



REPORT ON PROTECTED DISCLOSURES



South African Law Reform Commission: Project 123

Protected Disclosures

Report: November 2007

TO MRS BS MABANDLA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973 as amended), for your consideration, the Commission's Report on Protected Disclosures.

A handwritten signature in black ink, appearing to read 'Y Mokgoro', with a stylized flourish at the end.

Y Mokgoro
Chairperson: South African Law Reform Commission
2007

SOUTH AFRICAN LAW REFORM COMMISSION

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

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Summary of Recommendations

Extension of the ambit of the Protected Disclosures Act

The definition of employee

1. The remedies presently provided for in the Protected Disclosures Act 26 of 2000 ("the PDA") are confined to the relationship between an employer and employee in the public and private sectors. The PDA 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. With the notable increase in the use of part-time and temporary workers coupled with the trend of outsourcing the restricted definition of employee excludes a growing number of people from protection in terms of the PDA if they should make a disclosure regarding improprieties in the work arena. The Commission recommends that the widest possible protection should be afforded to any person functioning or having functioned within the workplace. This would include those who generate an income within the work environment, such as independent contractors, persons employed by temporary employment services, former employees, pensioners receiving pensions from their former employers and those who function within the workplace but who do not generate an income from within the work environment, i.e. volunteers.

2. As the status of a person who resigns or retires in relation to the employer is the same, i.e. a former employee, it is deemed adequate to extend the definition of employee to include someone who worked for the employer and not necessary to specifically refer to pensioners. The Commission is of the view that volunteers already fall under part (b) of the existing definition of employee and that an amendment in this regard is unnecessary.

3. The Commission is however concerned that extending the definition of 'employee' to include persons such as independent contractors who are not considered to be employees in terms of labour legislation and are expressly excluded from the reach of labour legislation and the remedies contained therein could create confusion regarding the remedies available to such people. The Commission is of the opinion that the object of extending the protection of the PDA to persons in the work environment who are not employees could be achieved by separately defining independent contractors, agents, consultants and similar persons as 'workers' and recommends accordingly.

4. The Commission recommends that for the sake of clarity the words temporary employment service and business used in the definition of employee should be defined and that for this purpose the relevant definitions in the Labour Relations Act 66 of 1995 ("the LRA") should be incorporated in the PDA.

The definition of employer

5. The term 'employer' is not defined in either the LRA or the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"), and its meaning in those statutes is established by reference to the definition of 'employee'. Therefore the continued use of the term 'employer' in the PDA does not seem to be problematic as a counterpart to 'employee' or 'worker' and in general there seems to be no real need to invent a new term to define an employer in the broad or PDA sense. The Commission recommends that the designation 'employer' be retained.

6. For the same reason the Commission does not deem it necessary to insert a matching reference to a client in the definition of employer. The definition of 'employee' and 'worker' make it clear that for the purposes of the PDA, 'employer' encompasses the hirers of services and is not confined to employers as defined in the LRA. Consequently for the purposes of the PDA an employee or worker who is rendering services to a client will have two 'employers'.

7. The Commission finds merit in holding the employer in the strict or traditional sense and the employer in the expanded sense jointly and severally liable where the former employer, on the express or implied instructions of the latter employer, subjects an employee or a worker to an occupational detriment and recommends accordingly.

8. The Commission is however not in favour of apportioning joint and several liability in other circumstances. It is of the opinion that doing so would have the effect that a client could be held liable for non-compliance with the PDA by a temporary employment service (in its capacity as employer). This would place an unnecessarily stringent burden on all clients to ensure that the temporary employment service or employer they contract with complies with the PDA in order to avoid liability for non-compliance. The nature of the relationship between a temporary employment service and a client militates against this approach.

The definition of disclosure

9. The Commission recommends that reference to Chapter II of the Employment Equity Act 55 of 1998 ("the EEA"), be included in the definition of disclosure as it contains a range of grounds considered to be unfair discrimination within the context of employment policy and practice.

The definition of occupational detriment

10. The Commission is of the opinion that the present list of occupational detriments read together with the phrase 'being otherwise adversely affected in respect of his or her employment, profession or office . . .' is broad enough to provide for other instances of occupational detriment within the narrow definition of employment. However the definition does not specifically make provision for instances of occupational detriment relating to the wider understanding of worker as is proposed. For this reason the Commission deems it necessary to make express reference to a detriment typically experienced by contract workers, namely the loss of a contract or the inexplicable failure to be given a contract.

11. The Commission is mindful of the reality that employees and workers are often too scared to blow the whistle on fraud and corruption not only for fear of becoming victims of reprisals within the workplace but also for fear that the protection of their property, their families and their own lives will be compromised. Employees and workers may also be concerned that they will be hindered from participating in activities which do not fall strictly within the employment relationship, e.g. being part of an office or company cricket or soccer team. The Commission is however of the view that aside from the fact that certain retributive conduct would be criminal that intimidation and harassment of this nature would fall under the definition as it currently stands. The deletion of the words 'in relation to the working environment of an employee' supports this interpretation. The Commission therefore does not recommend that being prevented from participating in activities falling outside the employment relationship as a result of making a protected disclosure should be included in the definition.

12. Although the Commission acknowledges that the possibility of criminal liability arising from the making of a disclosure is clearly a deterrent to a whistleblower making a disclosure, it agrees with the Public Prosecutor that the National Prosecuting Authority may only proceed with instituting a prosecution in compliance with the law. The Commission therefore does not support the inclusion of 'being subjected to a criminal prosecution in bad faith' in the definition of 'occupational detriment'.

13. The Commission is of the view that revealing the identity of the whistleblower, although not prohibited in terms of the PDA, would of itself give rise to or potentially give rise to any number of detriments already listed in this definition, for example, harassment or intimidation, and is therefore not of the opinion that it should be listed in this definition.

14. Section 9 of the PDA already provides for a remedy where a disclosure has been made in respect of which no action was taken within a reasonable period after the disclosure in that such disclosure can be made generally. This would include a disclosure to the media. The Commission is therefore of the opinion that the inaction of the employer should not be included in the definition of 'occupational detriment'. Naturally where the worker is subjected to any detriment in relation to his or her occupational environment following a disclosure due to the inaction of the employer, such detriment would fall within the reach of the extended definition of 'occupational detriment'.

15. The Commission is of the opinion that threats of occupational detriment are adequately addressed under the phrase 'otherwise adversely affected in respect of his or her employment' and therefore do not need to be specifically listed.

The list of persons/bodies to whom disclosures may be made

16. The Commission has ascertained that to date no regulations have been issued in terms of the PDA and consequently that a disclosure in terms of section 8 of the PDA may only be made to the Public Protector or the Auditor-General and then only in relation to their particular functions. However the mandate of the Public Protector is fairly comprehensive and is such that any person who suspects that any conduct in state affairs, or in the public administration in any sphere of government is improper or has resulted in any impropriety or prejudice may report such to the Public Protector. As the Public Protector is the South African equivalent of what is termed an Independent Advisory Body or Whistleblower Protection Authority in other countries the Commission does not support the establishment of another body to do what the Public Protector is already mandated to do.

17. In order to encourage and facilitate compliance with the PDA, the Commission recommends that an extended list of persons or bodies to whom one may disclose in terms of section 8 should be provided for in regulations. As provision is made in section 8 for the issuing of regulations in this regard it is not deemed necessary to amend section 8 to include such a list.

18. In addition to the proposals contained in the discussion paper and the additional proposals received from respondents, the Commission recommends that consideration should particularly be given to the inclusion of persons or bodies to whom or to which disclosures can be made in other legislation. For example, the National Nuclear Regulator Act 47 of 1999 provides that a disclosure of information may also be made to the Human Rights Commission, the National Director of Public Prosecutions, or the National Nuclear Regulator; and the National Environmental Management Act 107 of 1998 includes an organ of state responsible for protecting any aspect of the environment or emergency services.

Citizens' whistleblowing

19. The Commission is of the view that extending the PDA by duplicating existing remedies and protection already available to the general public, with regard to disclosures of improprieties of public bodies or officials, would not enhance such remedies or protection. It is also of the view that the specific focus of the PDA on the work environment militates against such an extension. It consequently does not recommend that the PDA be extended to include whistleblowing by members of the general public in respect of public bodies or officials.

Immunity from criminal and civil liability

20. The Commission is of the opinion that the need to protect certain information either in the national interest of the country or in the interest of the livelihood of an employer by way of confidentiality or secrecy agreements militates against granting blanket immunity from liability for disclosures relating to all improprieties provided for in the PDA. It is of the view that exposing an employer to such risk would only be justified where the

content of the disclosure is sufficiently serious i.e. where the disclosure relates to the commission of a criminal offence. It is also of the opinion that immunity from civil and criminal liability should not be automatic but should be granted subject to the discretion of the court in which the action is brought.

21. The Commission is of the view that a whistleblower should not be enabled to circumvent her criminal and civil liability arising out of her participation in the wrongdoing by reason of making a disclosure. Section 204 of the Criminal Procedure Act 51 of 1977 ("the CPA") already provides a mechanism whereby a witness for the prosecution may be discharged from criminal prosecution. The Commission is of the view that this mechanism is sufficient. For the sake of clarity the Commission recommends that the PDA be amended to clearly reflect that immunity from liability is not granted in relation to a disclosure which relates to criminal conduct or participation in criminal conduct by the whistleblower.

22. The Commission is of the view that granting immunity from criminal and civil liability to an employee who discloses the commission of a criminal offence in conflict with an obligation or agreement against disclosure will nullify the exclusion created by section 1 of the PDA. Section 1 provides that a disclosure made to 'any other person or body in accordance with section 9' where the employee concerned commits an offence by making a disclosure is not protected. Granting immunity from liability would make such a disclosure a 'protected disclosure' ensuring that the employee would enjoy the protection of the PDA. However the exclusion regarding the disclosure of all other improprieties made by an employee where she commits an offence by making such disclosure and for which immunity is not given would only be considered to be a protected disclosure as defined in the PDA if it is made in accordance with sections 5, 6, 7 or 8 of the PDA. A disclosure to 'any other person or body in accordance with section 9', for example the media, where the employee concerned commits an offence by making that disclosure will not be a 'protected disclosure' for purposes of the PDA and she will not receive immunity from liability as a result thereof.

Protection of identity of whistleblowers

23. A whistleblowers primary concerns relate firstly to whether her identity will be kept confidential, particularly in instances where she is the only available witness and secondly to her safety pursuant to exposing fraud and corruption. A person identified by a disclosure of a whistleblower in terms of the PDA also deserves protection from malicious or bona fide but erroneous disclosures. There is a need to treat all information including the subsequent investigation relating to the disclosure of improprieties confidentially. The Commission is of the opinion that any information relating to a protected disclosure should only be discussed or disclosed to a person who has a legitimate right to such information or for the purposes of investigating the disclosure or in order to compile a report or convey a recommendation in connection with the disclosure.

24. The Commission is of the opinion that a blanket prohibition against revealing the identity of a whistleblower, either by way of excluding the circumstances under which such persons identity may be revealed in terms of the proposed clause or by expanding the grounds of refusal of access to records in terms of the Promotion of Access to Information Act 2 of 2000 ("the PAIA"), would not be conducive to the proper investigation of such a disclosure. Certain records, which may include the identity of the whistleblower may be relevant to discovering the truth of the case at hand. Persons implicated or identified by a whistleblower also have a right to be informed of the disclosure with sufficient detail to answer it and in order to exercise the right to adduce and challenge evidence.

25. The Commission is aware that a request to reveal a whistleblowers identity would entail the weighing up of competing interests and that this exercise may be difficult and intricate. The Commission recommends that the guidelines which have been developed and issued in terms of section 10 of the PDA should be amended to specifically address the issue of confidentiality and to remind employers of the right to privacy which is inherently attached to all personal or identifying data pertaining to the whistleblower and anyone identified in terms of the protected disclosure.

Remedies

26. The Commission is of the opinion that although the common law principle of vicarious liability would in all likelihood hold an employer responsible for its employee's intentional or negligent acts or omissions, section 4 of the PDA is sufficiently flexible to allow for personal accountability for those responsible for whistleblower reprisals. However the Commission is of the view that the employer should remain primarily accountable as this provides an important incentive for employers to maintain appropriate conditions in the workplace. The Commission therefore does not recommend that section 4 of the PDA be amended to specifically provide for personal liability for those responsible for reprisals.

27. The Commission is also of the view that compliance with all legislative imperatives is inherently part of an employment contract. With regard to the public sector, section 28 of the Public Service Act, 1994 ("the PSA") specifically provides that an officer or employee shall fulfill the obligations imposed by the PSA or any other law. This would include the PDA and more pertinently section 3 of the PDA which expressly prohibits subjecting employees to occupational detriments. 'Honesty and Integrity' have also been defined as part of a key set of 11 competencies required by senior managers in the Public Service. The Commission therefore does not deem it necessary that compliance with the PDA be included in manager's performance appraisals.

28. The Commission agrees that the investigation of a disclosure by the Public Protector by way of mediation, conciliation or negotiation falls within the reach of section 4 of the PDA.

29. The Commission also agrees that section 4 already allows for compensation beyond the two year salary ceiling. In theory a whistleblower could turn to the common law and claim contractual or delictual damages in excess of the amount of compensation available in terms of the LRA depending on the circumstances of each case. However in practice few if any whistleblowers are able to afford to launch actions in different forums to remedy the actual damages they have suffered. Whistleblowing is essentially a public duty which may attract detrimental financial and private consequences. At the very least whistleblowers should be able to, in one action, remedy the harm they have been subjected to. The Commission concludes that there is therefore a need to expressly provide that the actual damage suffered may be claimed.

30. The Commission has determined that to obtain legal aid a whistleblower would have to pass a means test, based on income, to qualify for assistance from the Legal Aid Board. The existing means test ceiling is low, so aid is generally available only to the lowest income groups. Although some whistleblowers might qualify for legal aid others might not and given the prohibitive costs involved in litigation would not be able to pursue legal remedies provided for in the PDA. The vulnerable position a whistleblower may be placed in as a result of an occupational detriment pursuant to making a disclosure of impropriety is therefore compounded by the inaccessibility of justice. The Commission understands that the Legal Aid Guide which includes particulars of the scheme under which legal aid is rendered or made available is submitted to the Minister for Justice and Constitutional Development on an annual basis. The Commission requests that given the particular vulnerability of whistleblowers who disclose in compliance with the PDA, the Department of Justice and Constitutional Development consider extending the provision of legal aid assistance in civil matters to whistleblowers.

31. The Commission deems it necessary to provide an avenue by which application for redress can be made for those whistleblowers that are unable to do so in their own name and recommends that section 4 be amended accordingly. In order to avoid possible abuse or institution of proceedings where a whistleblower is opposed to it, the Commission recommends that an application may only be brought on behalf of a whistleblower with her written consent.

32. Based on the fact that neither the legislature nor the courts seem to be in favour of recognizing or granting punitive damages the Commission endorses the view of the majority of the respondents that there is insufficient reason for providing for such damages in the PDA.

Creation of offences

33. The Commission confirms its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalised. 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 present form) and might also be guilty of criminal defamation, *crimen injuria* or fraud at common law.

34. The Commission also confirms its preliminary recommendation that, in order not to add unnecessary tension to employment relationships and jeopardize good labour relations, it should not be made an offence to subject an employee or a worker to an occupational detriment. The Commission is of the opinion that a better and more constructive approach would be to *inter alia* confer a qualified immunity on whistleblowers who disclose in good faith and to create a duty to keep the identity of whistleblowers confidential.

Good faith

35. The Commission agrees that the inclusion of a requirement of good faith in section 5 of the PDA would infringe the principle of legal professional privilege and inhibit the freedom of communication between a lawyer and her client for the purpose of the giving and receiving of legal advice. It therefore does not recommend that section 5 of the PDA be amended to include the requirement of good faith.

36. The Commission is mindful of the fact that very few employees can afford access to private legal advisers and that trade union representatives are more frequently utilized by employees in the workplace. It is also mindful that an employee who is accompanied and or assisted by a trade union representative in making a disclosure to an employer or superior is less likely to be subjected to victimisation or intimidation. The Commission is of the opinion that a legal representative of a trade union qualifies as a person 'whose occupation involves the giving of legal advice' and would therefore fall within the reach of section 5 of the PDA. The Commission is therefore of the opinion that section 5 of the PDA should not be amended.

Creation of a conducive workplace environment

37. The Commission is of the view that the PDA already encourages the implementation of internal procedures for making disclosures and the recognition of a duty on employers to investigate a disclosure. Section 6(1)(a) of the PDA requires a disclosure to an employer to be 'substantially in accordance with any procedure prescribed, or authorized by the employee's employer for reporting or otherwise remedying the impropriety concerned'. With regard to setting up of procedures the PDA 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'. The Portfolio Committee on Justice and Constitutional Development adopted the Practical Guidelines for Employees on the 31st May 2006. The Commission is of the view that the issuing of these guidelines will ameliorate a number of problems experienced in practice thus far.

38. The Commission is of the opinion that the PDA is drafted in such a way that to include a section in the Act which places a legislative duty on an employer to investigate would be spurious. This is because where an employer fails to investigate a disclosure, this effectively entitles an employee to disclose more widely. In other words if an employer wants to prevent wider disclosures he or she will have to investigate the disclosure. Having said this, the Commission is cognizant of the difficulties experienced by a number of whistleblowers who, in the absence of an obligation to give feedback or to be notified, were not notified of a decision not to investigate the disclosure, or of a decision to refer the matter to another body to investigate, or the outcome of an investigation. The Commission recommends that the PDA be amended to include a duty to investigate and a duty of notification. It also recommends that the practical guidelines issued in terms of section 10 of the PDA should be amended to include an obligation on employers to have appropriate internal procedures in operation for receiving and dealing with information about improprieties.

39. The Commission further recommends that the Department of Justice and Constitutional Development should give consideration to including the following in the practical guidelines or regulations to the PDA:

- Stipulation of timeframes within which action should be taken by the recipient of a disclosure and within which feedback should be given to the whistleblower;
- Provision for referral of disclosures to more appropriate agencies or persons where the original recipient does not have the power or jurisdiction to appropriately deal with it;
- Submission of statistics and details of protected disclosures dealt with by employers.

Duty to disclose corruption and other illegalities in other legislation

40. The definition of 'disclosure' in the PDA refers to 'any disclosure' and therefore does not exclude disclosures made in compliance with a duty to report corruption or irregularities. The Commission therefore does not agree that the PDA be amended to include reference to 'involuntary disclosures'. However section 10(4) (a) refers to 'procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety'. The Commission recommends that the words 'or are obliged by law' be added to this section.

General protected disclosure - whistleblowing to the media

41. The Commission recommends that the guidelines to be issued in terms of the PDA should, in addition to an explanation of the procedures available, include the pre-conditions which need to be met in order to comply with the PDA. The Commission does not agree that the fundamental right of freedom of expression may be eroded by the existence of requirements for making a disclosure. Compliance with extra measures or requirements act as an incentive to the whistleblower to first blow the whistle within the organization in which she finds herself.

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Introduction

On the 20th July 2000 the Minister for Justice and Constitutional Development (“the Minister”) included the investigation into Protected Disclosures on to the South African Law Reform Commission’s (“SALRC”) programme. This was done pursuant to deliberations before the Portfolio Committee on Justice and Constitutional Development on the Open Democracy Bill and the subsequent promulgation of 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 traditionally understood employer/employee relationship.

The Commission published an Issue Paper in January 2003 and a Discussion Paper in June 2004. This Report contains the final recommendations of the Commission and is accompanied by proposed draft amendments to the PDA. The Report and proposed draft amendments will be handed to the Minister for Justice and Constitutional Development for her consideration. The Commission will thereafter publish the report.

Background

The PDA is 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 (“the Committee”) 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 Disclosures Bill [B30-2000]. The Bill was presented to Parliament and later enacted as the PDA.

Whistleblowing generally entails that employers facilitate disclosures by employees concerning wrongdoing in the workplace. Employees are often in the best position to detect criminal activities and irregular conduct at work. 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 disclosure.

The objects of the PDA are 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 on account of having made a protected disclosure.

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. The Committee considered the possibility of extending the ambit of the PDA beyond the purview of the employer/employee relationship. It also considered various other extensions of the PDA. However, it felt that any extension beyond the current ambit of the PDA would require definition of the various types of victimisation to which persons who are not in an employer/employee relationship may be subjected as a result of making certain disclosures. This, the Committee said, would require comprehensive and comparative research.

Clause 63(1) of the Open Democracy Bill made provision for the exclusion of criminal and civil liability upon making a protected disclosure. The Committee was not in a position to conduct an audit of the effect that such a provision might have on existing laws, and was of the view that such an audit would be essential to prevent unintended consequences resulting from such a provision. It concluded that it was undesirable to include such a provision in the PDA, but acknowledged that this was arguable and suggested that it be investigated more fully.

