclose information about malpractice or misconduct within an organisation.[21] The extent to which disclosures qualify for protection depends on the circumstances in which the disclosure is made and, in particular, on the nature of the recipient of the disclosure. Whistleblowers are in effect encouraged to raise the issue internally with the organisation first, since in terms of the PIDA disclosures within the workplace are less onerous to make than 'general' qualifying disclosures (for instance, those made to the media). Importantly, the whistleblower may not be penalised for doing so.[22] This is to enable those in charge to investigate and deal with any malpractice or, if the concern turns out to have been misplaced, to offer an explanation.[23] If, after the matter has been raised internally, the malpractice is allowed to continue, the individual who disclosed it will be protected from reprisals if he or she felt that an external disclosure of confidential information was necessary.[24] However, for such a disclosure to be protected in terms of the PIDA, it must be one that a court would find lawful and justified in the public interest, in an action for breach of confidence.[25] The public interest would be sufficient to outweigh the normal duty of confidentiality. This principle does not apply to a disclosure where a whistleblower was acting in bad faith and did not have reasonable grounds to believe the information was accurate, or where the whistleblower sold the information to the media.[26]

3.10 In terms of the PIDA, any provision in an agreement between a worker and his or her employer which would prevent a worker from making protected disclosures is void.[27]

3.11 The PIDA provides for remedies where a whistleblower has been subjected to a detriment. Detriment may take a number of forms such as denial of promotion, being denied facilities or training opportunities which the employer would otherwise have offered, dismissal, being singled

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21 Press release (footnote 4 above).

22 Press release (footnote 4 above).

23 The PIDA imposes no specific duty on employers and other recipients of information to rectify matters disclosed, but the PIDA is drafted in such a way as to facilitate disclosure to a wider audience in the event that no remedial action is taken. It thus reduces the likelihood of unresponsiveness to workers' concerns.

24 Section 43G(2)(c) and (3); press release (footnote 4 above).

25 Press release (footnote 4 above).

26 Press release (footnote 4 above).

27 Section 43J.

out for redundancy or being discriminated against in any other way.[28] An employee subjected to a detriment may obtain an interdict to prevent threats of reprisal from being carried out, and is entitled to an award of compensation for loss of earnings, distress and damage to his or her reputation.[29] Whistleblowers protected by the provisions of the PIDA may complain that they have been subjected to a detriment by their employer for making a protected disclosure and may make a claim for unfair dismissal if they are dismissed for making a protected disclosure. A worker who is not an employee, for instance a contract worker or a voluntary worker, obviously cannot claim for unfair dismissal. However, if his or her contract has been terminated by an employer as a result of making a protected disclosure, such a worker may instead make a complaint to an employment tribunal, alleging that he or she has been subjected to a detriment. Where the employment tribunal finds the complaint well-founded, it will make a declaration to that effect and may order the payment of compensation.[30]

3.12 The PIDA has a built-in limitation in that, as with many other claims to employment tribunals, the complaint should normally be made within three months of the dismissal or detriment.[31] For unfair dismissal claims interim relief is also available, provided the claim is made within seven days of the effective date of the termination of employment. Where a tribunal finds that a complaint of unfair dismissal is justified, it will order reinstatement or re-employment or the payment of compensation.[32] Cripps suggests that in terms of the PIDA, there is no upper limit on compensation when an employee is dismissed principally for making a protected disclosure.[33]

3.13 The PIDA does not limit protection to disclosures of information relating to events in the UK alone, but extends to events worldwide.[34]

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28 Public Concern at Work, PIDA 1998 available online at Hhttp://www.pcaw.co.uk/legislation/legislation.htmlH, accessed on 19-02-2003.

29 Press release (footnote 4 above).

30 DTI Employment Relations (footnote 9 above).

31 Press release (footnote 4 above).

32 Public Concern at Work (footnote 28 above); DTI Employment Relations (footnote 9 above).

33 Cripps (footnote 7 above).

34 Section 43B(2); See also Stephen Cavalier et al 'Blowing the Whistle – Protecting Whistleblowers at Work – The Public Interest Disclosure Bill' Issue 23 *Thompson Solicitors: Labour and European Law Review* (June 1998), also available online at Hhttp://www.thompsons.law.co. uk/ltext/l0340005. htm#06H, accessed on 11-02-2002.

New Zealand

3.14 The New Zealand Act on whistleblowers, the Protected Disclosures Act, 2000, promotes the public interest by facilitating disclosures and the investigation of serious wrongdoing in an organisation. It does this by protecting employees who disclose information about such wrongdoing.[35] In terms of the Act,[36] an employee includes:

- a former employee;
- a homeworker within the meaning of section 5 of the Employment Relations Act, 2000;[37]
- a person seconded to the organisation;
- an individual who is engaged or contracted under a contract for services to do work for the organisation;
- a person concerned in the management of the organisation; and
- in relation to the New Zealand Defence Force, a member of the Armed Forces.

3.15 A protected disclosure is a declaration by an employee where he or she believes that serious wrongdoing has occurred. An employee may disclose information where:

- the information is about serious wrongdoing in or by that organisation;
- the employee believes on reasonable grounds that the information is true or is likely to be true;
- the employee wishes to disclose the information so that the wrongdoing can be investigated; and
- the employee wishes the disclosure to be protected.[38]

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35 Section 5.

36 Section 3.

37 Section 5 of the Employment Relations Act, 2000, provides that for the purposes of that Act, and unless the context otherwise requires, 'homeworker'

> (a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and
> (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser [and for the purpose of this definition, the definition of 'dwellinghouse' does not apply].

38 Section 6.

3.16 'Serious wrongdoing' is defined in the Act[39] to include any serious wrongdoing of any of the following types:

- an unlawful, corrupt or irregular use of public funds or public resources;
- an act, omission or course of conduct that constitutes a serious risk to public health or public safety or the environment;
- an act, omission or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; and
- an act, omission or course of conduct by a public official that is oppressive, improperly discriminatory or grossly negligent, or that constitutes gross mismanagement,

whether the wrongdoing occurs before or after commencement of the Act.

3.17 Among other things, the Act provides that a public sector organisation must have internal procedures for dealing with allegations of serious wrongdoing,[40] while private sector organisations may have such internal procedures. Where these procedures exist, an employee has to follow them first by making an internal disclosure.[41] These internal procedures should set out the steps to be taken by an employee who wishes to make a disclosure. They must comply with the principles of natural justice and be published regularly in staff manuals or on notice boards and in newsletters.[42] However, in certain circumstances an employee may bypass the internal procedure or make disclosures to entities outside the organisation. Depending on the circumstances, these entities include the Commissioner of Police, the Serious Fraud Office, an Ombudsman, the Health and Disabilities Commissioner and a Minister of the Crown. The internal procedure must detail how an employee may approach an outside entity and the steps involved.[43]

3.18 The Act is intended to promote good employment relations by creating an atmosphere of trust and protection within the workplace. If an employee becomes aware that serious wrongdoing is

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39 Section 3.

40 Section 11.

41 Section 7.

42 Lawlink: Whistle-blowers at Work (July 2001), available online at Hhttp://www.lawlink.co.nz/lawbiz/employment/whistle.aspH, accessed on 11-02-2002.

43 Lawlink (footnote 42 above).

being committed either by or within an organisation, then the employee will be protected from any retaliatory acts by the organisation for disclosing the serious wrongdoing.[44]

3.19 There are three main protections in respect of disclosures properly made under the Act:

- personal grievance procedures for unjustified dismissal or unjustified disadvantages;[45]
- confidentiality, in that the person receiving the disclosure 'must use his or her best endeavours' to keep confidential the identity of the disclosing party, except in special circumstances;[46] and
- a general immunity from civil or criminal proceedings which might otherwise have resulted.[47]

3.20 The protection against civil and criminal proceedings ensures that

> . . . an employee who discloses information under the Act cannot be held liable in respect of that disclosure, whether civilly or criminally. Employers who pass the information on to the authorities are guaranteed the same immunity.[48]

This immunity is a considerable incentive to blow the whistle, and is thought to be the most valuable protection the Act gives.[49]

3.21 The various protections are provided in order to encourage disclosures and enable the alleged wrongdoing to be investigated. The protections do not apply where the person makes an allegation knowing it to be false or otherwise acts in bad faith.[50] The employee must make the disclosure for the purpose of starting an investigation into the serious wrongdoing, and the employee must also want the disclosure to be protected.[51] Employees making disclosures will be

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44 HRINZ Guides – Protected Disclosures Act, 2000, available online at Hhttp://www.hrinz.org.nz/ info/guides/protected_disclosures.aspH, accessed on 08-02-2002.

45 Section 17.

46 Section 19.

47 Section 18.

48 Lawlink (footnote 42 above).

49 Lawlink (footnote 42 above).

50 Section 20.

51 Section 6(1).

protected against retaliatory actions and will not be liable for civil or criminal proceedings related to the disclosures. Retaliatory action would include the employer's dismissing, demoting, disadvantaging or harassing an employee.

3.22 Where an employee has made a protected disclosure and suffers retaliatory treatment from the employer, the employee may have a personal grievance claim and the Employment Relations Act, 2000, will apply accordingly.

United States of America (USA)

3.23 There is a plethora of legislation in the USA on whistleblowing, but one statute applying at the federal level is the Whistleblower Protection Act of 1989 (the WPA). The purpose of the WPA is to 'strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government' by providing that employees should not suffer adverse consequences as a result of prohibited personnel practices.[52] In passing the WPA, Congress noted that Federal employees who make disclosures serve the public interest by assisting in the elimination of fraud, waste, abuse and unnecessary government expenditure.[53] Protecting employees who disclose government illegality, waste and corruption is thus a major step toward a more effective civil service. In 1998 Congress passed the Civil Service Reform Act, establishing the Office of Special Counsel to protect whistleblowers. The WPA is meant to amend Title 5, Part II of the US Code[54] and strengthen the protections available to Federal employees against prohibited personnel practices.

3.24 The primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices. It acts in the interests of employees who seek assistance from the Office. While disciplining those who commit prohibited personnel practices may be used as a means to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[55] The WPA has

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52 Section 2(b).

53 See section 2(a).

54 Title 5, Part II of the US Code is available online on Hhttp://www4.law.cornell.edu/uscode/5/1211.htmlH, accessed on 27-03-2003.

55 Section 2(b)(2)(c).

been described as a government statute that implements the protection of First Amendment free speech for government workers challenging betrayals of the public trust.[56]

3.25 In terms of the WPA, whistleblowing may be defined as the disclosure by organisation members, former or current, of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.[57] A protected disclosure includes disclosures made by employees as part of the performance of their duties.[58]

3.26 People who act as whistleblowers are often the subject of retaliation by their employers. Typically the employer will dismiss the whistleblower. Whistleblowing statutes, including the WPA, protect from dismissal or discrimination an employee who has initiated an investigation of an employer's activities or who has otherwise co-operated with a regulatory body in carrying out an inquiry or the enforcement of regulations.[59]

3.27 A disclosure is protected in terms of the WPA if made to the Special Counsel, the Inspector General of an agency or another employee designated by an agency head to receive such disclosures. A disclosure is also protected if made to any other individual or organisation, for instance a Congressional Committee or the media, provided that the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defence or the conduct of foreign affairs.

3.28 The WPA was enacted to 'protect employees who report genuine infractions of law, not to encourage employees to report arguably minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties'.[60]

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56 Thomas Devine in an interview by Contributing Editor David Pitts 'Issues of Democracy' *Accountability in Government* (August 2000).

57 MP Miceli et al 'Can laws protect whistleblowers? Results of a naturally occurring field experiment' available online at Hhttp://newfirstsearch.oclc.org/WebZ/FSQUERY?sessionid= sp04sw0...:%7H, accessed on 20-02-2002.

58 *Garrett v Department of Defence* 62 MSPR 666, 671 (1994).

59 Whistleblowing *West's Encyclopedia of American Law* West (1998) at 326.

60 *Thomas B Frederick v The Department of Justice* 95-3194 decided on 4 January 1996, available online at Hhttp://www.law.emory.edu/fedcurcuit/jan96/95-3194.htmlH, accessed on 11-02-2002.

