ABSTRACT

Whistleblowers have become known as being disloyal employees and troublemakers. This perception has caused whistle blowing to be despised rather than encouraged. Whistle blowing is effectively raising a concern about an impropriety that assists in ensuring individual responsibility and organisational accountability. Making disclosures causes employees to be victimised by their employers as well as fellow employees.

Employees generally did not feel protected enough to come forward with information on corruption, even though the witness protection system had been reformed and was working well. A well functioning hotline system is of importance and should be linked to the implementation of a protection regime for whistle blowers.

Employees making anonymous disclosures are difficult to investigate, in that problems in corroborating the information as well as in not being able to remedy the underlying cause of the disclosure exist. Hotlines through which the public and employees anonymously report suspected corruption does not satisfactory deal with the issues when the purpose of whistle blowing is to promote a culture of transparency and accountability.

The aim is to provide provisions for employees to disclose information about suspected criminals or other irregular conduct without fear or reprisals. The Protected Disclosures Act is an important step in providing protection for those who expose corruption in the workplace.

Employers and employees should be treated on an equal basis with regards to whistle blowing. It is in the best interest of both employees and employers to have internal channels that encourage protected disclosures, providing protection to both employers and employees.
Different measures exist to protect whistleblowers. One such measure is by means of legislation. Secondly, courts have also developed principles in this regard. However, in certain instances, the labour law will not provide protection were a professional individual acts in breach of the confidentiality obligation vested upon him within the client professional relationship. Legislation relating to general protection such as the right to freedom of association and access to information, also provide protection. The codes of conduct and ethical rules of professional bodies can also be adapted to provide protection to professionals, including employment contracts that provide for protection in certain instances. Despite all of the above, instances will always arise where tensions exist and problems arise, such as the continuous tension between the monopoly of the state in respect of certain information and the question on which information should be protected under legislation. It is therefore clear that many instances arise where protection is not afforded to whistleblowers.

To apply the protection afforded by the Protected Disclosure Act horizontally between private bodies, private bodies should be protected from detriment. A tax consultant aware that a client is defrauding the South African Revenue Service will fear that if it challenges the client or threatens to report the fraud, the client will cancel the contract.

It is recommended that a more inclusive approach to employment is to be followed as “atypical” employment is on the increase in South Africa as in many other countries. Homework, where a person undertakes to work on contract from home as well as workers supplied by temporary employment services, enable the organisations to vary the number of workers deployed so as to ensure flexibility. Independent contractors are often in a good position to uncover and disclose irregular conduct in the private or public sector. In addition, it is also advised that applicants for employment in the definition of an employee in the Protected Disclosures Act be included.

In order to protect whistle blowers further, the definition of occupational detriment in the above act should also be extended to include reprisal by employers such as the use or treat to use defamation suites and suites based on the alleged breach of confidentiality, a loss of a contract or the inexplicable failure to be given a contract in the instance of
contract workers. In addition, the list of forms of occupational detriment to be suffered should be left open ended to allow recognition of further types of victimisation.

The effectiveness of measures put in place within organisations to encourage employees to speak out against impropriety and misconduct will be difficult to determine as only when there has been non-adherence to the Protected Disclosures Act and the whistle blower has been detrimentally affected, will it come into force to protect bona fide whistleblowers.
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INTRODUCTION

1. A person may make a protected disclosure for a number of reasons or combination of reasons. Whistleblowers may be considered heroic for making a protected disclosure on the basis of principle because of personally held ethical or moral beliefs or could be considered hideous.

2. People may also blow the whistle for legal considerations due to the fact that they may be required by law to obey, either due to professional obligations or in terms of their employment conditions.

3. Disclosures may be made for the public benefit whilst a protected disclosure may also be made due to “ancillary motives”. This could include motivation for personal gain, malicious intent such as revenge, or a destructive falling out of concerned parties.

4. The media when deemed to be acting as whistleblowers include journalists both as reporters when approached by whistleblowers and the journalist as initiating investigations.¹

5. Tension exists between an employee wanting to make a disclosure based on his / her moral beliefs and the pleasure to adhere to a culture of loyalty and the legal duty of confidentiality. The breach of confidentiality owed towards the employer or the profession is justified in that it is consistent with the public interest and his professional duty.

6. An exception to the legal obligation to confidentiality and loyalty exists when the employer or employees of the employer act in a fraudulent and corrupt manner.

7. Whistleblowers often suffer tremendously for their efforts in trying to rectify the misconduct that often leads to fear of intimidation.

8. Individuals making protected disclosures are being loyal by affording their employers to rectify the corrupt and or wrongdoing.

9. An environment where employees, aware of a transparent and open environment wherein which to raise concerns do so, ensure larger accountability for their organisations. Whistleblowing should therefore be a positive reaction to misconduct taking place within the workplace.

10. It is interesting to note that after an incidence of a disclosure by an employee, certain patterns of reaction at some companies are identified. The fist step is to isolate the whistleblower. The company then attempts to deny the information relating to the disclosure, followed by advertising the good progress and financial position of the company or business by means of the media. As a next step, companies then place the blame on the whistleblower in order to discredit him or her.

11. With corruption costing the South African economy an estimated R40 billion a year, it is not surprising that government introduced legislation to encourage whistleblowers to expose improprieties.²

12. Employees often fail to raise serious concerns, or raise concerns that are ignored or raised with the wrong individuals leading to a communication lapse that results in no action being taken by the employer and leading to possible disasters that could have been avoided had the information been communicated along the correct channel and to the appropriate individuals.³

CHAPTER 2
METHODOLOGY

2.1 THE PROBLEM AND ITS SETTING

13. Increased awareness of the ethical and moral obligation on employees to report malpractices in the workplace have recently led to increasing numbers of employees reporting their employers of unethical, immoral, illegal and unjust practices.

14. Whilst many instances of whistleblowing have been reported in the media, only a few cases have resulted in the courts giving judgement on these matters since the acceptance of the Protected Disclosures Act that only took effect on 16 February 2001.

15. Various acts exist which acknowledge the right of employees to protection in the instances of disclosures in strictly specified instances such as whistleblowing in terms of the National Environmental Management Act 107 of 1998.

16. The research undertaken by the writer of this dissertation is aimed at examining the various legislative requirements, case law and available academic material with the inclusion of media reports to establish the current position with the aim of suggesting proposals to improve the protection of the whistleblower in the workplace.

17. The research methodology applied in this dissertation is set out in such a way that it attempts to address the concerns of the whistleblower on the one hand whilst also ensuring that the public interest is served on the other by the provision of suitable and appropriate protection measures to the benefit of the whistleblower.
2.2 RESEARCH CONDUCTED

18. A review of primary, secondary and tertiary literature on protected disclosures has been undertaken.


20. A review of relevant legislation in South Africa, being the Protected Disclosures Act\(^4\) and other legislation providing for similar protection of whistleblowers.


CHAPTER 3
THE PROTECTION OF WHISTLEBLOWERS BEFORE THE ADOPTION OF THE PROTECTED DISCLOSURES ACT

3.1 GENERAL

22. One of the main obstacles in the fight against corruption before the passing of the Protected Disclosure Act was that individuals were not prepared to speak out because they had no legal protection. Employees found themselves victimised and intimidated if they raised concerns about corruption. The relationship between a whistleblower and a suspected corrupt employer was strained when making a disclosure, in particular when it was found that the allegations were without substance.

23. By remaining silent about corruption, offences or other malpractices taking place in the workplace, an employee necessarily contributed to and became part of a culture of fostering such improprieties which might have been detrimental to his or her own career as well as to the legitimate interest of the South African society in general.