In its report the Committee also considered the creation of a new cause of action for an employee who had been victimised by an employer in contravention of the PDA. It was suggested that such remedy could be aimed at the person who acted in contravention of the PDA or at both the employer and such person, and could also introduce the concept of punitive damages into our law. The Committee stated, however, that the creation of new remedies in the labour field should be approached with caution, and with a thorough knowledge and understanding of the existing remedies and procedures in this field.

The Committee was also of the view that it might well be appropriate to create offences in 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 or by making a disclosure without knowing or believing it to be true.

A request was made to the Minister to instruct the Commission to investigate these matters and to present a report and recommendations in terms of the South African Law Reform Commission Act .

General approach taken in canvassing amendments to the Protected Disclosures Act

The Commission canvassed the extension 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.

Some recommendations and areas on which comment was requested in the Discussion Paper were purposely provocative. The intention was to oblige respondents to critically evaluate the recommendations (a comprehensive exposition of the preliminary recommendations is to be found in the Discussion Paper on Protected Disclosures). The underlying goal being to ensure that any amendments to the PDA would remain focused on promoting individual responsibility with regard to making public disclosures and organizational accountability with regard to the response to the making of such disclosures.

Financing and costing

Determining the financial implications (to the State) of proposed legislation or amendments to legislation is a precondition for obtaining Cabinet approval to introduce draft legislation in Parliament. Such Cabinet approval is sought on the basis of a memorandum setting out the purpose and object of the intended legislation, and importantly, whether the legislation envisaged would have a cost implication and if so, what that would be. As the PDA is administered by the Department of Justice and Constitutional Development the task of costing the proposed amendments to the PDA will be the responsibility of this department.

Conclusion

Internationally, there is growing recognition that whistleblowers need protection. The overarching motivation for the PDA and similar legislation internationally is to protect employees who disclose information about improprieties by their employers or other employees.¹ The proposed amendments to the PDA aim to inter alia ensure that the protection offered by the PDA is extended to a wider group of persons functioning or having functioned within the workplace; that immunity from criminal and civil liability may be granted to employees who disclose criminal offences in contravention of agreements or obligations of confidentiality; that a duty is placed on employers to establish appropriate internal procedures for receiving and dealing with disclosures and to place a duty on employers to investigate disclosures and to notify employees of the outcome of such investigations.

General comment

The Commission would like to thank all respondents to the Issue and Discussion Paper and in particular would like to highlight the valuable contributions made by the Office of the Public Protector and the National Economic Development and Labour Council (NEDLAC). The Commission is also indebted to Professor Cora Hoexter (former project leader) and Likentso Jankie (former researcher) for researching, deliberating and compiling the Issue and Discussion Papers on Protected Disclosures.

¹ **Tshishonga v Minister of Justice and others**, reported case no: JS 898/04, delivered electronically on 26 December 2006 in the Labour Court of South Africa at par 174.

Chapter 1:

Extension of the Ambit of the PDA Beyond the Employer/ Employee Relationship

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Extension of the Ambit of the PDA Beyond the Employer/Employee Relationship

1.1 In Discussion Paper 107 the Commission noted that the remedies provided for in the PDA are confined to the relationship between an employer and an employee in the public and private sectors. The PDA 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.² With the notable increase in the use of part-time and temporary workers coupled with the trend of outsourcing the restricted definition of 'employee' excludes a growing number of people from protection in terms of the PDA if they should make a disclosure regarding improprieties in the work arena.

Extension and amendment of the definition of employee

1.2 The PDA defines 'employee' as follows:

- (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.

and defines 'employer' as 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.

1.3 In Discussion Paper 107 the Commission voiced its provisional view that the ambit of the PDA should be extended. Such reform would extend the legal environment in which to make safe disclosures, and thus move towards a culture in which disclosures would be dealt with responsibly, even outside the sphere of the standard employment relationship. In extending the ambit of the PDA it was proposed that the definition of 'employee' be amended to include independent contractors and other 'workers' of this kind. It was also proposed that the word 'employee' be changed throughout the PDA to 'worker'.³

1.4 The proposed amendment to the definition of 'employee' read as follows:

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

... '[**employee**] worker' 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; 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;...

² Discussion Paper 107 at 9.

³ Discussion Paper 107 at 34.

Overview of comment

1.5 The proposal to amend the definition of 'employee' to include independent contractors and other 'workers' of this kind was endorsed by the majority of the respondents⁴ to the Discussion Paper.

1.6 The Auditor-General relates that experience in the field of auditing and audit related special investigations has taught that many sources of valuable information (whistleblowers) are not persons within the normal employer/employee relationship, but rather independent contractors or members of the public.

1.7 Requests were made to further extend the definition of 'employee' to address the shortcomings of the reach of the Act. In this regard Juliett Grosskopf, Director Labour Law, Legal Services of UNISA and Professor Henning Viljoen of the University of Pretoria favourably refer to the United States Whistleblower Protection Act 1989 which includes former employees and the Public Protector draws attention to section 3 of the New Zealand Protected Disclosures Act 2000 in which an employee is defined as including former employees. The Public Protector relates that one of the complaints investigated by the Public Protector revealed that a former employee disclosing irregularities after resigning from a municipality shared similar fears as whistleblowers that are protected in terms of the PDA, for instance civil action for defamation and breach of confidentiality.

1.8 The Open Democracy Advice Centre and Rochelle Le Roux⁵ propose that the definition should include volunteers. Professor Le Roux⁶ further notes that the PDA, in its present form, does not protect pensioners, agents and independent contractors who may operate (or operated in the case of pensioners) within the same workplace as employees and may be exposed to the same corrupt practices. She suggests that they should also be included in the definition. She comments⁷ that the purpose of the PDA is not to 'legislate the employment relationship', but is aimed at eradicating malpractices within a certain environment, i.e. the workplace. She argues that the widest possible protection ought to be afforded to those functioning within the workplace i.e. any individual whose 'income-generating environment' is at risk as a result of a disclosure.

1.9 The Open Democracy Advice Centre further poses the question as to whether the term 'temporary employment service' covers the labour broker e.g. the security company (business A) who hires out security personnel as security guards to business B. The security guard works every day at B, i.e. on a permanent basis, but A is her employer. If she were to blow the whistle on wrongdoing at B and B informs A that her services are no longer required, A could dismiss her as an operational requirements dismissal if A cannot place her at another business. Would such a worker be protected as an employee of a 'temporary employment service' If the worker is a secretary, and is placed at business B on a clearly temporary basis, the secretary would be covered.

1.10 Juliette Grosskopf⁸ and Professor Henning Viljoen⁹ argue that a person rendering services to a client while being employed by a temporary employment service should not be included as proposed. They submit that such a person is an employee of another organ or body and is accordingly, not in need of protection in their employment relationship. They are of the opinion this would create an atmosphere of suspicion and will not enforce the aim and purpose of the PDA.

4 The Society of Advocates of Kwazulu-Natal; the Open Democracy Advice Centre; the Auditor-General; Office of the Public Protector; NEDLAC; Rochelle Le Roux, Institute of Development and Labour Law, University of Cape Town; the Special Investigating Unit; Juliett Grosskopf, Director Labour Law, Legal Services, UNISA and Professor Henning Viljoen, University of Pretoria.

5 Institute of Development and Labour Law, University of Cape Town.

6 Le Roux R 'Aspects of South African law as it applies to corruption in the workplace' (2004) 2 **South African Journal of Criminal Justice** at 164.

7 Institute of Development and Labour Law, University of Cape Town.

8 Director Labour Law, Legal Services, UNISA.

9 University of Pretoria.

1.11 Rochelle Le Roux¹⁰ recommends that in relation to the definition of employee the terms 'business' and 'temporary employment service' should be defined. She suggests that the definitions of 'business' and 'temporary employment service' contained in the Labour Relations Act 66 of 1995 ("the LRA") be repeated in the PDA.

1.12 Most of the respondents¹¹ supported the provisional proposal to substitute the word 'employee' with 'worker' throughout the Act. The Department of Justice and Constitutional Development, however, points out that the definition of 'employee' is qualified by the introductory words in the definitions clause, i.e. 'in this Act, unless the context indicates . . . 'employee' means . . .' and that the continued use of the term employee will not create confusion. It does not support the proposed substitution.

Evaluation and recommendation

1.13 Although the PDA mirrors the definition of 'employee' in the Basic Conditions of Employment Act 75 of 1997 ("the BCEA"), the Commission agrees that the PDA, as it is currently worded, is aimed at eradicating malpractices within the workplace and not to regulate the employment relationship and that the PDA should therefore not be restricted to the reach of the BCEA or the LRA.

One of the shortcomings¹² of the PDA is that the definition of 'employee' in the PDA, in its present form, does not expressly protect pensioners or former employees. It also excludes agents and independent contractors who may operate within the same workplace as those who are deemed to be employees in terms of labour legislation.¹³ As the aim of the PDA and that of labour legislation is not the same, there is in principle no reason to restrict the operation of the PDA to the sphere protected by South African labour law. The Commission consequently recommends that the widest possible protection should be afforded to any person functioning or having functioned within the workplace. This would include those who generate an income within the work environment, such as independent contractors, persons employed by temporary employment services, former employees, pensioners receiving pensions from their former employers and those who function within the workplace but who do not generate an income from within the 'work environment', i.e. volunteers.

1.14 As the status of a person who resigns or retires in relation to the employer is the same, i.e. a former employee, it is deemed adequate to extend the definition of 'employee' to include someone who 'worked' for the employer and not necessary to specifically refer to pensioners. The Commission is of the view that volunteers already fall under part (b) of the existing definition of 'employee' and that an amendment in this regard is unnecessary.

1.15 The Commission takes the Department of Justice and Constitutional Development's point that definitions should be read in the context of the Acts in which they are found and that as 'employee' is expressly defined in the PDA and not defined with reference to any other Act it should be read in the context of the PDA. Seen in this light the use of the term 'employee' or 'worker' to define an extended category of employee seems to be more a matter of choice regarding terminology than of a need to ensure legal certainty. This conclusion is supported by the fact that although the United Kingdom¹⁴ and New Zealand¹⁵ both extend protection to employees/workers who fall outside of standard employment relationships, the United Kingdom has chosen to use the term 'worker' and New Zealand has chosen to use the term 'employee'. The Commission is however concerned that extending

10 Institute of Development and Labour Law, University of Cape Town.

11 The Society of Advocates of Kwazulu-Natal; the Open Democracy Advice Centre; the Auditor-General; Office of the Public Protector; NEDLAC; Rochelle Le Roux, Institute of Development and Labour Law, University of Cape Town; the Special Investigating Unit; Juliette Grosskopf, Director Labour Law, Legal Services, UNISA and Professor Henning Viljoen, University of Pretoria.

12 Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003 also expresses concern regarding the exclusion of pensioners and temporary and casual workers.

13 **Le Roux op cit** 164.

14 Public Interest Disclosures Act 1998.

15 Protected Disclosures Act 2000.

the definition of 'employee' to include persons such as independent contractors who are not considered to be employees in terms of labour legislation and are expressly excluded from the reach of labour legislation and the remedies contained therein could create confusion regarding the remedies available to such people. The Commission is of the opinion that the object of extending the protection of the PDA to persons in the work environment who are not employees could be achieved by separately defining independent contractors, agents, consultants and similar persons as 'workers'.

1.16 The disadvantage of limiting the operation of the PDA to the sphere of the labour law is aptly illustrated by the circumstances under consideration in the case *The Private Security Industry Regulatory Authority and others v Association of Independent Contractors and others*,¹⁶ where security officers operating as independent contractors were provided by the Association of Independent Contractors to perform contract work for a security business by performing services for a designated client. One of the primary concerns raised in this case, was that the security officer in this situation never works as an employee for anyone and never has the benefits of any employment legislation and is therefore liable to exploitation.

1.17 By including 'independent contractors' in the reach of the PDA a security officer who contracts her services to a security service provider as an independent contractor would be able to receive the protection offered by the PDA.

1.18 As illustrated by the Open Democracy Advice Centre the situation may also arise where a security officer is not an independent contractor but is hired out by a security business¹⁷ (labour broker) to a client. The term 'temporary employment service' was not defined in the proposed amendment to the PDA. However 'temporary employment service' as defined in section 198 (1) – (3) of the LRA caters for the situation of a person who performs work for or renders a service to one party (the client) but is remunerated by another and is faced with a denial by both that they are his or her employer. Subsection 198(2) deems the temporary employment service, in this case the security business, to be the employer of the person who provides the service or performs the work for the client.¹⁸ The Legislature clearly intended labour brokers and the like who pay the remuneration to be held liable as employers under the LRA.¹⁹ The Commission recommends that for the sake of clarity the terms 'temporary employment service' and 'business' as defined in the LRA should be incorporated in the PDA.

1.19 The Commission recommends that the definition of 'employee' be amended and that the definition of 'worker' be included in the PDA as follows:

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

... **"employee"** means —

- (a) any person, excluding an independent contractor who works or worked 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 or assisted in carrying on or conducting or conducted the business of an *employer or client*."

"worker" means —

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

16 2005 (5) SA 416 (SCA).

17 This term is defined in the Private Security Industry Regulation Act 56 of 2001 '... any person who renders a security service to another for remuneration, reward, fee or benefit, except a person acting only as a security officer'.

18 **Lad Brokers (Pty) Ltd v Mandla** 2002 (6) SA 43 (LAC).

19 Van Dijkhorst AJA in **Lad Brokers (Pty) Ltd v Mandla** 2002 (6) SA 43 (LAC).

And that the following be inserted in the Act:

'business' includes the whole or part of any business, trade, undertaking or service.'

'temporary employment service' means any person who, for reward, procures for or provides to a client other persons –

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

Extension and amendment of the definition of Employer

1.20 The Commission noted that the existing definition of 'employer' read together with the proposed definition of 'worker' would put it beyond doubt that for the purposes of the PDA, 'employer' encompasses the hirers of services and is not confined to true employers.²⁰ However, since the concept of a 'client' featured in the proposed new definition of 'worker', the Commission deemed it necessary to insert a matching reference into the definition of employer. The result would be that an employee of 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.²¹

1.21 The proposed amendment read as follows:

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
- (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,

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;

Overview of comment

Extension of definition of 'employer'

1.22 A number of respondents²² support the insertion of a matching reference to client in the definition of an employer in order to make it clear that for the purposes of the PDA, 'employer' encompasses the hirers of services and is not confined to true employers. In this regard the Public Protector points out that the proposed amendments of the terms 'employee' and 'employer' will bring it in line with the position in the United Kingdom.

Substitution of word 'employer' with 'workgiver'

1.23 While the Society of Advocates of Kwazulu-Natal supports this proposal the Public Protector points out that although the legislature in the United Kingdom did not deem it necessary to change the term 'employer', it might be feasible to invent a new term, such as 'work provider', in order to avoid any confusion and to distinguish

²⁰ Discussion Paper 107 at 35.

²¹ Ibid.

²² The Society of Advocates of Kwazulu-Natal; Office of the Public Protector; NEDLAC; Special Investigation Unit; Jeannette Campbell and Rochelle Le Roux, Institute of Development and Labour Law, University of Cape Town.

the meaning of 'employer' from that in Labour Law.²³ However Rochelle Le Roux²⁴ comments that it is generally accepted that the word employer is not exclusively a legislative term. She states that it is also a common law term where it can have a broader meaning than the statutory meaning. She contends that the meaning of the term depends on the context (or the legislation) in which it is used. She concludes that the use of a foreign term such as 'workgiver' is unnecessary and might cause confusion.

Joint and several liability

1.24 NEDLAC believes that joint and several liability would promote better enforcement of the PDA in this respect, and accordingly suggests the inclusion in the PDA of a provision replicating section 198(4) of the LRA or section 82(3) of the BCEA, in which the latter section states that

'The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client, does not comply with this Act...'

1.25 In this regard the Public Protector comments that NEDLAC's proposal needs to be revisited due to the fact that section 198(4) of the LRA only provides for such liability if the temporary employment service contravenes a collective agreement, a binding arbitration award, the BCEA or a determination made in terms of the Wage Act, 1957.

1.26 The Public Protector submits that introducing a similar concept in the PDA could be problematic in view of the considerable distinction between the principles of contravention for the purposes of section 198(4) and protected disclosures.

1.27 The Public Protector requests the Commission to consider section 43C of the United Kingdom Public Interest Disclosure Act 1998 which reads as follows:

'Section 43C ERA-*Disclosure to employer or other responsible person*

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith-

- (a) to his employer, or
- (b) where the worker reasonably believes that the relevant failure relates solely or mainly to-
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility to that person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.'

1.28 It further explains the import of this section by referring to the annotated guide on the Public Interest Disclosures Act 1998²⁵ in which the following explanatory remarks on the practical application of this provision are made:

23 Juliette Grosskopf of Unisa and Professor Henning Viljoen of the University of Pretoria agree that the use of the word 'work provider' would be more eloquent than 'workgiver'.

24 Institute of Development and Labour Law, University of Cape Town.

25 Annotated guide from Public Concern at Work (February 2003) http://www.pcaw.co.uk/policy_pub/pida.html (accessed on 31 May 2007).

'This subsection protects, for instance, a nurse employed by an agency who, in the care home where she works, raises a concern about malpractice. It would also protect a worker in an auditing firm who raises a concern with the client. It would also cover someone who works for a local authority highway contractor raising a concern with the local authority that the performance of the contract exposes the authority to negligence claims from injured pedestrians. This was the approach taken in *Azzaoui v Apcoa Parking* (2001)²⁶ where serious concerns about the way parking tickets were issued by a contractor were raised with the local authority.'

1.29 The Public Protector states that it is important to note that while a disclosure under subsection 1(b) is protected, (a) it does not amount to raising the matter with the employer for the purposes of a subsequent wider disclosure (under section 43G); (b) this Act does not place any obligation on the person responsible to respond to the concern; and (c) if the worker is victimised for making a disclosure under this subsection, any claim he may have is against his employer and not against the person to whom he made this disclosure.

1.30 It argues that in view of the fact that the PDA is largely modeled on the said Act consideration should be given to adopting an approach similar to that in the United Kingdom.

Evaluation and recommendation

1.31 As has been pointed out the term 'employer' is not defined in either the LRA or the BCEA, and its meaning in those statutes is established by reference to the definition of 'employee'. Therefore the continued use of the term 'employer' in the PDA does not seem to be problematic as a counterpart to 'employee' or 'worker' and in general there seems to be no real need to invent a new term to define an employer in the broad or PDA sense. The Commission recommends that the designation 'employer' be retained.

1.32 For the same reason the Commission does not deem it necessary to insert a matching reference to a client in the definition of employer. The definition of 'employee' and 'worker' make it clear that for the purposes of the PDA, 'employer' encompasses the hirers of services and is not confined to employers as contemplated in the LRA. Consequently for the purposes of the PDA an employee or worker who is rendering services to a client will have two 'employers'. This will mean that if a protected disclosure is made for example by a nurse employed by an agency to either the agency or to the care home where she works and the entity to which the disclosure has been made meets her disclosure with an occupational detriment, she will be entitled to the remedies provided in terms of the PDA.²⁷

1.33 The Commission finds merit in holding the employer in the strict or traditional sense and the employer in the expanded sense jointly and severally liable where the former employer, on the express or implied instructions of the latter employer, subjects an employee or a worker to an occupational detriment and recommends accordingly.

1.34 The Commission is of the opinion that prescribing joint and several liability in the manner suggested by NEDLAC would have the effect that a client could be held liable for non-compliance of the PDA by an employer or temporary employment service (in its capacity as employer). This would place an unnecessarily stringent burden on all clients to ensure that the employer or the temporary employment service they contract with complies with the PDA in order to avoid liability for non-compliance. The nature of the relationship between an employer or a temporary employment service and a client militates against this approach.

1.35 The Commission does not recommend that the definition of 'employer' be amended. It recommends that a clause relating to joint liability as discussed above be included in the Act. The relevant provisions read as follows:

26 Cited on the Public Concern at Work website www.pcaw.co.uk/policy_pub/case_summaries.html (accessed on 31 May 2007).

27 As the disclosure would be made to an employer, she would, other than is provided for in the United Kingdom, be entitled to make a subsequent wider disclosure and have a claim against such employer if met with an occupational detriment.

'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;

'3A. Joint liability -

- (1) Where an employer, under the express or implied authority or with the knowledge of a client, subjects an employee or a worker to an occupational detriment, both the employer and the client are jointly and severally liable.'

Amendment of the definition of 'disclosure'

1.36 In Discussion Paper 107 the Commission recommended that the definition of 'disclosure' be changed to include reference to Chapter II of the Employment Equity Act 55 of 1998 ("the EEA"), which deals with unfair discrimination in the workplace. The proposed amendment read as follows:²⁸

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

'disclosure' means any disclosure of information regarding any conduct of an *employer, or of an employee* of that *employer*, made by any *employee* who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1988 (Act No.55 of 1998) or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;...

Overview of comment

1.37 The Society of Advocates of Kwazulu-Natal, Jeannette Campbell and NEDLAC support the proposal made by the Commission to include reference to the EEA in the definition of 'disclosure'.

