

Dare I blow the whistle?

Is adequate protection given to SA employees in terms of the Protected Disclosures Act 26 of 2000?

Research Report by

Jeannette Campbell

(Higher Diploma in Labour Law)

Student Number: 03 51142

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1. Whistleblowing – An Introduction

My interest in whistleblowing was originally sparked by a particularly nasty case of employee fraud I had to deal with as HR Manager. The accompanying forensic audit gave rise to concerns that firstly, someone should have suspected something; and secondly, even if any suspicions had arisen earlier, there were no clear guidelines or channels to guide disclosure. This interest was reinforced by the almost daily media reports of corruption, fraud and whistleblowers, not only in South Africa but globally – one can think of Enron, Iraq Arms and the European Commission. These incidences range from the vast financial losses of Enron through the South African parliamentary 'Travelgate' scam to the relatively minor financial implications of corruption amongst local soccer referees and officials.¹ This, with the increasing emphasis on 'good corporate governance' in South Africa, led me to further research the whole concept of whistleblowing (making a protected disclosure) in the employment context.

This paper will first of all set the scene by analysing what whistleblowing is, who whistleblowers are likely to be, their options and obstacles, the consequences of their actions and to what extent they might need or merit protection. Later sections will analyse the statutes applicable to protected disclosures in South Africa, try to identify what patterns if any have been established by the emerging caselaw and anecdotal evidence, observe experiences gained elsewhere in the world, look at current legal developments and finally draw some conclusions and predict the likely way forward for whistleblowing in South African workplaces.

1.1 Definitions of whistleblowing

One early definition in 1999 was: 'Whistleblowing is generally defined as "...the disclosure of illegal, unethical or harmful practices in the workplace to parties who might take action" (Rothschild & Miethe 1994:254).² Professor Uys later expanded on this: '... whistleblowing occurs when an employee (or former employee) either circumvents the prescribed internal channels of communication or resorts to an external agency, which could include the media.'³ I disagree with this stance. The

¹ I find a delightful irony in persons blowing the whistle on those whose task it is indeed to 'blow the whistle' in the sporting context!

² Nico Alant and Tina Uys, *Whistleblowing: Fighting fraud in organisations*, paper to be presented at the Conference on Fraud and the African Renaissance, 8-10 April 1999, Uganda, at 5 (hereinafter Alant et al)

³ Professor Tina Uys, *Corporate Loyalty: Whistleblowing in the Financial Sector*, paper to be presented at RAU, 13 September 2002, at 2 (hereinafter Uys)

whole point of recent whistleblower protection is that in fact channels and procedures are prescribed for the legitimate reporting of concerns, even if this 'circumvents' the internal line structure.

The detailed definition most frequently used to date is that expressed by Guy Dehn, a leading whistleblowing expert:

'[a] Bringing an activity to a sharp conclusion as if by the blast of a whistle (Oxford English Dictionary); [b] Raising a concern about malpractice within an organisation or through an independent structure associated with it (UK Committee on Standards in Public Life); [c] Giving information (usually to the authorities) about illegal or underhand practices (Chambers Dictionary); [d] Exposing to the press a malpractice or cover-up in a business or government office (US, Brewers Dictionary); [e] (origins) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.'⁴

Another description: 'so-called "whistleblowers" - referred to as bell-ringers in the Netherlands and lighthouse keepers in the USA - act as guardians of the public interest,'⁵ highlights the role of whistleblowers as sounding the alarm rather than accusing. A very recent definition reads:

'... whistleblowing is now used to describe the options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance. ... Thus ... [whistleblowers] are the opposite of the anonymous informer that authoritarian systems nurture. ...'⁶

Due to Dehn's and Calland's influence, I expect that this definition will be widely applied by others, as it locates whistleblowing firmly in the current context. For the purposes of this paper, I shall limit myself to: '[r]aising a concern about malpractice within an organisation ...',⁷ or: 'the disclosure of illegal, unethical or harmful practices in the workplace to parties who might take action.'⁸ These basic definitions are in line with the approach taken in current legislation, discussed in the next section.