\(^4\) Protected Disclosures Act 26 of 2000
24. The failure to disclose improprieties in the public sector lead to the abuse of public power that should have been used for the benefit of others for private gain. Corruption stifles economic growth, impacts negatively on the poor, the weak and helpless.5

25. It is interesting to note that despite a perception that most corruption was exposed by the media, investigative journalism was only responsible for uncovering 8% of known incidents, whilst the official process was still the best corruption buster at 60%, followed by civil society (18%) and whistleblowers (13%).6

26. In too many sectors of business and government, unmasking dishonest colleagues was seen as anti-social. Whistleblowers were regarded as anti-social by colleagues or faced obstacles to career advancement set by employers who saw them as troublemakers, embarrassing their company or government.7

27. The results of a study conducted by Xavier Chartered Accountants, (SA), concluded that studies in the United States conducted on 233 whistleblowers revealed that 27% of them had been suspended from their place of work whilst 20% had to receive psychiatric treatment.8

28. The effectiveness of measures put in place within organisations to encourage employees to speak out against impropriety and misconduct were non-existent, as contracts of employment included provisions of confidentiality between an employer and an employee. Currently these provisions are void in so far as it attempts to exclude any provision of the PDA or attempts to preclude or discourage the employee from making a protected disclosure (s 2(iii)).9

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5 Business Day, “Just how corrupt is the new South Africa?”, Tuesday, 22 August 2000
7 Business Day, “Blowing the whistle”, Friday, 17 March 2000
8 Business Day, “New SA law protects whistle-blowers who report malpractice”, Friday, 8 November 2002
29. According to Camerer,\(^{10}\) the private sector will need to persuade business that is in its own interest to act ethically.

### 3.2 CASE LAW PRIOR TO THE PROTECTED DISCLOSURES ACT

30. In the absence of the PDA, an informer who blew the whistle was seen as someone who was a police or regulatory authority informer and could either have been planted within an organisation for that purpose or a member of the relevant organisation.

31. The courts have often commented on informers and people who act as undercover agents and traps: In *Rex v Van Schalkwyk*\(^ {11}\) it was stated that any person who gave information to the authorities of the commission of a crime, or information which lead to the detection of a crime is one who in the public interest ought to be protected. In *State v Tau*\(^ {12}\) it was held that both the state witnesses were over-eager in the light of their knowledge that there might possibly be a reward for them, should the accused be convicted. Due to rewards being paid to persons who informed on fellow employees regarding the theft of gold, the evidence of informers were approached with caution. In *State v Nangombe*\(^ {13}\) the judge, commenting on the reward system of the diamond industry that was threatened by losses incurred through theft, said that there was every justification for mining companies to introduce efficient measures in order to minimise losses through theft.

### 3.3 OTHER LEGISLATION PROVIDING FOR PROTECTED DISCLOSURES

32. Legal acceptance of whistleblowers, albeit statutory informers is nothing new in South Africa. Section 44(1) of the South African Police Services Act\(^ {14}\), provides for an appropriate award and recognition by the national or provincial commissioner to any member or other person for meritorious service in the

\(^{10}\) Ibid.

\(^{11}\) *Rex v Van Schalkwyk* 1936 AD 543

\(^{12}\) *State v Tau* 1996 (2) (SACR) 1997 (TPD)

\(^{13}\) *State v Nangombe* (unreported) case no SA2/93 dated 7 October 1994 (Supreme Court of Namibia)

\(^{14}\) South African Police Services Act 68 of 1995
interest of the South African Police Service (SAPS). Section 61 of the Marine Living Resources Act\textsuperscript{15}, provides for payment of information leading to a conviction where the Minister may from money appropriated by Parliament pay any person who has furnished information or material or proof which leads to a conviction by a court, remuneration in cash which in the opinion of the Minister, is reasonable and fair in the circumstances. Section 60 of the National Forest Act\textsuperscript{16} and Section 26(5) of the National Field and Forest Fire Act\textsuperscript{17}, provides that a court which imposes a fine for an offence in that Act, may order that a sum of not more than ¼ of the fine, be paid to any person whose evidence leads to the conviction or help in bringing the offender to justice.

33. In terms of section 31(4) of the National Environmental Management Act,\textsuperscript{18} no person is in terms of civil or criminal law liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information, if the person in good faith reasonably believed at the time that he or she was disclosing evidence of an environmental risk and the disclosure was made in accordance with subsection 5. In terms of subsection 5, the information may be disclosed to a committee of Parliament or of the Provincial Legislature, an organ of state which is responsible for protecting any aspect of the environment or emergency services, Public Protector, the Human Rights Commission, any attorney- general (currently the director of public prosecutions) or his or her successor. If the information is disclosed to one or more news media and on clear and convincing grounds believed at the time of the disclosure that the disclosure was necessary to prevent an imminent and serious threat to the environment, or to ensure that the threat to the environment was properly and timeously investigated or to protect himself or herself against serious or irreparable harm from reprisal or giving due consideration to the importance of open, accountable and participatory administration, that the public interest in the disclosure of the information clearly outweighed any need for non-disclosure.

\textsuperscript{15} Marine Living Resources Act, 18 of 1998  
\textsuperscript{16} National Forest Act, 84 of 1998  
\textsuperscript{17} National Field and Forest Fire Act, 101 of 1998  
\textsuperscript{18} National Environmental Management Act, 107 of 1998
34. Section 29 of the Financial Intelligence Centre Act,\textsuperscript{19} places an obligation on a person who carries on a business or is in charge of, or who manages a business or is employed by a business and knows and suspects that certain information relating to the receipt of the proceeds of unlawful activities, transactions to which the business is a party in the transfer of the process of unlawful activities and has no apparent business or lawful purpose and is conducted for the purpose of avoiding giving rise to a reporting duty under this Act or relevant to the investigation of an evasion or attempted invasion of a DG to pay any tax, must within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Financial Intelligence Centre the grounds for the knowledge or suspicion in the prescribed particulars concerning the transaction or series of transactions. A person commits an offence if he \textit{inter alia} fails to report suspicious or unusual transactions or makes an unauthorised disclosure.

\textbf{CHAPTER 4}

\textbf{THE NEED FOR WHISTLEBLOWER PROTECTION: CASE STUDIES}

35. Numerous examples exist where whistleblowers blowing the whistle have been on the receiving end of a backlash in return for making a disclosure in respect of irregularities. In an investigation by the Independent Complaints Directorate, investigating the alleged victimisation and acts of reprisal by Western Cape Chief Detective André du Toit, Bellville Superintendent Issy Gosker investigated a trip by Du Toit’s staff officer (personal assistant) and civilian husband who travelled to Gauteng at state expense during the course of 2000. Du Toit allegedly ordered that Gosker write him a letter justifying the reasons for prompting an investigation into the trip. Gosker, in her initial approach, exposed what she saw as evidence of misconduct involving misappropriation. She was discouraged even before she lodged an official complaint against the couple’s trip to Pretoria.\textsuperscript{20}

\textsuperscript{19} Financial Intelligence Centre Act, 38 of 2001
\textsuperscript{20} "Top Cops persecuting us, claim whistleblowers", Schronen J, Published on the web by IOL on 2001-03-26 10:10:21 \url{http://www.iol.co.za}
36. In another instance, a civilian employee at Kleinmond Police Station was allegedly victimised and intimidated when she accused a senior colleague of stealing crime exhibits, including confiscated liquor from the pound at the station. Dippenaar, who was ordered not to speak to the media, left the commissioner's office disillusioned and confused after having been called to appear on the red carpet at the police Commissioner's Headquarters. She complained to officers at headquarters in Pretoria who sent a delegation to Kleinmond to investigate her. Both Dippenaar and her husband who was a uniform inspector at Kleinmond, had to endure reprisal and victimisation and later saw a psychiatrist who had to book them off. These are just two examples of police culture that discourages the reporting of misconduct by members despite of the provisions of the Protected Disclosures Act.²¹

37. In the following case, senior officials rather wanted to shoot the messenger (whistleblower) rather than the message relating to the contents of a whistleblowing exercise where the Director of a Free State prison had a video made by prisoners of corrupt activities being committed by prison warders. He then released the video to a SABC television station that was broadcasted on national television. After its release, the prison head was suspended and then transferred against his will to another section. Only after a commission of enquiry had been called to investigate the activities revealed in the video, was the prison head moved back to his previous position. A task team was set up with ministerial backing to investigate corruption activities and other prisoners were requested to provide recommendations on how to prevent such activities from occurring.

38. An example of the culture of fear, concealment and secrecy which continues to exist in organisations with employees who blow the whistle on their employers, is the example of Mr Andre du Toit who blew the whistle on the Board of Directors at Beige Holdings in 1999. Du Toit, who had been employed at a pharmaceutical

²¹ Ibid.
and cosmetics company as a financial executive for one month, uncovered irregular transactions and fraud. Once he reported to the authorities what he had been hired to do, he was apparently branded as a traitor by the people he had implicated. Du Toit eventually managed to indicate that the Beige Board wiped out about R800 million and invested money in a stock market fraudulent scheme. Due to the actions of the Board, 700 staff lost their jobs and the company was also subsequently liquidated. The Du Toit family was followed around in Johannesburg, their telephone tapped and their home placed under surveillance. Both Du Toit and his wife were under tremendous pressure in exposing one of the biggest corporate scams to date, being placed on suspension shortly after having made the disclosure.