1.38 Juliett Grosskopf, Director Labour Law, Legal Services of UNISA and Professor Henning Viljoen of the University of Pretoria comment that from the current and proposed amended definition of 'disclosure' it is not clear whether workers will be protected from victimisation where they attempt to make a protected disclosure. They suggest that in the interest of legal certainty and in order to discourage employers from victimising workers who are in the process of reporting wrongdoings, but have not yet completed the procedure, that the definition of 'disclosure' be further amended to include any significant attempt to disclose information.

1.39 Rochelle Le Roux²⁹ advocates that the definition of 'disclosure' be amended by replacing 'failure to comply with any legal obligation . . .' with 'failure to comply with any legal obligation . . . including any legal obligation arising from the contract of employment'. She contends that this amendment will cover the situation that was considered in the English case *Parkins v Sodexho Ltd (2002)* IRLR 109 and serious mismanagement.

1.40 The requirement that the disclosure must relate to the conduct of the employer or an employee of the employer in the context of corruption is also identified as a major shortcoming of the PDA.³⁰ To illustrate the effect of this shortcoming the example is used of an employee who makes a disclosure to the employer about the corrupt activities of a lucrative client, and the employer, rather than antagonize the client, prefers to silence the employee by, for instance transferring him or her. Le Roux³¹ contends that under these circumstances the employee will not be protected in terms of the PDA. She suggests that the inclusion of a provision dealing with the conduct of persons other than employers and employees – such as clients and agents – will be more effective.³²

Evaluation and recommendation

1.41 The Commission confirms its preliminary recommendation to include reference to Chapter II of the EEA in the definition of 'disclosure' as it contains a range of grounds considered to be unfair discrimination within the context of employment policy and practice.

1.42 In order to evaluate the recommendation that the words . . . 'arising from the contract of employment' should be added to the definition of 'disclosure' it is necessary to consider the matter of *Parkins v Sodexho Ltd*. In this matter the Employment Appeal Tribunal³³ in the United Kingdom reversed the decision of an employment tribunal that the disclosure by an employee to his employer of a breach of his employment contract could not qualify for protection against dismissal under section 43B of the Employment Rights Act of 1996. In this case Mr Parkins was dismissed after complaining about a lack of appropriate on-site supervision at work. This section provides that a qualifying disclosure may be one that tends to show 'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject'. Other subject matters that qualify include the commission of criminal offences, miscarriages of justice, the protection of health and safety and the protection of the environment. The Employment Appeal Tribunal decided that three conditions must be satisfied in order for the disclosure of a breach of an employment contract to amount to a qualifying disclosure. These conditions are: (i) the breach of the employment contract must be a breach of a legal obligation under that employment contract; (ii) there must be a reasonable belief that the breach has, is, or is likely to happen; and (iii) the disclosure of this must be the reason for the dismissal.

1.43 Swift³⁴ argues that there is no genuine public interest in this situation, and that it is simply a dispute between employer and employee which arises within the four walls of the employment relationship. However, in South Africa, the Protected Disclosures Act is not restricted to public interest matters and clearly could be applied to irregular conduct in the workplace which if disclosed could give rise to consequences such as a breach of an employment contract by way of a dismissal. As this provision, which is identical to the provision contained in the definition of 'disclosure' in the PDA, has in the final instance been interpreted to include employment contracts the Commission is of the opinion that it is unnecessary to amend the definition of 'disclosure' in this regard.

29 Institute of Development and Labour Law, University of Cape Town.

30 **Le Roux op cit** 164.

31 *Ibid.*

32 **Le Roux op cit** 164.

33 Incomes Data Services 2001 (available at http://www.idsbrief.co.uk/news/parkins_Sodexho.htm)

34 Swift J, *Parkins v Sodexho Limited* . . . What happened to the "public" in Public Interest Disclosure? 20th March 2002 at <http://11kbw.com> accessed on 31 August 2005.

1.44 The Commission is of the view that disclosure in terms of the PDA is a defined event where a person either has or has not made any disclosure of information regarding any conduct as described in the PDA. Protection in terms of the PDA is not dependent on the completion of a process or the disclosure of all information relevant to the disclosure. An attempt would amount to disclosure. The Commission therefore does not agree that the definition of 'disclosure' should be amended to include any significant attempt to disclose information.

1.45 As pointed out by Professor Le Roux 'disclosure' 'means any disclosure of information regarding any conduct of an employer . . .'. Conduct is defined in the Oxford dictionary³⁵ as a person's behaviour in a particular place or in a particular situation. The only time that the conduct of a client would be pertinent to the employment relationship between an employer and employee necessitating a disclosure of an impropriety of such client would be if it related to the past, present or future conduct of the employer or a fellow employee in relation to that particular client. The Commission is therefore of the view that such a disclosure would fall within the reach of the definition of 'disclosure'.

1.46 The Commission recommends that the definition of 'disclosure' be amended to read as follows:

'disclosure' means any disclosure of information regarding any conduct of an *employer*, or of an employee or worker of that *employer*, made by any *employee or worker* who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1988 (Act No.55 of 1998) or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed; . . .

Extending the definition of 'occupational detriment'

1.47 Although several respondents to Issue Paper 20 recommended that the list of occupational detriments be expanded and that the term 'occupational detriment' should be changed, the Commission found that the term 'occupational detriment' itself adequately describes detriments that may be visited on a broader class of 'workers' as well as on employees in the strict sense and therefore did not need to be changed.³⁶ The Commission however agreed 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. The Commission also recommended that a detriment typically experienced by contract workers be included, namely the loss of a contract or the (otherwise inexplicable) failure to be given a contract.³⁷

1.48 In this regard the Commission further proposed that the list of forms of occupational detriment be left open-ended to allow the recognition of further types of victimization, on the understanding that any form of victimization suffered by a whistleblower will have to be shown to be causally linked – at least partly – to an act of whistleblowing.

35 Shorter Oxford English Dictionary (2nd edition) Oxford University Press 2002.

36 Discussion Paper 107 at 36.

37 Discussion Paper 107 at 37.

1.49 The proposed amendment read as follows:³⁸

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);
- [i] (l) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, **[and]** work security and the retention or acquisition of contracts to perform work or render services.

Overview of comment

1.50 The majority of the respondents³⁹ support the recommendation made in Discussion Paper 107 that the definition of 'occupational detriment' be extended to include reprisals such as defamation suits based on the alleged breach of a confidentiality agreement or duty; the loss of a contract or the (otherwise inexplicable) failure to be given a contract and that the list of forms of occupational detriment be left open-ended to allow the recognition of further types of victimization, on the understanding that any form of victimization suffered by the whistleblower will have to be shown to be causally linked – at least partly – to an act of whistleblowing.

1.51 The Special Investigating Unit notes that the proposed amendment, although broadened, is still not open-ended. It suggests the extension of the definition in generic rather than specific terms to achieve the objective.

1.52 In order to broaden the application of this definition the Open Democracy Advice Centre recommends that the definition should read 'occupational detriment', in relation to the working environment of a worker includes but is not limited to – (a)

1.53 However the Public Protector disagrees and argues that expanding the definition to such an extent would cause serious interpretation difficulties and would jeopardise legal certainty. It is also of the opinion that the phrase 'being otherwise adversely affected in respect of his or her employment, profession or office...' is broad enough to provide for other instances of victimisation.

³⁸ Ibid.

³⁹ The Society of Advocates of Kwazulu-Natal; the Open Democracy Advice Centre; the Auditor-General; Office of the Public Protector, Special Investigating Unit; Jeannette Campbell and NEDLAC.

1.54 The Open Democracy Advice Centre further recommends that the additional form of 'being subjected to a criminal prosecution in bad faith should be inserted as (m). However, it argues in the alternative that this matter may be dealt with in the proposed amendment around ensuring whistleblowers are not held criminally or civilly liable. The Public Prosecutor disagrees and points out that criminal prosecutions are instituted by the National Prosecuting Authority and that the National Prosecuting Authority is by law required to act fairly, in good faith and in compliance with the Constitution and the law. Any criminal charge lodged in bad faith should therefore not pass the test applied by the National Prosecuting Authority when deciding whether prosecution should be instituted.

1.55 The Open Democracy Advice Centre further suggests that breaching the confidentiality of a whistleblower should be an occupational detriment. It proposes that the following be added to the definition of occupational detriment:

(n) revealing the identity of a person who has made a protected disclosure in contravention of section 3A without his or her written permission.

1.56 It points out that the PDA does not expressly impose a duty on the person to whom the disclosure is made to investigate such a disclosure, or treat a failure to investigate as a detriment.⁴⁰ The Open Democracy Advice Centre submits that the failure to investigate the disclosure be treated as a detriment. The suggested amendment reads as follows:

'occupational detriment', in relation to the working environment of a worker includes but is not limited to- . . .

(o) failure on the part of the employer to take reasonable steps to investigate a disclosure.

1.57 The Public Protector raises the point that it is common cause that employees are generally subject to the duty of confidentiality by law, agreement, oath or practice. It explains that for instance, the Public Service Regulations⁴¹ impose the following duties on employees:

'E Handling of official information and Papers

An employee shall not release official information to the public unless she or he has the necessary authority."⁴²

"C4. Performance of duties

An employee-

C.4.12 honours the confidentiality of matters, papers and discussions, classified or implied as being confidential or secret."⁴³

1.58 In one of the case studies considered by the Public Protector, Mr X was charged in a disciplinary enquiry with, *inter alia*, contravening the former regulation when making a disclosure about improper conduct. The presiding officer found that, as Mr X went further than disclosing to the designated entities, i.e. releasing it to "the public", the PDA was no longer applicable. The question whether or not Mr X met the requirements of a general protected disclosure provided for in section 9 of the PDA, was not considered. Similarly, it seemed that the employer representative argued that, when the said regulation had been contravened, it was a separate matter that constituted misconduct.

40 Discussion Paper 107 at 9.

41 Public Service Regulations 2001 (Government Gazette 1 of 5 January 2001).

42 Regulation E, Chapter 1 Part II.

43 Regulation C.4.12 Chapter 2.

1.59 The Public Protector argues that as it could clearly not have been the intention of the drafters of the said Regulations to prohibit disclosures of improper, unlawful and irregular conduct, it would be in the interest of legal certainty to add the phrase 'or disciplinary action' to the proposed subparagraph (h) of the definition. Jeannette Campbell concurs that disciplinary proceedings should be included as is done in New South Wales. She adds that 'threats of reprisal' as found in the Whistleblowers Protection Act 1993 of South Australia should also be included.

1.60 The Department of Justice and Constitutional Development submits that the proposal to include being subjected to disciplinary action, a defamation suit or a suit arising out of the alleged breach of a duty of confidentiality or a confidentiality agreement as an occupational detriment should be coupled to the proviso that the disclosure shows or tends to show that a criminal offence has been committed, is being committed or is likely to be committed, thereby being of a serious enough nature to justify the alleged breach of confidentiality.

Evaluation and recommendation

1.61 The matter of *Tshishonga v Minister of Justice*⁴⁴ is pertinent to the proposal to include sub-paragraph (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' and to the proposal of the Public Protector to include the words 'or disciplinary action'. In *Tshishonga v Minister of Justice* the whistleblower was charged with misconduct in that he allegedly contravened:

- Clause C3.4 of the Public Service Code of Conduct, which requires that an employee must use the appropriate channels to air her or his grievances or to direct representations; and
- Clause C4.10 of the Code, which states that an employee must 'report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest'.⁴⁵

1.62 The court held that the disclosure complied with section 9 of the PDA and that the institution of disciplinary steps against the whistleblower therefore amounted to an occupational detriment. Consequently if a disclosure is found to have met the test or tests for recognition of a disclosure as a protected disclosure, subjecting such person to disciplinary action for an alleged breach of a duty or agreement of confidence would amount to an occupational detriment. The Commission is of the view that the court has provided clarity in this regard and that it is therefore unnecessary to specifically include disciplinary action in relation to a duty of confidence in the definition. It is also of the view that as the definition of 'occupational detriment' already includes 'being subjected to any disciplinary action' irrespective of the reason for the disciplinary action, it would create confusion if it were singled out in respect of an alleged breach of a duty of confidentiality or a confidentiality agreement.

1.63 In *Tshishonga* the court also held that disclosure of wrongdoing cannot be a breach of confidence.⁴⁶ The Commission does not agree on this point. It is of the view that disclosure of wrongdoing may constitute a breach of confidence but that given the nature of the breach of confidence that the breach may be condoned or that immunity from liability could be provided for the breach. The question of immunity from liability is dealt with below.⁴⁷ Based on its recommendations in this regard the Commission recommends that subjecting a person to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement should constitute an occupational detriment insofar as the disclosure relates to a criminal offence.

44 **Tshishonga v Minister of Justice and others**, case no: JS 898/04, delivered electronically on 26 December 2006 in the Labour Court of South Africa at par 174.

45 See par 53 of the judgment.

46 See par 256 of the judgment.

47 See par 2.18 below.

1.64 Bearing the abovementioned judgment in mind the Commission is of the opinion that the present list of occupational detriments read together with the phrase 'being otherwise adversely affected in respect of his or her employment, profession or office . . .' is broad enough to provide for other instances of occupational detriment within the narrow definition of employment. However the definition does not specifically make provision for instances of occupational detriment relating to the wider understanding of worker as is proposed. For this reason the Commission deems it necessary to make express reference to a detriment typically experienced by contract workers, namely the loss of a contract or the inexplicable failure to be given a contract.

1.65 The Commission is mindful of the reality that employees and workers are often too scared to blow the whistle on fraud and corruption not only for fear of becoming victims of reprisals within the workplace but also for fear of the protection of their property, their families and their own lives.⁴⁸ Employees and workers may also be concerned that they will be hindered from participating in activities which do not fall strictly within the employment relationship, e.g. being part of an office or company cricket or soccer team. The Commission is however of the view that aside from the fact that certain retributive conduct would be criminal that intimidation and harassment of this nature would fall under the definition as it currently stands. The deletion of the words 'in relation to the working environment of an employee' supports this interpretation. The Commission therefore does not recommend that being prevented from participating in activities falling outside the employment relationship as a result of making a protected disclosure should be included in the definition.

1.66 Although the Commission acknowledges that the possibility of criminal liability arising from the making of a disclosure where the whistleblower has participated in the impropriety is clearly a deterrent to a whistleblower making a disclosure, it agrees with the Public Protector that the National Prosecuting Authority may only proceed with instituting a prosecution in compliance with the law. However, in so doing, due regard, would be given to the applicability of section 204 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The Commission therefore does not support the inclusion of 'being subjected to a criminal prosecution in bad faith'.

1.67 The Commission is of the view that revealing the identity of the whistleblower, although not prohibited in terms of the PDA, would of itself give rise to or potentially give rise to any number of detriments already listed in this definition, for example harassment or intimidation, and is therefore not of the opinion that it should be listed in this definition. The need for protection of the identity of an employee is dealt with more comprehensively below.⁴⁹

1.68 Section 9 of the PDA already provides for a remedy where a disclosure has been made in respect of which no action was taken within a reasonable period after the disclosure in that such disclosure can be made generally. This would include a disclosure to the media. The Commission is therefore of the opinion that the inaction of the employer should not be included in the definition of 'occupational detriment'. Naturally where the worker is subjected to any detriment in relation to his or her occupational environment following a disclosure due to the inaction of the employer, such detriment would fall within the reach of the extended definition of 'occupational detriment'. The need to include a positive duty in the PDA to investigate a disclosure is dealt with below.⁵⁰

1.69 Although the Commission is of the opinion that threats should not be limited to a threat of reprisal, it is of the view that threats of occupational detriment are adequately addressed under being 'otherwise adversely affected in respect of his or her employment' and therefore do not need to be specifically listed.

48 Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003.

49 See par 3.1 and further.

50 See par 5.37.

1.70 The Commission recommends that the definition of 'occupational detriment' should be amended as follows:

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 any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence;
- (i) being threatened with any of the actions referred to paragraphs (a) to **[(g) h]**;
- [i]** (j) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, **[and]** work security and the retention or acquisition of contracts to perform work or render services.

Extending the list of persons/bodies to whom disclosures may be made

1.71 In taking cognizance of the fact that a number of other 'state institutions supporting constitutional democracy' exist to whom it would be equally if not more appropriate to make disclosures the Commission provisionally recommended that the list of persons to whom disclosures may be made should be extended. The proposed amendment read as follows:

Protected disclosures to certain persons or bodies—

- (1) Any disclosure made in good faith to —
 - (a) the Public Protector;
 - (b) the Auditor-General;
 - (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]** worker⁵¹ concerned reasonably believes that—

51 Reference to the retention of the designation 'employee' is dealt with above.

- (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.”.

Overview of comment

1.72 The majority of the respondents⁵² to the Discussion Paper support the provisional recommendation made in Discussion Paper 107 that the list of persons to whom disclosures may be made should be extended.

1.73 However, the Special Investigating Unit advocates an extension in carefully worded generic terms rather than by specification of a *numerus clausus*. It submits that in view of the fact that there are many agencies with an anti-corruption mandate the section should be amended to encompass all of them. In this regard it specifically refers to itself, the National Prosecuting Authority and the Department of Public Service and Administration. It acknowledges that these entities are organs of state and, therefore, included in the proposed amendment to section 8, but is of the view that the phrase “organs of state” in the proposed extended list is too wide. It is further of the view that the suggested generic description should include professional control bodies such as law societies, bar councils and the like.

1.74 With regards to professional bodies Kris Dobie⁵³ recommends that a disclosure to a professional body should either be a new category, or should fall under the same category as a disclosure to a legal advisor. He notes that the employing entity acquires the services of a professional for their professional expertise and as well as professional ethics. In his opinion if professionals do not have the right to go to their professional bodies with irregularities, the entire purpose of professions is weakened significantly. He suggests that the professional body should have some right to liaise with the employer on becoming aware of the irregularities, since a ‘collective voice’ would carry more power. He explains that although there might be a confidentiality clause in an employment contract, professionals have their first responsibility to their profession and its code of ethics. Many professional codes are enacted in legislation, which means that the professional has a legal as well as ethical obligation to the code. Currently, in a situation where professionals are aware of irregularities in their organization which contradicts their professional code they would be in a predicament. On the one hand they could face censure or even expulsion from the profession if they are involved in such activities. On the other hand they could face occupational detriment if they do make a disclosure to their professional body. This ‘catch-22’ could be averted by making a disclosure to a professional body a protected disclosure. He further comments that the purpose of having a professional body is to regulate the conduct of its members. He states that this function needs to be strengthened to enable a professional body to fulfill its intended role in society. Tina Uys⁵⁴ states that at the same time it is important for professional societies to engage with and clarify the meaning of the values set out in their code of ethics, to provide support to professionals upholding these values and also to educate employers with regard to the implementation of professional ethics. She comments that once this has been realized, professionals may begin to refocus on the public good and in the process also assist in the protection of whistleblowers.

52 The Society of Advocates of Kwazulu-Natal; the Open Democracy Advice Centre; the Auditor-General; Office of the Public Protector; Rochelle Le Roux, Institute of Development and Labour Law, University of Cape Town; Special Investigating Unit and NEDLAC.

53 Centre for Business and Professional Ethics, University of Pretoria.

54 Department of Sociology, University of Johannesburg.

1.75 The Auditor-General states that currently, the list of persons to whom protected disclosures may be made i.e. the Public Protector and the Auditor-General brings about a mere duplication of the powers invested in these bodies which are already contained in their own legislation and the Constitution. It comments that given the fact that only improprieties relating to their functions can be reported in terms of the PDA, there is a great possibility that many other improprieties will remain unreported. The Auditor-General supports the recommendation that chapter 9 institutions should be included and supports the inclusion of 'organ of state' in the list of bodies or persons.

1.76 The Open Democracy Advice Desk suggests that the following persons and bodies be included in the list:

- Permanent chairperson of the National Council of Provinces;
- Financial Services Board;
- National Nuclear Regulator;
- National Electricity Regulator;
- Speaker of the Legislative Assembly;
- Speaker of the Legislative Council;
- The Independent Complaints Council;
- The Independent Complaints Directorate.

1.77 The Public Protector suggests that the following institutions be added to subsection (1):

- The South African Revenue Service (in relation to tax irregularities);
- The Financial Intelligence Centre (money laundering activities);
- The Pension Fund Adjudicator (pension funds registered in terms of the Pension Funds Act, 1956);
- The Independent Complaints Directorate (misconduct by members of the SAPS);
- The Judicial Inspectorate of Prisons (treatment of prisoners and conditions and practices in prisons); and
- The Public Service Commission (compliance with applicable procedures and application of personnel and public administration practices in the Public Service).

1.78 The Public Protector further notes that with regard to the proposed inclusion of 'ombudsman' in section 8(1) of the PDA, it should be mentioned that some institutions use the term 'ombudsman' even though they are not independent or recognised oversight agencies. It is suggested that the term be more closely defined (for instance: 'recognised industry ombudsman'). It also points out that the addition of the said entities could add to their responsibilities. It suggests that these institutions be consulted and provided with an opportunity to comment on their inclusion.