⁴ Dehn, Discussion Paper at the OECD Labour/Management Programme: *Whistleblowing to combat corruption*, Paris 16 December 1999, (hereinafter Dehn *OECD*), at 6, and later in several other papers and books by Dehn and others

⁵ Kirstine Drew, *Whistleblowing and Corruption – an Initial and Comparative Review, January 2003*, (hereinafter Drew), Preface, also quoting from Tom Devine of the USA Government Accountability Project

⁶ Richard Calland and Guy Dehn, Introduction - Whistleblowing around the world: the state of the art, at 9 (hereinafter Calland et al *Introduction*), in *Whistleblowing around the World: Law, Culture and Practice*, edited by Richard Calland & Guy Dehn, 2004, (hereinafter Calland et al)

⁷ Dehn, see note 4

⁸ Alant et al, see note 2

1.2 Characteristics of whistleblowers

There is a fair degree of agreement amongst academics on the characteristics of 'typical' whistleblowers (if such a whistleblower exists). Whistleblowers are described as having a strong commitment to moral or ethical principles and personal integrity.⁹ Coupled with this is often a certain naïve idealism - they expect the organisation to welcome their disclosures and to take swift and appropriate action.¹⁰ They may act out of concern for the public good or as concerned citizens,¹¹ and may well be persistent to the point of obstinacy.¹² They are often highly competent and professional individuals,¹³ who tend to go against the silent majority stream – not breaking the rules but certainly more the exception than the rule. 'You have to be very brave, even slightly mad, to be a whistleblower.'¹⁴

The Times articles describing the three US whistleblowers hailed as 'Persons of the Year'¹⁵ indicate that: all were female, (unusual – most whistleblowers tend to be male), all were first-born, all grew up in small towns, all were married and were the chief bread-winners, all were reluctant heroes and just trying to do their jobs. All had typically 'righted wrongs' all their lives, some more overtly than others, had been single-minded and tending to perfectionism.¹⁶ Whistleblowers characteristically accept responsibility for their actions and are witnesses rather than accusers.¹⁷ Obviously there are also the less selfless and less purely-motivated whistleblowers who blow for revenge,¹⁸ profit¹⁹ or mixed motives: 'mischievous, malevolent or even near pathological'.²⁰ There is too the whistleblower in the role of professional 'informer' in the police force or amongst building contractors and planners,²¹ but these are not whistleblowers in the normal employment context. Some whistleblowers may also be trying to pre-empt and discredit disciplinary measures by employers but these comprise a small minority of employees, with probably a variety

⁹ Uys at 7, Calland et al *Introduction* at 11, Gobert et al at 28 and Estelle Feldman, *Protection for Whistleblowers*, Paper at the 9th International Anti-Corruption Conference, Durban, 1999, at 4, (hereinafter Feldman)

¹⁰ Uys at 7 and Gobert et al at 28

¹¹ Gobert et al at 28 and Feldman at 4

¹² Feldman at 3 and Gobert et al at 31

¹³ Uys at 6

¹⁴ Julian Clarke, *The Whistleblower's Dilemma*, in *The Sunday Business Post*, October 1999.

¹⁵ i.e. Cynthia Cooper (WorldCom), Coleen Rowley (FBI) and Sherron Watkins (Enron)

¹⁶ Richard Lacayo, Amanda Ripley and Maggie Sieger, articles in *The Times*, December 30, 2002 / January 6, 2003, (hereinafter *Times December 2002*)

¹⁷ Calland et al *Introduction* at 11. See also note 5

¹⁸ Feldman at 4, Gobert et al at 31 and 33

¹⁹ Gobert et al at 31, referring to the United States, which is the only country to reward whistleblowers in terms of the False Claims Act 1863 as amended 1986

²⁰ Gobert et al at 30

²¹ Feldman at 5

of objectives, normally cloaked in 'pure' motives but where it is often impossible to distinguish the true or driving motive.²²

1.3 Options for whistleblowers

Various options present themselves when an employee begins to suspect some impropriety in the workplace. Feldman suggests that such an employee has five initial choices when perceiving wrongdoing at work: to ignore, acquiesce, participate, object or walk away; and these are not mutually exclusive over time.²³ Calland et al suggests four choices: silence, internal disclosure, external disclosure or leaking the information anonymously.²⁴ Another author sees only three options: try to change the situation, mentally isolate yourself or resign.²⁵ Lynn Brewer, ex-Enron executive, suggests that as many as 75% of potential whistleblowers just change jobs or positions. i.e. 'walk away'.²⁶