39. Whilst presenting the information of incriminating evidence to the chairman of the particular board, nothing was done to resolve the discrepancies. Du Toit was suspended approximately 2 months after he had told auditors Ernest and Young of his findings, leading to his suspension for disclosing confidential information to third parties. Although Du Toit agreed to terminate his contract with Beige on reasonable terms early in 2003, applying for a job proved to be an extremely difficult task, as he believed that his honest endeavours counted against him. Despite all the measures as contained in the Protected Disclosure Act, the possibility of occupational detriment to those who blow the whistle is still a concern.

40. Another employee who had made a protected disclosure and had steps taken against him, was Glen Chase, a senior accountant in the Northern Cape Department of transport, who alleged during 2003 that John Block, a former MEC for transport, had misappropriated millions of rands for his personal use. In response thereto, the Chairperson of the Public Service Commission accused whistleblowers of rushing to the media rather than reporting their concerns to the authorities. However, a spokesperson for the National Anti-corruption Forum and
Chairperson of Transparency South Africa, said that such an approach was a narrow, legalistic view that was inconsistent with reality.\textsuperscript{22}

41. He was fired on 19 August 2004 for insubordination and the unauthorised release of confidential state information. However, revelations by Chase led to Block's resignation. Chase who was charged for unauthorised access and release of information indicated that the charges were a smokescreen to get rid of him for having exposed corruption. Whilst the PDA permitted him to disclose state information to statutory bodies, it was alleged that he was in breach for going to the media with the information. He had submitted affidavits to the Scorpions, the Public Protector and the provincial Auditor General by the time he went to the media, whilst the Auditor-General's Annual Report had already been released to the public.

42. A number of people who exposed corruption in the public sector have found themselves at risk of losing their jobs or slapped with charges of insubordination for not following proper channels when blowing the whistle.

43. A traffic inspector with the Gauteng Provincial Traffic Service, which resorts with the Gauteng Transport Department, had to go public after blowing the whistle in November 2000 by releasing a home video depicting policemen from the North East Rand dog unit setting their dogs free on three Mozambican illegal aliens was shown on television locally and around the world. The whistleblower was forced to call a radio show to save his job and possibly his life. The traffic officer, who was paid R50 000 by the SABC for the video footage showing apartheid style racism and police brutality at its worst while entering the democratic area, had subsequently been told that he was not wanted at work whilst former colleagues harassed him by playing songs and calling him names. In spite of the convictions of four members of the dog unit who were jailed for their involvement

\textsuperscript{22} This Day, "Whistleblowers need protection", Friday, 20 August 2004
in the incident after pleading guilty, red tape and what the traffic officer called old "regime tactics" made him wonder whether he had done the correct thing by in fact blowing the whistle. Despite being refused protection under a witness protection programme, the traffic officer was investigated for the circumstances under which he had come into possession of the video. On returning to work, his firearm was confiscated which meant that he could not go out on patrol as he was informed that going out on patrol unarmed would violate regulations. It is therefore clear that intimidation, ostracism and loss of work is commonly experienced by whistleblowers.23

CHAPTER 5
THE PROTECTION OF WHISTLE BLOWERS:
THE PROTECTED DISCLOSURES ACT

5.1 GENERAL
The Protected Disclosures Act (PDA)24, which took effect on 16 February 2001, determines that the purpose of the Act is to provide for a culture that will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner.

44. The intention of the Act is to protect employees both in the private and the public sector from being subjected to an occupational detriment, secondly to provide for remedies in connection with any occupational detriment suffered due to having made a protected disclosure and lastly to provide for procedures in terms whereof an employee can disclose information regarding improprieties by the employer.

45. A disclosure is not protected if the employee concerned commits an offence by making that disclosure. In addition, a disclosure is also not protected if a legal

23 "Broken promises for cops who led the dogs out", Bulger P, Published on the web by IOL on 2002-01-26 19:54:23 http://www.iol.co.za
24 Protected Disclosures Act, 26 of 2000
adviser to whom the information concerned was disclosed in the course of obtaining legal advice makes it.

46. The PDA assumes that the whistleblower has clean hands for it does not provide immunity for him or her against persons other than the employer. The relationship between the whistleblower and a co-employee is not the principle focus of the act.

47. By instituting internal channels to encourage protected disclosures, employers receive indications of potential problems within their business that enables them to deal with it effectively whilst employees making protected disclosures do not run the risk of being victimised or subjected to occupational detriment.  

48. The instances in respect for which disclosures are permissible include that of an employer or an employee of an employer. In the case of the conduct of an employee, it is not necessary for the employer of that employee to have known of that conduct. Such knowledge may or may not be necessary for the purposes of holding the employer responsible in terms of civil or criminal law for the actions of the employee, but it is not necessary for the purposes of evoking the protection in terms of the PDA. One limitation is that the employee must have reason to believe that the information shows, or tends to show, one of the above actions or circumstances.

49. Although the PDA is applicable to the private sector, the drafting of guidelines by the private sector is not prescriptive but could assist organisations to develop procedures for employees in terms whereof protected disclosures can be made.

50. In the private sector, the PDA could arguably cover price fixing, misleading or unfair consumer or shareholder practices and insider trading amongst others.

The employee should not be expected to be loyal to a practice occurring in the work place that is clearly wrong, criminal or not in the public interest.\textsuperscript{26}

5.2 THE REQUIREMENT OF EMPLOYMENT

51. It is important to note that the Act in its present form relates only to employees.

52. An "employee" in terms of the PDA refers to any person who works for another person or for the state and receives or is entitled to receive remuneration. The Act specifically excludes an independent contractor in s 1(ii)(a). A person who in any manner assists in carrying on or conducting the business of an employer is also regarded as an employee in terms of the PDA.

53. In this regard it can be mentioned that the PDA defines an employer as a person who employs or provides work and who remunerates or has expressly or tacitly undertaken to remunerate that person, or promotes anyone to assist in the carrying on or conducting of his, her or its business. The definition specifically includes any person who acts on behalf of or on the authority of such employer.

5.3 OCCUPATIONAL DETRIMENT

54. In terms of s 1(vi), "occupational detriment" in the workplace includes an employee being subjected to 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 to his or her disadvantage, refused a reference or being provided with an adverse reference, denied appointment to any employment profession or office, threatened with any of the actions referred to here in above as well as being otherwise adversely affected in the state of his employment, profession or office, including employment opportunities and work security.

\textsuperscript{26} Financial Mail, "At the Cost of Confidentiality", Friday, 3 March 2000
5.4 THIRD PARTIES TO WHOM PROTECTED DISCLOSURES MAY BE MADE

55. It is important to note that there may be multiple disclosures. An employer in the public sector may for instance first seek legal advice and disclose information in the cause of obtaining advice. The employee may then make a disclosure to his or her employer or to the person designated by the employer to receive such a disclosure. The same disclosure could also be made to a member of the cabinet or the executive council of a province depending on the circumstances.

56. The Act provides for the following instances where a disclosure to a third party will be regarded as a protected disclosure:

1. To a legal practitioner or to a person whose occupation involves the giving of legal advice and with the object of and in the course of obtaining legal advice, (section 5).

2. A disclosure by an employee made in good faith and substantially in accordance with any authorised or prescribed procedure provided by the employer for making a disclosure, or to the employer of the employee where there is no such procedure, is a protected disclosure. In addition, an employee who makes a disclosure to a person other than his or her employer but in accordance with a procedure authorised by his or her employer (s6).

3. A disclosure made in good faith to a member of cabinet or to the executive council of a province, if the employer is appointed by a member of cabinet or the executive council of a province or if the employer is a body of which the members are appointed by a member of cabinet or of the executive council of a province or an organ of state falling within the area of responsibility of such a member (s7).

4. A disclosure made in good faith to the Public Protector, the Auditor General or a person or body prescribed, in respect of which the employee concerned
reasonably believes that the impropriety falls within any description of matters which is ordinarily dealt with by the person or body concerned, and the information disclosed and any allegation contained in it are substantially true (s8).