1.79 Jeanetha Brink suggests that consideration be given to Australian legislation where a whistleblower can take the matter to Parliament or the press if either no action was instituted by the Institution with whom it had been reported, or if no action had been instituted within 6 months. She is of the opinion that the credibility of an Anti-corruption policy and awareness campaigns rests heavily on the perception of action instituted or not. She notes that a similar consideration might contribute towards the effectiveness of the whistle-blowing mechanism in support of an anti-corruption policy.

1.80 Jeannette Campbell agrees with the reservation that the list of persons to whom disclosures may be made should be extended. She comments that South Africa has a proliferation of Constitutional and other State bodies with specific functions. In her opinion all are overloaded and under-resourced with no real teeth. She states that these bodies struggle to make an impact and are themselves not immune from corruption and reprisals. She alternatively recommends that an independent 'Whistleblower Protection Authority' independent of government and all other authorities, reporting directly to Parliament, with sufficient powers and resources

to carry out its mandate, should be established. Juliett Grosskopf⁵⁵ and Professor Henning Viljoen⁵⁶ also propose that an independent advisory body should be established. They are of the opinion that the PDA is very technical as regards the types of disclosures that qualify for protection and the processes to follow. They suggest a body similar to the Ombudsman in New Zealand where proper and independent advice may be obtained. They are of the opinion that this will encourage whistleblowing as a prospective whistleblower will be clear as to his or her rights and limitations.

1.81 The office of the Director General of the Free State Province requests that a disclosure made to a police official in terms of the Prevention of Combating of Corrupt Activities Act 12 of 2004 ("the PCCAA") be included in regulations issued in terms of section 8 of the PDA instead of extending the list in section 8. It explains that section 34 of the PCCAA, compels certain persons to report corrupt activities to any police official and that if such persons fail to comply with this section, they are guilty of an offence. It is of the view that the PDA does not currently provide specifically that a disclosure to a police official, as envisaged in the PCCAA, would qualify as a protected disclosure.

Evaluation and recommendation

1.82 The Commission has ascertained that to date no regulations have been issued in terms of the PDA⁵⁷ and consequently that a disclosure in terms of section 8 of the PDA may only be made to the Public Protector or the Auditor-General and then only in relation to their particular functions. However the mandate of the Public Protector is fairly comprehensive and is such that any person who suspects that any conduct in state affairs, or in the public administration in any sphere of government is improper or has resulted in any impropriety or prejudice may report such to the Public Protector. As the Public Protector is the South African equivalent of the proposed Ombudsman, the Commission does not support the establishment of an 'Independent Advisory Body' or 'Whistleblower Protection Authority'.

1.83 In order to encourage and facilitate compliance with the PDA, the Commission recommends that an extended list of persons or bodies to whom one may disclose in terms of section 8 should be provided for in regulations. Exploratory discussions with some of the proposed bodies, for example, the Gender Commission, the South African Police Service and the Human Rights Commission have shown that these bodies are amenable to inclusion in the PDA, either by way of regulation or amendment of the PDA. The Commission is of the opinion that it would be preferable to issue regulations in terms of section 8 as opposed to amending the PDA itself. This would ensure that persons or bodies could over time be included or excluded from the regulations as the need arises and with relative ease.

1.84 In addition to the proposals contained in the discussion paper and the proposals received from respondents, the Commission recommends that in compiling such regulations the Department of Justice and Constitutional Development should particularly give consideration to the inclusion of persons or bodies to which disclosures can be made in other legislation. For example, the National Nuclear Regulator Act 47 of 1999 ("the NNRA") provides that a disclosure of information may also be made to the Human Rights Commission, the National Director of Public Prosecutions⁵⁸, or the National Nuclear Regulator; and the National Environmental Management Act 107 of 1998 ("the NEMA") includes an organ of state responsible for protecting any aspect of the environment or emergency services.⁵⁹ Consideration should also specifically be given to the inclusion of professional bodies.

55 Director Labour Law, Legal Services, UNISA.

56 University of Pretoria.

57 Telephonic discussion with Ms Botha of Secondary Legislation in the Department of Justice and Constitutional Development.

58 Section 51.

59 Section 31.

1.85 While the Commission is not opposed to the inclusion of the South African Police Service and the Independent Complaints Directorate in regulations issued in terms of section 8 of the PDA, it is of the view that although section 8 of the PDA does not currently provide that a disclosure made to a police official in terms of section 34 of the PCCAA is a protected disclosure, such a disclosure may be considered to be a protected disclosure in terms of section 9 of the PDA, i.e. a general protected disclosure. In essence section 34 of the PCCAA establishes a duty in respect of any person who holds a position of authority to report corrupt transactions. This duty to report is qualified in that the person must know or ought reasonably to have known that certain corrupt transactions have been committed. A disclosure is deemed a general protected disclosure in terms of section 9 of the PDA where the disclosure

- (i) is made in good faith by an employee;
- (ii) is of information which the employee believes to be substantially true;
- (iii) is not made for purposes of personal gain;
- (iv) is made in respect of which one or more conditions referred to in subsection (2) apply; and
- (v) in all the circumstances of the case was reasonable.

1.86 The categories of persons regarded as 'persons in positions of authority' in terms of the PCCAA, with the exception of 'any partner in a partnership',⁶⁰ fall within the scope of the definition of 'employee' in the PDA. As such person must know or ought reasonably to have known or suspected the commission of certain offences it follows that such person will believe that the relevant information being disclosed is substantially true. Section 9 does not require an objective evaluation of the disclosed information to determine whether it is in fact true or not. The question of whether the person acted for purposes of personal gain is a factual one and therefore does not of its own preclude a disclosure in terms of section 34 of the PCCAA.

1.87 Section 9(2) of the PDA requires that at least one of a number of stipulated conditions must be present when a disclosure is made in order for it to be a protected disclosure. One of these conditions is that the impropriety is of an exceptionally serious nature. The PCCAA duty to report corrupt transactions only applies in respect of corruption, theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more. This could be regarded as an indication that the Legislature intended to impose the relevant duty to report in the more serious cases of corrupt transactions. It would appear that a disclosure in accordance with the PCCAA will qualify as a general protected disclosure on the ground that a disclosure was made in respect of an impropriety of an exceptionally serious nature.

1.88 Section 9(3) of the PDA stipulates which factors must be taken into consideration when a determination is to be made as to whether it was reasonable to make a disclosure. Consideration must inter alia be given to the identity of the person to whom the disclosure is made, the public interest and or the seriousness of the impropriety. The Commission is of the view that these factors could be taken into consideration in order to substantiate a conclusion that a disclosure to a policeman in accordance with the PCCAA was made in a reasonable manner and therefore could be considered to be a protected disclosure.

Further extension of the PDA: Citizen's whistleblowing

1.89 One of the main aims of the PDA is to establish a culture that facilitates disclosures. Some respondents to the Discussion Paper submitted that this culture should not be restricted to the work environment and that any person acting in the public interest should be afforded the same protection as a worker. In Discussion Paper 107⁶¹ the Commission acceded that the definition of 'disclosure' in the PDA contains a fairly extensive list of matters to which information disclosed could relate, and that many of these are as applicable to public officials and bodies as they are to the workplace. Although the Commission acknowledged the fact that various pieces of legislation

⁶⁰ Section 34(4).

⁶¹ Discussion Paper 107 at 42.

exist which inter alia place an obligation on people to report the commission of certain offences;⁶² provide for the judicial review of administrative action that is unlawful, unreasonable or procedurally unfair;⁶³ or outlaw unfair discrimination,⁶⁴ it noted that such laws enable the whistle to be blown but do not necessarily adequately provide protection for whistleblowers against reprisals.

1.90 The Commission suggested that if provision was to be made for citizens' whistleblowing, the concept of 'occupational detriment' would have to be replaced or at least supplemented by a class of detrimental action relating more specifically to the sort of victimization that might be visited on a citizen by a public official or body. Alternatively that detrimental action be described in a general but brief fashion and be supplemented by an illustrative list of detriments.

1.91 The Commission commented that in terms of section 6(4) of the Public Protector Act 23 of 1994 ("the PPA") the Public Protector has the power to investigate a number of matters on his or her own initiative or on receipt of a complaint. The Commission suggested that all incidents listed in section 6(4) of the PPA could be listed in the PDA as actions that might be the subject of a disclosure by a person making a disclosure in the public interest, or reference could be made to section 6(4) itself. Similarly the Commission argued that the list contained in the Auditor-General Act 12 of 1995 could be used or referred to in the PDA.

1.92 No recommendation was made in this regard and the Commission extended an invitation for comment on the desirability of providing for citizens' whistleblowing in the PDA.

Overview of comment

Who should be able to disclose?

1.93 Although several respondents⁶⁵ to the Discussion Paper agree that any person⁶⁶ should be able to make a disclosure of improprieties without fear of victimisation some respondents⁶⁷ state that the PDA is not an appropriate vehicle for 'citizen's whistleblowing' as the PDA was designed to govern whistleblowing in respect of events occurring in a 'captured environment' namely the workplace⁶⁸ and that by extending it to cover areas not originally intended by the Legislature would result in serious interpretation and implementation difficulties.⁶⁹ Juliett Grosskoff⁷⁰ states that sufficient provision has already been made for certain other channels through which a citizen may complain or make a disclosure, for example, the ICD. She notes that citizens will not suffer 'occupational detriments' or fear of reprisal as anticipated in the PDA. She concludes that extending protection to citizens through the PDA is without function and unnecessary. The Public Protector, Rochelle Le Roux,⁷¹ Juliett Grosskopf and the Special Investigating Unit are not in favour of incorporating the concept of protection for 'citizen's whistleblowing' in the PDA.

62 The Prevention and Combating of Corrupt Activities Act 12 of 2004.

63 Promotion of Administrative Justice Act 3 of 2000.

64 The Promotion of Equality and Prevention of Discrimination Act 4 of 2000.

65 The Society of Advocates of Kwazulu-Natal; the Open Democracy Advice Centre; NEDLAC; and the Public Protector.

66 NEDLAC emphasizes that protection should not be limited to citizens. It argues that temporary or permanent residents may also witness irregularities or corruption and should also be assured of protection against reprisals as a result of making a disclosure in this regard.

67 The Public Protector; Rochelle Le Roux, of the Institute of Development and Labour Law, University of Cape Town; Juliett Grosskopf, Director Labour Law, Legal Services, of UNISA; Special Investigating Unit.

68 Rochelle Le Roux, of the Institute of Development and Labour Law, University of Cape Town.

69 The Public Protector.

70 Director Labour Law, Legal Services, of UNISA.

71 The Institute of Development and Labour Law, University of Cape Town.

What sort of wrongdoing (and which wrongdoers) should the disclosure relate to?

1.94 NEDLAC states that any person should be able to make a disclosure regarding improprieties defined in the PDA. This would include disclosure of conduct relating to a criminal offence, failure to comply with any legal obligation, a miscarriage of justice or the endangering of the health or safety of an individual. Jeannette Campbell comments that disclosures should be limited to public sector misconduct, reprisals, danger to health, safety or the environment as is done in Queensland. Another respondent is of the view that any person should be able to make a disclosure regarding wrongdoing as set out in the Hume City Council Procedures namely,

- 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.

1.95 In this regard the Public Protector does not agree that section 6(4) of the PPA be listed in the PDA as actions that might be the subject of a disclosure by a person making a disclosure in the public interest, or that reference could be made to section 6(4) of the PPA itself.

To which bodies or persons should disclosures be made?

1.96 On the one hand The Open Democracy Advice Centre is of the opinion that a person should be able to disclose to any organ of state. It explains that frequently it is not clear to the citizen whether a service is provided by local or provincial government, or national or provincial government, or even by a private company undertaking a traditional government function. It expresses concern that if protection is only provided if the whistleblower blows the whistle to a group of agencies, there will inevitably be people who get it wrong, and go to the Scorpions or the police rather than the designated bodies. Jeannette Campbell agrees that there should be some latitude and suggests that a disclosure should be made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure. She comments that the focus should be on the content of the disclosure and what is subsequently done about it and not on the procedure followed.

1.97 On the other hand, NEDLAC feels that the body or person to whom the disclosure should be made should be determined by the content or subject matter of the disclosure as well as the location or environment of the violation. It states that in order to cover a wider range of contexts, it may be necessary to insert a general provision requiring the initial disclosure to be made to a person who has authority over or is in control of an area that is the subject of the disclosure. In its opinion the retention of the current limitation to the Public Protector and Auditor-General would make implementing a citizens' whistleblowing mechanism, impossible.

1.98 Another respondent⁷² relates that a challenge faced by ordinary citizens is the lack of a dedicated office to deal with complaints from the public about any irregularities by members of the prosecuting authority and the judiciary. He makes the following recommendation:

'the Department of Justice and Constitutional Development is entrusted with the responsibility "to uphold and protect the Constitution and the rule of law" and should be seen as an institution that enjoys the trust and acceptance of all the communities as a protector of justice for all regardless of differences or disadvantage. Therefore, the department should consider an office that will, among others, encourage and facilitate the disclosures, in the public interest, of any form of corruption, maladministration and serious and substantial waste within the courts, by:

- Enhancing and augmenting established procedures for making disclosures concerning such matters;
- Protecting person's from reprisals that might otherwise be inflicted on them because of those disclosures; and
- Providing for those disclosures to be properly investigated and dealt with.'

1.99 However the Public Protector explains that disclosures, including disclosures by the general public, should be made to it as, in terms of the PPA, it is able to provide a guarantee of confidentiality to any whistleblower (including "citizen whistleblowing"). It states that:

'The Public Protector is empowered by the provisions of Chapter 9 of the Constitution, 1996 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 types of misconduct that can be investigated by the Public Protector are listed (but not limited) in section 6(4) of the Public Protector Act, 1994.'

1.100 The Public Protector explains that any person who wishes to disclose any misconduct of a public body or official, can approach the Public Protector who has the powers to investigate and take action.

What other requirements ought there to be in order for the disclosure to attract protection?

1.101 The Open Democracy Advice Centre is of the opinion that the only requirement for the disclosure to attract protection should be good faith. It remarks that there is a need for the net to be cast as widely as possible to make it easy for the citizen to blow the whistle. Whistleblowing is often an act of courage in the face of intense pressure to remain silent, and the protections should be extended unless the whistleblower is mala fide.

1.102 NEDLAC agrees and comments that the emphasis should remain on bona fide disclosures and on disclosing to appropriate persons or bodies. In its view the PDA should not be heavily prescriptive in order for protection to be invoked as this would be counterproductive.

How should detrimental action be defined?

1.103 The Open Democracy Advice Centre suggests that a list of actions such as 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 4 of 2000 would provide a good basis for the definition of detrimental action.

1.104 NEDLAC responds that due to the wide ranging potential contexts in which detriment may take place there may be a need to provide for a generally worded provision, which would focus on harm, detriment, prejudice, discrimination or hardship that the whistleblower would not have suffered in the absence of making the disclosure. It is of the view that the facts of each particular incident will have to be examined on a case-by-case basis.

What remedies should be provided for?

1.105 The Open Democracy Advice Centre suggests that the following remedies should be provided for:

"The court or tribunal may grant an order that is just and equitable, including orders –

- (a) directing the wrongdoer
 - (i) to give reasons for their action or failure to act;

- (ii) to act in the manner the court or tribunal requires
- (b) prohibiting the wrongdoer from acting in a particular manner
- (c) setting aside the action and
 - (i) remitting the matter for reconsideration by the wrongdoer with or without directions or
 - (ii) in exceptional cases –
 - (aa) substituting or varying the action or correcting a defect resulting from the action; or
 - (bb) directing the wrongdoer or any other party to the proceedings to pay compensation
- (d) declaring the rights of the parties in respect of any matter to which the action relates
- (e) granting a temporary interdict or other temporary relief; and
- (f) granting an order as to costs.”

1.106 Professor Viljoen submits that a citizen who reports a wrongdoing should be protected to the extent that she is exonerated from any action against her arising from the disclosure. He is of the opinion that the provision of compensation should be investigated. Jeannette Campbell argues that compensation should be granted for actual or proven loss plus compensation for injury to feelings.

1.107 The Public Protector states that remedies are already available. It explains that at the conclusion of an investigation it has to report on the conduct investigated to the government agency involved and to the complainant, and then has to take appropriate remedial action. The remedial action that can be taken includes (but is not limited to) mediation, conciliation, negotiation and the making of recommendations on how the shortcomings found should be rectified. The Public Protector can report to the National Assembly on a specific investigation when he deems it appropriate. Section 6(4)(c)(i) of the PPA also provides that the Public Protector can refer any matter that appears to relate to the commission of an offence to the prosecuting authorities.

1.108 It also states that the extent to which the Public Protector can protect the whistleblower is determined by section 7(2) of the PPA which provides that:

‘Notwithstanding anything to the contrary contained in any law no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, a Deputy Public Protector or a person contemplated in subsection (3)(b) (authorised by the Public Protector to obtain information) during an investigation, unless the Public Protector determines otherwise.’

Contravention of this section is a criminal offence.⁷³

1.109 Furthermore, in terms of section 6(8) of the PPA, the Public Protector or any member of his or her staff shall be competent, but not compellable to answer questions in any proceedings in or before a court of law or any body or institution established by or under any law, in connection with information relating to the investigation which in the course of his or her investigation has come to his or her knowledge.

1.110 However, the Public Protector points out that as a result of the reach of the PAIA the guarantee of confidentiality provided to any whistleblower is qualified. The Public Protector explains that section 5 of the PAIA applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public body and that is materially inconsistent with the object of the PAIA. Whilst Chapter 4 of the PAIA regulates the mandatory grounds for refusal of access to information that might cover information disclosed to the Public Protector, it also provides for discretionary refusal that may be challenged in court. The Public Protector identifies this as an area that is of concern to many whistleblowers.

73 Section 11(1) of the Public Protector Act.

1.111 The Public Protector proposes that the PAIA be amended to provide for the mandatory protection of certain records of the Office of the Public Protector.⁷⁴ It suggests that section 35 of the PAIA be amended by adding the following provision:

‘The information officer of the Office of the Public Protector must refuse a request for access to a record of the Office if it contains information which was obtained or is held by the Office for the purposes of investigating or having investigated any matter by virtue of the powers afforded to the Public Protector by the Constitution and national legislation.’

1.112 Jeanetha Brink agrees that the provisions of the PAIA should be amended to ensure that the identity of a whistleblower will not become available as a result of an application in terms of the PAIA.

1.113 The Public Protector further remarks that as far as protecting the individual making the disclosure is concerned, it should be noted that victimization of a whistleblower that has made a disclosure to the Public Protector by a public body or official might be regarded as improper conduct or conduct that causes prejudice. It can be investigated by the Public Protector and appropriate remedial action may be taken, which could include recommending disciplinary steps, compensation or damages. In extreme cases, the possibility of court action against the official or public body cannot be excluded.

Should a public body’s contravention of the PDA be a criminal offence?

1.114 The Open Democracy Advice Centre and NEDLAC both submit that there is no advantage to creating a separate criminal charge in this area.

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?

1.115 Jeannette Campbell submits that it would be feasible to combine citizens’ whistleblowing with ‘workplace’ whistleblowing as many types of misconduct are common to both the private and public sectors, but if necessary, different subsections could address sector-specific issues. NEDLAC and the Open Democracy Advice Centre submit that citizens’ whistleblowing and ‘workplace’ whistleblowing should be divided into two separate parts or chapters of the PDA.

Evaluation and recommendation

1.116 Although the term ‘citizens’ whistleblowing’ was used in the Discussion Paper to describe disclosure of improprieties by a person who is not in an employee/employer relationship with the public official or body about whom the disclosure is made, the intention was not to exclude non-citizens. The term ‘citizens’ whistleblowing’ was used loosely to refer to any member of the general public who falls outside of an employee/employer relationship as defined in the PDA.

1.117 “Citizens’ whistleblowing” relates to improprieties by public bodies or officials, which may include actions such as the refusal to deal with or process an individual’s application; the refusal to grant a benefit such as a pension or intimidation, harassment and discrimination. The “citizen” may also fear such actions in reprisal for making a disclosure of improprieties.

74 See in this regard the provisions of section 35(1) in respect of the South African Revenue Service.

1.118 In comparative jurisdictions 'citizen's whistleblowing' amounts to a disclosure made by any person regarding improper conduct by public officers and public bodies.⁷⁵ Such disclosures are preferably made to an Ombudsman or to a person to whom it is in the circumstances of the case, reasonable and appropriate to make a disclosure.⁷⁶ The main responsibility of an Ombudsman is to ensure that public institutions serve private citizens and institutions in a fair and equitable way. In South Africa the equivalent of the aforementioned Ombudsman is the Office of the Public Protector.⁷⁷

1.119 Any person who suspects that any conduct in state affairs, or in the public administration in any sphere of government is improper or has resulted in any impropriety or prejudice may report such to the Public Protector. Recourse in terms of the PPA is not restricted to citizens.