1.4 Cultural and other impediments to whistleblowing

At this stage of the whistleblowing cycle, an employee's choice of action will inevitably be influenced by his or her cultural environment, which may include some very real impediments to blowing the whistle. These cultural impediments include divided loyalties, history, logistics and fear of retribution.²⁷ Most employees have a sense that 'dirty linen is not to be washed in public' and feel they may be betraying their organisation and damaging its reputation.²⁸ From childhood onwards the belief that it is somehow wrong to 'snitch', 'tell tales'²⁹ or 'rat on' a friend or colleague is inculcated in us³⁰ and the terms themselves are pejorative. In the South African context in particular, coming painfully out of an era characterised by authoritarianism

²² Gobert et al at 32 and 33

²³ Feldman at 3

²⁴ Calland et al *Introduction* at 3-4

²⁵ Michael Skopinker, Whistle while you work, article in *The Financial Times*, 20 January 2004, quoting Chris Heaton-Harris, a member of the European Parliament

²⁶ Lynn Brewer, Lecture given in Sandton on 1 July 2004

²⁷ Lori Tansey Martens and Amber Crowell, Whistleblowing: A Global Perspective (Part 1), in *ethikos*, Volume 15, Issue 6, May/June 2002, at 1, (hereinafter Martens et al)

²⁸ Gobert et al at 27

²⁹ Mukelani Dimba, Lorraine Stober and Bill Thomson, The South African Experience, at 143 (hereinafter Dimba et al), in Calland et al

³⁰ Helena Kennedy, Foreword, (hereinafter Kennedy), in Calland et al refers to 'deeply ingrained sociological habits and attitudes' at xvi, and Calland et al *Introduction*: 'law, culture and practice give a strong message that employees should turn a blind eye to wrongdoing' at 3

and state informers, ('impimpis'),³¹ the notion that I, as an employee, should 'inform' someone in authority about another's suspected impropriety is hard to accept. Making whistleblowing with its attendant risks even less appealing in South Africa is the current high rate of unemployment (30 to 45%)³² – if I am aware that blowing the whistle could lead to an occupational detriment as serious as losing my job and perhaps thereafter also being blacklisted in a particular industry, I need to either be very sure of protection or have exceptional courage - or both.

1.5 Dilemmas of whistleblowers

This leads us naturally to consider the dilemmas faced by an employee who begins to believe that he or she should blow the whistle on some workplace wrong. In addition to cultural impediments, our potential whistleblower finds himself 'balancing ... conflicting loyalties, obligations and values'³³ – none of which are inherently right or wrong. There is the importance of being a team player juxtaposed with the value of individualism; being a busy-body versus sitting on the fence; the conflict between the right to privacy and the right to know; and loyalty to one's colleagues and employer vis à vis the citizen's duty to uphold the law.³⁴ Set against these imperatives are many fears: the fear of reprisals, of being thought disloyal, of losing the trust of colleagues and the broader industry, of a cover-up, of being wrong, of the need to prove the allegations and the fear of feeling responsible if the wrongdoer is ultimately punished.³⁵ Small wonder then that whistleblowers make up a small percentage of the workforce³⁶ and that others who are in a position to reveal impropriety turn a blind eye rather than follow through with a disclosure.

1.6 Organisational responses to whistleblowing

There are any number of subtle and blatant ways in which an organisation faced with a damaging disclosure can react negatively. In some cases, the organisation may react positively: investigate the issues raised, take prompt and appropriate action,

³¹ Calland et al *Introduction* at 18. See also Dimba et al at 143, Camerer at 1 and Dehn *Open Democracy* at 3

³² Calland et al *Introduction* at 18. See also Rochelle le Roux and Ghalib Galant, *Corruption in the Workplace: The Whistle Blower's Dilemma* at 1 (hereinafter le Roux et al.)

³³ Uys at 4

³⁴ Lala Camerer, *Summary of Panel Discussion on Whistleblowing: A Practical Tool in Combating Corruption*, at the 10th International Anti-Corruption Conference, 7-11 October 2001, (hereinafter Camerer 10th IACC), at 2, summarising Tom Devine's input.