3.29 The government, too, is prohibited[61] from taking or threatening to take any personnel action against an employee because the employee has disclosed information that he or she reasonably believed showed a violation of the law, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public safety or health. In order to prevail in a claim, an employee must show that a protected disclosure was made, that the accused official knew of the disclosure, that the retaliation resulted and that there was a genuine connection between the retaliation and the employer's action. Employees who blow the whistle on matters that affect only private interests will generally be unsuccessful in maintaining a cause of action for discharge in violation of public policy.[62]

Australia

3.30 Australia has separate whistleblowing legislation for each of its states. Australian statutes include the Whistleblowers Protection Act 1993 (South Australia), the Protected Disclosures Act 1994 (New South Wales), the Public Interest Disclosures Act 1994 (Australian Capital Territory), the Whistleblowers Protection Act 2001 (Victoria) and the Public Interest Disclosures Act 2003 (Western Australia). The provisions of these Acts are materially similar, with almost the same procedures and requirements for making a protected disclosure, but some are more far-reaching than others. The discussion that follows focuses on the New South Wales legislation – the Protected Disclosures Act of 1994 – and on the Victorian legislation, the Whistleblowers Protection Act of 2001.

3.31 The Protected Disclosures Act of New South Wales commenced on 1 March 1995. The Act provides for the protection of public officials who make disclosures of corruption, maladministration or serious substantial waste in the public sector. The object of the Act is

> to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:
>
> (a) enhancing and augmenting established procedures for making disclosures concerning such matters, and
> (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and
> (c) providing for those disclosures to be properly investigated and dealt with.[63]

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61 5 USCA, sections 2302(b)(8) and 2302(b)(9).

62 West's Encyclopedia (footnote 59 above).

63 Section 3(1).

3.32 In terms of the Act, a protected disclosure must be made by a public official and it has to be a voluntary disclosure.[64] Disclosures concerning corrupt conduct must be made to the Independent Commission Against Corruption,[65] and those concerning maladministration to the Ombudsman.[66] Disclosures may also be made to the Auditor-General if they concern serious and substantial waste,[67] while disclosures concerning the police must be made to the Police Integrity Commission.[68] Disclosures may also be made to a public official who constitutes a public authority.[69] Such disclosure must be of information that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any of its officers. Fox[70] notes that

> the price whistleblowers may have to pay for statutory protection from reprisals is that their disclosures must first be made to an authority invested with the duty of receiving or acting on such complaints . . . [T]o gain the protection of the proposed legislation, the disclosure must be made to a proper authority. This is the *quid pro quo.*

3.33 A disclosure may also be made to a Member of Parliament or to the media.[71] Such disclosure will be protected in terms of the Act if the public official making the disclosure had already made substantially the same disclosure to an investigating officer or a relevant body for such a disclosure, and such body either decided not to investigate the matter or decided to investigate the matter but did not finish the investigation within six months of the original disclosure being made. Such disclosure is also protected where the investigating officer investigated the matter but did not recommend any action in respect of the matter or failed to notify the person making the disclosure, within six months of the disclosure being made, of whether the matter was to be investigated. For this kind of disclosure to be protected, the public official must have reasonable grounds for believing that the disclosure is substantially true.[72]

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64 Sections 8 and 9.

65 Section 10.

66 Section 11.

67 Section 12.

68 Section 12A.

69 Section 14.

70 Fox 'Protecting the Whistleblower' (1993) 15 *Adelaide LR* 137 at 150-1, quoted in M R Goode 'Policy Considerations in the Formulation of Whistleblowers Protection Legislation: The South Australian *Whistleblowers Protection Act 1993*' (2001) 22 *Adelaide LR* 27 at 36.

71 Section 19.

72 Section 19(4).

3.34 The Act provides that the identity of the official making the disclosure has to be kept confidential, and documents relating to a protected disclosure cannot be released under a Freedom of Information Act request.[73] The reason given for this kind of confidentiality is that the fewer people who know that one has made a protected disclosure, the less the likelihood of reprisals for making the disclosure.[74] The Act also provides for protection against reprisals that may be taken against public officials who make protected disclosures, including injury, damage or loss, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to employment, dismissal from or prejudice in employment and disciplinary proceedings.[75] Reprisals are an offence in terms of the Act,[76] and persons who engage in them may be prosecuted. If convicted, a person may be fined and/or imprisoned.

3.35 Under the 1994 Act, a person is not subject to any legal liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.[77] The Act also protects the person making the disclosure from criminal and disciplinary action for a breach of confidentiality.[78] Protection is not available for disclosures that are frivolous or vexatious,[79] or made in an attempt to avoid dismissal or disciplinary action. Protection is also not available if the disclosure contains intentionally false statements or is intended to mislead or attempt to mislead the recipient or where the disclosure questions the merits of government policy.[80] It is important that information provided in the disclosure be clear, accurate and factual. The Act does not prescribe whether anonymous disclosures are protected. As Goode[81] indicates with reference to the South Australian legislation:

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73 ICAC – Protection available under the Protected Disclosures Act available online at Hhttp://www.icac.nsw.gov.au/reporting/7_3_3.cfmH, accessed on 03-12-2002.

74 Ibid.

75 Section 20.

76 Section 20.

77 Section 21.

78 Section 21.

79 Section 16.

80 ICAC (footnote 73 above).

81 Goode (footnote 70 above) 38.

> The strategy is that in order to get protection, disclosure must be made to a person 'to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure'. The Act deems disclosure to an 'appropriate authority' to be reasonable and appropriate.

3.36 The Victorian legislation, the Whistleblowers Protection Act, 2001, is wider in application than the New South Wales Act. The main purposes of this statute are to encourage and facilitate disclosures of improper conduct by public officers and public bodies; to provide protection for persons who disclose improper conduct; and to provide for the matters disclosed to be properly investigated and dealt with.[82] The Act essentially establishes a system for the matters disclosed to be investigated and rectifying action to be taken.

3.37 The Act provides for disclosures about improper conduct by a natural person who believes on reasonable grounds that a public officer or public body has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or has taken, is taking or proposes to take detrimental action in contravention of section 18 of the Act.[83]

3.38 The Act further provides for disclosures made to public bodies by natural persons. Such disclosures have to be made in the public interest. A public body to whom such a disclosure is made has a duty to determine whether the disclosure is a public interest disclosure within a 45 days after receiving the disclosure.[84] In reaching a conclusion on whether a disclosure is a public interest disclosure, the public body in question has to consider whether the disclosure shows or tends to show that the public officer to whom the disclosure relates has engaged, is engaging or proposes to engage in improper conduct in his or her capacity as a public officer. Further, it must consider whether a public officer in question has taken, is taking or proposes to take detrimental action in contravention of the Act.[85]

3.39 In terms of this Act, a whistleblower may make a disclosure even if such whistleblower cannot identify the person or body to whom or which the disclosure relates.[86] Such disclosures relating to public bodies and public officers may be made to an Ombudsman or, if the disclosure relates to a member, officer or employee of a public body, to that public body.[87] A disclosure relating to a

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82 Section 1.

83 Section 5; section 18 provides for protection against reprisals.

84 Section 28.

85 Section 28.

86 Section 8.

87 Section 6(1).

Member of Parliament has to be made to the President of the Legislative Council if the member is a member of the Legislative Council, and to the Speaker of the Legislative Assembly if the member is a member of the Legislative Assembly.[88] Further, a person may make a disclosure against a public body or public officer about conduct that occurred before the commencement of the section dealing with such disclosures.[89]

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88 Section 6(2).

89 Section 9.

CHAPTER 4: SUBMISSIONS AND RECOMMENDATIONS

4.1 This chapter sets out the various responses received by the South African Law Reform Commission (the Commission) to the Issue Paper.[1] Based on those responses and on the Commission's research, including the foreign legislation outlined in chapter 3, this chapter states the Commission's provisional recommendations for reform and invites comment on those recommendations.

A. EXTENSION OF THE AMBIT OF THE PDA BEYOND THE EMPLOYER / EMPLOYEE RELATIONSHIP

4.2 In its current form the PDA protects only those whistleblowers who fall within the definition of an 'employee' in the PDA. The definition in the PDA is the same as that appearing in section 213 of the Labour Relations Act 66 of 1995 (LRA) and section 1 of the Basic Conditions of Employment Act 75 of 1997 (BCEA), and it covers employees working for private or public organisations. It states that an '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; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

4.3 Unlike the LRA and BCEA, the PDA also defines 'employer' – a term used throughout the Act. It does so in very broad terms, stating that '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.

Submissions

4.4 Most of the respondents to the Issue Paper agreed that it was desirable to extend the ambit of the PDA beyond the narrow employer/employee relationship, or what is sometimes called the 'standard

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[1] Issue Paper 20 of 2002, available on http://wwwserver.law.wits.ac.za/salc.

employment relationship' (SER). The Office of The Director General, Provincial Administration, Western Cape (the PAWC) submitted that in order to achieve the main objective of the PDA, which is the establishment of a culture that facilitates disclosures, any person acting in the public interest should be afforded the same protection as an employee in the strict sense. The Open Democracy Advice Centre (ODAC)[2] took a similar view, regarding this as compatible with the policy behind the PDA – that whistleblowers should not be disadvantaged for reporting criminal or unlawful activities. It was pointed out that the aims of labour legislation and those of the PDA are not identical, so that there is no reason in principle to restrict the operation of the PDA to the sphere protected by South African labour law.

4.5 However, some respondents felt that any extension of the ambit of the PDA beyond the employer/employee relationship was neither necessary nor desirable. One of the reasons given was that the judicial system would not be able to deal with the resulting increase in whistleblowing matters and that the end result, being justice delayed, would not be justice at all.[3] The Society of Advocates, Kwazulu-Natal (Society of Advocates) felt that there was something distasteful in the notion of encouraging and protecting informers, whistleblowers and other odious individuals. It suggested approaching any extension of the Act with caution. One respondent indicated that the main objectives of the PDA militated against the extension of the Act – seeming to argue that because the Act is currently confined to the employment relationship, it should continue to be so confined.[4]

4.6 Respondents offered several examples of persons whom the Act ought to cover beyond employees in the strict or narrow sense, ie those in an SER. These included independent contractors and workers or providers of services who are remunerated and supplied by a temporary employment service[5] – the sort of whistleblowers who are expressly protected by the Public Interest Disclosure Act

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2 In terms of written submissions by the Open Democracy Advice Centre (ODAC). Wherever reference is made to ODAC's written submissions, these include those of Anti-Corruption Strategies, Institute for Security Studies (ISS). The ISS stated that it supported all of ODAC's written submissions on Issue Paper 20.

3 Department of Education, Legislation and Legal Services (Department of Education).

4 Professor Van Jaarsveld, Department of Mercantile Law, University of South Africa, (Professor van Jaarsveld).

5 Section 198(2) of the Labour Relations Act describes workers supplied by an agency as employees of a temporary employment service (the agency). The person for whom the work is done is the client. In subsection (4) the LRA provides for joint and several liability of the client and the employment service where the service contravenes a collective agreement, a binding arbitration, etc.

of the United Kingdom.[6] Others mentioned were consultants and agents. Several respondents suggested expanding the definition of 'employee' to include such persons. It was also suggested that the definition of 'employer' should be changed to include public bodies explicitly.[7]

4.7 The submissions arguing for a more inclusive approach to employment were not surprising, since it is well known that 'atypical' employment is on the increase in South Africa, just as it is in many other jurisdictions.[8] One employment trend has been described as 'flexibilisation'[9] – the increased use of part-time and temporary workers. Another trend is outsourcing, which entails contracting out work that would once have been performed by SERs. A form of subcontracting that is becoming more prevalent these days is homework, where a person undertakes work on contract from home. Another trend is the use of workers supplied by temporary employment services. Theron[10] uses the term 'externalisation' to describe these trends. He notes that they all tend to achieve much the same thing: 'They enable the user enterprise, or core business, to vary the number of workers deployed, so as to achieve numerical or employment flexibility . . . In effect they also enable the core business to achieve wage flexibility.' However, such workers are not protected by the LRA and other labour legislation.

4.8 As noted in an article on the PDA by Rabin-Naicker,[11] persons such as independent contractors are often in a good position to uncover and disclose irregular conduct in a private or public organisation, and the inclusive British approach to whistleblowing thus seems logical. But our PDA offers such workers no protection at all. In this regard, she says, and given the growing number of

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6 The Public Interest Disclosure Act of 1998.