1.120 The Public Protector has the power to investigate⁷⁸ any alleged –

- Maladministration in connection with the affairs of government at any level;
- Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
- Improper or dishonest act, or omission or specified offences in the PCCAA with respect to public money;
- Improper or unlawful enrichment, or receipt of any improper advantage, or promise or such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
- Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

1.121 The investigation powers of the Public Protector include matters which amount to improprieties in terms of the PDA and wrongdoing as set out in the Hume City Council Procedures.

1.122 The Public Protector may resolve any dispute or rectify any act or omission by mediation, conciliation, negotiation; giving advice regarding appropriate remedies; bringing the commission of an offence to the notice of the relevant authority charged with prosecutions or refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice caused.⁷⁹ For example, if a disclosure has been made with regard to a magistrate or judge such matter could depending on the circumstances be referred to the Magistrates Commission or the Judicial Services Commission.

1.123 The consequences for impropriety by Public Servants are enumerated in the Public Service Act of 1994 (Proc. 103 of 3 June 1994) ("the PSA"). Section 17 of the PSA deals with some of the conditions under which employees can be discharged from the Public Service, one of which is on account of misconduct.

1.124 An employee will be guilty of misconduct if she inter alia:

- Fails to comply with, or contravenes an Act, regulation or legal obligation;
- Steals, bribes or commits fraud;
- Accepts any compensation in cash or otherwise from a member of the public or another employee for performing her or his duties without written approval from the department;

75 Whistleblowers Protection Act 2001 (Victoria).

76 The South Australian Whistleblowers Protection Act 1993.

77 The Machinery of Government Structure and Functions of Government, May 2003, Department of Public Service and Administration at 23.

78 See section 4 of the Public Protector Act 23 of 1994.

79 Section 6 of the Public Protector Act 23 of 1994.

- While on duty, conducts herself or himself in an improper, disgraceful and unacceptable manner;
- Incites other personnel to unprocedural and unlawful conduct;
- Intimidates or victimizes fellow employees;
- Gives false statements or evidence in the execution of his or her duties or falsifies records or any other documentation.⁸⁰

1.125 Where the rights of any person have been adversely affected by any decision taken, or any failure to take a decision by an organ of state or a natural or juristic person exercising a public power or performing a public function, such person also has recourse in terms of the PAJA. This Act gives effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action.

1.126 Any person whose rights have been materially and adversely affected by administrative action and who has not been given written reasons for the action may in terms of the PAJA request that she be furnished with written reasons. Adequate reasons must be furnished within 90 days.⁸¹ The use of the word "person" means that the remedies available in this act are available to citizens and non-citizens.⁸²

1.127 Any person may also institute proceedings in a court or a tribunal for the judicial review of an administrative action.⁸³ Remedies available upon judicial review include orders directing the administrator to give reasons; prohibiting the administrator from acting in a particular manner; setting aside an administrative action and in exceptional circumstances substituting or varying the administrative action or directing the administrator to pay compensation; granting a temporary interdict or other temporary relief or granting an order as to costs.

1.128 Where a "citizens' whistleblower" believes that her safety or the safety of a related person is or may be threatened, by reason of her being a witness, she may report such belief to the investigating officer, to any person in charge of a police station, or if she is in prison, to the person in charge of the prison where she is being detained or to any person registered as a social worker; or to the public prosecutor or the Office for Witness Protection and apply to be placed under protection.⁸⁴ A witness is defined as any person who is or may be required to give evidence, or who has given evidence in any proceedings.⁸⁵ 'Proceedings' means any criminal proceedings in respect of any offence referred to in the Schedule to the Act (including offences in terms of the PCCAA); proceedings before a commission or Tribunal; proceedings under the Inquests Act 58 of 1959; proceedings relating to an investigation conducted by the Complaints Directorate; or proceedings referred to in the Prevention of Organised Crime Act 121 of 1998.⁸⁶

1.129 Where a whistleblower is subjected to or threatened with criminal conduct, such as intimidation, assault or damage to property she also has recourse to the Criminal Justice System.

1.130 The Commission is of the opinion that a number of remedies, including administrative and criminal remedies and protection are already available to members of the general public who wish to disclose improprieties and who fear reprisal or who have been subjected to detrimental action. The Public Protector also provides a qualified guarantee of confidentiality.

80 PSCBC Resolution No.2 of 1999 at 84 The Machinery of Government Structure and Functions of Government May 2003 Department of Public Service and Administration.

81 Section 5(2) of the Promotion of Administrative Justice Act 3 of 2000.

82 Section 5 of the Promotion of Administrative Justice Act 3 of 2000.

83 Section 6 of the Promotion of Administrative Justice Act 3 of 2000.

84 Section 7 of the Witness Protection Act 112 of 1998.

85 Section 1 of the Witness Protection Act 112 of 1998.

86 Ibid.

1.131 The Commission is of the view that extending the PDA by duplicating existing remedies and protection available to the general public would not enhance such remedies or protection. It is also of the view that the specific focus of the PDA on the work environment militates against such an extension. It consequently does not recommend that the PDA be extended to include whistleblowing by members of the general public in respect of public bodies or officials.

1.132 The Public Protector voiced its concern regarding its inability to provide whistleblowers with a blanket guarantee of confidentiality. As it stands the PAIA provides that both public and private bodies are obliged to refuse access to a record held by a body if its disclosure would involve the unreasonable disclosure of personal information about a third party. The definition of personal information includes the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual.⁸⁷ Provision is made for disclosure on condition that the individual concerned may consent to disclosure. Section 38 of the PAIA provides for the mandatory protection of safety of individuals and protection of property where, for example, disclosure would reasonably be expected to endanger the life or physical safety of the individual. Where an application for access to information is being considered, notice will have to be given to the third party informing him or her that a request for access to a record is under consideration, by whom the application has been made and that the third party may make written or oral representations why the request should be refused or give written consent for the disclosure of the record.⁸⁸ The Commission does not recommend that a mandatory protection of certain records of the Office of the Public Protector or a blanket guarantee of confidentiality should be attached to disclosures made to the Public Protector as it is of the opinion that the PAIA provides adequate protection and that valid reasons may exist to grant access to such information.

87 Section 1 of the Promotion of Access to Information Act 2 of 2000.

88 Sections 47 and 71 of the Promotion of Access to Information Act 2 of 2000.

Chapter 2:

Immunity from Criminal and Civil Liability

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Immunity from Criminal and Civil Liability

2.1 The central objective of the PDA is to encourage disclosures of criminal and irregular conduct and to 'create a culture which facilitates the disclosure of information by employees' by protecting them from reprisals.⁸⁹ In this spirit section 2(3) of the PDA provides that any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it purports to exclude any provision of the PDA, including an agreement to refrain from instituting or continuing any proceedings under the PDA or any proceedings for breach of contract; or purports to preclude the employee or has the effect of discouraging the employee, from making a protected disclosure.

2.2 However, employees may be bound by agreement or by law not to disclose any information relating to their work. Confidentiality agreements and obligations are diverse and are based on a number of needs ranging from owners of intellectual property or trade secrets seeking to protect their property rights to military bodies or government institutions protecting the security and interests of the country. Depending on the nature of such agreement, law, oath or contract the contravention thereof may result in criminal and or civil liability. The prospect of being charged criminally or civilly by reason of making a disclosure of an impropriety is clearly a deterrent to making a disclosure outside of the framework in which disclosures, as prescribed by the employer, may be made. The PDA also inter alia provides in the definition of 'protected disclosure' that where the employee concerned commits an offence by making a disclosure such disclosure is not a protected disclosure where that disclosure is made in accordance with section 9 of the PDA i.e. a general disclosure.

2.3 The PDA does not provide immunity from liability by reason of making a protected disclosure or provide immunity from liability where the person making the disclosure was involved in the illegal activity or wrongdoing.

2.4 In Discussion Paper 107 the Commission stated that the PDA does not shield whistleblowers from criminal or civil liability and noted that most respondents to Issue Paper 20 favoured the introduction of such immunity, arguing that this would help achieve the main aim of the PDA, i.e. to facilitate and encourage disclosures. The Commission invited comment on whether the PDA should provide for immunity from both criminal and civil liability on making a protected disclosure. It suggested that a provision ensuring exclusion of liability could 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.
- (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.

2.5 The Commission stated that given such immunity, a whistleblower might well be more willing to reveal her identity when making a disclosure. This would help defeat the problem of anonymous disclosures, which in the view of the Commission may facilitate frivolous or malicious whistleblowing and which cannot be followed up when the need arises.

Overview of comment

2.6 The Society of Advocates of Kwazulu-Natal, the Special Investigating Unit, Jeannette Campbell and the Open Democracy Advice Centre are in favour of granting whistleblowers immunity from criminal and civil liability.

2.7 Advocate Theron of the Special Investigating Unit explains that a whistleblower may face a broad category of action, for example, damages under the *actio iniuriarum* for defamation, actions for damages for injurious falsehoods, impairment of dignity, including invasion of privacy, actions for damages for patrimonial and financial loss under the *actio legis aquiliae* and possibly depending on the circumstances actions *ex contractu*. He is of the opinion that immunity should be granted against the outcome of the proceedings as opposed to immunity against the proceedings itself. However Jeannette Campbell recommends that immunity (both civil and criminal) should be given to a whistleblower for any 'offences' she may commit in the process of making a protected disclosure, and, further, that she must be indemnified against a defamation action and against charges of contravening any confidentiality or secrecy agreements. She notes that all jurisdictions in Australia provide immunity for criminal and civil liability and that 5 of the jurisdictions provide absolute privilege for defamation.

2.8 Advocate Theron⁹⁰ suggests that wording similar to that found in the Mine Health and Safety Act 29 of 1996 should be followed. He proposes as follows:

'A worker who makes a protected disclosure does not incur any liability, whether civil or criminal, or disciplinary, by reason of having made that disclosure.'

2.9 According to Rochelle Le Roux⁹¹ immunity is important and should be given if the disclosure meets certain requirements, such as being bona fide and reasonable. She is of the opinion that without immunity no disclosures will be made for fear of victimization and other forms of liability. The whistleblower may only have a strong suspicion which might, upon proper investigation, turn out to be without foundation. Liability could include civil liability for defamation if the disclosure turns out to be incorrect and criminal liability for making a disclosure contrary to statute, i.e. the SARS official is ordinarily not permitted to disclose information about individuals.

2.10 The Open Democracy Advice Centre points out that although the PDA currently contains a clause making any contractual provision preventing whistleblowing null and void, there are statutes which prevent individuals from speaking about their work under pain of criminal sanction, for example, the Explosives Act 15 of 2003, the PSA, and the Protection of Information Act 82 of 1984 ('the PIA'). The Open Democracy Advice Centre comments that although prosecution under these types of provisions would amount to an 'occupational detriment' as currently defined, there appears to be a widespread belief that the breach of such a law or regulation is an offence which may, and moreover must be, prosecuted, despite the PDA. Blowing the whistle is seen as one thing – but the act of passing information on without the permission of the state, or bringing the department into disrepute, or allowing a video to be made in breach of regulations: all these are seen as self standing transgressions which are separate from the whistleblowing.

2.11 The Public Protector observes that there appears to be a significant body of opinion suggesting that it would make no sense to shield whistleblowers against victimisation and 'occupational detriment', but not afford them indemnity from possible criminal and civil liability arising out of a protected disclosure. It states that in principle it supports granting whistleblowers immunity from criminal and civil liability. However, in so doing, it wishes to raise a number of concerns which militate against granting such immunity.

90 Special Investigation Unit.

91 Associate Professor, Institute of Development and Labour Law, Faculty of Law, University of Cape Town.

2.12 The first concern it raises is that granting immunity from liability could lead to abuse of the protection of the PDA. It states that there should be a balance to protect employers against frivolous and false disclosures. It notes that the requirement of 'good faith' referred to in sections 6 to 9 of the PDA might suffice in this regard, but suggests that this issue be considered further. In this regard the Department of Justice and Constitutional Development notes that granting blanket immunity from liability for all categories of protected disclosure where the person making the disclosure is for example subject to a secrecy clause or duty of confidentiality would allow such person to divulge information which may be highly sensitive or could compromise the security of the country. It is of the opinion that the qualifying requirement of 'good faith' is not sufficient to warrant a breach of this nature. It is of the opinion that the substance of the disclosure must be of such a serious nature that it justifies breaching the secrecy or confidentiality agreement and being granted immunity from liability. It recommends that immunity from liability only be granted where a criminal offence has or is being committed.

2.13 The second concern raised by the Public Protector relates to the exclusion of civil liability in cases where the disclosure results in loss to an innocent third party. Thirdly, the Public Protector raises the concern that granting immunity would result in a limitation on the right to access to the courts, in terms of section 34 of the Constitution. However, in relation to the last mentioned concern and given the objective of the PDA, the Public Protector supports the view of other respondents that immunity would be a reasonable and justifiable limitation of this fundamental right.

2.14 The Public Protector states that in practical terms, several whistleblowers interviewed by its office raised real concerns of reprisal (disciplinary and/or civil actions) as a result of breach of a duty of confidentiality. It notes that often the making of a protected disclosure invariably results in a breach of such duty in terms of oath, contract, agreement or law. It recommends that whistleblowers be granted immunity in this respect. In addition, it notes that the proposed amendment contains the phrase: '... an obligation by way of oath, contract or practice or under an agreement...'. It suggests that the words 'or by law' be added in this phrase (as is the case in some foreign legislation).⁹²

2.15 The Public Protector's fourth concern relates to granting immunity in situations where the whistleblower was involved in the illegal activity or wrongdoing disclosed, and where this would have the effect of him or her not being held accountable for his or her actions. The Public Protector is of the opinion that blanket immunity in this regard could lead to abuse of the protection provided by the PDA. It states that the Queensland Whistleblowers Protection Act 1994 has managed to strike a balance between adequate protection of whistleblowers and possible abuse of the whistleblowing regime. It refers to sections 39 and 40 the said Act. These sections provide as follows:

'Division 2—Limitation of action

39 General limitation

- (1) A person is not liable, civilly, criminally or under an administrative process, for making a public interest disclosure.
- (2) Without limiting subsection (1)—
 - (a) in a proceeding for defamation the person has a defence of absolute privilege for publishing the disclosed information; and
 - (b) if the person would otherwise be required to maintain confidentiality about the disclosed information under an Act, oath, rule of law or practice the person—
 - (i) does not contravene the Act, oath, rule of law or practice for making the disclosure; and
 - (ii) is not liable to disciplinary action for making the disclosure.

⁹² New South Wales Protected Disclosures Act 1994, section 21(2) "...despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to that person."; New Zealand Protected Disclosures Act 2000, section 18(2) "Subsection (1) applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice."

40 Liability of discloser unaffected

A person's liability for the person's own conduct is not affected only because the person discloses it in a public interest disclosure.'

2.16 The Public Protector recommends that consideration should be given to introducing similar provisions in the PDA.

2.17 Professor Rochelle Le Roux of the Institute of Development and Labour Law, University of Cape Town questions the impact of granting immunity on section 1 of the PDA, which provides that an employee who commits an offence by making a disclosure is not protected.

Evaluation and recommendation

2.18 Comparatively the Whistleblowers Protection Act 2001 (Victoria),⁹³ the Protected Disclosures Act 2000 (New Zealand),⁹⁴ the Whistleblowers Protection Act 1993 (South Australia), Whistleblowers Protection Act 1994 (Queensland), Public Interest Disclosure Act (Australian Capital Territory), Protected Disclosures Act 1994 (New South Wales), Public Interest Disclosures Act 2002 (Tasmania) and the Public Interest Disclosure Act 2003 (Western Australia) all provide immunity from criminal and civil liability to whistleblowers who make a protected disclosure. It must be noted that in order to be given immunity the disclosures must qualify as protected disclosures. For example, immunity will only be given in terms of the New Zealand Protected Disclosures Act if the disclosure is made to the appropriate authorities, the definition of which excludes the media.

2.19 The United Kingdom Public Interest Disclosures Act 1998 ("the PIDA")⁹⁵ does not provide for immunity from criminal and civil liability. Although PIDA provides that any provision in an agreement is void in so far as it purports to preclude the worker from making a protected disclosure,⁹⁶ it clearly states that if the person making the disclosure commits an offence by making it, the disclosure is not a qualifying disclosure.⁹⁷

2.20 Civil servants in the United Kingdom are bound by the Official Secrets Act. If a civil servant makes a disclosure of information to someone external and in breach of the Official Secrets Act, then the whistleblower will lose the protection of PIDA and may be subject to criminal or disciplinary proceedings. The Civil Service Code and PIDA require employees to use internal routes before external ones when making disclosures, or they risk losing the protection afforded to them under PIDA. If an employee feels that she would be victimised by making an internal disclosure, she may make a disclosure to a regulatory body. Employees may make a wider disclosure to an external organization, such as to the police or to a Member of Parliament. However, in order to qualify for protection, the employee must make a qualifying disclosure, honestly and reasonably believe that the

93 Section 14 provides as follows:

14. Immunity from liability

"A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure."

94 Section 18 of the New Zealand Protected Disclosures Act 2000 also provides as follows:

"18 (1) No person who –

(a) makes a protected disclosure of information; or

(b) refers a protected disclosure of information to an appropriate authority for investigation – is liable to any civil or criminal proceeding or to a disciplinary proceeding by reason of having made or referred that disclosure of information.

(2) Subsection (1) applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice."

95 The Protected Disclosures Act is primarily based on PIDA.

96 Section 43J.

97 Section 43B(3).

information and any allegation in it are substantially true, make sure that the disclosure is reasonable in all of the circumstances and not make the disclosure for personal gain.⁹⁸

2.21 Similarly the current centerpiece of South African legislation restricting disclosure of information is the PIA. Subsection 4(1)(b) of the PIA targets 'any person who has in his possession or under his control or at his disposal . . . any document, model, article or information . . . which has been entrusted in confidence to him by any person holding office under the Government . . . or which he has obtained or to which he has had access to by virtue of his position as a person who holds or has held office under the Government . . . and the secrecy of which . . . he knows or reasonably should know to be required by the security or other interests of the Republic.' This subsection prohibits the disclosing of the information to a non-authorized person as well as failing to take care of such information. The extent of the application of section 4 of the PIA has real consequences: a violation of section 4(1) of the PIA is made an offence punishable by up to 10 years imprisonment and a fine.⁹⁹ The Correctional Services Act 111 of 1998,¹⁰⁰ the Defence Act 42 of 2002,¹⁰¹ and the South African Police Services Act 68 of 1995,¹⁰² also make the unauthorized disclosure of information an offence.

2.22 The abovementioned non-disclosure obligations or secrecy agreements do not prohibit disclosures to authorized persons or within the structures provided by the relevant employer. Where an employee has disclosed within the structures provided for she would not be breaching the non-disclosure obligation or agreement and would not be committing an offence. It follows that if the disclosure meets the criteria set out in the PDA the employee would enjoy the protection of the PDA and institution of action against the employee would amount to an occupational detriment.

2.23 In South African legislation examples of immunity from civil or criminal liability for making a disclosure are found in section 51(5) of the NNRA and section 31(4) of the National Environmental Management Amendment Act 46 of 2003 ("the NEMAA"). The NNRA makes the disclosure of any information relating to any nuclear installation or site or vessel or action described in the NNRA an offence. However where a person in good faith reasonably believes that there is evidence of a health or safety risk or a failure to comply with a duty imposed by this Act she will be granted immunity from civil or criminal liability where a disclosure is made to one of, or more than one of the bodies listed in section 51(5)(a) of the NNRA, namely, a committee of Parliament or a provincial legislature; the Public Protector; the Human Rights Commission; the Auditor-General; the National Director of Public Prosecutions; the Minister; or the Regulator. Immunity is also granted where a disclosure is made to the media where the whistleblower on clear and convincing grounds (of which she bears the burden of proof) believed at the time of the disclosure that the disclosure was necessary to avert an imminent and serious threat to the health or safety of an individual or the public, to ensure that the health or safety risk or the failure to comply with a duty imposed by the Act was properly and timeously investigated or to protect herself against serious or irreparable harm from reprisals; or giving due weight to the importance of open, accountable and participatory administration, that the public interest in disclosure of the information clearly outweighed any need for non-disclosure; or disclosed the information substantially in accordance with any applicable external or internal procedure other than provided in section 51 of the NNRA.

2.24 Section 31 of the NEMAA inter alia regulates the protection of whistle-blowers in terms of this Act. Section 31(4) provides that:

'Notwithstanding the provisions of any other law, no person is civilly or criminally 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 of the disclosure that he or she was

98 Whistleblowing Policy of the Office of Rail Regulation Doc#176083.01 dated March 2005.

99 Klaaren J National Information Insecurity? Constitutional Issues regarding the Protection and Disclosure of Information by Public Officials 31 July 2002.

100 Section 127.

101 Section 104(7).

102 Section 70.

disclosing evidence of an environmental risk and the disclosure was made in accordance with subsection (5).'