³⁵ Dehn *OECD* at 8

³⁶ Section 1.2 above

resolve the matter amicably and perhaps even reward him.³⁷ Convincing explanations are put forward for the often harsh and extreme reactions by an organisation to a whistleblower. Not only does the employer fear damaging publicity or reduced profitability, and hence desire to punish the whistleblower for his 'deviant act'³⁸ but the retaliation is particularly fierce if the disclosure reveals systemic abuse rather than a once-off event. This then points to serious deficiencies in the organisation's structures, communication channels and management efficiency and adequacy.³⁹ Instead of addressing the issue, the employer wants to 'shoot the messenger'.⁴⁰ In the ensuing 'power struggle' the employer may try to shift the battlefield to the labour relations arena.⁴¹ A 'contest of credibility'⁴² ensues and the two protagonists are *not* equally matched: it is relatively easy for an employer to disguise the real reason for the occupational detriment, and allege incompatibility, diminished performance and so on.⁴³ The onus is on the whistleblower to link the occupational detriment to his disclosure, and, being in all probability denied external legal representation at disciplinary hearings, he has little chance of proving this.⁴⁴ There is a 'gross disproportion of resources available to the organisation'⁴⁵ and, controlling the reward structure, it is relatively easy for the employer to impose occupational detriment.⁴⁶

Possible occupational detriments are virtually endless: isolation, stonewalling, character assassination, downgrading job performance ratings, disciplinary procedures or threats thereof, withholding salary increases, retrenchment, sidelining and generally limiting the whistleblower's career.⁴⁷ Also frequent are dismissal, demotion, suspension, salary reduction, reassignment or transfer against one's will, degrading of status or credibility, being denied support, not receiving notice of meetings, assignment of unpleasant or impossible tasks and being made unwelcome

³⁷ Gobert et al at 33, referring to an Abbey National employee in the UK

³⁸ Uys at 2

³⁹ Alant et al at 6-7

⁴⁰ Uys at 7. See also Camerer at 1

⁴¹ Alant et al at 7

⁴² Gobert et al at 26

⁴³ Uys at 12-13

⁴⁴ Ibid

⁴⁵ Dr William de Maria, *Common Law – Common Mistakes, The Dismal Failure of Whistleblower Laws in Australia, New Zealand, South Africa, Ireland and the United Kingdom*, paper presented to the International Whistleblowers Conference, University of Indiana, 12-13 April 2002, (hereinafter de Maria), at 26

⁴⁶ Uys at 3

⁴⁷ Uys at 7-8

in the wider industry.⁴⁸ An employee may also be sent for psychiatric evaluation to a medical practitioner chosen and paid for by the employer, yielding 'skewed' results.⁴⁹

1.7 Do whistleblowers need protection?

It is difficult to estimate how many instances of whistleblowing do have a happy outcome, as it is only those where the organisation has had a very negative response and where the employee has suffered actual occupational detriment that reach the labour tribunals and media headlines. Perversely, the graver the detriment, the more notorious the employee, (usually ex-employee by then), so the public perception is that whistleblowing leads to suffering. This stance is supported by the number of statutes various countries around the world have felt it necessary to put in place to protect whistleblowers and also by many academics and empirical evidence, as will be discussed later.

'It is in fact not uncommon for the whistleblower to suffer physically, mentally and emotionally'.⁵⁰ This was still true in May 2000, when a US study found that 100% of whistleblowers were fired, many unable to find new jobs, 90% suffered emotional stress, depression and anxiety, 80% experienced health problems, 54% were harassed by colleagues, 17% lost their homes, 15% were divorced and 10% attempted suicide.⁵¹ It is indeed 'rare for whistleblowers in contested cases not to have to engage in a significant and protracted struggle ... Whistleblowing can have a long and all too often bitter resonance.'⁵² A study in December 2002 indicated that 57% of respondents still believed whistleblowers would be victimised most of the time, and 30% believed some victimisation would result.⁵³

'Without legal protection, individuals are often too intimidated to speak out or 'blow the whistle' on corrupt activities which they observe in the workplace.'⁵⁴ The legislative protection now afforded in many countries to those making protected disclosures is an attempt to change the existing prevalent workplace cultures to the point where employees are comfortable about the concept of blowing the whistle and really feel safe making a disclosure without endangering their livelihoods – and even

⁴⁸ Gobert et al at 34-35

⁴⁹ This actually happened to one of my acquaintances, a senior manager in local government in KwaZulu Natal, many years before the PDA came into effect.

⁵⁰ Gobert et al at 34

⁵¹ Drew at 4, quoting *The Irish Times*, 29 May 2000.