5. Section 9 deals with general protected disclosures, where a disclosure made in good faith by an employee who reasonably believes that the contents of the disclosure are substantially true and who does not make the disclosure for purposes of personal gain, on the basis that it is reasonable to make the disclosure having regard to the specific circumstances. Any one or more of the following conditions must also apply:

5.1 That the employee has reason to believe that he or she will be subjected to an occupational detriment if the disclosure is made to the employer, or

5.2 The employee making the disclosure has reason to believe that it is likely that the evidence relating to the impropriety will be concealed or destroyed if such a disclosure is made to the employer,

5.3 That the employee has previously made a disclosure of substantially the same information to the employer or to a person or body referred to in section 8 and where no action has been taken within a reasonable period after the disclosure, or

5.4 That the impropriety is of an exceptionally serious nature.

57. In determining the criteria as by whether a disclosure is reasonable (as required in section 9), the identity of a person to whom the disclosure is made, the seriousness of the impropriety, whether it is to continue or likely to occur in the future, whether it is made in breach of a duty of confidentiality of the employer towards any other person, the action which the employer or the person to whom
the disclosure was made has taken, or might reasonably be expected to have taken as a result of the previous disclosure or whether the employee having made the disclosure to the employer has complied with any procedure which was authorised by the employer and the public interest in making such disclosure.

5.5 INVESTIGATING AUTHORITIES

58. Institutions authorised to investigate corruption and acts of impropriety following a disclosure by a whistleblower includes the Public Protector (misadministration, dishonesty in dealing with public money, improper enrichment and receipt of improper advantage in the public sector), the Auditor General (audits the accounts, financial statements and make an assessment of the financial management of all national and provincial departments, local government and bodies funded out of taxpayers' money) and the Special Investigating Unit may be authorised by the President to investigate corruption, maladministration, the unlawful appropriation or spending of government funds, unlawful, irregular, or unapproved state acquisitions and the intentional or negligent loss or damage to public property.

59. In addition The Open Democracy Advice Centre in Cape Town ensures the effective implementation of the Promotion of Access to Information Act and the Protected Disclosures Act.

60. In certain instances, companies have set up services available to ensure that the consequences of whistleblowing are understood by whistleblowers. Services such as Whistle Blowers (Pty) Limited provide a safe, third party environment in which dishonest activities can be reported without any fear of reprisals. These services are an alternative to hotlines and establish an effective programme in which the ethics line is simply one step in comprehensive crime identification and prevention. Sensitive information is managed in sophisticated control rooms. Trade unions have indicated their approval towards companies providing services for whistleblowers to provide information of any impropriety. Continuous
communication with management and the workplace are undertaken by means of thorough education programmes and interaction between the workplace and management. In these instances, a whistleblower's anonymity is protected from any form of backlash.

5.6 **HORIZONTAL APPLICATION**

61. Horizontal application of the PDA needs serious consideration. Businesses have started blowing the whistle on suspicious and unusual transactions in other organisations as required by the new Financial Intelligence Centre Act.\(^{27}\)

62. A company which is asked to pay a bribe if its tender is to be accepted, will fear that if it reports such behaviour, it may never be awarded a tender in future.

5.7 **EXTRATERRITORIAL JURISDICTION**

63. An impropriety is any conduct, irrespective of whether or not the impropriety occurs or has occurred in the Republic of South Africa or elsewhere, or the law applying to the impropriety is that of the Republic of South Africa or of another country. It is argued by Landman that evidential problems are due to arise where it is alleged by a whistleblower that the employer or co-employee breached a law of a foreign country.\(^{28}\) The whistle blower is therefore protected despite the impropriety being disclosed, has occurred outside South Africa and might be governed in terms of another country's law.

5.8 **RETROSPECTIVITY**

64. The act does not apply retrospectively as only disclosures made after the date on which section 2 of the PDA came into operation, irrespective of whether or not the impropriety concerned has occurred after the said date, qualifies as a protected disclosure.

\(^{27}\) Ibid

65. This section does therefore not protect whistleblowers who made disclosures of an impropriety before the commencement of this Act.

5.9 INSTITUTIONAL COMPLIANCE

66. In a joint survey conducted by KPMG in 2001, the Public Service Commission and Transparency South Africa, it was revealed that a basic ethics infrastructure, including issues such as Codes of Conduct and whistleblower protection, seemed to be in place in most of the surveyed organisations. The existence of written documents that outline the organisations values and principles was reported by 84% of respondents and 54% of respondents indicated that the organisation had a confidential reporting mechanism. Disturbing trends were however identified which indicated that South African organisations had not yet been able to integrate ethics management practices into the existing management processes, the failure of assigning a senior level manager with ethics responsibility and also a more broad range ethics management strategy and procedures were lacking. In more than 50% of the cases, ethics criteria did not form part of performance, reward or promotion criteria. This indicated that a lot of work remained to be done in ensuring that organisations were convinced of the importance of integrating ethics management practices as integral parts of all processes within the organisation.29

5.10 REPORTED CASES IN TERMS OF THE PROTECTED DISCLOSURES ACT

67. Two particular cases have been reported in terms whereof the PDA, since it's introduction, has been interpreted and applied.

68. In Klein No v Kolosus Holding Ltd and another,30 it was decided that a disclosure that is based on corroborated and supported information, which possibly reveals a breach of legal duty and criminal activity and prima facie has been made with

30 Klein NO v Kolosus Holding Ltd and another [2003] 1 All SA 559 (T)
bona fide intentions, is a protected disclosure. Klein represented a group of employees who had obtained and compiled complaints and evidence of mismanagement by a general manager of a division of Kolosus. A further colleague had advised Klein to refer the matter to the board of Kolosus Holdings and informed the general manager against whom the complaint was formulated of the fact that he intended doing so. The general manager subsequently questioned Klein in a business meeting regarding the nature of the complaint and evidence as well as to how Klein had obtained the evidence. The manager also requested the identity of the employees concerned who had filed complaints. Both the general manager against whom the complaints had been directed as well as his colleague indicated that such evidence was obtained by unlawful means, leading to Klein's suspension and served with a notice for a disciplinary enquiry. Klein was subsequently charged with giving out information about the company to outsiders in breach of confidentiality and other unrelated charges. Klein sought an interim interdict restraining Kolosus from bringing him before a disciplinary enquiry, relying on the PDA and the Labour Relations Act. The courts agreed that the disclosures he had made were protected disclosures and that a disciplinary enquiry was an occupational detriment on the basis that the charges would not have been brought against him had he not made the disclosures. The court found that Mr Klein had established a *prima facie* link between the disclosures he had made and the charges being brought against him. The timing of the charges and the fact that he had been singled out for improper internet usage, supported this conclusion. The court therefore interdicted the respondents from proceeding with any disciplinary action or enquiry against the applicant regarding any of the allegations contained in the notice of a disciplinary enquiry, pending the determination of an unfair labour practice dispute as to his suspension and / or the proposed disciplinary proceedings.
69. In the second case of Grieve v Denel (Pty) Ltd,31 Grieve, whilst preparing a report for the respondent's board concerning certain allegations of wrong doing by the general manager of one of Denel's divisions and after being charged with misconduct and suspended from duty, summoned to attend a disciplinary enquiry. The applicant claimed that by doing so, the respondent had infringed the requirements of the PDA and launched an urgent application for an order restraining the respondent from instituting disciplinary action against him. The court felt that the disclosures by the applicant appeared to be bona fide and if true, those disclosures would reveal possible criminal misconduct. It was found that prima facie, the disclosure fell within the terms of the PDA. Although the applicant was not expressly charged with making disclosures, the charges against him related inter alia to the manner in which he had obtained information on which the disclosure were based. Furthermore, it was questionable why the respondent decided to press other unrelated charges at the same time. Denel was ordered not to proceed with disciplinary action against the applicant pending the determination of an unfair labour practice dispute.

CHAPTER 6
THE "PUBLIC INTEREST" REQUIREMENT REQUIRED FOR PROTECTION IN CERTAIN INSTANCES

70. Due to the complex nature of modern society, greater reliance is placed on the knowledge and understanding of others to decide whether a particular environment is safe and free.