7 In terms of submissions by Congress of South African Trade Unions Parliamentary Office (COSATU). The Act currently defines an employee to include 'any person . . . who works for . . . the State'. The Act also contains a definition of an organ of state which is based on (though not identical to) that in section 239 of the Constitution.

8 For an overview, see Jan Theron 'Employment is Not What it Used to Be' (2003) 24 *Industrial Law Journal* 1247.

9 Ibid at 1250.

10 Theron (footnote 8 above) at 1254.

11 Hilary Rabin-Naicker 'The Protected Disclosures Act: Challenges for Labour Law Jurisprudence' (2000) 6 *Law, Democracy and Development* 139 at 141. This author also suggests including applicants for employment in the definition of 'employee', particularly since the PDA lists 'being denied appointment to any employment, profession or office' amongst the Act's occupational detriments.

these contractual relationships in both the private and public sectors, 'the objectives of the PDA appear to be compromised'.[12]

4.9 Respondents to the Issue Paper also suggested that the definition of 'disclosure' would need to be changed. In particular, para (f) of the definition currently makes reference to unfair discrimination as contemplated in the Promotion of Equality and Prevention of Discrimination Act 4 of 2000. It was proposed that reference should also be made to Chapter II of the Employment Equity Act 55 of 1998, which deals with unfair discrimination in the workplace.[13] The same point is made by Rabin-Naicker, who describes the reference to Act 4 of 2000 as 'unexpected' and goes on to say that '[a] reference to the definition of unfair discrimination contained in the Employment Equity Act would have kept us on charted territory'.[14]

4.10 Respondents believed that if the Act were extended in the ways described above, this would assist in achieving the main objectives of the PDA. It would promote a culture of disclosures in which the whistleblower's message would be listened to responsibly and the messenger treated with respect, and not derision or worse.

4.11 If the ambit of the PDA were extended, it was suggested, the list of occupational detriments provided for in the Act would have to be expanded as well. The PAWC stated that victimisation might include any conduct or behaviour that was aimed at inducing the whistleblower to abstain from disclosing any further information. Other forms of victimisation by employers might include a threat of an action for defamation against an employee, where an employer uses the suit to cover up the information disclosed by characterising it as defamatory statements; the loss of a contract in the case of a contract worker; the loss of an employment opportunity in the case of a person employed and remunerated by an agency (temporary employment service); and any criminal or civil action taken against a whistleblower. It was pointed out by COSATU that to cover all forms of victimisation, 'occupational detriment' in the PDA might need to be redefined, and it was suggested that the concept be defined in a more open-ended manner.

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12 Ibid.

13 Oral responses given at a consultative meeting with Marylyn Christianson, André van Niekerk and PAK le Roux on 19 June 2003 (consultative meeting).

14 Rabin-Naicker (footnote 11 above) 142.

4.12 The Open Democracy Advice Centre was also of the opinion that 'occupational detriment' should be defined in such a way as to include detriments that could be encountered in relationships outside the strict employer/employee relationship. In this regard, it is interesting to note that certain other jurisdictions treat a failure to investigate a disclosure as a detriment. This, it was suggested, further supported a submission to redefine 'occupational detriment'.[15]

4.13 On the other hand, some respondents felt that the definition of 'occupational detriment' was wide enough to cover any negative action by an employer to the detriment of an employee following the employee's disclosure.[16] The Department of Education agreed that the current definition is sufficiently broad, with a catch-all clause covering a wide range of employees' and other workers' interests. This clause refers to 'being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security'.[17]

4.14 It was submitted by COSATU that if the ambit of the PDA were extended, the list of persons or bodies to whom disclosures could be made would also need to be revisited. The Act would have to make provision for disclosure of irregularities falling outside the strict employer/employee relationship.

Recommendations

4.15 The submissions indicate fairly widespread agreement as to the extension of the ambit of the PDA beyond the strict employer/employee relationship to include persons such as consultants, persons employed by temporary employment services and independent contractors – that is, workers in a broad sense. There was also some support for the idea of offering protection to any person, whether a worker or not, who blows the whistle on corruption and maladministration in the public sphere. As seen in chapter 3, there are jurisdictions providing for whistleblowing by public officials, and even by a broad class of citizens, against public bodies.

4.16 The reluctance of those respondents who did not favour the extension of the ambit of the PDA appears to be based on an understanding of whistleblowers as undesirable individuals who are out to make trouble – an understanding that is at variance with the existing objects and scope of the Act. It must be borne in mind, too, that a whistleblower will gain protection in terms of the PDA only if the

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15 COSATU (footnote 7 above).

16 Professor Van Jaarsveld (footnote 4 above).

17 Para (i) of the definition of 'occupational detriment'.

disclosure concerned is made in accordance with the provisions and requirements of the Act. This feature is a crucial safeguard against abuse of the whistleblowing system.

4.17 **The provisional view of the Commission is that the extension of the ambit of the PDA is desirable. Such reform would extend the legal environment in which to make disclosures safely, and thus move towards a culture in which disclosures would be dealt with responsibly, even outside the sphere of the SER.** This view is supported by the comparative research conducted by the Commission. For example, the United Kingdom's Public Interest Disclosure Act of 1998 (PIDA), on which the PDA was largely modelled, is considerably wider in application than the PDA. It offers protection not only to employees but to contract workers, agency workers and homeworkers as well. It seems to be functioning effectively and provides a useful model for reform of our own law in this regard. The same is true of the New Zealand Act, the Protected Disclosures Act of 2000, which defines 'employee' to include a homeworker and an individual who is engaged under a contract for services to do work for an organisation. Some amendment of the Act will be required in order to extend its ambit in this regard, and proposed amendments are detailed below.

4.18 It should be noted that the PDA's current definition of 'employee' could easily be read as covering a range of people other than employees in the strict sense – except for independent contractors, of course, since they are expressly excluded by paragraph (a) of the definition. Grogan,[18] referring to the identical definition of 'employee' in the LRA, states that this definition begs just as many questions as the common-law definition does: 'The civil courts have often struggled with the problem of distinguishing between independent contractors and persons who are "entitled to receive remuneration" or someone who "assists in conducting the business of an employer".' Van Niekerk,[19] also writing about the definition in the LRA, has the following to say:

> If the two parts of the definition . . . are read disjunctively, it would seem that anybody who merely assists in the carrying on or conducting of the business of an employer is an employee. Part (b) of the definition casts the net of employment very widely, and a literal application of the definition would include many people not ordinarily considered to be employees, even the independent contractors specifically excluded in part (a) of the definition . . . The two paragraphs that make up the definition of 'employee' in section 213 must therefore be read conjunctively, and the existence of an employment relationship must be determined on that basis.

4.19 Van Niekerk points out that in spite of excluding independent contractors expressly, the LRA actually does protect classes of employees whose relationship with their employers is atypical, such as part-time and temporary workers, seasonal workers, homeworkers, teleworkers and casual

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18 John Grogan *Workplace Law* (2003) at 16.

19 André van Niekerk *Unfair Dismissal* 2nd ed (2004) at 5.

workers.[20] This is in line with the increasingly inclusive approach being evidenced in South African labour law. Indeed, amendments effected in 2002 to the LRA and the BCEA go so far as to create a rebuttable presumption that a worker is an employee.[21] Nevertheless, in the context of the PDA at least it seems desirable to have greater clarity as to the meaning of the definition. If relationships analogous to employment are to be covered, this must be made absolutely plain.

4.20 In extending the ambit of the PDA it is thus proposed to amend the definition of 'employee' to include independent contractors and other 'workers' of this kind. It is further proposed that the word 'employee' be changed throughout the PDA to 'worker'. The term seems an appropriate alternative, particularly since it is used in the Constitution.[22] Furthermore, it would be confusing and obviously undesirable to retain the designation 'employee' while materially altering the terms of a definition that is fundamental in labour legislation generally. The Commission is aware, however, that its provisional recommendation in this regard is not universally supported. The Business Unit of the National Economic, Development and Labour Council (NEDLAC),[23] in particular, is of the view that expanding the definition to include independent contractors and other categories of workers is problematic. It points out that all other employment legislation specifically *excludes* independent contractors; also that other categories of workers may not necessarily be employees in respect of the particular employer to whom they provide services. The recommended reform is likely to cause confusion, it argues, and it is undesirable further to confuse the already complex jurisprudence on this issue.[24] **The Commission invites comment in this regard. The proposed amendment to the definition could read as follows:[25]**

1. Definitions. – In this Act, unless the context otherwise indicates—

…

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20 Van Niekerk (footnote 19 above).

21 Section 200A of the LRA and section 83A of the BCEA.

22 Section 23 is especially relevant in this regard.

23 National Economic, Development and Labour Council (NEDLAC) in its comments to the draft Discussion Paper. The Labour Unit and the Business Unit submitted separate sets of comments to the Commission.

24 NEDLAC (footnote 23 above).

25 Words in bold type in square brackets indicate omissions from the existing enactment, while words underlined with solid line indicate insertions in the existing enactment.

"worker" means —

(a) any person who works for another person or for the State, and who receives, or is entitled to receive, any remuneration; or

(b) any other person who in any manner assists in carrying on or conducting the business of an employer or client, including but not limited to any independent contractor, consultant, agent or person rendering services to a client while being employed by a temporary employment service.

….

4.21 The existing definition of 'employer' is already a very broad one. Furthermore, it will have to be read in the light of the amended definition of 'worker', which will put it beyond doubt that for the purposes of the PDA, 'employer' encompasses the hirers of services and is not confined to true employers. It should be noted that the term 'employer' is not defined in either the LRA or BCEA, and its meaning in those statutes is thus established by reference to the definition of an 'employee'.[26] The continued use of the term 'employer' in the PDA does not, therefore, seem to be problematic as a counterpart to 'worker', and in general there seems no real need to invent a new term to describe an employer in the broad or PDA sense. **However, since the concept of a 'client' features in the proposed new definition of a 'worker', it seems necessary to insert a matching reference into the definition of an employer.** The result will be that an employee of such an employment service who is rendering services to a client will have two 'employers' as far as the PDA is concerned – an employer in the strict sense (the temporary employment service) and an 'employer' who is the hirer of services or the client. Thus, according to the Labour Unit,[27] the principle of joint and several liability should be adopted in respect of both employers' compliance with the PDA, which principle is in line with section 198(4) of the LRA. **The proposed amendment could read as follows:**

1. Definitions. – In this Act, unless the context otherwise indicates—

. . .

"**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

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26 See Grogan (footnote 18 above) 22.

27 NEDLAC (footnote 23 above).

(b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business as defined in section 197 of the Labour Relations Act,[28]

including any person acting on behalf of or on the authority of such employer and including any client to whom services are being rendered by the employee of a temporary employment service.

… .

4.22 **Comment is invited on the question whether a new term, such as 'workgiver', should be created in the PDA to replace 'employer', and on how the employees of temporary employment services ought to be dealt with in the PDA.**

4.23 In relation to the direct reference to the Unfair Discrimination Act in the existing definition of a 'disclosure', **the Commission recommends that the definition make reference in addition to Chapter II of the Employment Equity Act of 1998, which also deals with unfair discrimination. The proposed amendment could read:**

1. Definitions. – In this Act, unless the context otherwise indicates –

"disclosure" means—

…

(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

. . .

4.24 In extending the ambit of the PDA, several respondents pointed to the need to expand the list of occupational detriments. The Commission sees no need to change the term 'occupational detriment' itself, since this adequately describes detriments that may be visited on a broader class of 'workers' as well as on employees in the strict sense. However, **the Commission is of the view that the definition of 'occupational detriment' should be extended to include reprisals such as defamation suits and suits based on the alleged breach of a confidentiality agreement or duty. Such suits are by all accounts frequently used to intimidate would-be whistleblowers. The Commission also proposes to include a detriment typically experienced by contract workers –**

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[28] 'Business' is defined in section 197 of the LRA to include 'the whole or part of any business, trade, undertaking or service'.

the loss of a contract or the (otherwise inexplicable) failure to be given a contract. In the nature of things it will be much more difficult for a person falling within the proposed part (b) of the definition of 'worker' to persuade a court that an occupational detriment of this kind was visited upon him or her as a result, or even partly as a result, of making a disclosure. However, having received submissions in this regard the Commission believes that this difficulty should not stand in the way of someone who is confident of being able to prove a link between the disclosure and the occupational detriment.