2.25 A disclosure may furthermore be made to the media where the whistleblower on clear and convincing grounds believed at the time of the disclosure that the disclosure was necessary to avert an imminent and serious threat to the environment; to ensure that the threat to the environment was properly and timeously investigated or to protect herself against serious or irreparable harm from reprisals.

2.26 It is important to note that the NNRA and the NEMAA do not grant blanket immunity from liability for making a disclosure in contravention of the respective Acts. The content or nature of the protected disclosure is specific, i.e. evidence of a health, safety or environmental risk. The test to qualify for immunity is made more stringent where the breach of confidentiality is brought about by a general disclosure, i.e. it must be proved that the person believed on clear and convincing grounds (of which she bears the burden of proof) that the disclosure was necessary to avert an imminent and serious threat.

2.27 In respect of employees who are subject to a duty of confidentiality the court held in *Tshishonga v Minister of Justice*¹⁰³ that employees have to act in the employer's best interest, to observe its right to confidentiality, to be loyal and ultimately to preserve its viability, good name and reputation.¹⁰⁴ These obligations are owed to the employer as an organization and to the state as the employer in the case of public servants.¹⁰⁵ The court further held that the duty of confidence and loyalty to the employer is however not absolute and that it cannot protect an employer or other employees who act wrongfully.¹⁰⁶ It held that in order to manage the conflict between the duty to disclose and the duty of confidence, employers must make effective internal procedures for reporting wrongdoing available and should ensure that the policy on the management of confidential information is clearly and consistently applied.¹⁰⁷

2.28 The court noted that employers should be given a chance to explain or correct the situation. It stated that the motivation for this approach is not to cover up wrongdoing but because the internal remedy may be the most effective. Further that genuine engagement on the issues minimizes the risks for both parties.¹⁰⁸

2.29 In order to determine the risks inherent in granting immunity from liability where a person discloses in conflict with an obligation not to disclose it is necessary to consider the standard that a disclosure is required to meet to qualify as a protected disclosure. In terms of the PDA the standard that the disclosed information must meet is pitched no higher than requiring the impropriety to be 'likely'. It is enough if the information 'tends to show' an impropriety. This anticipates the possibility that no impropriety might ever be committed or proved eventually. The PDA does not require an employee to prove the truth of information disclosed. Consequently inestimable damage could be caused where a disclosure is made in good faith but is found not to be an impropriety. The Commission is of the opinion that the need to protect certain information either in the national interest of the country or in the interest of the livelihood of an employer militates against granting blanket immunity from liability for disclosures relating to all improprieties provided for in the PDA. It is of the view that exposing an employer to such risk would only be justified where the content of the disclosure is sufficiently serious i.e. where the disclosure relates to the commission of a criminal offence. It is also of the opinion that immunity from civil and criminal liability should not be automatic but should be granted subject to the discretion of the court in which the action is brought. It should again be noted that where an employee follows the internal remedies provided by her employer, she will qualify for protection in terms of the PDA.

103 Labour Court of South Africa, Case No:JS 898/04 delivered on 26th December 2006.

104 See par 170 of the judgment.

105 See par 171 of the judgment.

106 See par 172 of the judgment.

107 See par 173 of the judgment.

108 See par 198 of the judgment.

2.30 The Commission agrees that where immunity from liability is granted the words 'or by law' should be included in the phrase '. . . an obligation by way of oath, contract or practice or under an agreement . . .'

2.31 The Commission agrees with the Public Protector that a person should not be enabled to circumvent his or her criminal and civil liability arising out of his or her participation in the wrongdoing by reason of making a disclosure. Section 204 of the Criminal Procedure Act 51 of 1977 ("the CPA") already provides a mechanism whereby a witness for the prosecution may be discharged from criminal prosecution. The Commission is of the view that this mechanism is sufficient. For the sake of clarity the Commission recommends that the PDA be amended to clearly reflect that immunity from liability is not granted in relation to a disclosure which relates to criminal conduct or participation in criminal conduct by the whistleblower.

2.32 The Commission is of the view that granting immunity from criminal and civil liability to an employee who discloses the commission of a criminal offence in conflict with an obligation or agreement against disclosure will nullify the exclusion created by section 1 of the Act in that section 1 provides that a disclosure made to 'any other person or body in accordance with section 9' where the employee concerned commits an offence by making a disclosure is not protected. Such a disclosure would be a 'protected disclosure' and therefore as a result of the immunity from liability would enjoy the protection of the Act. However the exclusion regarding the disclosure of all other improprieties made by an employee where she commits an offence by making such disclosure and for which immunity is not given would only be considered to be a protected disclosure as defined in the PDA if it is made in accordance with sections 5, 6, 7 or 8 of the Act. A disclosure to 'any other person or body in accordance with section 9', for example the media, where the employee concerned commits an offence by making that disclosure will not be a 'protected disclosure' for purposes of the PDA and she will not receive immunity from liability as a result thereof.

2.33 The Commission recommends that the following clauses be included in the PDA:

9A. Exclusion of civil and criminal liability

- (1) A court may find that an *employee* or *worker* who makes a *protected disclosure* of information in accordance with paragraph (a) of the definition of *disclosure* which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed shall not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter;
- (2) Exclusion of liability as contemplated in subsection (1) does not extend to the civil or criminal liability of the *employee* or *worker* for his or her participation in the disclosed *impropriety*.

Chapter 3:



Protection of the Identity of Whistleblowers

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Protection of the Identity of Whistleblowers

3.1 In Discussion Paper 107 the Commission suggested that a provision which expressly creates a duty to protect the identity of a whistleblower would constitute a positive incentive to whistleblowers. It requested comment on whether, where the identity of a whistleblower is known, it should be kept confidential and protected. It suggested the following provision for consideration:

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
 - (iii) 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.

Overview of comment

3.2 The Society of Advocates of Kwazulu-Natal, Jeannette Campbell, NEDLAC and the Special Investigating Unit are in favour of a provision which protects the identity of whistleblowers and keeps such information confidential, limiting any disclosure to only necessary parties. Jeannette Campbell notes that most Australian jurisdictions make it an offence to reveal the identity of a whistleblower unless very specific conditions are met.

3.3 The Open Democracy Advice Centre supports including identity protection for a person who makes a protected disclosure. It agrees with the drafting of clause 1(a) but is of the opinion that sub-clause (b) should be excluded. It states that many whistleblowers have great fear about their identity becoming known to the wrongdoers and their supporters. It argues that excluding sub-clause (b) in the draft provision would give the whistleblower far more peace of mind and place a heavier onus on the employer not to divulge the whistleblower's identity.

3.4 The Public Protector supports the proposed provision on the grounds that it will minimize the risk of reprisals and address the fears of whistleblowers. The Public Protector states that consultations with whistleblowers revealed that confidentiality and protection of identity is their primary concern. It notes that in practical terms it is not always possible to disclose irregularities without the employer realising that it had been reported. It further notes that it is also often not difficult to surmise who had blown the whistle and that in some cases it may be known in the workplace that only a particular individual could have had access to the information referred to in the disclosure. However it states that it may often be possible to keep the identity of the whistleblower confidential and still deal with the disclosure effectively.

3.5 The Public Protector anticipates that the application of the proposed new provision will be more intricate in practice. It notes that recipients of disclosures on the one hand have the clear duty not to reveal the identity of

a whistleblower – which could be said to be in the public interest. However in accordance with sub-clause 1(b) of the proposed provision disclosing the identity of the whistleblower may also be in the public interest. It is of the view that it could be difficult for the recipient to balance these competing issues. For instance, a designated entity might be required to explore ways and means to effectively investigate the subject of the disclosure that would not result in identification. Balancing confidentiality and procedural fairness might even prove to be more problematic.

3.6 The Public Protector suggests that guidelines should be developed and implemented by way of regulations issued in terms of section 10 of the PDA.

3.7 The Public Protector anticipates that recipients of disclosures could be placed in a precarious position if they are faced with an application for access to information in terms of the PAIA. It comments that a number of foreign jurisdictions have made provision for the limitation of requests for access to information. The New Zealand Protected Disclosures Act¹⁰⁹ provides that a request for information under the Official Information Act 1982 may be refused, as contrary to this Act, if it might identify a person who has made a protected disclosure.

3.8 The Public Protector submits that, in view of the need to protect the identity of whistleblowers, the grounds for refusal of access to records should be expanded. It suggests that sub-paragraph (aa) of sections 38 and 66 of the PAIA be amended to add the phrase 'or a person who made a protected disclosure in terms of the Protected Disclosures Act 2000'.

3.9 Rochelle Le Roux¹¹⁰ recommends that the concept 'necessary parties' referred to in the proposed section 3A(2) be defined.

3.10 The Department of Justice and Constitutional Development is opposed to the inclusion of this provision. It is of the opinion that this provision would provide a legal screen for employers and would set up a platform for legal disputes. It also states that the unnecessary or malicious disclosure of an employee's identity would amount to an occupational detriment.

Evaluation and recommendation

3.11 A whistleblowers primary concerns relate firstly to whether her identity will be kept confidential, particularly in instances where she is the only available witness¹¹¹ and secondly to her safety pursuant to exposing fraud and corruption.¹¹² Employees in the public service are of the opinion that if they were assured of the confidentiality of their identities and their protection, that such a mechanism would be an effective tool in encouraging individuals to 'speak out' against fraud and corruption in the Public Service.¹¹³ In circumstances where a whistleblowers identity is not protected, she would tend to make anonymous disclosures. 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.

3.12 Disclosure of the identity of the whistleblower is however not the only information which could cause harm and is consequently in need of protection. A person identified by the whistleblower by a disclosure in terms of the PDA also deserves protection from malicious or bona fide but erroneous disclosures. There is a need to treat all information including the subsequent investigation relating to the disclosure of improprieties confidentially. The Commission is of the opinion that any information relating to a protected disclosure should only be discussed

109 Section 19(2).

110 Institute of Development and Labour Law, University of Cape Town.

111 **Le Roux op cit** 164.

112 Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003 at 5.

113 *Ibid.*

or disclosed to a person who has a legitimate right to such information or for the purposes of investigating the disclosure or in order to compile a report or convey a recommendation in connection with the disclosure.

3.13 The Commission is mindful that a recipient of a disclosure may be requested to provide access to information relating to a disclosure in terms of the PAIA which might include the identity of a whistleblower and that it may be found that revealing the identity of a whistleblower is in the public interest.

3.14 However an application in terms of the PAIA does not automatically give the applicant access to the information sought. The PAIA provides for certain limitations in this regard and for grounds for the refusal of access to records. Section 37 provides for the protection (by a public body) of certain confidential information of a third party. Similarly, section 63 (applicable to private bodies) provides for the protection of privacy of a third party who is a natural person. Furthermore, in terms of sections 47 and 71, an information officer of a public body and the head of a private body respectively, must inform such third parties of the request for access, who could make representations why the request should be refused. Sections 38 and 66 of the PAIA provide that the information officer of a public body and the head of a private body respectively-

- (a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or
- (b) may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair-
 - (i) ...
 - (ii) methods, systems, plans or procedures for the protection of-
 - (aa) an individual in accordance with a witness protection scheme;

3.15 The Commission is of the opinion that a blanket prohibition against revealing the identity of a whistleblower by way of excluding the circumstances under which such persons identity may be revealed in terms of the proposed clause would not be conducive to the proper investigation of such a disclosure. Certain records, which may include the identity of the whistleblower may be relevant to discovering the truth of the case at hand. Persons implicated or identified by a whistleblower also have a right to be informed of the disclosure with sufficient detail to answer it and in order to do so the right to adduce and challenge evidence.

3.16 The Commission is aware that a request to reveal a whistleblowers identity would entail the weighing up of competing interests and that this exercise may be difficult and intricate. The Commission recommends that the guidelines which have been developed and issued in terms of section 10 of the PDA should be amended to specifically address the issue of confidentiality and to remind employers of the right to privacy which is inherently attached to all personal or identifying data pertaining to the whistleblower and anyone identified in terms of the protected disclosure.

Chapter 4:

Remedies

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Remedies

4.1 Section 4(1) of the PDA provides that 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 law'. Discussion Paper 107 invited comment on whether section 4 of the PDA should be amended to expressly provide for claims for damages with no ceiling.¹¹⁴ Comment was also requested on whether the PDA ought to create a more explicit link between the amount of compensation awarded and the actual loss or damage suffered by the employee concerned.

4.2 The Commission further submitted that 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. To this end the Commission 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 employees – 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. The Commission invited comment on these recommendations.

4.3 Although the Commission invited comment on the topic of punitive damages, it recommended that this concept should not be included in the PDA as it is foreign to South African law.

4.4 The proposed amended section 4 of the PDA 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
 - (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.

Overview of comment

4.5 Although some respondents are in favour of the proposal to amend section 4 of the PDA,¹¹⁵ and it was generally agreed that punitive damages should not be included in the Act, a number of respondents disagreed with the content of the recommendation and commented on various aspects of the proposed amendment.

4.6 The Public Protector points out that the proposed sections 4(1B) and 4(3) refer to the phrases 'a person' and 'any employee'. It recommends that these expressions should probably be replaced with 'worker' to be in conformity with the proposed amendments referred to earlier.

4.7 The Public Protector states that one of the remedies available in some foreign jurisdictions, such as the US is to provide for personal accountability for those responsible for whistleblower reprisal. It submits that, apart from the liability of an employer organisation, providing for personal liability for punitive damages by those found responsible for violating whistleblower laws, allowing whistleblowers to counterclaim for disciplinary action, including termination and making compliance with the PDA a critical element in every manager's performance appraisal, might effectively deter managers in the public and private sector from victimizing whistleblowers. It requests that consideration be given to whether some of these could fit into the PDA and South African law at large. It also notes that some foreign laws place a duty on public sector entities to protect their officers from reprisals.¹¹⁶

4.8 It further observes that the proposed amendment of section 4 of the PDA focuses primarily on legal remedies. The Public Protector has however interpreted the section to include the lodging of a complaint and an investigation by virtue of section 182 of the Constitution and the PPA. In terms of section 6(4)(d) of the PPA, the Public Protector is also competent to resolve any dispute by mediation, conciliation or negotiation. Accordingly,

¹¹⁵ The Society of Advocates of Kwazulu-Natal; Jeannette Campbell and the Open Democracy Advice Centre.

¹¹⁶ Section 44 of the Queensland Whistleblowers Protection Act of provides that a public sector entity must establish reasonable procedures to protect its officers from reprisals that are, or may be, taken against them by the entity or others officers of the entity.

the Public Protector could, in appropriate circumstances, provide a suitable remedy at no cost to whistleblowers. It is of the opinion that these remarks could also apply to other ombudsman or oversight institutions.

4.9 The Public Protector is of the view that the proposed amendment of section 4 of the PDA by removing the phrase 'pursue any other process allowed or prescribed by any law' and the insertion of the provision that 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 does not bring about any change.

4.10 NEDLAC supports the proposal to remove the two-year salary ceiling currently applicable to unfair dismissals in breach of the PDA. Regarding the proposal to link compensation to actual loss or damage suffered by the worker, NEDLAC urges that cognizance be taken of the impact of an unfair labour practice on a worker's life and consequently its potential to discourage disclosure. It explains that loss in income is not limited to dismissals since, for example, a demotion could also have major economic consequences, which would be more acute for more vulnerable workers. Jeannette Campbell agrees that compensation should be uncapped. She also agrees that a whistleblower should be able to pursue a claim for the actual loss of earnings and other costs incurred in trying to obtain redress under the PDA and compensation for injury to feelings and ancillary costs. She submits that a whistleblower should also have access to both interim and final interdicts.

4.11 Rochelle Le Roux¹¹⁷ comments that the link between the amount of compensation awarded and the actual loss or damage suffered by the worker concerned is sufficient. She adds that damages will differ from case to case and that the ordinary principles governing the recovery of damages should govern each case.

4.12 However she adds that if amendments are to be brought about then subsection 4(1)(b) should be deleted. She suggests that this subsection should be substituted with the following:

'To claim compensation for an automatically unfair dismissal as defined in section 187(1)(h) of the Labour Relations Act subject to the limitations provided in section 194 of the Labour Relations Act.'

4.13 Alternately she suggests that subsection 4(1)(c) be inserted, i.e. 'to claim for compensation for an unfair labour practice as defined in section 186(2)(d) subject to the limitations provided in section 194 of the Labour Relations Act' together with subsection 4(1)(d) i.e. 'to recover damages in an action in any court or tribunal of competent jurisdiction.' She submits that a labour court does not have the power in terms of section 158 of the LRA to award damages in respect of protected disclosures. In terms of the EEA the Labour Court can award damages, but only because it has been empowered to do so by section 50(2) of the EEA. She suggests that a new provision be included in the PDA addressing the powers of the Labour Court in this regard. Professor Le Roux further submits that the above construction will possibly render section 4(2) superfluous.

4.14 The Special Investigating Unit is of the view that there is no need to provide expressly for claims for damages with no ceiling. It argues that the current wording of section 4(1)(a) of the PDA clearly and unequivocally provides that 'appropriate relief' may be sought. 'Appropriate relief' includes all the common law remedies open to a claimant without specifying any ceiling on the quantum of damages claims. It states that the common law provides adequate remedies and procedures for all the matters dealt with in the proposed new sections 4(1A), 4(1B) and 4(1C). It is of the opinion that it is unnecessary and undesirable to attempt a re-enactment of the common law in this regard. It notes that the proposed new sections 4(1A), 4(1B) and 4(1C) deviate from the common law in some respects, for example, the requisites for obtaining an interdict. It does not support the inclusion of these new sections.

4.15 With regard to the exercise of remedies in terms of the PDA the Public Protector submits that the majority of whistleblowers interviewed emphasised the need for the availability to potential whistleblowers of legal advice

on the requirements and procedures of making disclosures as well as on the exercise of their rights in terms of the PDA in cases of victimisation or harassment.

4.16 It suggests that the former could be addressed by internal policies, assistance by legal staff of the designated entities, advocacy by NGO's etc. However, as indicated in the Discussion Paper,¹¹⁸ if a matter is to be adjudicated in the Labour or High Court, it might have considerable financial implications for employees.¹¹⁹ The Open Democracy Advice Centre also mentions that it is seeing an increasing number of whistleblowers who are not able to defend their matters in court because of prohibitive legal costs. The Public Protector and the Open Democracy Advice Centre suggests that the provision of legal aid by the Legal Aid Board may be apposite.

Evaluation and recommendation

4.17 As the Commission has recommended¹²⁰ not substituting the designation 'worker' for 'employee' the comments on conformity in this regard are no longer pertinent and will therefore not be dealt with. However as a separate category of persons, namely workers, is to be included in the PDA, the designation worker will, where appropriate, be inserted wherever the designation employee appears.

4.18 The Commission is of the opinion that although the common law principle of vicarious liability would in all likelihood hold an employer responsible for its employee's intentional or negligent acts or omissions, section 4 of the PDA is sufficiently flexible to allow for personal accountability for those responsible for whistleblower reprisals.¹²¹ However the Commission is of the view that the employer should remain primarily accountable as this provides an important incentive for employers to maintain appropriate conditions in the workplace. The Commission therefore does not recommend that section 4 of the PDA be amended to specifically provide for personal liability for those responsible for reprisals.

4.19 The Commission is also of the view that compliance with all legislative imperatives is inherently part of an employment contract. With regard to the public sector, section 28 of the PSA specifically provides that an officer or employee shall fulfill the obligations imposed by the PSA or any other law. This would include the PDA and more pertinently section 3 of the PDA which expressly prohibits subjecting employees to occupational detriments. 'Honesty and integrity' have also been defined as part of a key set of 11 competencies required by senior managers in the Public Service.¹²² The Commission therefore does not deem it necessary that compliance with the PDA be included in manager's performance appraisals.

4.20 The Commission agrees that the investigation of a disclosure by the Public Protector by way of mediation, conciliation or negotiation falls within the reach of section 4.

4.21 The Commission also agrees that section 4 already allows for compensation beyond the two year salary ceiling. In theory a whistleblower could turn to the common law and claim contractual or delictual damages in excess of the amount of compensation available in terms of the LRA depending on the circumstances of each case. However in practice few if any whistleblowers are able to afford to launch actions in different forums to remedy the actual damages they have suffered. Whistleblowing is essentially a public duty which may attract detrimental financial and private consequences. At the very least whistleblowers should be able to, in one action, remedy the harm they have been subjected to. The Commission concludes that there is therefore a need to expressly provide for claims for damages with no ceiling.