71. Despite various institutions and mechanisms established for this purpose, failures are sometimes eminent, and in certain instances the capacity limited. The consequences of a breach of trust to modern society are sometimes fatal and may lead to catastrophic results. It is in these instances where public interest is heavily relied on by whistleblowers for purposes of information

31 Grieve v Denel (Pty) Ltd [2003] 4 BLLR 366 (LC)
intending to protect the public and identify impropriety. Despite this the whistleblower is often victimised. Further complications arise in that most temporary contracts provide for a measure of loyalty between the employer and the employee. *In Ray Palmateer versus International Harvester Company Inc,* \(^{32}\) the plaintiff claimed punitive damages on the basis of dismissal. Punitive damages is an unknown concept to the South African law. Palmateer, an employee with 16 years of service with the International Harverster Company, was apparently dismissed due to providing the local police with information relating to a colleague that could possibly give rise to a criminal offence. The International Harverster Company submitted that, due to the fact that the alleged contravention was of such a minor nature, the plaintiff could have resolved the matter by referring it to internal management procedures. Despite the applicability of the *at-will* employment doctrine in American law where an action for dismissal is at stake, acknowledgement exists that a balance should exist between the employer’s interest in managing his business effectively and profitably, the employee’s interest in ensuring an income and the community’s interest in ensuring that the public interest is upheld. Only in the event where the employee acted in the public interest, should an employee be able to rely on the protection of the court.

72. In terms of the English statutes, a whistleblower can rely on protection where the information relates to the commission of an offence or any other statutory requirement or duty. In addition thereto, the unauthorised use of public funds, the misuse of authority, a miscarriage of justice, mismanagement, a danger to the health or safety of any individual or the environment or any other form of practice or ill behaviour. The court found that the public interest in ensuring that the penal code was enforced was of primary concern and of public interest. The court found that the seriousness of the crime did not have an impact on the principle of the enforcement of the penal code.

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\(^{32}\) Ray Palmteer v International Harvester Company Inc 85ILL 2d 124 : NE 2d 876
CHAPTER 7
CATEGORIES OF INFORMATION FOR WHICH THE WHISTLE BLOWER WILL NOT BE PROTECTED

73. The definition of protected information is relatively narrow. In at least three important categories of information, disclosure of such information will not fall within the scope and ambit of the act. Matters of ethical concern are not included in the expressed terms of the act that has as consequence that if information is available which might show a breach or a likely breach of ethics; such information is not covered by the PDA. Secondly, matters that are of professional concern and which do not necessarily indicate a breach of an ethical rule also do not fall within the scope of the act. Matters of public concern also apparently fall outside the ambit of a scope of the PDA. In this regard, it also appears that the act fails to cover information disclosures relating to the functioning of a policy.

74. The PDA does not restrict the operation of the Protection of Information Act (PIA)\(^33\), which restricts disclosure of information. Section 4 of last-mentioned act makes little or no distinction between information that should not be disclosed because of its military or national security significance and other information held by the public service that should be disclosed. The PIA furthermore makes no distinction in its application to current and former public officials. The principle mechanism whereby the PIA is implemented is based on a document called the Minimum Information Security Standards (MISS). An attempted disclosure in terms of the PDA will therefore be subject not only to the Protection of the Information Act but as well as the MISS policy applicable to all government departments. The ambit of the Protected Disclosures Act is therefore clearly limited by the operation of PIA, in so far it is consistent with the Promotion of Access to Information Act (PAIA)\(^34\) and the Constitution of South Africa. In view

\(^{33}\) Protection of Information Act (PIA) 84 of 1982
\(^{34}\) Promotion of Access to Information Act, 2 of 2000
of the Constitutional Court ruling in *Dawood v the Minister of Home Affairs*, the freedom of expression for public officials in terms of section 16 of the Constitution, is strongest for those public officials employed outside the Security Force institutions, being the South African Police Service, the National Intelligence Agency (NIA), the military and the South African Secret Services. The application of the MISS policy outside the ambit of military institutions is therefore debatable.

75. The PDA therefore does not extend protection to previous public servants disclosing government information, whilst it protects current employees against occupational detriment only under certain circumstances.

76. Directors, who are not also employees, cannot claim the protection of the PDA as the act currently applies to employers and employees only.

77. If a disclosure is made in breach of a law, such as the National Prosecuting Authority Act of 1998 or any other secrecy law, then it would not be a protected disclosure.

**CHAPTER 8**

**PROTECTION OF WHISTLEBLOWERS**

8.1 **GENERAL**

78. Different measures to protect whistleblowers include legislation, whilst courts can also develop principles in this regard, as indicated in American Jurisprudence, such as the Palmateer case. The labour law will not apply where a professional individual acts in breach of the confidentiality obligation invested upon him within the client professional relationship. Despite all of the above, instances will always arise where problems arise, such as the continuous tension between the

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35 *Dawood v the Minister of Home Affairs* 2000(3) SA 936 (CC)
36 Ibid.
monopoly of the state in respect of certain information and which information should be protected under legislation, such as the protection of Information Act relating to information in respect of security, intelligence, defence, foreign affairs, special investigations and information which is given and which is provided to other states and international organisations on a confidential basis. It is therefore clear that many instances arise where protection is not afforded to whistleblowers.\footnote{Malan, op. cit}

79. The PDA broadly encourages a 3-stage approach to whistle blowing with the first step being that an employee should first of all approach his or her employer or immediate supervisor. Should the employee not be 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 other person or body prescribed for the purpose of the PDA. As a last resort, the employee may take the matter to the media or Parliament should the employee still not be satisfied. 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.

80. In order to achieve the main objectives 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. It is furthermore important to note that the aims of the LRA and that of the PDA differ in that there is no reason to restrict the operation of the PDA to the sphere protected by the South African Labour law.

81. Independent contractors, workers or providers of services who are remunerated and supplied by a temporary pre-employment service, are whistleblowers who are expressly protected by the Public Interest Disclosure Act of the United Kingdom.\footnote{Public Interest Disclosure Act, 1998, United Kingdom \url{http://www/hmso.gov.uk/act1998/19980023.htm}}

\footnotesize{\textsuperscript{37} Malan, op. cit \textsuperscript{38} Public Interest Disclosure Act, 1998, United Kingdom \url{http://www/hmso.gov.uk/act1998/19980023.htm}}
82. Problems arise where the whistleblower is not the individual who obtains the information. In this regard the question arises as to whether the secondary whistleblower could also be protected in this regard. The English statutory law provides that the secondary whistleblower cannot be forced to identify the identity of the primary whistleblower. Total protection is therefore afforded to journalists in instances where they cannot be compelled to provide the name of the primary whistleblower.

83. In providing an infrastructure to improve ethical behaviour, whistle blowing mechanisms should be provided for including an increased awareness of these mechanisms. Consideration should also be given to incentives that would have an impact on the culture of an organisation.

84. The Country Corruption Assessment Report for South Africa\textsuperscript{39} referred to the National Public Anti-Corruption Strategy, proposing 9 considerations that were considered to be inter-related and mutually supportive. One consideration referred to improved access to report wrongdoing and protection of whistleblowers and witnesses, focussing on improving the application of the PDA, the witness protection programme and hotlines. In terms of the assessment report, whistle blowing is crucial to the detection of fraud and corruption. For a whistle blowing mechanism to be effective, there should be effective protection of the identity of the whistleblower with an effective follow-up of all \textit{bona fide} disclosures. Improved access to report wrongdoing and protection of whistleblowers and witnesses need to be developed. Establishing guidelines for the implementation of the PDA could do this. It was found that institutions should implement whistle blowing implementation policies, including policies for supporting persons maliciously and falsely implicated, obtaining support from the civil society to assist, support and protect whistleblowers, promoting a culture of whistle blowing amongst employees, whilst taking steps to

\textsuperscript{39} Country Corruption Assessment Report, South Africa, Department of Public Service and Administration, April 2003
improve the conditions and functioning of the witness protection system, including the issuing of guidelines on the conditions and working of the system. Reviewing the effectiveness, risks and existing problems of current hotlines in which to improve the system was also required.

8.2 NATURE OF A PROTECTED DISCLOSURE

85. A disclosure must relate to the conduct of an employer or an employee of an employer and must be made by an employee who has reason to believe that the disclosure relates to a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, the health or safety of an individual, damage to the environment, unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act.  

86. A “protected disclosure” is defined as a disclosure made to a legal adviser, an employer, a member of cabinet or of the executive council of a province. A disclosure must be made in good faith to the Public Protector, the Auditor General, or a person or body prescribed for certain circumstances, or any other person or body in accordance with Section 9. However the Act explicitly excludes a disclosure in respect of which the employee commits an offence by making that disclosure or information disclosed to a legal advisor for the purpose of obtaining legal advice.