4.25 **It is further proposed that the list of forms of occupational detriment be left open-ended to allow the recognition of further types of victimisation, on the understanding that any form of victimisation suffered by a whistleblower will have to be shown to be causally linked – at least partly[29] – to an act of whistleblowing. The proposed amendment could read as follows:**

> **1. Definitions. –** In this Act, unless the context otherwise indicates—
>
> "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 subjected to a defamation suit or a suit arising out of the alleged breach of a duty of confidentiality or a confidentiality agreement;
>
> (i) being subjected to intolerable working conditions;
>
> (j) being prevented from participating in activities falling outside the employment relationship;
>
> (k) being threatened with any of the actions referred to paragraphs (a) to (j);
>
> (l) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities,

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[29] Section 3 of the PDA forbids any occupational detriment 'on account, or partly on account, of having made a protected disclosure'.

[and] work security and the retention or acquisition of contracts to perform work or render services.

4.26 In relation to persons and bodies to whom disclosures may be made, **the Commission's provisional view is that the list of persons to whom disclosures may be made should also be extended.** It is already possible, in terms of section 8 of the Act, to disclose to the Public Protector and the Auditor-General in relation to improprieties reasonably thought to fall within their respective functions.[30] However, there seems no good reason to limit the list to these two particular bodies and 'a person or body prescribed for purposes of this section'. Chapter 9 of the Constitution lists a number of other 'state institutions supporting constitutional democracy' to whom it would be equally appropriate to make disclosures, such as the Human Rights Commission, the Commission for Gender Equality, the Electoral Commission and the Independent Authority to Regulate Broadcasting. South Africa also has ombudsmen responsible for particular sectors, such as the Insurance Ombudsman, and it seems that such officers would also make appropriate persons to whom to disclose. Where matters relate to a Member of Parliament, it seems appropriate that such disclosure should be made to the Speaker of Parliament. In a case where the disclosure relates to a member of the South African Police Service, it should be possible to disclose to the Commissioner of Police. Disclosures relating to a particular organ of state could be made directly to the organ of state concerned. NEDLAC's Labour Unit[31] has also suggested that it ought to be possible to make a disclosure to a Labour Inspectorate of the Department of Labour where the disclosure relates to matters within the authority of the Inspectorate. **The amendment could read:**

8. Protected disclosures to certain persons or bodies.—

(1) Any disclosure made in good faith to —

(a) the Public Protector;

(b) the Auditor-General;

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30 The Public Protector is mandated by section 182 of the Constitution to investigate 'any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice'. The functions of the office are described in detail in the national legislation contemplated in section 182(2), the Public Protector Act 23 of 1994. The Auditor-General, according to section 188 of the Constitution, is responsible for auditing and reporting on the accounts, financial statements and financial management of all state departments, municipalities and various other public bodies. The Auditor-General Act 12 of 1995 sets out in more detail the duties of this office, which can broadly be described as being concerned with the proper management and use of public money.

31 NEDLAC (footnote 23 above).

(c) the Human Rights Commission;
(d) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
(e) the Commission for Gender Equality;
(f) the Electoral Commission;
(g) the Independent Authority to Regulate Broadcasting;
(h) the Speaker of Parliament;
(i) the Commissioner of Police;
(j) an ombudsman;
(k) an organ of state;
(l) a Labour Inspectorate; or
(m) a person or body prescribed for purposes of this section; and
in respect of which the **[employee]** worker 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]** worker as is necessary to enable that **[employee]** worker to comply with this section.".

Further extension of the PDA: Citizens' whistleblowing

4.27 Though the Issue Paper did not specifically invite comment on the desirability of extending the PDA to allow any citizen (or indeed any person) to blow the whistle on any public official or body, the Commission has received several submissions in favour of such an extension. For instance, the PAWC submitted that in order to achieve one of the main objectives of the PDA, the establishment of a culture that facilitates disclosures, any person acting in the public interest should be afforded the same protection as a worker. Another respondent, ODAC, referred to the vulnerability of citizens who wish to expose corruption or wrongdoing in organs of state. It pointed out that the preamble to the PDA recognises that 'criminal and other irregular conduct in organs of state . . . [is] detrimental to

good, effective, accountable and transparent governance in organs of state . . . and can endanger the economic stability of the Republic and have the potential to cause social damage'. The South African Police Service[32] also indicated the need for the extension of the PDA in this respect. The SAPS argued that the unequal relationship between an organ of state and a private individual makes victimisation very likely where it is known that someone has blown the whistle on an organ of state. The individual would require special protection in order to encourage him or her to provide information about unlawful conduct on the part of organs of state.[33] The Labour Unit[34] supported this type of extension and referred to several examples to illustrate the need for a wider type of whistleblowing. It was pointed out that in the case of members of boards and professional associations, victimisation could take the form of being removed or excluded from membership. Students, too, might uncover irregularities on the part of educational institutions while conducting research; and here victimisation might take the form of exclusion from the university, being assessed in a discriminatory manner, or perhaps being intimidated.[35]

4.28 South Africa already has a considerable range of statutes that contribute in some way to the discovery and rectification of wrongdoing in organs of state. One such statute is the Promotion of Administrative Justice Act 3 of 2000, which provides for the judicial review of administrative action that is unlawful, unreasonable or unfair. Another is the Promotion of Equality and Prevention of Discrimination Act 4 of 2000, which outlaws unfair discrimination by 'the state or any person'.[36] The Public Protector Act 23 of 1994 allows the Public Protector to investigate, report on and even take action to remedy a wide range of unlawful and undesirable activities in the public arena. Examples of statutes allowing for the reporting of wrongdoing or misconduct are Defence Act 44 of 1957[37] and the South African Police Service Act 68 of 1995. Furthermore, the Public Service Act 103 of 1994 provides that a complaint concerning an official act or omission may be investigated by the Public Service

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32 The South African Police Service, Legal Services and Legislation (SAPS).

33 COSATU also supported this view at a meeting held in Cape Town in May 2003. The purpose of the meeting, hosted by ODAC, was to allow ODAC and COSATU to make oral submissions to the South African Law Reform Commission in support of their written submissions.

34 NEDLAC (footnote 23 above).

35 NEDLAC (footnote 23 above).

36 Section 6.

37 See especially sections 7, 21 and 134.

Commission.[38] These pieces of legislation, and others like them, have recently been supplemented by the Prevention and Combating of Corrupt Activities Act 12 of 2004. Section 34 of this Act requires 'any person who holds a position of authority' to report to a police official his or her reasonable suspicions regarding the commission of certain types of offence.

4.29 In the light of all this, some may doubt the need for general legislation allowing for persons to blow the whistle on public officials and organs of state. However, it should be borne in mind that the aim of whistleblowing legislation is specifically to protect people against being victimised on account of their disclosures. Just as labour legislation such as the LRA and BCEA does not address itself specifically to the issue of protecting whistleblowers, the sort of legislation described above enables the whistle to be blown but does not necessarily address itself to the protection of whistleblowers against reprisals.

4.30 As indicated in chapter 3, certain other jurisdictions enjoy statutory regimes in which persons may make disclosures of this kind in the public interest. This is the legal position in Victoria, Australia,[39] where a natural person may blow the whistle on public bodies and officials. In New South Wales public officials themselves are able to make disclosures concerning wrongdoing in the public sector. [40]

4.31 In terms of the Hume City Council Procedures, Victoria,[41] which are based on the Whistleblowers Protection Act of 2001 (the WPA), a disclosure may be made about improper conduct on the part of a public body or public official. Improper conduct means conduct that is corrupt, that entails a substantial mismanagement of public resources, or that involves substantial risk to public health or safety or to the environment. The conduct must be serious enough to constitute (if proved) a criminal offence or reasonable grounds for dismissal. For instance, it would amount to improper conduct if an environmental health officer ignored or concealed evidence of the illegal dumping of waste in an effort to avoid closure of an important industry.

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38 Section 35.

39 The Whistleblowers Protection Act of 2001.

40 In terms of the Protected Disclosures Act of 1994.

41 Whistleblowers Protection Act 2001 Hume City Council Procedures available online on http://www.hume.vic.gov.au/resources/file/917.PDF accessed on 11-02-2004.

4.32 The definition of 'disclosure' in the PDA contains a fairly extensive list of matters to which information disclosed could relate, and many of these are as applicable to public officials and bodies as they are to the workplace. If it were thought necessary, however, this list could be supplemented. More specific examples are provided by the Hume City Council Procedures, which refer to:

- the conduct of any person (whether or not a public official) that adversely affects the honest performance of a public officer's or public body's functions;
- the performance of a public officer's functions dishonestly or with inappropriate partiality;
- the conduct of a public officer, former public officer or a public body that amounts to breach of public trust;
- conduct by a public officer, former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their official functions; and
- a conspiracy or attempt to engage in the above conduct.

A typical example of corrupt conduct would be where a public officer favours unmeritorious applications for jobs or permits by friends and relatives.

4.33 Disclosures could also relate to detrimental action itself. The WPA, for instance, makes it an offence for a person to take detrimental action against a person in reprisal for a protected disclosure. Where a person has suffered detrimental action as a result of a disclosure, such person may make yet another disclosure by reporting the detriment.

4.34 Returning to South Africa, section 6(4) of the Public Protector Act gives the Public Protector powers to investigate, on his or her own initiative or on receipt of a complaint, a number of matters. These include any maladministration in connection with the affairs of government at any level; abuse or unjustifiable exercise of power; and unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function. All the incidents listed in section 6(4) could be listed in the PDA as actions that might be the subject of a disclosure, or reference could be made to section 6(4) itself. The same may be said of the Auditor-General Act,[42] which lists matters to which the Auditor-General may draw attention when reporting. These include where a grant has been exceeded or has been utilised for a service or for a purpose other than that for which it was intended.[43] Once again, this list could be used or referred to in the PDA.

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42 Auditor-General Act No 12 of 1995.

43 Section 5.

4.35 As to persons and bodies to whom disclosures may be made, the bodies listed earlier in relation to disclosures by 'workers'[44] would be equally suitable in relation to whistleblowing by citizens. The Hume City Council Procedures already referred to contain a table which clearly illustrates what disclosure should be reported to whom. It offers a possible example of what might be done in our case:

Person who is the subject of the disclosure	Person/body to whom the disclosure must be made
Official of a public body	That public body
Member of Parliament (Legislative Assembly)	Speaker of the Legislative Assembly
Member of Parliament (Legislative Council)	President of the Legislative Council
Councillor	The Ombudsman
Chief Commissioner of Police	The Ombudsman or Deputy Ombudsman
Member of the Police Force	The Ombudsman, Deputy Ombudsman or Chief Commissioner of Police

4. 36 If the Act were extended in this way, 'occupational detriment' would have to be replaced or at least supplemented by a class of detrimental action relating more specifically to the sort of victimisation that might be visited on a citizen by a public official or body. In this context, disciplinary action, demotion, transfer and dismissal are obviously inappropriate. Instead, detrimental action would be more likely to take the form of a refusal to deal with or process an individual's application; the refusal to grant a benefit such as a pension; the withdrawal of a benefit, licence or permission; the expropriation of property; and more generally, intimidation, harassment and discrimination as contemplated in legislation such as the Promotion of Equality and Prevention of Discrimination Act. Such a list would no doubt have to be left open-ended. Alternatively, the description of detrimental action could be fairly brief and general, and be supplemented by an illustrative list of detriments. This is in fact the approach adopted in the Promotion of Equality Act in relation to 'unfair practices in certain sectors'.

4. 37 Where a citizen or person has made a disclosure against a public body and has suffered a detriment as a result of such disclosure, any remedies available to rectify the situation would also have to be provided for in the PDA. These would certainly include interdicts, both prohibitory and

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[44] See para 4.26 above and the amendment proposed there.

mandatory, interim relief and the payment of compensation where loss or damage has been suffered a result of a reprisal. As one might expect, many of the remedies listed in the Promotion of Administrative Justice Act would be appropriate in this context.