118 At 54.

119 This finding is endorsed by the Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003 at 25.

120 See par 1.15 above.

121 View supported by Prof Van Jaarsveld.

122 Overview of Anti-Corruption Programmes and Strategies in South Africa available at <http://www.psc.gov.za>.

4.22 The Commission has determined that to obtain legal aid a whistleblower would have to pass a means test, based on income, to qualify for assistance from the Legal Aid Board.¹²³ The existing means test ceiling is low, so aid is generally available only to the lowest income groups. Although some whistleblowers might qualify for legal aid others might not and given the prohibitive costs involved in litigation would not be able to pursue legal remedies provided for in the PDA. The vulnerable position a whistleblower may be placed in as a result of an occupational detriment pursuant to making a disclosure of impropriety is therefore compounded by an inability to access justice. The Commission understands that the Legal Aid Guide which includes particulars of the scheme under which legal aid is rendered or made available is submitted to the Minister for Justice and Constitutional Development on an annual basis. The Commission requests that given the particular vulnerability of whistleblowers who disclose in compliance with the PDA, the Department of Justice and Constitutional Development consider extending the provision of legal aid assistance in civil matters to whistleblowers.

4.23 Although the *Tshishonga* judgment heralds a significant victory for whistleblowers in that legal costs were awarded in the whistleblowers favour, the fact that the legal struggle was protracted over four years should not be lost sight of. The court held that the employer, the Department of Justice and Constitutional Development, was liable for the whistleblower's legal costs including the costs of Senior Counsel in addition to being directed to pay the whistleblower twelve month's remuneration.¹²⁴ The court found that legal representation is a necessity in cases under the PDA not least because employees need to test their beliefs and the information they intend to disclose against the objective, independent and trained mind of a lawyer. Further that legal costs in opposing detrimental action, such as disciplinary action for misconduct where the employee has not committed any misconduct, is part and parcel of the damages imposed on the employee. The court held that it is a patrimonial loss that must be included in the compensation awarded without exceeding twelve month's remuneration.

4.24 The Commission agrees that the general rule should be that a victim or complainant should seek a remedy in his or her own name. However circumstances may prevail that make it difficult or impossible to do so. Bringing an application on behalf of a third person is not foreign to our law. In section 38 of the Constitution of the Republic of South Africa 1996 specific provision is made for the enforcement of rights. It provides that where a right in the Bill of Rights has allegedly been infringed anyone acting on behalf of another person who cannot act in their own name has the right to approach a competent court. It also includes anyone acting in the public interest; anyone acting as a member of, or in the interest of, a group or class of persons or association acting in the interests of its members. The Domestic Violence Act 116 of 1998 also acknowledges that an application on behalf of a complainant may be necessary. However, in order not to infringe the freedom of choice of a victim of domestic violence, the Act circumscribes the circumstances under which a person may bring an application on behalf of another person. In relation to whistleblowing the Commission deems it necessary to provide an avenue by which application for redress can be made for those whistleblowers that are unable to do so in their own name. In order to avoid possible abuse or institution of proceedings where a whistleblower is opposed to it, the Commission recommends that an application may only be brought on behalf of a whistleblower with her written consent.

4.25 The Discussion Paper¹²⁵ noted that punitive damages are foreign to South African law. The only legislative reference to punitive damages is found in the Protection of Businesses Act 99 of 1978 and the Security Services Act 36 of 2004¹²⁶. In terms of the former Act the term 'multiple or punitive damages' is defined as that part of the amount awarded as damages which exceeds the amount determined by the court as compensation for the damage or loss actually sustained by the person to whom the damages have been awarded. However, in defining the term, the Act proceeds to emphatically provide that no judgment delivered by a court outside the

123 <http://www.southafrica.info>.

124 Par 309 of the judgment.

125 At 59.

126 In section 77 the Security Services Act 36 of 2004 provides, in narrowly defined terms, for the payment of a penalty, for compensatory and punitive purposes, 'in a sum determined in the discretion of the court but not exceeding three times the amount which is equivalent to a profit made through such dealing'.

Republic directing the payment of multiple or punitive damages will be recognized or enforced in the Republic. Based on the fact that neither the Legislature nor the courts seem to be in favour of recognizing or granting punitive damages the Commission endorses the view of the majority of the respondents that there is insufficient reason for providing for such damages in the PDA.

4.26 The Commission recommends that section 4 of the PDA be amended as follows:

5. Remedies —

- (1) Any *employee* who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, or anyone on behalf of an *employee* not able to act in his or her own name, 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
 - (b) pursue any other process allowed or prescribed by any law
- (1A) Any *worker* who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, or anyone on behalf of a *worker* who is not able to act in his or her name, may approach any court having jurisdiction for appropriate relief.
- (1B) If the court or tribunal, including the Labour Court is satisfied that an *employee* or *worker* has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including—
 - (i) payment of compensation by the employer to that *employee* or *worker* or
 - (ii) payment by the *employer* of actual damages suffered by the *employee* or *worker*;
 - (iii) an order directing the *employer* to take steps to remedy the occupational detriment.
- (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 **[Part B of Schedule 7 to]** section 186(2) of that Act, and the dispute about such an unfair labour practice must follow the procedure set out in **[that Part]** 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.

Chapter 5:

Creation of Offences Within the Protected Disclosures Act

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Creation of Offences within the Protected Disclosures Act

Offence for imposing an occupational detriment and making a false disclosure

5.1 Although remedies are provided where an employer contravenes the PDA 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 PDA. Nor is it an offence for an employee (worker) to knowingly make a false disclosure. The PDA lays down requirements such as good faith and, in some instances, a reasonable belief in the truth of the information disclosed – but those who abuse the legislation by making false disclosures, even if they do so deliberately, merely forfeit the protection of the PDA, and are not visited with criminal sanctions in terms of it.

5.2 In keeping with international jurisprudence the Commission recommended that an employee's or worker's actions should not be criminalized where she knowingly makes a false disclosure. The Commission noted that a person who deliberately or recklessly discloses false information does not qualify as a whistleblower and might also be guilty of criminal defamation, *crimen injuria* or fraud at common law. An employee may be guilty of misconduct as well, and quite possibly misconduct justifying dismissal. It was further argued that prosecution for false disclosure under the PDA would be incompatible with the recommendation of a duty of confidentiality.

5.3 The Commission requested comment on the proposals not to criminalize an employee's or worker's actions should he or she knowingly make a false disclosure and that the PDA should not make it an offence to subject an employee or a worker to an occupational detriment.

Overview of comment

5.4 The Society of Advocates of Kwazulu-Natal, Rochelle Le Roux, the Public Protector, NEDLAC and the Special Investigating Unit recommend that where an employee or worker knowingly makes a false disclosure it should not be criminalized and that it should not be made an offence to subject an employee or a worker to an occupational detriment. The Special Investigating Unit adds that criminalization of an employer may serve as an instrument for a disgruntled employee to subject an employer to anxiety occasioned by pending prosecution.

5.5 Jeannette Campbell disagrees and submits that it should be an offence to subject an employee to an occupational detriment and it should be an offence to knowingly make a false disclosure. She submits that the prospect of losing protection and or immunity under the PDA for making such a disclosure should be sufficient deterrent.

5.6 Professor Rochelle Le Roux¹²⁷ is of the opinion that the criminalization of the conduct of the worker or employer in terms of the PDA will undermine the purpose of the PDA. She states that this ought to be dealt with in criminal legislation. The Public Protector submits that although some foreign jurisdictions such as Queensland, Western Australia, Victoria, the Australian Capital Territory and Tasmania have made it an offence to reveal information that is the subject of, or received as a result of a protected disclosure it is of the view that a contravention of the confidentiality duty should also not be criminalized.

5.7 NEDLAC notes that 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 misconduct as well, and quite possibly misconduct justifying dismissal. Immunity would, in fact, be premised on the truth of the information disclosed rather than its falsity.

5.8 The Public Protector says that it is noteworthy that a review of the adequacy of the New South Wales Protected Disclosures Act in April 2004, found that only three criminal actions alleging detrimental action by the whistleblower had been instituted in Australia all of which were unsuccessful.

Evaluation and recommendation

5.9 Comparatively and by example, South Australia's Whistleblowers Act, the United Kingdom PIDA and the New Zealand Protected Disclosures Act do not provide for criminal offences. In South Australia the opinion is held that the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it.

5.10 The Commission confirms its preliminary recommendations that where an employee or a worker knowingly makes a false disclosure such disclosure should not be criminalized. A person who deliberately or recklessly discloses false information does not qualify as a whistleblower (except under section 5 of the PDA in its present form) and might also be guilty of criminal defamation, *crimen injuria* or fraud at common law.

5.11 The Commission also confirms its preliminary recommendation that, in order not to add unnecessary tension to employment relationships and jeopardize good labour relations, it should not be made an offence to subject an employee or a worker to an occupational detriment. The Commission is of the opinion that a better and more constructive approach would be to *inter alia* confer a qualified immunity on whistleblowers who disclose in good faith and to create a duty to keep the identity of whistleblowers confidential.¹²⁸

Good faith requirement

5.12 In the Discussion Paper the Commission requested comment on whether a requirement of good faith should be included in section 5 of the PDA thereby providing that disclosures made to legal advisers would not be protected if not made in good faith.

5.13 The proposed amendment read as follows:

Protected disclosure to legal adviser

Any disclosure made in good faith -

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

is a *protected disclosure*.

5.14 The Commission suggested that an alternative to including a requirement of good faith in section 5 of the PDA would be to amend section 5 to make room for trade union representatives, whose occupation may be said to 'involve the giving of legal advice'. The Commission also invited comment in this regard.

128 See par 3.11 above.

5.15 The second proposal read as follows:

Protected disclosure to legal adviser or trade union representative.

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) to a trade union representative for the purposes of obtaining advice

is a protected disclosure.

Overview of comment

5.16 The Open Democracy Advice Centre submits that the purpose of a section 5 of the PDA disclosure is to seek legal advice and as such it should not be necessary for the disclosure to be made in good faith. It does not agree with the first proposal but instead supports the implementation of the second proposal which includes obtaining advice from a trade union. NEDLAC, Jeannette Campbell and Professor Rochelle Le Roux¹²⁹ also favour the second option. Rochelle Le Roux reasons that the reality is that workers would often consult trade union representatives rather than a lawyer and the proposed amendment gives recognition to this reality. Jeannette Campbell submits that mandatory 'good faith' defeats the object of getting legal advice. She notes that six Australian jurisdictions require a whistleblower to 'believe on reasonable grounds' that the information shows or tends to show wrongdoing. In her opinion it is absurd to require 'good faith' from someone disclosing suspicions of misconduct. In her view police informers and criminals who turn 'state-witness' are not burdened with such a requirement.

5.17 The Public Protector observes that section 5 of the PDA appears to be based on the concept of legal professional privilege and accordingly, even if a whistleblower has other motives, a legal practitioner to whom a disclosure is made when providing legal advice, may not disclose such information. The Special Investigating Unit comments that for the proper functioning of our legal system our law recognises the fundamental principle that there must be freedom of communication between a lawyer and his client for the purpose of the giving and receiving of legal advice. It reasons that this is probably the reason why a section 5 disclosure currently does not require good faith whereas all the other sections dealing with the making of protected disclosures do have that requirement. In its view, the inclusion of a requirement of good faith in section 5 would infringe against the freedom of communication principle.

5.18 However, the Public Protector and the Special Investigating Unit note that the concept of legal professional privilege does not apply to trade union representatives and therefore do not support the second proposal which includes the insertion of sub-clause (c) in section 5. The Special Investigating Unit and Rochelle Le Roux¹³⁰ comment that if a disclosure to a trade union representative is to be included elsewhere in the Act, good faith ought to be a requirement.

Evaluation and recommendation

5.19 The Commission agrees that the inclusion of a requirement of good faith in section 5 of the PDA would infringe the principle of legal professional privilege and inhibit the freedom of communication between a lawyer and her client for the purpose of the giving and receiving of legal advice. It therefore does not recommend that section 5 of the PDA be amended to include the requirement of good faith.

129 Institute of Development and Labour Law, University of Cape Town.

130 Ibid.

5.20 The Commission is mindful of the fact that very few employees can afford access to private legal advisers and that trade union representatives are more frequently utilized by the employees in the workplace. It is also mindful that an employee who is accompanied and or assisted by a trade union representative in making a disclosure to an employer or superior is less likely to be subjected to victimisation or intimidation. The Commission is of the opinion that a designated or legal representative of a trade union qualifies as a person 'whose occupation involves the giving of legal advice' in respect of the workplace and would therefore fall within the reach of section 5 of the PDA. The Commission is therefore of the opinion that section 5 of the PDA should not be amended.

Citizens' whistleblowing

5.21 The Commission invited comment on the question whether, if citizens' whistleblowing is introduced into the PDA, contravention of section 3 of the Act should be made a criminal offence.

Evaluation and recommendation

5.22 In the absence of comment on this point and in light of the fact that the Commission does not support the inclusion of citizen's whistleblowing in the PDA, it is unnecessary to discuss this point in any detail.

Creation of a conducive workplace environment

5.23 The Commission acknowledged the view that there is a wide acceptance of a duty on employers to create an open and transparent work environment that facilitates the implementation of the PDA. It invited comment on whether a specific duty should be placed on employers to inform workers of their rights and obligations under the PDA.

Overview of comment

5.24 A number of respondents¹³¹ support the proposal that a specific duty should be placed on employers to inform employees of their rights and obligations under the PDA and that a duty should be placed on employers to put in place and implement internal procedures for making disclosures.¹³² The Public Service Commission warns that if the matter is not dealt with internally, the only option that remains for a whistleblower is to make a wider disclosure, for example to the media.¹³³

5.25 The Open Democracy Advice Centre submits that the PDA should place a duty on employers over a certain size to put policies and procedures for reporting wrongdoing in place, supported by a Code of Good Practice which would involve whistleblowing training for all personnel within the business.

5.26 The prominent posting of whistleblowers rights, together with the duty to disclose illegality in any workplace is mooted as an important aspect of effective protection. NEDLAC suggests that the Department of Justice and Constitutional Development should prepare appropriate summaries and guidelines in this regard. It explains that this would enable even small employers to comply and also ensure consistency in what is communicated.

5.27 Jeannette Campbell submits that for the workplace to be conducive to disclosure the PDA needs to be amended as proposed; imperatives need to be included in the Act in relation to the private and public sectors to ensure employees are aware of the PDA; confidential reporting procedures must be put in place; reprisals for

131 The Society of Advocates of Kwazulu-Natal, the Open Democracy Advice Centre, NEDLAC and the Public Protector.

132 The Public Protector.

133 Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003.

protected disclosures must be an offence in terms of disciplinary codes; greater resources and authority should be dedicated to a body such as the Open Democracy Advice Centre with a view to awareness raising, training and monitoring; and alternative fora should be found to pursue protected disclosure disputes and of extending Legal Aid for such proceedings.

5.28 The Public Protector holds the view that whistleblowers are particularly vulnerable if they do not know the requirements for making a protected disclosure in terms of the PDA. It states that to comply with the PDA employees need to be aware of the employer's internal procedures, as section 6(1)(a) of the PDA requires a disclosure to an employer to be 'substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned'.¹³⁴ In this regard the Public Protector refers to the position in New Zealand where public sector organisations are obliged in terms of the New Zealand Act to establish internal procedures for receiving and dealing with disclosures. The Public Protector recommends that a similar approach be adopted in South Africa. It is further of the view that this duty will assist potential whistleblowers and benefit organisations by encouraging staff to raise matters of concern internally and promote a culture of whistleblowing.

5.29 The Public Protector draws the Commissions attention to a guide for public sector managers¹³⁵ and a draft whistleblowing policy which has been published by the Public Service Commission. It submits that the PDA should require all employers to take similar steps.

5.30 The Public Protector relates that from investigations conducted by the Office of the Public Protector, it was found that most whistleblowers fear that nothing will be done in response to their efforts to disclose wrongdoing. Currently, the PDA places no positive duty on employers, members of the Cabinet, Executive Councils or other designated institutions, such as the Public Protector and Auditor-General, to investigate irregularities contained in disclosures. Thus, normal principles of accountability are relied upon.

5.31 The Public Protector draws the Commissions attention to legislation in some Australian states which imposes a duty on authorities to investigate disclosures, but with the right to decline investigation in certain circumstances. Such legislation requires authorities that receive disclosures, to give feedback to the whistleblower and to notify him or her of:

- A decision not to investigate the issue;
- A decision to refer the matter to another body to investigate; or
- The outcome of any investigation.¹³⁶

5.32 The Public Protector and Professor Henning Viljoen recommend that similar provisions should be introduced into the PDA. Professor Henning adds that compliance with these provisions should be met prior to the employer resorting to disciplinary action against the worker.

5.33 The Public Protector also suggests that it might be expedient to regulate the following matters in the PDA or by way of regulation:

- A schedule listing the designated entities referred to in section 8 of the PDA and briefly explaining their core business, powers and functions, to enable whistleblowers to determine which body would be the most appropriate to approach;
- Stipulation of timeframes within which action should be taken by the recipient of a disclosure and within which time feedback should be given to the whistleblower;
- Referral of disclosures to more appropriate agencies or persons where the original recipient does not have the power or jurisdiction to appropriately deal with it;

134 Eight Provincial workshops endorsed the need for the implementation of internal procedures for disclosures. In this regard see the Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003.

135 "Whistle-blowing Will you be ready when the whistle blows?" (available at <http://www.psc.gov.za/menu/mnu2.html>)

136 Ibid 136.

- An obligation on the whistleblower to maintain confidentiality;
- An obligation on the whistleblower to co-operate with and assist investigators tasked to investigate the information disclosed; and
- A duty to annually submit to the Department of Justice and Constitutional Development statistics and details of protected disclosures dealt with by public bodies. Such provisions could be similar to section 35 of the PAIA. The Department should include such statistics in its annual report to Parliament (see section 84 of the PAIA). This information would enable Parliament to determine the successes and shortcomings of the PDA.

5.34 The Public Service Commission Report on the Establishment of a Whistleblowing Infrastructure for the Public Service¹³⁷ also highlighted a number of issues in this regard. Some of the key recommendations contained in the report are:

- The need for the implementation of a whistleblowing mechanism in the public service.
- The need to establish what constitutes fraud, corruption and malpractice in the public service.
- The need for policy and procedure on whistleblowing in the public service.
- That there be the demonstrable political will and buy-in of the politicians and the senior managers in the Provinces that they are committed to the elimination of corruption in the public service. That they should be seen to be 'driving and championing' whistleblowing as a tool for improved and good corporate governance.
- That proactively and demonstrably managing the whistleblowing process be included in managers performance contracts and measured in terms of their Key Performance Areas.
- That a whistleblowing infrastructure be budgeted for so as to ensure an effective whistleblowing mechanism. The provision of such a budget would be a good indicator of political will of the respective provinces in ensuring good corporate governance.
- That potential whistleblowers should be assured of the confidentiality of the process, in the policy, through awareness campaigns and demonstrably by political leaders and senior managers.
- That the confidentiality of the whistleblower be maintained.
- That whistleblowers be assured of their protection including what the PDA defines as occupational detriment.
- Departments are encouraged to look at measures that they could put in place that go beyond the protection provided for by the PDA.
- The need for promotion and awareness of the PDA and the Whistleblowing Policy.
- The need for the training and awareness of employers and employees in the public service around the PDA.
- The need for the participative development of a Whistleblowing Policy and procedure for the public service.
- The need for training and awareness of employers and employees in the public service on the Whistleblowing Policy.
- The need for a booklet to be made available in all official languages on the Whistleblowing Policy for distribution to all employees.
- The need for the establishment of whistleblowing hotlines in both provincial and national departments.

Evaluation and recommendation

5.35 A safe legal environment in the form of the PDA has to be matched by a safe working place environment in terms of the attitudes adopted by the employer. Responsible employers should welcome responsible

whistleblowing, in recognition of the common 'greater good' that is shared by both the employer and the employee, and often the wider public.¹³⁸

5.36 The Commission is of the view that the PDA already encourages the implementation of internal procedures for making disclosures and the recognition of a duty on employers to investigate a disclosure, not only by favouring disclosure to the employer but also by envisaging the setting up of internal procedures. Section 6(1)(a) of the PDA requires a disclosure to an employer to be 'substantially in accordance with any procedure prescribed, or authorized by the employee's employer for reporting or otherwise remedying the impropriety concerned'. With regard to setting up of procedures the PDA 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'.¹³⁹ The Portfolio Committee on Justice and Constitutional Development adopted the Practical Guidelines for Employees on 31 May 2006. The Commission is of the view that the issuing of these guidelines will ameliorate a number of problems experienced in practice thus far.

5.37 Despite the delay in issuing these guidelines¹⁴⁰ a number of anti-corruption measures, which facilitate the implementation of the PDA, have seen the light of day in accordance with the Public Service Anti-Corruption Strategy. For example a national public service anti-corruption hotline system has been established.¹⁴¹ This hotline which is run by the Public Service Commission is an initiative by the State that aims to ensure that all cases of corruption are reported centrally and re-directed to relevant departments/provincial administrations. It aims to be the source of a central database for reported corruption cases. It will enable government to analyse corruption trends and to initiate preventative strategies in this regard. Additionally the Public Service Code of Conduct, new Disciplinary Code and practical guideline on the Code of Conduct have been put in place.¹⁴² The Public Service Commission has also published a public information brochure 'Whistleblowing: A guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act' as a complementary measure to the official guidelines issued by the Minister for Justice.¹⁴³

5.38 The Commission is of the opinion that the PDA is drafted in such a way as to make 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.