8.3 ASSISTANCE OFFERED BY INSTITUTIONS

87. The Public Service Accountability Monitor, which has as aim to monitor transparency and accountability in the public sector, issued an advice sheet for potential whistle blowers.  

88. The advice sheet states that by remaining silent about acts of corruption, maladministration and other forms of misconduct, officials are guilty of breaking the Public Service Regulations Code of Conduct. This Code of Conduct

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40 Promotion of Equality and Prevention of Unfair Discrimination Act, no 4 of 2000
41 http://www.psam.ru.ac.za/advice.htm
prescribes that "in the cause of his or her official duties an employee shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, which is prejudicial to the public interest."

89. Any attempt to have an official dismissed for having made a protected disclosure would have to take place in accordance with the procedures set out in the Public Service Co-ordinating Bargaining Council Resolution number 2. In terms hereof, every official has the right to a disciplinary enquiry before being dismissed. Pending the disciplinary enquiry, such an official could approach a court on the basis that he or she is being exposed to an occupational detriment and could apply for an interdict to prevent him or her from being exposed to further detriment.

90. If such an official, who has made a protected disclosure, is brought before a disciplinary hearing, he or she could immediately bring the disclosure to the attention of the disciplinary committee. If the hearing refuses to accept this argument and the official is found guilty by the disciplinary committee, the employee can then appeal the outcome of the disciplinary hearing to his or her executing authority (Minister or MEC) and in the event of the appeal failing, the official has the right to take his or her case to the CCMA and ultimately the Labour Court. During this appeal period, the employer cannot dismiss the official. If an official who has made a protected disclosure is harassed, intimidated or threatened or in any other way adversely affected, such employee can ask for a transfer in the same position in another department with the same benefits and remuneration. Such an employee can also seek protection before any court of law to obtain an interdict to prevent any future harassment and intimidation.

91. The Department of Justice and Constitutional Development drafted practical guidelines for employees as required by the PDA, explaining the provisions of the
Act to employees who wish to report or otherwise remedy an impropriety. These guidelines have not yet been finalised.\footnote{Protected Disclosures Act: Draft Practical Guidelines for Employees, Department of Justice and Constitutional Development \url{http://doj.gov.za/legislation/acts/2001}}

8.4 REMEDIES FOR PROTECTION OF THE WHISTLE BLOWER

92. Whistleblowers will always be fraught with danger. It may be very difficult for a whistleblower to prove victimisation, and no law can prevent a whistleblower from being ostracised by colleagues. But the PDA goes someway towards protecting honest employees against the more obvious dangers, or recognising damage that can result from a culture of secrecy, fear and concealment.

93. A dismissal of a whistleblower constitutes an automatically unfair dismissal. The Labour Court is entitled to order the re-instatement of the whistleblower or to order compensation not exceeding an amount equal to 24 months of the monthly remuneration payable to the employee at the date of dismissal. Lesser occupational detriments are treated as alleged unfair labour practices. Such disputes, like dismissals must be referred to a bargaining council or to the CCMA as the case may be, and thereafter to the Labour Court for adjudication.

94. An unfair labour practice must be referred to the CCMA for conciliation and thereafter to the CCMA for arbitration. The director has no power to refer an unfair labour practice to the Labour Court even if there are complete legal issues attached to the dispute. An arbitrator has the power to determine a dispute over an unfair labour practice in reasonable terms. The employee is not permitted to be legally represented at the CCMA arbitration except in certain circumstances.

95. The dismissal for making a protected disclosure is regarded as an automatically unfair dismissal in terms of section 187 of the LRA. It is therefore clear that the Labour Court may order a compensation of up to 24 months remuneration to be paid to an employee whose dismissal is based on a protected disclosure. In
terms of section 158 of the LRA, the Labour Court may make any appropriate
order, including the grant of urgent interim relief, an interdict, an order directing
the performance of any particular act which order, when implemented will remedy
a wrong, a declaratory order, an award for compensation in any circumstances
contemplated in the LRA, an award for damages as well as an order for costs. It
may also review any decision taken or any act performed by the state in its
capacity as employer on grounds as is permissible by law. It is therefore clear
that in the present circumstances, as with all unfair labour practice disputes, a
dispute arising from an occupational determent, must be referred to the CCMA
for conciliation. Dismissal as a result of a protected disclosure is equivalent to
victimisation that is one of the issues dealt with in the concept of an automatically
unfair dismissal.

96. The court has to determine whether, the public interest in making a protected
disclosure weighed heavier than the public interest that requires that employees
owe the employer a legal duty of confidentiality and loyalty. It is important to note
that the disclosure must relate to it being in the public interest and not merely of
interest to the public.

97. It is possible that in certain instances, external methods of disclosures such as to
the media would be appropriate in instances as described for in the PDA,
especially, where internal disclosure mechanisms have failed to deliver the
desired results. Failure of such information systems could lead to the harm
outweighing the possible merit of making such disclosures, therefore failing the
rationale of the act.

98. Section 4(iii) allows for the transferral of an employee from the position occupied
by him or her at the time of the disclosure to another position in the same division
or another division of his or her employer. Where a person employed by an
organ of state makes a disclosure, such an employee may be transferred to
another organ of state. However the employment terms and conditions of a
transferred person may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before the transfer.

8.5 PROTECTION REQUIRED BY THE KING REPORT ON GOOD GOVERNANCE

99. In terms of the King Report, companies should aspire to principles of fairness, transparency, honesty, non-discrimination, accountability and responsibility and respect for human dignity, human rights and social justice. Demonstrable adherence to those principles and standards require structural measures as part of a programme to support imbedded ethical business practices by the establishment of easy, accessible, safe reporting channels for whistleblowers.

100. Employers should introduce effective, accessible and safe reporting by whistleblowers and the establishment of channels. Employees on the other hand, should be rewarded for complying with established principles and standards of ethical conduct and be subjected to appropriate disciplinary measures for failing to do so.

8.6 INTER-RELATIONSHIP BETWEEN THE LABOUR RELATIONS ACT AND THE PROTECTED DISCLOSURES ACT IN AFFORDING PROTECTION

101. Although there is a measure of overlapping between the provisions of the PDA and the Labour Relations Act, it is clear that the provisions of the PDA cover a wider scope. The fact that a dismissal in contravention of the PDA will constitute an automatically unfair dismissal extends greater protection to employees than a dismissal in terms of the LRA, for such a disclosure would typically not be automatically unfair under the LRA. The PDA also provides greater protection for employees against acts by employers short of dismissal.44

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43 King Report on Corporate Governance for South Africa – 2002, King Committee on Corporate Governance, Chapter 3, on pg 108
44 Labour Relations Act 66 of 1995
102. Affected employees, who have suffered occupational detriment, may approach any court having jurisdiction, including the Labour Court or pursue any other process by law (section 4). In terms of s 4(ii) and for purposes of the Labour Relations Act, any dismissal in breach of the PDA is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act and specifies that such a dismissal must follow the procedure set out in chapter (viii) of that act. The PDA further prescribes that any occupational detriment in breach of the PDA is deemed to be an unfair labour practise as contemplated in Part B of Schedule 7 of that Act. However, if the matter fails to be resolved through conciliation, it may be referred to the Labour Court for adjudication.

CHAPTER 9
COMPARATIVE STUDY

9.1 GENERAL

103. The PDA is based extensively on the British Public Disclosure Act.45

104. The ambit of the PDA is much wider than that of the Australian law as it covers both the public and private sector. However the PDA has not been extended beyond the employer/employee relationship.

105. From a comparative study of legislation dealing with protected disclosures, it is clear that a general provision normally states that whistleblowers are excluded from liability if they disclose a contravention of law, corruption or maladministration. The protection of a whistleblower is dependant on the person making their disclosure in a court in accordance with the various legislative models. However, all legislation indicates organisations to which disclosures can be made as well as the circumstances under which disclosures to the media can be made, mostly on clear and convincing grounds that it is necessary to avert

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45 Public Disclosure Act, op. cit
eminent and serious threat to an individual or the public. Most legislation presumes that disclosures of information to the public is better than concealing it.