4.38 The Commission invites comment on the desirability of providing in the PDA for what we term, for the sake of convenience, citizens' whistleblowing, and is particularly interested in receiving responses concerning the following:

- **Who should be able to disclose?**
- **What sort of wrongdoing (and which wrongdoers) should the disclosure relate to?**
- **To which bodies or persons should disclosures be made?**
- **What other requirements ought there to be in order for the disclosure to attract protection?**
- **How should detrimental action be defined?**
- **What remedies should be provided for?**
- **Should a public body's contravention of the Act be a criminal offence?**
- **From a drafting point of view, and given certain differences such as the nature of the detriments likely to be suffered, is it feasible to combine citizens' whistleblowing with 'workplace' whistleblowing? Would it be better to divide the two into separate parts or chapters of the PDA?**

B. IMMUNITY FROM CRIMINAL AND CIVIL LIABILITY AND PROTECTION OF THE IDENTITY OF WHISTLEBLOWERS

Submissions

4.39 The central objective of the PDA is to encourage disclosures of criminal and other irregular conduct and to 'create a culture which will facilitate the disclosure of information by employees' by protecting them from reprisals.[45] Any deterrent to making disclosures potentially threatens the achievement of the purposes of the PDA in a fundamental way.[46] However, the PDA does not provide for immunity from criminal or civil liability where a protected disclosure is made. Various respondents

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45 Preamble to the PDA.

46 Submissions by ODAC (footnote 2 above).

suggested that this ought to be remedied. They submitted that potential whistleblowers who had themselves been involved in wrongdoing might easily be inhibited by the fear of criminal prosecution. Furthermore, a problem experienced in several jurisdictions is that would-be whistleblowers are deterred from making disclosures by threats of defamation suits and/or 'official secrets' suits. (Disciplinary action, which is actually listed in the PDA as an occupational detriment, is another threat that may discourage whistleblowing.)[47]

4.40 One respondent, COSATU, submitted that the lack of immunity is a serious weakness in the PDA in that it discourages the making of disclosures. Other respondents also submitted that it would be in the broader interests of the public to exclude the criminal and civil liability of whistleblowers, since the state relies on citizens to provide it with information concerning irregularities and criminal conduct in order to curb such undesirable activities.[48] It was argued by ODAC that the main policy objective of the PDA, to encourage whistleblowing, should override other policy considerations, provided of course that whistleblowers follow the requirements of the PDA for making a disclosure. Further, ODAC pointed out that if a whistleblower does not follow the Act's requirements, no protection will be granted. This, it felt, was sufficient to deter people from acting maliciously or frivolously in making disclosures.

4.41 A few respondents did not support the idea of immunity for whistleblowers. The Department of Education argued that the PDA ought not to make provision for excluding criminal or civil liability since this might lead to abuse of the protection offered by the Act. It was argued by the SAPS that there is a need for a balance, so that employers are also protected. Without the threat of some sort of liability, some respondents felt, employees might act frivolously and perhaps even disclose false information simply to make trouble. Further, as far as criminal proceedings are concerned, the SAPS pointed out that section 204 of the Criminal Procedure Act 51 of 1977 already provides a mechanism to deal with a person disclosing information regarding criminal conduct in which he or she took part. The SAPS suggested that this existing mechanism is sufficient.

4.42 Section 204 reads as follows:

> (1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor –
> (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness –

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47 One of the handful of reported South African cases dealing with the PDA illustrates the use of disciplinary action in this way: see *Grieve v Denel (Pty) Ltd* [2003] 4 BLLR 366 (LC).

48 Submissions made by the Office of the Director-General, Provincial Administration, Western Cape (the PAWC).

(i) that he is obliged to give evidence at the proceedings in question;
(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;
(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him –
(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

. . .

4.43 Section 204 thus provides a mechanism whereby a witness for the prosecution may be discharged from criminal prosecution. It is, however, a limited and uncertain protection that is dependent on the court's perception that questions have been answered 'frankly and honestly'. Nor does it address the issue of civil liability.

4.44 Another respondent[49] felt that immunity from liability following a disclosure should not be the rule but rather a potential consequence depending on the type of disclosure, taking into account (i) the reason for the disclosure, (ii) the level of the employee's involvement in the alleged illegal activity and (iii) the seriousness of the alleged illegal activity.

4.45 On the argument that immunity from civil and criminal liability might lead to abuse of the protection of the Act, COSATU suggested that there were adequate safeguards in the PDA to prevent its abuse should criminal and civil liability be excluded. The various procedures and conditions are clearly specified in the Act, and where these are not complied with the whistleblower will not enjoy the protection of the PDA. Besides, it was pointed out that the state relies on citizens to provide information concerning irregularities and criminal conduct in order to curb criminal activities. The possibility of criminal and civil liability would not contribute to the creation of a culture of disclosure

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[49] Professor Van Jaarsveld (footnote 4 above).

such as is envisaged by the PDA, and might rather serve as a deterrent.[50] The general feeling was that criminal and civil immunity should be conferred only where disclosures are made in terms of and in full compliance with the provisions of the PDA. The giving of immunity would assist in dealing with threatened victimisation in the form of defamation suits or official secrets suits against whistleblowers.[51] If indemnity against such liability were guaranteed, whistleblowers would also be more willing to disclose their own identity.

4.46 The exclusion of criminal and civil liability would, most respondents felt, amount to the denial of the constitutional right of access to courts guaranteed in section 34 of the Constitution. This section provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. However, the rights in the Bill of Rights may of course be limited by a law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society'.[52] Respondents tended to agree that immunity would be a reasonable and justifiable limitation given the main objective of the PDA, which is to facilitate disclosures and thereby address corruption and other wrongdoing.

4.47 First, it is clear that section 34 applies only to civil proceedings, since criminal proceedings are not ordinarily categorised as 'disputes'.[53] Criminal proceedings are governed by section 35 of the Constitution rather than section 34.[54] The exclusion of liability of whistleblowers would infringe on section 34 of the Constitution only in relation to civil disputes 'that can be resolved by the application of law', so that this would not be a very extensive limitation of the right.[55]

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50 The PAWC (footnote 48 above).

51 ODAC (footnote 2 above).

52 Section 36(1) of the Constitution.

53 Johan de Waal et al *The Bill of Rights Handbook* 4th ed (2001) 555, referring to *S v Pennington* 1997 (4) SA 1076 (CC).

54 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC), para 28.

55 See section 36(1)(c) of the Constitution.

4.48 Secondly, immunity from civil liability would apply only in respect of disclosures made in compliance with the procedures and conditions of the PDA.[56] This fact, respondents pointed out, also has to be balanced against any violation of the right of access to court. It was further submitted by the PAWC that in the pursuit of public interests, the right to be protected from reprisals upon making a disclosure in terms of the PDA should enjoy preference above the right of the individual to have access to the courts. In its view the individual right of access in section 34 could hardly outweigh the important public interests served by the PDA, which is of course a 'law of general application' for the purposes of section 36. The limitation would thus be reasonable and justifiable, particularly given the importance of the purpose of the limitation[57] – facilitating disclosures so as 'to promote the eradication of criminal and other irregular conduct in organs of state and private bodies'.[58]

4.49 Another point raised by several respondents was the desirability of keeping the identity of whistleblowers confidential where possible. It was indicated by ODAC that many whistleblowers want their disclosures and/or their identities to be treated as confidential by the person to whom they disclose. The PDA does not currently provide for this. It was suggested that if identities were not protected, people would tend to blow the whistle anonymously. This is obviously undesirable, since anonymous whistleblowing gives more scope for malicious whistleblowing, and also does not allow for disclosures to be followed up properly – often leaving whistleblowers with the impression that nothing has been done about their disclosures. It was submitted that a duty of confidentiality should be created in the PDA. It was argued that the inclusion of such a provision would substantially reduce the possibility of malicious reporting on the basis of anonymity,[59] and it would also tend to limit the possibility of a whistleblower's suffering an occupational detriment.

4.50 The ISS noted that in order to protect a whistleblower's identity, it would be necessary to place a duty on the person who received a disclosure to ensure that the identity is not made public. Ideally the identity of a whistleblower should not be disclosed to others except where the whistleblower gives consent for such disclosure or where it is necessary for the investigation of the information disclosed or for an equally legitimate reason. In some jurisdictions the identity of a whistleblower is kept confidential in the belief that the whistleblower is less likely to be subjected to a detriment if only a few

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56 Submissions by the Society of Advocates of KwaZulu-Natal (Society of Advocates).

57 Section 36(1)(b) of the Constitution.

58 See the preamble to the PDA.

59 Anti-Corruption Strategies, Institute for Security Studies (ISS).

people know the whistleblower's identity.[60] The New South Wales Act,[61] for example, expressly provides for this protection.

Recommendations

4.51 The PDA does not shield whistleblowers from criminal or civil liability. Most respondents favoured the introduction of such immunity, arguing that this would help achieve the main aim of the PDA – to facilitate and encourage disclosures. A few respondents felt that an immunity provision could lead to abuse of the protection of the Act. However, it was argued that the policy objectives of the PDA should override other considerations, provided always that whistleblowers follow the requirements of the PDA regarding the making of a protected disclosure. Lack of an immunity provision would seem to be a strong deterrent to potential whistleblowers. In New Zealand such immunity is widely regarded as the most valuable protection given to whistleblowers, especially since an employee's duty of fidelity towards an employer has been used as a legitimate justification for dismissing an employee who reported a transgression on the part of the employer.[62] This kind of protection removes the fear of certain kinds of victimisation, such as defamation suits. However, NEDLAC's Business Unit[63] expressed concerns about the exclusion of civil liability, at least in the broad terms proposed. Where the disclosure results in loss to an innocent third party, it asked, should the reasonableness of the disclosure not be weighed against any foreseeable loss that might result? Is it justifiable to limit an innocent third party's constitutional right of access to court? **The Commission invites comment on the proposal that the PDA should provide for immunity from both criminal and civil liability on making a protected disclosure. A proposed new provision regarding the exclusion of liability might read as follows:**

> **9A. Exclusion of civil and criminal liability.—** (1) A worker who makes a protected disclosure shall not be liable to any civil or criminal proceedings or to disciplinary proceedings by reason of having made that disclosure.

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60 John Bowers QC et al *Whisteblowing: The New Law*, London: Sweet & Maxwell 1999 at 103.

61 The Protected Disclosures Act of 1994, section 22(2).

62 Lawlink: Whistle-blowers at Work, July 2001, available online at http://www.lawlink.co.nz/lawbiz/ employment/whistle.asp, accessed on 11-02-2002.

63 NEDLAC (footnote 23 above).

(2) A worker who makes a protected disclosure does not by doing so breach an obligation by way of oath, contract or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter.

4.52 Given such immunity, whistleblowers might well be more willing to reveal their identity when making disclosures. This would help defeat the problem of anonymous disclosures, which facilitate frivolous or malicious whistleblowing and which cannot be followed up when the need arises. The PDA does not expressly provide for the anonymity of whistleblowers. The New Zealand Act, by contrast, positively protects the identities of employees who reveal information relating to serious wrongdoing. The protection provided by the Act includes employees' rights to have their name and identity kept confidential, unless the disclosure of this information is essential to the subsequent investigation or to public health and safety. **The Commission feels that a provision expressly creating a duty to protect the identity of a whistleblower would constitute a positive incentive to whistleblowers. Comment is invited on the proposal that where the identity of a whistleblower is known it be kept confidential and protected. The proposed new provision could read as follows:**

3A. Protection of the identity of a person who makes a protected disclosure—(1) A person to whom a protected disclosure has been made shall not reveal the identity of a worker who made a protected disclosure or disclose information or particulars likely to reveal that worker's identity, except —

(a) where that worker consents in writing to the disclosure of his or her identity or the disclosure of the information or particulars; or

(b) where the person to whom a protected disclosure has been made reasonably believes that disclosure of such identity or information or particulars –

(i) is essential to the effective investigation of the allegations in the protected disclosure;

(ii) is essential to prevent serious risk to public health or public safety or the environment; or

(ii) is essential having regard to the requirements of procedural fairness.

(2) For the purposes of subsection (1), identity may only be disclosed to necessary parties.

C. REMEDIES

Employees' remedies

4.53 In terms of section 4(1) of the PDA an employee who has been, is being or may be subjected to any occupational detriment on account (or partly on account) of having made a protected disclosure may approach any court, including the Labour Court, for 'appropriate relief'. Alternatively, he or she may pursue 'any other process prescribed by any law'. For the purposes of the LRA and the jurisdiction of the Labour Court, any dismissal in breach of section 3 of the PDA is deemed by virtue of section 4(2) of the PDA to be an automatically unfair dismissal, while any other occupational detriment is deemed to be an unfair labour practice. The remedies provided by the LRA in this regard are described below.