5.39 Having said this, the Commission is cognizant of the difficulties experienced by a number of whistleblowers who, in the absence of an obligation to give feedback or to be notified, were not notified of a decision not to investigate the disclosure, or of a decision to refer the matter to another body to investigate, or the outcome of an investigation. The Commission recommends that the duty to investigate and to notify the employee or worker of the outcome of the investigation be included in the PDA as follows:

138 Public Service Commission **Report on the Establishment of a Whistleblowing Infrastructure for the Public Service** 2003 at 6.

139 Hilary Rabin-Naiker 'The Protected Disclosures Act: Challenges for Labour Law Jurisprudence' (2000) 6 **Law, Democracy and Development** 139 at 141.

140 The Protected Disclosures Act was enacted in 2000.

141 The toll-free number is 0800 701 701.

142 S Sangweni "Overview of Anti-corruption Programmes and Strategies in Sough Africa a look at the Past Decade, and Forward to a Common Programme of Action" available at <http://www.psc.gov.za>.

143 Whistleblowing: A guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act available at <http://www.psc.gov.za>.

3B. Duty to investigate and notify employee or worker

- (1) Any person or body to whom a *protected disclosure* has been made must investigate such disclosure;
- (2) Such person or body must in writing and within 14 days after the *protected disclosure* has been made acknowledge receipt of the disclosure and notify the *employee or worker* of the steps to be taken and the timeframe in which the investigation will be completed.

5.40 The Commission also recommends that the practical guidelines issued in terms of section 10 of the PDA should be amended to include an obligation on employers to have appropriate internal procedures in operation for receiving and dealing with information about improprieties. Section 10 should be amended as follows:

10. Regulations

- (1) The *Minister* may, after consultation with the Minister for the Public Service and Administration, by notice in the *Gazette* make regulations regarding-
- ...
- (4) (a) The *Minister* must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which =
- (i) explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to or are obliged by law to report or otherwise remedy an impropriety;¹⁴⁴
- (ii) oblige every employer to have appropriate internal procedures in operation for receiving and dealing with information about improprieties. . . .

5.41 It is also imperative that an employer identifies a senior person in the organization to whom confidential disclosures can be made. This person must have the authority and determination to act if concerns are not raised with – or properly dealt with by – immediate line management.¹⁴⁵

5.42 The Commission agrees with the recommendation made by Rochelle Le Roux¹⁴⁶ that in establishing an internal procedure an employer must be mindful that the normal grievance procedure may not be adequate to ensure confidentiality and that a different procedure involving regulators or confidants, removed from the grievance procedure, may be more appropriate. It also endorses the view that the procedure should be accessible and opportunities to contact the regulators or confidants away from the workplace by, for example, supplying after hours phone numbers, should be provided. Although the PDA does not prohibit anonymous disclosures, anonymous disclosures run counter to the transparency and the accountability that the PDA attempts to promote and should not be encouraged. Despite this, procedures should be available to accommodate and investigate anonymous disclosures as employees may not have confidence in the reporting system: the information could still be true and, if ignored, may encourage a general disclosure that could embarrass the employer. The Commission agrees that it is important that employees be assured that no action will follow if bona fide concerns turn out to be groundless, but that malicious allegations may result in disciplinary action.¹⁴⁷ Finally both regulators or confidants and employees should be trained, particularly with regard to the type of issues to be disclosed and the manner of feedback.¹⁴⁸

144 To provide for those people who are obliged by law to make a disclosure e.g. Prevention and Combating of Corrupt Activities Act 12 of 2007.

145 Whistleblowing: A guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act available at <http://www.psc.gov.za> at pp14.

146 **Le Roux op cit** 168.

147 Ibid.

148 Ibid.

5.43 The Commission further recommends that the Department of Justice and Constitutional Development should give consideration to including the following in the practical guidelines or regulations to the PDA:

- Stipulation of timeframes within which action should be taken by the recipient of a disclosure and within which feedback should be given to the whistleblower;
- Provision for referral of disclosures to more appropriate agencies or persons where the original recipient does not have the power or jurisdiction to appropriately deal with it;
- Submission of statistics and details of protected disclosures dealt with by employers.

5.44 The Commission notes with approval that the designated entities referred to in section 8 of the PDA are listed and that this listing is accompanied by a concise explanation of their core business, powers and functions.

Chapter 6:



Additional Matters

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Additional Matters

Duty to disclose corruption and other illegalities

6.1 The Public Protector points out that there are several laws in South Africa that impose a duty on certain persons to report corruption, irregularities or illegalities. It cites the following examples:

- ***Prevention and Combating of Corrupt Activities Act 2004***

Section 34(1) requires a person who holds a position of authority and who knows or ought reasonably to have known or suspected that any person has committed certain offences under the Act involving an amount of R100 000 or more, to report such knowledge or suspicion to any police official. In terms of section 34(2) any person who fails to comply with subsection (1) is guilty of an offence.

- ***Financial Intelligence Centre Act 2001***

Section 29(1) *inter alia* provides that a person who is in charge of, manages or is employed by a business and who suspects that the business has received the proceeds of unlawful activities, certain specified unusual transactions took place or the business has been used for money laundering purposes, must report to the Financial Intelligence Centre prescribed particulars concerning the transactions. Section 52 criminalizes a failure to report such transactions. Section 38 provides for protection of persons making such reports, though it appears to be more limited than what is envisaged by the PDA.

- ***National Nuclear Regulator Act 1999***

Section 51(2) read with section 52(1) of this Act criminalizes the disclosure to any other person or publication of any information, which relates to any nuclear installation or site or vessel or action in certain circumstances. Section 52(3) further provides that no member of the board or an employee of the National Nuclear Regulator may disclose any information obtained in the performance of his or her functions, except in certain circumstances. However, in terms of section 51(4) of this Act, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information, if the person in good faith reasonably believed that he or she was disclosing evidence of a health risk or failure to comply with a duty imposed by the Act and, *inter alia*, the disclosure was made to certain agencies, for example the Public Protector, Human Rights Commission or the Auditor-General.¹⁴⁹

6.2 The Public Protector relates that in relation to the PCCAA and the Financial Intelligence Centre Act 2001 ("the FICA"), whistleblowers interviewed by the Public Protector confirmed that the benefit of a duty to report in terms of legislation is that it changes the disclosure from a personal initiative to a duty in the public interest. The Public Protector however anticipates that the lack of co-ordination between these laws and the PDA could be problematic. The dilemma foreseen is that these acts are fragmented, some of which offer no protection whilst other laws provide for limited protection, for example the FICA. The Public Protector holds the opinion that the relationship of such laws *vis-à-vis* the PDA should be considered. It proposes that a possible interim solution could be to include a provision in the PDA which is similar to section 22 of the Queensland Whistleblowers Protection Act, which deals with 'involuntary disclosures'. The latter section provides that a disclosure may be a public interest (protected) disclosure even though it is made under a legal requirement.

6.3 The Public Protector views disclosure in terms of the NNRA as problematic as it prohibits disclosure of information, and essentially provides for a separate 'whistleblower regime'. It states that it could be argued that whistleblowers for the purposes of this law do not enjoy the same protection than that provided for by the PDA. It

¹⁴⁹ The National Environmental Management Act 1998 also encapsulates similar provisions.

questions whether a person can claim protection in terms of the PDA if he or she does not meet the requirements of the NNRA.

6.4 The Public Protector is of the opinion that these fragmented laws jeopardise legal certainty and suggests that the Commission considers how legal certainty can be brought about. It submits that a solution could be to incorporate provisions of the PDA into these statutes by reference.

Evaluation and recommendation

6.5 The definition of 'disclosure' in the PDA refers to 'any disclosure' and therefore does not exclude disclosures made in compliance with a duty to report corruption or irregularities. The Commission therefore does not agree that the PDA be amended to include reference to 'involuntary disclosures'. However section 10(4)(a) of the PDA refers to 'procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety'. For sake of clarity the Commission recommends that this subsection be amended as follows:

10(4)(a) The Minister must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to or are obliged by law to report or otherwise remedy an impropriety.

6.6 Section 6(1)(a) of the PDA provides that a disclosure made to an employer must be 'substantially in accordance with any procedure prescribed' in terms of section 10 of the PDA or authorised by the employee's employer for reporting or otherwise remedying the impropriety. Section 10(4)(a) provides that practical guidelines must be issued which explain the 'provisions of this Act and all procedures which are available in terms of law to employees who wish to report or otherwise remedy an impropriety'. The PDA therefore recognises that procedures other than that which is to be issued in the guidelines exist and need to be complied with. This would mean that if an employee does not meet the requirements of the NNRA she will not be able to claim protection in terms of the PDA. She will also not be able to claim the protection of the PDA where she makes a disclosure to one of the bodies in terms of section 51 of the NNRA which is not provided for in section 8 of the PDA.

6.7 The Commission has recommended above that regulations be issued with an extended list of public bodies. Bodies listed in the NNRA largely correspond with the suggested extended list. The Commission recommends that the Department of Justice and Constitutional Development give due regard and consideration to the inclusion of other bodies listed in other laws which provide for whistleblowing or obligatory disclosure.

General protected disclosure - whistleblowing to the media

6.8 The PDA discourages a whistleblower to make a disclosure to the media in the first instance. The PDA promotes a three-staged approach to whistleblowing - firstly to an employee's employer or a member of the Cabinet or an Executive Council. If the employee is not satisfied with the response of the employer, 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 and if that route fails and the employee is still not satisfied, she could make a general protected disclosure. It seems that a disclosure to the media might, in certain circumstances, fall within the ambit of section 9 of the PDA.

6.9 A person who makes a disclosure in terms of section 9 has to meet a number of requirements. This section is also fairly extensive and potential whistleblowers might find some of the concepts difficult to understand (e.g. it might be difficult to assess when a disclosure is made for personal gain and whether it is in the circumstances reasonable to make the disclosure).

6.10 The Public Protector explains that more than one of the prominent whistleblowers interviewed by it was dismissed on account of making disclosures to the media. They maintained that as they faced a clumsy bureaucracy, the only manner to ensure that appropriate action was taken, was to bring it to the attention of the public.

6.11 The Public Protector quotes B Martin¹⁵⁰ where he states that:

'[i]n contrast to official channels, the media are often extremely helpful, reporting on the whistleblower's plight as well as the issues about which they raised concerns. The media and whistleblowers have a common interest in bringing issues into the open for public scrutiny and in resisting attempts to squash free speech ... the two things most helpful to whistleblowers are publicity and talking to other whistleblowers.'

6.12 It argues that to subject a whistleblower to such stringent requirements before she can approach the media, may erode the fundamental right of freedom of expression and public accountability of organisations. For instance, it might be difficult for a whistleblower to determine whether or not she meets the conditions contained in subsection (2)(c), i.e. whether the period that has elapsed since the prior disclosure, is sufficient (reasonable time) when making a general protected disclosure.

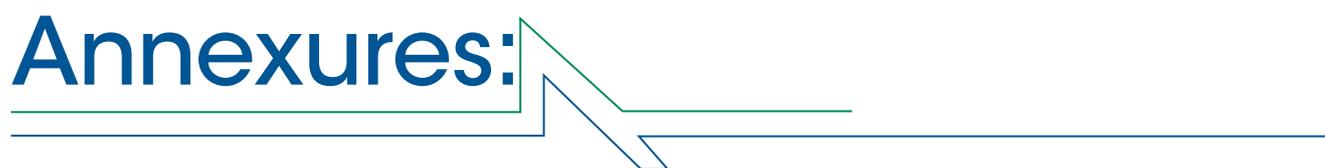
6.13 The Public Protector submits that in light of the above section 9 of the PDA be revisited.

Evaluation and recommendation

6.14 Although the recently adopted Practical Guidelines for Employees lists the requirements for each level of disclosure as is reflected in the Act itself, this is done without further explanation or guidance. The Commission is of the opinion that the requirements especially with regard to a general disclosure need to be demystified by way of examples. The Commission does not agree that the fundamental right of freedom of expression may be eroded by the existence of requirements for making a disclosure. Compliance with extra measures or requirements act as an incentive to the whistleblower to first blow the whistle within the organization in which she finds herself.

150 'Whistleblowers Australia' at 197.

Annexures:



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Annexure A

GENERAL EXPLANATORY NOTE:

Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

PROTECTED DISCLOSURES ACT 26 OF 2000

ACT

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

Preamble

Recognising that-

- the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
- section 8 of the Bill of Rights provides for the horizontal application of the rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right;
- criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage;

And bearing in mind that-

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

And in order to-

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

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

1 Definitions

In this Act, unless the context otherwise indicates-

'business' includes the whole or part of any business, trade, undertaking or service;

'disclosure' means any disclosure of information regarding any conduct of an employer, or of an employee or of a worker of that employer, made by any employee or worker who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;
- (e) that the environment has been, is being or is likely to be damaged;
- (f) unfair discrimination as contemplated in Chapter II of the Employment Equity Act, 1988 (Act No.55 of 1998) or the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

'employee' means-

- (a) any person, excluding an independent contractor, who works or worked 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 or assisted in carrying on or conducting or conducted the business of an employer;

'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;

'impropriety' means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition of 'disclosure', irrespective of whether or not-

- (a) the impropriety occurs or occurred in the Republic of South Africa or elsewhere;
- (b) the law applying to the impropriety is that of the Republic of South Africa or of another country;

'Minister' means the Cabinet member responsible for the administration of Justice;

'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 any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence;
- (i) being threatened with any of the actions referred to in paragraphs (a) to **([g] h)**; or
- (**[i]**) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, **[and]** work security and the retention or acquisition of contracts to perform work or render services;

'organ of state' means-

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;

'prescribed' means prescribed by regulation in terms of section 10;

'protected disclosure' means a *disclosure* made to-

- (a) a legal adviser in accordance with section 5;
- (b) an *employer* in accordance with section 6;
- (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
- (d) a person or body in accordance with section 8; or
- (e) any other person or body in accordance with section 9, but does not include a *disclosure*-
 - (i) in respect of which the *employee or worker* concerned commits an offence by making that disclosure; or
 - (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

'Temporary employment service' means any person who, for reward, procures for or provides to a client other persons –

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

'this Act' includes any regulation made in terms of section 10.

'worker' means –

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

2. Objects and application of Act

- (1) The objects of this Act are-
 - (a) to protect an *employee or worker*, whether in the private or the public sector, from being subjected to an *occupational detriment* on account of having made a *protected disclosure*;

- (b) to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a *protected disclosure*; and
- (c) to provide for procedures in terms of which an *employee or worker* can, in a responsible manner, disclose information regarding *improprieties* by his or her *employer*.

(2) This Act applies to any *protected disclosure* made after the date on which this section comes into operation, irrespective of whether or not the *impropriety* concerned has occurred before or after the said date.

(3) Any provision in a contract of employment or other agreement between an *employer* and an *employee or worker* is void in so far as it-

- (a) purports to exclude any provision of *this Act*, including an agreement to refrain from instituting or continuing any proceedings under *this Act* or any proceedings for breach of contract; or
- (b)
 - (i) purports to preclude the *employee or worker*; or
 - (ii) has the effect of discouraging the *employee or worker*, from making a *protected disclosure*.

3. **Employee or worker making protected disclosure not to be subjected to occupational detriment**

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

3A. **Joint Liability**

Where an employer, under the express or implied authority or with the knowledge of a client, subjects an employee or a worker to an occupational detriment, both the employer and the client are jointly and severally liable.

3B. **Duty to investigate and notify employee or worker**

(1) Any person or body to whom a *protected disclosure* has been made must investigate such disclosure;

(2) Such person or body must in writing and within 14 days after the *protected disclosure* has been made acknowledge receipt of the disclosure and notify the *employee or worker* of the steps to be taken and the timeframe in which the investigation will be completed.

4. **Remedies**

(1) Any *employee* who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, or anyone on behalf of an *employee* not able to act in his or her own name, 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
- (b) pursue any other process allowed or prescribed by any law.

(1A) Any *worker* who has been subjected, is subject or may be subjected, to an *occupational detriment* in breach of section 3, or anyone on behalf of a *worker* who is not able to act in his or her name, may approach any court having jurisdiction for appropriate relief.

(1B) If the court or tribunal, including the Labour Court is satisfied that an *employee or worker* has been subjected to or will be subjected to an *occupational detriment* on account of a *protected disclosure*, it may make an appropriate order that is just and equitable in the circumstances, including—

- (i) payment of compensation by the employer to that *employee or worker* or

- (ii) payment by the employer of actual damages suffered by the employee or worker;
- (iii) an order directing the employer to take steps to remedy the occupational detriment.

(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 **[Part B of Schedule 7 to]** section 186(2) of that Act, and the dispute about such an unfair labour practice must follow the procedure set out in **[that Part]** 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)~~⁽³⁾ 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.

5. Protected disclosure to legal adviser

Any *disclosure* made-

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

is a *protected disclosure*.

6. Protected disclosure to employer

- (1) Any disclosure made in good faith-
 - (a) and substantially in accordance with any procedure prescribed, or authorised by the *employee's or worker's employer* for reporting or otherwise remedying the impropriety concerned; or
 - (b) to the *employer* of the *employee or worker*, where there is no procedure as contemplated in paragraph (a), is a protected disclosure.

(2) Any *employee or worker* who, in accordance with a procedure authorised by his or her *employer*, makes a *disclosure* to a person other than his or her *employer*, is deemed, for the purposes of *this Act*, to be making the *disclosure* to his or her *employer*.

7. Protected disclosure to member of Cabinet or Executive Council

Any *disclosure* made in good faith to a member of Cabinet or of the Executive Council of a province is a *protected disclosure* if the *employee's* or *worker's* employer is-

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

8. Protected disclosure to certain persons or bodies

- (1) Any *disclosure* made in good faith to-
 - (a) the Public Protector;
 - (b) the Auditor-General; or
 - (c) a person or body *prescribed* for purposes of this section; and in respect of which the *employee* or *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* or *worker* as is necessary to enable that *employee* or *worker* to comply with this section.

9. General protected disclosure

- (1) Any *disclosure* made in good faith by an *employee* or *worker* -
 - (a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
 - (b) who does not make the *disclosure* for purposes of personal gain, excluding any reward payable in terms of any law;

is a *protected disclosure* if-

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

(3) In determining for the purposes of subsection (1) (ii) whether it is reasonable for the *employee or worker* to make the *disclosure*, consideration must be given to-

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

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

9A. Exclusion of civil and criminal liability

(1) A court may find that an *employee or worker* who makes a *protected disclosure* of information in accordance with paragraph (a) of the definition of *disclosure* which shows or tends to show that a criminal offence has been committed, is being committed or is reasonably likely to be committed shall not be liable to any civil, criminal or disciplinary proceedings by reason of having made the disclosure if such disclosure is prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter;

(2) Exclusion of liability as contemplated in subsection (1) does not extend to the civil or criminal liability of the *employee or worker* for his or her participation in the disclosed *impropriety*.

10. Regulations

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

- (a) for the purposes of section 8 (1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-General, as the case may be;
- (b) any administrative or procedural matter necessary to give effect to the provisions of *this Act*; and
- (c) any other matter which is required or permitted by *this Act* to be prescribed.

(2) Any regulation made for the purposes of section 8 (1) (c) must specify persons or bodies and the descriptions of matters in respect of which each person or body is prescribed.

(3) Any regulation made in terms of this section must be submitted to Parliament before publication thereof in the *Gazette*.

(4)(a) The *Minister* must, after consultation with the Minister for the Public Service and Administration, issue practical guidelines which -

- (i) explain the provisions of this Act and all procedures which are available in terms of any law to *employees or workers* who wish to or are obliged by law to report or otherwise remedy an *impropriety*;
- (ii) oblige every employer to have appropriate internal procedures in operation for receiving and dealing with information about improprieties.

- (b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the *Gazette*.
- (c) All organs of state must give to every *employee or worker* a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every *employee or worker*.

11. Short title and commencement

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

Annexure B

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.

LIST OF RESPONDENTS WHO COMMENTED ON DISCUSSION PAPER 107

1. Department of Justice and Constitutional Development.
2. Kris Dobie, Centre for Business and Professional Ethics, University of Pretoria.
3. Jeanetha Brink, Gauteng Provincial Government.
4. Jeanette Campbell (Student: Higher Diploma in Labour Law).
5. Mrs Juliett Grosskopf, Director Labour Law, Legal Services, UNISA.
6. National Economic Development and Labour Council (NEDLAC).
7. Office of the Auditor-General.
8. Office of the Public Protector.
9. Open Democracy Advice Centre.
10. Professor H. Viljoen, University of Pretoria.
11. Rochelle Le Roux, Institute of Development and Labour Law, University of Cape Town.
12. Renay Ogle, Forensic Audit, Provincial Government Western Cape.
13. Society of Advocates of Kwazulu-Natal.
14. Special Investigating Unit.

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