9.2 UNITED KINGDOM

106. The United Kingdom Public Interest Disclosure Act protects anyone in the public or private sector who makes a protected disclosure.\textsuperscript{46} A protected disclosure is determined as one where the reasonable belief of the worker making the disclosure tends to show whether a criminal offence has been committed, is being committed or is likely to be omitted, that the person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, that a miscarriage of justice has occurred, is occurring or is lightly to occur, the health and safety of an individual has been, is being or is likely to be in danger, that the environment has been, is being or is likely to be damaged or that information tends to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

107. As with the PDA, a disclosure is not protected if the person making the disclosure commits an offence by making it, or is a privileged legal disclosure made in the cause of obtaining legal advice.

108. Disclosures from employees and responsible persons are protected if they are made in good faith. Disclosures to the Minister of the Crown are protected if the worker's employer is an individual appointed under the enactment of the Minister of the Crown, or a body whose members are so appointed. Disclosures must also be made in good faith to the Minister of the Crown.

109. Disclosures to prescribed persons are protected if made in good faith to a person prescribed by an order made by the Secretary of State, and if the person reasonably believes the accused is or should be held responsible for the relevant failure.

\textsuperscript{46} Ibid.
110. Disclosures in other cases are protected if they are made in good faith, the person making the disclosure reasonably belies it to be true, does not do it for personal gain, and any of the following conditions are met:

(a) If the person making the disclosure reasonably believes he will be subject to detriment if he makes the disclosure to his employer or to the prescribed person, (b) there is no prescribed person to make the disclosure to, and the person making the disclosure reasonably believes that evidence relating to the relevant failure will be destroyed if he makes a disclosure to his employer, or (c) the worker has previously made a disclosure of substantial information to his employer or to a prescribed person. Disclosures under this section must also be reasonable. Reasonableness is determined by the identity of the person to whom the disclosure is made, the seriousness of the relevant failure, or that the relevant failure is continued or is likely to occur in the future, whether the disclosure is made in breach of a duty of confidentiality owed by the employer to another person or whether a disclosure has been previously made to an employer or to a prescribed person. In the case where a person has made a complaint to an employer, reasonableness is also determined if the worker complied with any procedure used by him or authorised by employers.

111. Disclosures of exceptionally serious failures are protected if the worker makes disclosures in good faith, reasonably believes that the information disclosed and any allegation contained in it, are substantially true, he does not make the disclosure for personal gain, the relevant failure is of an exceptional serious nature and in all the circumstances of case, it is reasonable for him to make the disclosure. Reasonableness is also determined by considering the identity of the person to whom the disclosure is made.

112. A worker has the right not to be subjected to any detriment, act, or any deliberate failure to act by his employer done on the basis that the worker has made a protected disclosure. A worker may present a complaint to an employment tribunal that he has been subjected to a detriment. An employee who is
dismissed shall be regarded as unfairly dismissed if the reason for the dismissal is or making a protected disclosure. As with the PDA, disclosures of wrongdoing are punishable whether or not the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the applicable law of the United Kingdom or any other country or territory. Contractual duties of confidentiality are also void if they violate the provisions of this act.

9.3 AUSTRALIA

113. In the instance of parliamentary service employees, the Secretary of Parliament must, in terms of the Public Service (Parliamentary Officers) Amendment Regulations Act, establish procedures for dealing with whistleblowers, whilst in the case of Australian public service employees, an Agency Head must in accordance with the Public Service Regulations Act 1999, establish procedures for dealing with whistleblowers. With regards to parliamentary service employees who provide professional advice and support to Parliament independently of the executive government of the Common Wealth, the legislation maintains that procedures must (a) have due regard to procedural fairness and privacy, (b) provide that a parliamentary service employee may report breaches or alleged breaches of the code of conduct to the secretary of the employee’s department, (c) provide that if the presiding officer agrees that a report relates to an issue that would be inappropriate to report to the secretary, the employee makes a report to the Presiding Officer or a person authorised by the Presiding Officer, (d) it is showed that reports made by parliamentary service employees are breaches of the code of the conduct, such reports are investigated, unless the Secretary or the Presiding Officer considers that a particular report is frivolous or vexatious, (e) provide information about the available protection to the person making the report, (f) enable parliamentary service employees who are not satisfied with the outcome of the investigation by the Secretary to refer the issue to the Presiding Officer and (g) ensure that the findings of an investigation are dealt with as soon as possible.

47 Public Service Regulations Act, 1999, Australia
114. In respect of Australian public service employees who are responsible to government by providing frank, honest, comprehensive, accurate and timely advice in implementing government policies and programmes, the legislation indicates that the procedures must have (a) due regard to procedural fairness and comply with the Privacy Act of 1998, (b) provide that agency employees may report breaches of the code of conduct to the Agency Head or person authorised, (c) provide that if the Commissioner decides that a report relates to the issue that would be inappropriate to report to the Agency Head, the employer makes report to the Commissioner or a person authorised, (d) ensue that all reports made by agency employees of breaches of the code of conduct are investigated, unless the Agency Head or Commissioner considers that a particular report is frivolous or vexatious, (e) provide information about the available protections of the person making a report, (f) enable agency employees who are not satisfied with the outcome of an investigation by the agency to refer the issue to a Commissioner and (g) to ensure that the findings of an investigation are dealt with as soon as possible.

115. In terms of section 89A the Public Service Act, whistleblowers in both Parliamentary Service and Public Service are protected as follows:

1. An action or proceeding does not lie against a person for or in respect of any old written report made in good faith by the person on or in connection with (a) work performed, by an officer or employee or (b) conduct of an officer or employee.

2. A report shall be deemed to have been made in good faith if the person by whom the report was made was not motivated by ill will to the officer or employee or by any other improper motive.

48 Public Service Act, 1922, Australia
3. Reports are not covered by this act unless (a) the person who made the report believed on reasonable grounds that it was a function of the person to whom the report was made to receive the report and (b) in the case of a report containing matters that was false or misleading in a material respect, the person who made the report did not know and could not with reasonable diligence have ascertained, that the report contained matters that was false and misleading.

9.4 NEW SOUTH WALES

116. The New South Wales Protected Disclosure Act\(^49\) requires that the person initiating whistle blowing protection must be a public official. In addition, disclosures must be made to an investigating authority, principle officer, public authority, a member of parliament or journalist. Disclosures should be made voluntary by public officials in accordance with the code of conduct adopted by the investigating authority or public authority. Disclosures made in the exercise of a duty imposed on the public official by another act, is also considered involuntary.

117. The organisation, to which a whistleblower will bring their claim, depends on the nature of the claim. In the event of corruption claims, such claims should be brought to and satisfy the Independent Commission Against Corruption Act\(^50\). Claims should show or tend to show that the public official has engaged, is engaged or proposes to engage in corrupt conduct. In terms of maladministration claims, such claims should be brought to the Ombudsman and satisfy the requirements as set out in the Ombudsman Act\(^51\). Claims should show or tend to show that the public official is engaged or proposes to be engaged in conduct of the kind that amounts to maladministration. Additional powers are given to the investigating agencies in order for the agencies to check on one another.

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\(^{49}\) Protected Disclosures Act, 1994, New South Wales  
\(^{50}\) Independent Commission Against Corruption Act, 1988, New South Wales  
\(^{51}\) Ombudsman Act, 1974, New South Wales
118. The Act provides procedures for making a disclosure, protection of persons from reprisals that may be afflicted upon them and provides mechanisms for disclosures to be properly evaluated. The Act also states that no beneficial treatment is to be given in favour of a person if its purpose is to influence a person to make, to refrain from making or to withdraw a disclosure.

119. Disclosures to a member of parliament or a journalist are protected if the same disclosure has been made to an investigating authority or public authority. Disclosures are also protected if the person, to whom the disclosure has been made or referred to do not investigate the matter, investigated the matter but did not complete the investigation within 6 months of the original date of disclosure. In addition, the public official must have reasonable grounds for believing that the disclosure is substantially true and that the disclosure must be substantially true.

120. A person who is found guilty of taking detrimental action against a person, who has made a protected disclosure, is guilty of a crime. Detrimental action is defined as injury, damage or loss, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to the employment, dismissal from or prejudice in employment, or disciplinary proceedings.