4.54 In addition, section 4(3) of the PDA allows an employee to request a transfer if the employee reasonably believes that he or she may be adversely affected as a result of making a protected disclosure. Finally, section 4(4) states that the terms and conditions of a person so transferred may not, without his or her written consent, be less favourable than the terms and conditions applicable immediately before his or her transfer.

4.55 Existing remedies for the unfair dismissal of employees are set out in section 193 of the LRA. These are reinstatement of the employee from any date not earlier than the date of dismissal; re-employment of the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms, and from the date not earlier than the date of dismissal; and the payment of compensation to the employee. If the dismissal is automatically unfair, or if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court may, in addition, make any other order that it considers appropriate in the circumstances.[64]

4.56 'Automatically unfair dismissal' is defined in section 187 of the LRA. The legislation provides that a dismissal is automatically unfair if, inter alia, it is on account of an employee's having made a protected disclosure.[65] Where dismissal is found to be automatically unfair, the employer has no

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64 Section 193(3).

65 Section 187(1)(h).

defence and the employee is entitled to reinstatement, re-employment or (more unusually) compensation. According to Grogan,[66] victims of automatically unfair dismissal will invariably be reinstated unless they choose compensation instead. Compensation for dismissal is, however, capped in terms of section 194 of the LRA. Section 194(3) provides that the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of the dismissal.[67]

4.57 In terms of section 191 of the LRA, the first step when an unfair dismissal is alleged is conciliation by a bargaining council or the Commission for Conciliation, Mediation and Arbitration (CCMA). If the matter remains unresolved it will generally go to arbitration where the dismissal relates to the employee's conduct or capacity, where it is characterised as constructive dismissal,[68] where the employee does not know the reason for the dismissal or where the dispute concerns an unfair labour practice. All other cases may be adjudicated in the Labour Court unless the parties agree to arbitration. This may have considerable financial implications for employees. While the CCMA is not only accessible but also very affordable, the same cannot necessarily be said of the Labour Court. It should be noted that the jurisdiction of the High Courts and of the Labour Courts will in all likelihood be merged in the future. There is at present much discussion amongst the various stakeholders, but it seems that the new scheme may give the High Courts jurisdiction over all labour matters. These would be heard by judges who are experts in the field and who would be appointed to a special labour panel.[69]

4.58 An 'unfair labour practice', as defined in section 186(2) of the LRA, means certain types of unfair acts or omissions that arise between an employer and an employee. Section 186(2) expressly encompasses an occupational detriment, other than dismissal, in contravention of the PDA, on

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66 Grogan (footnote 18 above) 130.

67 The provision (s 194(2)) relating to dismissals other than those that are automatically unfair sets a ceiling of 12 months' remuneration. In relation to the meaning of 'remuneration', see Grogan (footnote 18 above) 122ff.

68 Constructive dismissal, as described in section 186(1)(e) of the LRA, occurs where 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'.

69 See Basheer Waglay 'The Proposed Re-Organization of the Labour Court and the Labour Appeal Court' (2003) 24 *ILJ* 1223.

account of the employee's having made a protected disclosure as defined in the PDA.[70] Unfair labour practices are generally referred for conciliation by a bargaining council having jurisdiction or to the CCMA.[71] However, an employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that he or she has been subjected to an occupational detriment by the employer in contravention of section 3 of the PDA for having made a protected disclosure.[72] An arbitrator appointed in terms of the LRA may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.[73]

4.59 The compensation awarded to an employee in respect of an unfair labour practice is also capped in terms of section 194(4) of the LRA, which provides that the compensation must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration.

Submissions

4.60 The PAWC noted that the PDA undoubtedly affords an employee protection against victimisation or reprisals for having made a protected disclosure. However, it pointed out that the compensation available under the LRA in respect of automatically unfair dismissal is limited to two years' salary. It was suggested by ODAC that a whistleblower should be able to claim such damages as he or she could prove, with no ceiling.[74] Whistleblowers, it was pointed out, suffer enough as it is through losing employment, often being ostracised or harassed as well. The capping of damages, ODAC argued, could seriously prejudice a senior employee working in a small field where few alternative employers were to be found.

4.61 The point was made by SAPS that section 4(1)(b) of the PDA in fact allows for compensation beyond the two-year salary ceiling, as it enables a whistleblower to pursue 'any other process allowed or prescribed by any law'. Thus a whistleblower could in any event turn to the common law and claim

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70 Section 186(2)(d).

71 Section 191(1).

72 Section 191(13)(a).

73 Section 193(4).

74 ODAC (footnote 2 above).

contractual or delictual damages. These might well exceed the amount of compensation available in terms of the LRA, depending on the circumstances of each case. Respondents applauded this feature of the Act, but tended to agree that section 4 of the PDA ought to be worded in a more explicit way to make it clear that compensation may be claimed at common law.[75]

4.62 Some respondents felt that no further remedies were necessary as these were adequately provided for in the LRA, or that the remedies currently listed in the PDA were sufficient, taking into account the existing limited ambit of the Act.[76] Other respondents were in favour of increased remedies, particularly given the two-year ceiling stipulated in relation to compensation for automatically unfair dismissal.[77] It was felt by some that additional remedies should be provided to ensure that whistleblowers were not further penalised for making disclosures, and these might include special remedies for constructive dismissal. It was argued that the courts needed more guidance in relation to delictual damages and that there should be clearer and more explicit remedies listed in the PDA rather than simply a broad reference to 'appropriate relief'. For instance, it was suggested by COSATU that the PDA should expressly provide for remedies such as interim orders and declaratory orders.

4.63 It was also argued that adjudication by the Labour Court would often result in high legal costs for whistleblowers who could not afford these, legal aid not being available for Labour Court matters.[78] It was suggested by ODAC that the Legal Aid Board be asked to make provision for such cases to be supported. It was also noted that the provisions of the LRA are applicable only to the employment sphere, so that all other relationships are excluded from its ambit.[79]

4.64 It was suggested that, as has been done in one or two other jurisdictions, a duty should be placed on employers – perhaps employers over a certain size – to put in place and implement an

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75 Consultative meeting (footnote 13 above).

76 Society of Advocates (footnote 56 above); The Department of Education (footnote 3 above) and Professor Van Jaarsveld (footnote 4 above) took the same view with regard to further remedies.

77 Consultative meeting (footnote 13 above).

78 ODAC (footnote 2 above).

79 COSATU (footnote 7 above).

internal procedure for making disclosures.[80] Where such internal mechanisms are in place, employees know who is responsible for receiving disclosures and the correct procedure to follow when making a disclosure within an organisation. Another suggestion was that a duty be placed on employers to investigate a disclosure. The Act already encourages both of these things, of course, not only by favouring disclosure to the employer but also by envisaging (in section 6) the setting up of internal procedures.[81] Furthermore, the Act is drafted in such a way as to make such a duty to investigate spurious. This is because where an employer fails to investigate a disclosure, this effectively entitles an employee to disclose more widely.[82]

4.65 A question raised in the Issue Paper was whether, assuming that new remedies are included in the PDA, such remedies should lie against the person who actually acted in contravention of the PDA, where relevant, or both that person and the employer. It may be noted that in its current form, section 4 of the PDA seems sufficiently flexible to allow for both. The question did not elicit much comment, but respondents seemed to agree that whether or not remedies might be available against other persons, they should in any event always lie against the employer. This, it was felt, would create an important incentive for employers to maintain appropriate conditions in the workplace.[83] It was submitted by ODAC that the employer is responsible for creating and maintaining the workplace environment and culture – a culture which ought to encourage responsible whistleblowing. Further, referring to the common-law principle of vicarious liability and to relevant statutes, Professor van Jaarsveld pointed out that an employer would in all likelihood be held responsible for its employees' intentional or negligent acts and omissions in any event. (See in this regard the Act's existing definition of 'employer' and the proposals in para 4.21 above.)

Remedies for independent contractors, agents, consultants, etc

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80 The PAWC (footnote 48 above). This idea also received support from the consultative meeting (footnote 13 above).

81 See also Rabin-Naicker (footnote 11 above) 143. The writer notes that the Act also requires (in section 10(4)) that the Minister 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 any impropriety'. Draft guidelines have in fact been produced by the Minister for Justice and Constitutional Development, but are subject to consultation requirements laid down in section 10(4).

82 Section 9(2)(c).

83 COSATU (footnote 7 above).

4.66 Most foreign legislation on whistleblowing extends beyond employees in the strict sense. For instance, the PIDA protects against reprisals whistleblowers who work under contracts of employment, agency workers and homeworkers. Remedies for such whistleblowers are expressly provided for in the Act. For example, a contract worker may make a complaint to an employment tribunal that he or she has been subjected to a detriment if his or her contract has been terminated as a result of making a protected disclosure. Where such complaint is well founded, a declaration will be made to that effect and the payment of compensation will be ordered. Another example is New Zealand's Protected Disclosures Act of 2000, which covers former employees, homeworkers, persons seconded to an organisation and independent contractors.

Submissions

4.67 One respondent, ODAC, submitted that if the PDA were to be extended beyond the ambit of the employer/employee relationship to include independent contractors, workers supplied by temporary employment services, consultants and the like, then other fora would have to deal with the resolution of disputes – the CCMA and Labour Courts deal only with disputes between employer and employee. Other respondents, too, noted that the most obvious remedies provided by the PDA are those governed by the LRA. The PAWC suggested that since the LRA applies only to the employer/employee relationship, further remedies and procedures would have to be provided in the PDA in order to cater for disclosures not taking place within the strict employer/employee relationship. These should include compensation to take into account the actual loss suffered by a whistleblower without setting artificial ceilings. At a meeting where oral representations were made, ODAC suggested that where the cancellation of a contract or the refusal to enter into a contract could be shown to be a result of whistleblowing, the whistleblower should be able to get full contractual damages in the form of lucrum cessans rather than simply be compensated for damnum emergens.

4.68 COSATU suggested that in order to avoid the creation of a confusing dual system, any new remedies should be developed to supplement and not duplicate or replace the provisions of the LRA so as to cater for whistleblowers who do not qualify as employees in the strict sense. Thus the PDA should supplement the procedures provided for in the LRA. Similarly, the PAWC took the view that if the LRA did not provide sufficient remedies, the PDA should expand but not replace the remedies already provided for, to cover all whistleblowers.

Punitive damages

4.69 Apart from the remedies described above, no particular measures are provided in the PDA to discourage the contravention of the Act and the victimisation of whistleblowers. The Issue Paper thus posed the question whether an award of punitive damages should be included amongst the remedies listed in the PDA. Punitive or exemplary damages, which are sometimes sanctioned by English law, are not necessarily related to the actual or calculable damages sustained by a claimant.[84] Their main purpose is to punish the defendant and 'mark the outrageous nature of his conduct'.[85] Another purpose may be to deter others from committing similar acts in the future. An award of punitive damages may also afford the plaintiff some feeling of revenge.[86] A perceived disadvantage of such damages is that they can place a heavy burden on those penalised, forcing them to disgorge amounts that are disproportionate to their wrongdoing. A countervailing view is that if applied prudently, punitive damages do not necessarily shift the scales of justice unfairly in favour of the claimant.[87]

4.70 Punitive damages are unfamiliar in South African law, although a parallel can perhaps be drawn with constitutional damages – something that our Constitution neither prevents nor particularly encourages.[88] Constitutional damages are intended not only to compensate the victim of a violation of rights but also to promote respect for human rights by punishing the violator and deterring future violations of rights.[89] The Constitutional Court has been very cautious about awarding such damages, however.[90]

Submissions

4.71 Some respondents favoured the imposition of punitive damages as a way of discouraging contravention of the PDA. At least one respondent was of the view that the existing remedies in the

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84 Michael Judin 'Punitive Damages: Justice for all?' *South Africa's Corporate Legal Magazine* February 2002, vol 2 No 1 at 9.

85 David M Walker *The Oxford Companion to Law* (1980) 332 sv 'Damages'.

86 Michael Judin (footnote 84 above).

87 Michael Judin (footnote 84 above).

88 Rather like section 4(1) of the PDA, section 38 of the Constitution refers to 'appropriate relief' for a violation or threatened violation of a right listed in the Bill of Rights.