121. The Act maintains that the individual to whom the disclosure has been made is not to disclose information that might identify or tends to identify a person who has made protected disclosures unless that person consents in writing to the disclosure of that information or that justice requires it or, furthermore, that the disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

122. Disclosures about conduct or activities that took place before this Act became law are also protected.
CHAPTER 10
CONCLUSION

123. According to Camerer, the actual implementation of the PDA may be hampered by four concerns, the first being accessibility in that awareness of citizens of the legislation will be lacking, secondly, that information and support will be required to ensure assistance to those wishing to make protected disclosures, thirdly, implementation requires that substantial burdens are placed upon institutions in the public and private sector to develop policies and procedures in order to support the legislation and lastly ensuring the effectiveness of the PDA by the monitoring, implementation and use of legislation in order to ensure it is implemented effectively.

124. Failure to attend to the concerns of the whistleblower may possibly result in loss of life, damage to reputation and increased financial costs, thereby failing to ensure a workplace conducive to an environment of trust.

125. Whatever the motive of the whistleblower in eventually blowing the whistle against his employer, acting contrary to his sense of loyalty towards the company is usually a dramatic experience. Whilst being aware of the injustice on the one side, he also has to justify his sense of loyalty towards his employer. It is therefore common cause that blowing the whistle on an impropriety normally has dire consequences for the whistleblower.

126. It is the above dire consequences existing legislation intended to address, albeit unsuccessful to a large extent. Recommendations by the South African Law Commission as discussed hereinabove which ought to be incorporated into legislation, should address most, if not all, those concerns to enable an environment conducive to responsible whistleblowing. Correctly

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52 Camerer L, "Exposed : Blowing the Whistle, Black Business Quarterly (BBQ), Fourth Quarter 2000 on pg 80
informed and legally protected employees and employers can only improve
employee / employer relationships where events lead to instances of
whistleblowing.

CHAPTER 11
RECOMMENDATIONS

127. The South African Law Commission (Law Commission) recently produced a
discussion paper on the PDA. Various issues were raised on which comment
had been received to elicit responses. It is expected that a report will be
submitted to the Minister of Justice within the foreseeable future following final
deliberations on the issues raised in the discussion paper. Some of those
comments are considered and recommendations made on the basis of selected
responses received.

128. In various instances, employees are threatened with the use of defamation
claims and other law suites, such as interdicts. The Law Commission considered
whether the various forms of victimisation of employees should include instances
where an employer uses the threat of an action for defamation against an
employee and/or uses the threat to cover up information disclosed by
characterising it as defamatory statements. The loss of a contract in the case of
a contract worker and the loss of an employment opportunity in the case of a
person unemployed and remunerated by an agency after acting as a
whistleblower should be regarded as occupational detriment. It is important to
note that the United Kingdom’s Public Disclosure Act, is wider in application
than the PDA in that it affords protection also to contract workers, agency
workers and home workers as well. The New Zealand act, The Protected
Disclosure Act defines an employee to include a home worker as an individual
who is engaged under a contract for services.

54 Public Disclosure Act, United Kingdom, op. cit
55 Protected Disclosure Act, 2000, New Zealand
129. The Law Commission’s consideration to increase the scope and ambit of the PDA by substituting the word “employee” be changed throughout the PDA to “worker”, is supported. It is important to note that the word “worker” is used in section 23 of the South African Constitution.\textsuperscript{56}

130. It is clear that in the case of members belonging to a board of professional associations, victimisation could take the form of being removed or excluded from membership. So too could students uncover irregularities on the part of educational institutions while conducting research and thereby be victimised by being excluded from a university or being assessed in a discriminatory manner.

131. It is important to note that the definition of occupational detriment would have to be supplemented by a definition relating specifically to the sort of victimisation that might be visited on a citizen by a public official or body. Detrimental action in this instance would more likely deal with the processing of an individuals application, refusal to grant a benefit such as a pension or the withdrawal of such a benefit, licence or permission, application, expropriation of property, harassment and discrimination as contemplated in the legislation.

132. In terms of whether a whistleblower making a protected disclosure should be excluded from civil liability, it was recommended by the Law Commission that civil liability possibly endured by the whistle blower did not contribute to the creation of a culture of disclosure as envisaged by the PDA. This position appears to be quite correct. The granting of civil immunity will encourage whistle blowing whilst whistleblowers will be more willing to disclose their own identity. It is important to note that immunity from civil liability will apply only in terms of disclosures in accordance with the procedures and conditions of the PDA. The giving of immunity to potential whistleblowers is regarded as the most, valuable protection given to whistleblowers, especially, since an employee’s duty of

\textsuperscript{56} Ibid
confidentiality towards an employer has been used as a justification for dismissing an employee who disclosed impropriety on the part of an employer.

133. Most foreign legislation on whistle blowing extends beyond employees, protecting whistleblowers against reprisals that work under contracts of employment, agency workers and as home workers. Remedies expressly provided for in the United Kingdom Act,\(^{57}\) include that a contract worker may make a complaint to an employment tribunal that he or she is being subjected to a detriment or that his or her contract has been terminated as a result of making a protected disclosure. Where such a complaint is founded, a declaration will be made to that effect and the payment of compensation will be awarded. It is important to note that in South Africa, the CCMA and the Labour Court will only deal with a dispute between an employer and an employee.

134. The Law Commission considered whether remedies available to the whistleblower should include compensation, taking into account the actual loss suffered by a whistleblower without setting a maximum amount to be claimed. It is submitted that the PDA as recommended by the SALC, should create a remedy where the actual damages suffered by a worker who made a protected disclosure, be paid. A direct link should be established between the amount of compensation awarded and the actual loss of damage suffered by the worker. The proposals of the Law Reform Commission provide for more specific remedies such as interdicts, a declaratory order, as well as an interdict prohibiting a detrimental action or further detrimental action is available to the employee. Such orders include an interim order or an interim interdict pending the final decision of an application or a final order. In considering whether to create a criminal offence where detrimental action is taken against a whistleblower, it is to be noted that New Zealand’s Protected Disclosures Act\(^{58}\) as

\(^{57}\) Public Disclosure Act, United Kingdom, op. cit

\(^{58}\) Protected Disclosure Act, New Zealand, op. cit
well as The United Kingdoms Public Interest Disclosure Act of 1998 does not make provision for criminal offences under the circumstances.

135. It should not be a criminal offence where an employee knowingly makes a false disclosure. The PDA requires that protected disclosures be made in good faith, probably referring to the subjective belief in the truth of the information disclosed. As stated in *CWU and Another v Mobile Telephone Networks (Pty) Ltd*\(^5^9\) at paragraph 21, “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 that good faith requires proof of the validity of any concerns or suspicions that an employee may have, or even a belief that a wrong doing has actually occurred.” Whistle blowers, who lack subjective belief in the truth of the information, will not be protected by the Act. A false disclosure may well amount to criminal defamation, which consists of the unlawful and intentional publication of matters concerning another, which tends to injure his reputation.

136. In many instances, a disclosure may be made in good faith on the basis of a genuine suspicion. The threat of criminal prosecution would no doubt tend to encourage anonymous whistle blowing, which is clearly undesirable.

137. It is important to note that the Act does not state a specific period for which a person making a protected disclosure is protected. However, employers do manage to harass and victimise the employees in a subtle way without it being able to be relayed back to the whistle blowing incident. A whistleblower basically needs life long protection, especially if he needs to return to the employment of the employer.

138. Implementation and adherence to the following 10 recommendations should promote ethics in both the public service and the private sector and monitor the implementation of a whistle blowing infrastructure:

\(^5^9\) *CWU and Another v Mobile Telephone Networks (Pty) Ltd*, [2003] 8 BLLR 741 (LC)
1. Responsibility for the implementation of a whistle blowing policy should be that of the most senior official within the entity in order to create an enabling environment for whistle blowers.

2. A sufficient budget for a whistle blowing infrastructure should be provided to ensure an effective whistle blowing mechanism.

3. Employee consultation and participation in the development and adoption of a whistle blowing policy through an intensive participatory process is required.

4. The implementation of the policy should be well marketed and awareness campaigns and programmes for promotion, publicity and marketing thereof should be undertaken.

5. Training on a whistle blowing policy and the Protected Disclosure Act should take place with all managers and with all staff.

6. Every employee should be provided with a copy of the whistle blowing policy.

7. Whistle blowing policies should be made available in as many official languages as practical possible.

8. Training on the whistle blowing policy should be included in the induction of all new employees.
9. Implementation of the whistle blowing policy should be included in the key performance measurable of every senior management that constantly make employees aware of the policy.

10. Hotlines to report fraud and corruption should be introduced.
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