89 See futher De Waal et al (footnote 53 above) 188ff.

90 See especially *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), paras 67-68.

Act were not sufficiently drastic, so that employers might be inclined to build the costs of existing remedies into operating costs rather than comply with the PDA.[91]

4.72 Almost half of the respondents felt that since the concept of punitive damages is foreign to South African law, it should not be introduced into the PDA. A point conceded by ODAC was that punitive damages would not be necessary provided that the whistleblower was put into the position he or she would have enjoyed but for blowing the whistle. The PAWC suggested that the CCMA, bargaining councils and the Labour Court were not the appropriate fora to award punitive damages. Provision might, however, be made for High Courts to award punitive damages where the whistleblower decided to sue in contract or delict.

4.73 On the other hand, ODAC noted that the main purpose of the PDA would be served by being able to punish the worst offenders through punitive damages. Where an employee had experienced monetary losses as a result of victimisation for a disclosure of misconduct which proved to be both real and serious, it would be appropriate to award exemplary damages. Professor Van Jaarsveld felt that the payment of punitive damages should not be the general rule but rather a possible option for the court after consideration of the circumstances of the employee and the consequences of the occupational detriment following the disclosure. It was argued by COSATU that companies that regarded the damages paid to a whistleblower as 'money well spent', or as part of the ordinary cost of doing business, needed to be sent a strong signal. This point was taken further by ODAC in the suggestion that a portion of moneys paid in exemplary damages could go into a central fund and be used for the implementation of and training on the PDA.

Recommendations

4.74 As noted by some respondents, section 4(1)(b) of the PDA already goes beyond the two-year salary ceiling of section 194 of the LRA in providing that a whistleblower may pursue 'any other process allowed or prescribed by any law'. However, it seems that this broad provision should be made more specific. **The Commission invites comment on a proposal that section 4 be amended to provide expressly for claims for damages with no ceiling.** It was pointed out by NEDLAC's Labour Unit[92] that where an occupational detriment stops short of dismissal then that constitutes an unfair labour practice, which must follow relevant dispute resolution mechanisms of the LRA. Should

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91 COSATU (footnote 7 above).

92 NEDLAC (footnote 23 above).

conciliation of such a dispute fail, then it may be resolved through arbitration at the CCMA and 'appropriate awards' may be determined in the discretion of the commissioner. The Labour Unit further stated that such a discretionary award might result in compensation that did not reflect the actual damages suffered by a worker who made a protected disclosure. **The Commission invites comment on whether the Act ought to create a more explicit link between the amount of compensation awarded and the actual loss or damage suffered by the worker concerned**.

4.75 The PDA is also not as specific as it might be in dealing with remedies to prevent or cure harm caused or threatened to a whistleblower. The legislation of certain foreign jurisdictions offers a useful contrast in this respect. The emerging South African case law on protected disclosures suggests that interdicts, for instance, are an essential remedy in this regard.[93]

4.76 **It is proposed that, without reducing the existing flexibility of section 4 of the Act, the PDA should provide for more specific remedies such as interdicts, including mandatory interdicts**. **Crucially, such remedies would also be available to a broader category of 'workers' – that is, whistleblowers who fall outside the employer/employee relationship and thus outside the protection of the LRA, including independent contractors, consultants and employees of temporary employment services. Comment is invited on these recommendations.**

4.77 **Since the concept of punitive damages is foreign to South African law, the Commission is of the view that it ought not to be introduced into the PDA. Comment is invited on this issue. The amended section relating to damages could read as follows:**

> **4. Remedies––**
>
> (1) **[Any employee]** A worker who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may—
>
> (a) approach any court or tribunal 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

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93 The applicant in *Grieve v Denel (Pty) Ltd* [2003] 4 BLLR 366 (LC) was granted an order restraining his employer from instituting disciplinary action against him pending a determination of an unfair labour dispute. The applicant in *CWU v Mobile Telephone Networks (Pty) Ltd* [2003] 8 BLLR 741 (LC) was initially successful in compelling the employer to lift his suspension and desist from disciplinary action against him.

(b) **[pursue any other process allowed or prescribed by any law]** notwithstanding the provisions of section 194 of the Labour Relations Act, recover damages in an action in any court or tribunal of competent jurisdiction.

(1A) (a) A worker who reasonably believes that he or she has been or may be subjected to an occupational detriment on account of a protected disclosure may apply for orders including—

(i) an order declaring the rights of the parties;

(ii) an order prohibiting the detrimental action or further detrimental action; and

(iii) an order requiring the detrimental action to be remedied.

(b) If, in an application under paragraph (a), the court or tribunal is satisfied that a person has taken or intends to take occupational detrimental action against a worker on account of a protected disclosure, it may—

(i) make an order or grant an interdict on any terms it considers appropriate; or

(ii) order the person to take specified action to remedy any occupational detriment.

(c) Pending the final decision of an application under paragraph (a), the court or tribunal may make an interim order in the terms referred to in subsection 1A(b)(ii) or grant an interim interdict.

(1B) The right of a person to recover damages does not affect any other right or remedy available to the person arising from the detrimental action.

(1C) In awarding damages for any occupational detriment, a court or tribunal must take into account the loss or damage actually suffered by the worker.

(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 resolution of the dispute about such a dismissal **[must]** may follow the procedure set out in Chapter VIII of that Act or any other process to recover damages in a competent court; and

(b) any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in section 186(2) of that Act, and the dispute about such an unfair labour practice must follow the procedure set out in section 191: 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.

Extension of remedies to all citizens

4.78 A question raised in this Discussion Paper is whether the PDA ought to be extended beyond the working environment so as to allow *any* citizen, irrespective of whether he or she is an employee or a worker, to blow the whistle on corruption or other misconduct occurring in organs of state. In New South Wales,[94] for instance, protected disclosures concerning corruption or maladministration in the public sector can be made by public officials, while in the State of Victoria[95] citizens are able to make protected disclosures in the public interest against public bodies and public officials. As pointed out earlier in this chapter, the types of detrimental action that can be visited on citizens by public officials and bodies are potentially different from those to be expected in the working environment. For instance, a whistleblower applying for a licence or a pension would not experience an unfair labour practice but might well find that her application is refused on spurious grounds or that it is unduly delayed.

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94 The Protected Disclosures Act of 1994.

95 The Whistleblowers Protection Act of 2001.

4.79 Some of the proposed remedies listed above, such as interdicts, would remain relevant if the PDA were extended in this way. South African law does of course already provide for the review of and remedies in respect of administrative action that is unlawful, unreasonable or unfair, and also for the review (on more limited grounds) of action that does not amount to administrative action.[96] However, it might nevertheless be desirable to provide particular remedies for this type of citizens' whistleblowing, and it would in any event be important to make it clear to whistleblowers what their remedies are.

4.80 **The Law Commission is reluctant to recommend reform in this respect without the benefit of further information and responses from its readers. It invites comment particularly regarding the remedies that would be appropriate where citizens blow the whistle on wrongdoing in the public sphere**.

D. CREATION OF OFFENCES WITHIN THE PDA

4.81 Although remedies are provided where an employer contravenes the Act by imposing an occupational detriment on an employee, the PDA does not make it an offence for an employer to subject an employee (or a 'worker') to an occupational detriment in contravention of section 3 of the Act. Nor is it an offence for an employee (worker) knowingly to make a false disclosure. The Act lays down requirements such as good faith and, in some instances, a reasonable belief in the truth of the information disclosed[97] – but those who abuse the legislation by making false disclosures, even if they do so deliberately, merely forfeit the protection of the Act, and are not visited with criminal sanctions in terms of it. A question posed in the Issue Paper was whether the Act should be amended to provide for criminal offences in either or both of these respects.

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96 The Promotion of Administrative Justice Act 3 of 2000 gives effect to section 33 of the Constitution in relation to the review of administrative action. In relation to other action, the constitutional principle of legality ensures that those exercising public powers of any kind are required to do so lawfully: see eg *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), para 85.

97 A reasonable belief in the truth of the information is required in respect of disclosures under sections 8 (entitled 'disclosures to certain persons or bodies') and 9 (entitled 'general protected disclosures') of the PDA.

4.82 In Australia most whistleblowing statutes make it an offence to victimise a whistleblower. Thus, for instance, the New South Wales statute, the Protected Disclosures Act of 1994, makes it a criminal offence to take detrimental action against another person for making a protected disclosure.[98] The onus is on the defendant in any proceedings to establish that detrimental action shown to be taken against a person was not substantially in reprisal for the disclosure. The Victorian statute, the Whistleblower Protection Act of 2001, also criminalises the taking of detrimental action against any person in reprisal for a protected disclosure.[99] The Act provides for a certain number of penalty units to be imposed, or two years' imprisonment, or both. The legislation applicable in Western Australia, the Public Interest Disclosure Act of 2003, also makes it a criminal offence to take detrimental action against a whistleblower, and transgressors are liable to a fine or imprisonment.[100]

4.83 Not all jurisdictions adopt this approach. For instance, New Zealand's Protected Disclosures Act of 2000 is silent on the subject of criminal offences. In the United Kingdom, too, the Public Interest Disclosure Act of 1998 does not make provision for criminal offences where detrimental action is taken against a whistleblower. What is particularly interesting, however, is that none of the pieces of legislation mentioned above makes it a criminal offence for a whistleblower to disclose false information while not knowing or believing it to be true.

Submissions

4.84 Several respondents submitted that it should be a criminal offence for an employer unlawfully to subject an employee to an occupational detriment. The Society of Advocates, Kwazulu-Natal, felt there was no reason in principle why this should not be a criminal offence. Further, COSATU pointed out that this would serve as a deterrent and would counter the power imbalances that exist in the workplace and which undermine the implementation of the PDA.[101] On the other hand, ODAC stated that there would be no real advantage in creating a separate criminal charge in this area, particularly since behaviour involving assault, harassment and the like is already dealt with by our criminal law. Furthermore, as pointed out by the Department of Education, to create a criminal offence here would go against the spirit of the LRA and of South African labour law in general. The PAWC argued that to

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98 Section 20.

99 Section 18(1).

100 Section 14.

101 COSATU (footnote 7 above).

subject an employer to criminal charges, in addition to the liability already incurred in terms of the LRA such as payment of compensation, would amount to the imposition of a double penalty.

4.85 Most respondents argued that it should not be a criminal offence for an employee knowingly to make a false disclosure. The PDA requires that protected disclosures be made 'in good faith', which probably refers to a subjective belief in the truth of the information disclosed. This interpretation of the term is supported by what was said by Van Niekerk AJ in *CWU & Another v Mobile Telephone Networks (Pty) Ltd,*[102] one of the first reported cases on the PDA:

> An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirement of good faith. It does not necessarily follow though that good faith requires proof of the validity of any concerns or suspicions that an employee may have, or even a belief that any wrongdoing has actually occurred.

4.86 It seems, then, that whistleblowers who lack subjective belief in the truth of the information will not be protected by the Act, making it somewhat unnecessary to criminalise their actions. They are already punished, in effect. This view was expressed by ODAC in the submission that persons who disclose without having any faith in the truth of the information are not whistleblowers in terms of the PDA, so they do not enjoy the protection of the statute. Their actions do not, in fact, amount to whistleblowing.[103]

4.87 Furthermore, a false disclosure made deliberately might well amount to a crime at common law. One possibility in this regard is criminal defamation, which consists in 'the unlawful and intentional publication of matter concerning another which tends to injure his reputation'.[104] Another candidate is crimen injuria, which consists in unlawfully, intentionally and seriously impairing the dignitas of another – the concept of dignity here encompassing both self-respect and privacy.[105] These two crimes overlap to some extent. A third (though less likely) possibility is fraud, the elements of this crime being the unlawful making of a misrepresentation with intent to deceive and which causes prejudice.[106] It is

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102 [2003] 8 BLLR 741 (LC), para 21.

103 Submissions at a meeting hosted by ODAC (footnote 33 above).

104 Burchell & Hunt *South African Criminal Law and Procedure* Vol II *Common-Law Crimes* 3 ed (1996) by J R L Milton (hereafter 'Milton') at 520.

105 Milton (footnote 104 above) at 491.

106 Ibid 701.

also worth noting that any immunity from criminal prosecution granted to whistleblowers by the PDA[107] would not apply to false disclosures made deliberately, since these would not comply with the requirement of good faith. Section 1 of the PDA defines a 'protected disclosure' to exclude a disclosure 'in respect of which the employee concerned commits an offence by making that disclosure', meaning that where an offence is indeed committed, the disclosure will not be protected.

4.88 However, it should be borne in mind that section 5 disclosures to a legal adviser do not currently require good faith on the part of the whistleblower. Thus it would seem that a person can make a disclosure in terms of section 5 without any belief at all in the truth of the information, and indeed with full knowledge of its falsity, and still qualify for protection under the Act. It is also true that the Act does not protect the legal adviser's subsequent disclosure of the information – section 1 expressly defines a 'protected disclosure' to exclude this – but this feature may not in itself prevent the information from becoming known and possibly causing prejudice to another.

4.89 It was argued by COSATU that criminalising false disclosures in the Act would have an unfortunate 'chilling' effect on potential whistleblowers, particularly where an employee is not entirely sure of the accuracy of the information to be disclosed. Here one might add that while many people are unaware of the existence and scope of common-law crimes such as criminal defamation and crimen injuria, the creation of a statutory offence in the PDA would be much more likely to come to the attention of employers. Employers could easily use the threat of criminal prosecution to intimidate employees and discourage them from blowing the whistle. This would obviously frustrate the main purpose of the Act, which is to facilitate disclosures – particularly those made to employers – in order that allegations of wrongdoing can be investigated and pursued if necessary. As stated by ODAC, in many instances a disclosure may be made in good faith on the basis of a genuine suspicion. It is surely to the advantage of the employer to hear what the whistleblower says, and any rumours (where they are merely rumours) can simply be quashed.[108] Van Niekerk AJ reasoned in a similar fashion in the *CWU* case,[109] pointing out that—

> [t]he purpose of the PDA would be undermined if genuine concerns or suspicions were not protected in an employment context even if they later proved to be unfounded. Th[at] is no doubt why disclosures

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107 See the Commission's recommendations in this regard in para 4.51.

108 ODAC (footnote 2 above).

109 Footnote 93 above, para 21.

made in general circumstances require in addition to good faith a reasonable belief in the substantial truth of the allegation.[110]

4.90 The PAWC observed that some disclosures are made anonymously, and that it would be difficult or impossible to prosecute a person whose identity is unknown. The threat of criminal prosecution, too, would no doubt tend to encourage anonymous whistleblowing, which is clearly undesirable. The PAWC suggested that in practice, allegations of irregularity would normally be investigated first. If the preliminary investigation proved the allegation to be without substance, the matter would not be pursued. Since an investigation is meant to determine the validity of the allegations before any legal steps are taken, no real or lasting harm could be done by a false disclosure. It was submitted by the PAWC that, as the courts are already overburdened by their current workload, the inclusion of a criminal offence for disclosing false information that could be corroborated by a proper investigation is an avenue that should probably not be pursued.

4.91 Some respondents felt that including criminal offences in the PDA was not prudent. The department of Education was of the opinion that this would create a binomial system that would result in legal uncertainty and would detrimentally affect the administration of sound labour practices. The PAWC noted that the trend in South African labour law emphatically points away from the use of criminal law, and that instituting criminal prosecutions against employees would hardly contribute towards good industrial relations.

4.92 On the other hand, the Society of Advocates, Kwazulu-Natal argued that the creation of such offences in terms of the PDA would not impact on the existing laws and practices that regulated the relations between employers and employees. Further, ODAC indicated that if contraventions of the PDA by employers were criminalised, this would complement existing laws and practices, both in the PDA and in general labour legislation. It was stated by COSATU that it would be important to ensure that the PDA provisions supplemented rather than duplicated the labour provisions so as to prevent the creation of a dual system.

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110 However, Van Niekerk AJ went on to say in the same paragraph that '[h]owever more extensive the rights established by the PDA might be in the employment context, I do not consider that it was intended to protect what amounts to mere rumours or conjecture.' He decided that the disclosure relied on by the second applicant 'was no more than an expression of a subjectively held opinion or an accusation, rather than a disclosure of information'. It was simply 'an unfortunately phrased expression of the second applicant's personal views' (para 22).

4.93 The Commission has already recommended in this chapter[111] that the PDA be extended beyond the strict employer/employee relationship to encompass disclosures by a broader class of 'workers', such as independent contractors, consultants, agents and service providers employed by temporary employment services. It was indicated by COSATU that criminalising acts of reprisal by persons supplying this kind of work (that is, employers in a broader sense) would be particularly appropriate in relation to such workers, as they are not protected by the LRA. A strong countervailing consideration here is that it is difficult enough for an independent contractor to establish a causal link between an act of whistleblowing and a detriment such as the loss of a contract. The presence of a criminal sanction and the seriousness of the consequences would tend to make the courts all the more reluctant to find such a link, meaning that such persons would seldom, if ever, enjoy the protection of the Act in practice.

Recommendations

4.94 **The provisional view of the Commission is that an employee's or worker's actions should not be criminalised where he or she knowingly makes a false disclosure.** It seems significant that no jurisdiction has seen fit to criminalise false disclosures, no doubt because of the chilling and discouraging effect this would have. As it is, a person who deliberately or recklessly discloses false information does not qualify as a whistleblower (except under section 5 of the PDA in its current form) and might also be guilty of criminal defamation, crimen injuria or fraud at common law. An employee would no doubt be guilty of misconduct as well, and quite possibly misconduct justifying dismissal.[112] Furthermore, prosecutions for false disclosures under the Act would be somewhat incompatible with the duty of confidentiality that has already been recommended in this chapter. Such prosecution would also sit uncomfortably with the Commission's recommendation in favour of immunity from criminal prosecution for whistleblowers, although the two are not necessarily incompatible as a matter of logic. The whistleblower's immunity applies only to *protected* disclosures, and would thus relate to prosecution for his or her involvement in events revealed by a disclosure rather than the action of deliberately making a false disclosure. Immunity would, in fact, be premised on the truth of the information disclosed rather than its falsity.

4.95 **The Commission invites comment on this proposal, as also on the proposal that the PDA should not make it an offence to subject an employee or a worker to an occupational**

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111 See paras 4.15-4.20 above.

112 See generally Grogan (footnote 18 above) 154ff.

detriment. The Labour Unit[113] argues that visiting an occupational detriment on a worker is not only a contravention of the PDA but also a serious violation of workers' rights, and thus deserves to be penalised. However, while criminal punishment would no doubt have salutary effects in encouraging compliance with the PDA, the Commission is of the opinion that it would be unwise and perhaps even perverse to introduce this type of criminal sanction into South African labour law. Such a course would be likely to add unnecessary tension to employment relationships and jeopardise good labour relations. It is also of the view that criminalising the actions of those who visit detriments on independent contractors and other 'workers', ie those who are not employees in the strict sense, would encourage the courts to exercise such caution that these persons might well lose the protection of the Act altogether. The Commission is aware of the need to achieve an appropriate balance in the Act and to reduce the risk inevitably taken by a whistleblower. However, it feels that resorting to criminal sanction is not necessarily the most effective way of doing this. A better and more constructive approach might be to expand the list of remedies available to whistleblowers, to confer immunity on whistleblowers who disclose in good faith and to create a duty to keep the identity of whistleblowers confidential. All of these have been recommended earlier in this chapter.[114]

4.96 **Comment is also invited on the proposal that section 5 of the Act should be amended to include a requirement of good faith**. It is one thing to refrain from legislating a punishment for a person who deliberately makes a false disclosure, but should the Act go so far as to facilitate the making of such a false disclosure? Can it be desirable or fair to confer the protection of the PDA on a person who deliberately makes a false disclosure to his or her legal adviser? It goes without saying that a false accusation against a person, even if that person is exonerated in a subsequent investigation, can cause considerable prejudice to him or her. **An amendment in this regard could read as follows:**

> **5. Protected disclosure to legal adviser.—** Any disclosure made <u>in good faith</u> . . .

4.97 The Labour Unit[115] argues that this proposal does not take into consideration that the sole purpose of disclosure under section 5 is to obtain legal advice, whereas in the other sections the objective is to trigger action against the irregular conduct. Disclosure to the legal adviser would

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113 NEDLAC (footnote 23 above).

114 See paras 4.76, 4.51 and 4.52 above.

115 NEDLAC (footnote 23 above).

necessarily maintain confidentiality in respect of the facts disclosed, which is unlikely to be the case in respect of disclosures to other persons. It is assumed that in obtaining legal advice a worker would be informed of the requirements of the PDA in order to qualify for its protection, including the requirement of making disclosures in good faith. The Labour Unit points out that obtaining legal advice prior to making disclosures ought to be encouraged in order to promote compliance with the procedures of the Act.

4.98 Instead of amending section 5 to include the requirement of good faith, it has been suggested that the section be amended to make room for trade union representatives, whose occupation may be said to 'involve the giving of legal advice' in terms of section 5. In particular, COSATU indicates that workers often obtain legal advice from trade union representatives and that trade union representatives may even represent workers in the labour courts.[116] Though it cannot realistically be said that a trade union representative's occupation 'involves the giving of legal advice' in accordance with section 5, such representatives certainly present a less costly and more accessible option for workers. Further, the Labour Unit[117] points out that approaching a trade union representative before making a disclosure to the employer may improve the implementation of the PDA. A worker who is assisted by a trade union representative is less likely to be victimised when making a disclosure to an employer. In addition, obtaining legal advice in advance will increase the likelihood of compliance with the procedures stipulated in the PDA. Accordingly, the Labour Unit is of the view that section 5 should be amended to include protection of disclosures made to trade union representatives. **The Commission invites comment on this recommendation. An amendment in this regard could read as follows:**

> **5. Protected disclosure to legal adviser <u>or trade union representative.</u>**
>
> Any disclosure made—
>
> (a) to a legal practitioner or to a person whose occupation involves the giving of legal advice;
>
> (b) with the object of and in the course of obtaining legal advice; or
>
> (c) <u>to a trade union representative for the purposes of obtaining advice</u>
>
> is a protected disclosure.

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116 See section 161(c) of the LRA.

117 NEDLAC (footnote 23 above).

Citizens' whistleblowing

4.99 This chapter has posed the question whether the PDA should provide for persons other than workers to blow the whistle on public bodies and public officials (organs of state). Such a reform would take the PDA out of the workplace, and somewhat different considerations will thus govern the decision whether to make it an offence to contravene section 3 of the Act by visiting reprisals on a victim. A public body can hardly be convicted of a criminal offence, but the public official responsible for the reprisals could be. Such an official would no doubt be subject to existing sanctions, including disciplinary proceedings, and could certainly be made to pay compensation or costs in terms of the PDA itself – perhaps even de bonis propriis. Officials and bodies would also be subject to judicial review under the Promotion of Administrative Justice Act where their conduct amounted to administrative action. Should such officials be subject to criminal prosecution under the PDA as well?

4.100 A common argument for criminalising conduct is that victims can get some satisfaction merely by laying a charge instead of having to spend their own money by pursuing civil remedies; but on this argument all delicts would be crimes. However, the Labour Unit[118] is of the view that there is no justification for discriminating between contraventions of the PDA occurring within a workplace as opposed to those outside. It suggests that there should be imposition of a criminal sanction for *any* detriment visited on a whistleblower in contravention of the PDA irrespective of the context. **Comment is invited on the question whether, if citizens' whistleblowing is indeed introduced into the PDA, contravention of section 3 of the Act should be made a criminal offence.**

Creation of a conducive workplace environment

4.101 It has been pointed out by the Labour Unit[119] that there is wide acceptance of a duty on employers to create an open and transparent work environment that facilitates the implementation of the PDA. **The Commission acknowledges this view and invites comment on whether a specific duty should be placed on employers to inform workers of their rights and obligations under the PDA**. Possible options for the implementation of this duty could include the posting of notices, as well as obligations in relation to education and training.

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118 NEDLAC (footnote 23 above).

119 NEDLAC (footnote 23 above).

ANNEXURE A

LIST OF RESPONDENTS WHO COMMENTED ON ISSUE PAPER 20

1. Anti-Corruption Strategies, Institute of Security Studies.
2. Congress of South African Trade Unions, Parliamentary Office.
3. Department of Education, Legislation and Legal Services.
4. Johan PE Swarts
5. Office of the Director-General, Provincial Administration, Western Cape.
6. Open Democracy Advice Centre.
7. Professor André van Niekerk.
8. Professor Marylyn Christianson.
9. Professor PAK le Roux
10. Professor Van Jaarsveld.
11. Society of Advocates of Kwazulu-Natal.
12. South African Police Service, Legal Services and Legislation.