⁵² Gobert et al at 36

⁵³ Interview with Cooper, Rowley and Watkins, *Times December 2002*, at 62

⁵⁴ Camerer at 2

possibly their lives.⁵⁵ Another question that will be asked (if perhaps not fully answered) whether in fact laws are enough or even the most appropriate route to follow to achieve whistleblower protection.

1.8 Is there a need for whistleblowing?

We have assumed in the discussion above that there is an implied need for and value to be added by whistleblowing, but is whistleblowing desirable and does it achieve ends unattainable by other methods?

In the KPMG Fraud Survey 2002, 88% of respondents indicated that employees were the major source of frauds, compared to 75% in 1999, while 46% of incidences of fraud were revealed by means of whistleblowing.⁵⁶ Whistleblowing as 'an effective tool in the fight against corruption,' and the associated need for legal protection for whistleblowers, was ranked as the fourth highest anti-corruption control measure in a survey, scoring 62.3%.⁵⁷ Other controls have been found inadequate: the KPMG Survey 2002 found that internal controls only revealed 61% of fraud cases, while the internal audit function was even less effective at 43%.⁵⁸ Internal employees are often best placed to notice early evidence of impropriety,⁵⁹ and such employees are vital in successful investigations.⁶⁰ This viewpoint is supported in that, five years after a strong focus on whistleblowing in the health sector in the UK, an audit found that fraud incidence in this sector had decreased for the first time.⁶¹ A somewhat cynical view is that 90% of people are 'just opportunists', and that whistleblowing options will help to influence the conduct of the 90% group.⁶² 'The only thing required for evil to triumph is for good men to do nothing.'⁶³ Ironically, notepads issued to Enron employees bore a Martin Luther King quote: 'Our lives begin to end the day we become silent about things that matter.'⁶⁴

⁵⁵ Richard Calland and Guy Dehn, Conclusion, (hereinafter Calland et al *Conclusion*), at 199, in Calland et al, referring to a young Indian engineer who was murdered after raising concerns about corruption on a massive road project

⁵⁶ *KPMG Southern Africa Fraud Survey 2002*, at 7-8, (hereinafter *KPMG Survey 2002*), involving 162 South African companies.

⁵⁷ Camerer at 2, quoting from a survey by the Institute for Security Studies in 2000/2001.

⁵⁸ *KPMG Survey 2002* at 8

⁵⁹ Dehn *OECD* at 7

⁶⁰ Dehn *Integrity* at 5

⁶¹ Dehn *Open Democracy* at 3

⁶² Dehn *Open Democracy* at 2 & 3

⁶³ Quotation from Edmund Burke, *KPMG Southern Africa Fraud Survey 1999* at 9

⁶⁴ Jodie Morse and Amanda Crasher, article in Times December 2002, at 58

Several authors submit that whistleblowing provides an excellent check to possible government arrogance,⁶⁵ that it is a very effective counter to authoritarian bureaucracies,⁶⁶ that it is a vital instrument in ensuring or enhancing the accountability of organisations,⁶⁷ and also in promoting the public interest.⁶⁸ Not only is it in the public interest that wrongdoing in organisations, whether public or private, be brought to light but there is also a high degree of self-interest. Internal, early disclosures enable companies to rectify wrongs without receiving damning publicity or eroding shareholder confidence,⁶⁹ and is a 'key aspect of effective self-regulation'.⁷⁰ Employees and employers alike have a common interest in the survival and prosperity of the enterprise,⁷¹ and preventing corruption could directly help protect directors of companies against personal liability.⁷²

Some fairly new reports and statutes take note of the valuable role employees can play in the prevention and early detection of fraud and corruption. Although not a 'statute', one must mention The King Report on Corporate Governance 2002 (King II) as it is widely respected and implemented. One of King II's guiding principles relates to 'reporting on issues associated with ... safety, health and environment ("SHE")',⁷³ specifically dealt with in the PDA. King II recommendations include 'the need for a confidential reporting process ("whistleblowing") covering fraud and other risks' and 'providing, monitoring and auditing safe systems for reporting of unethical or risky behaviour'.⁷⁴ The Public Finance Management Act,⁷⁵ applicable to those government bodies that operate with public money, stresses the importance of taking appropriate preventative and reporting mechanisms regarding the irregular use of public funds.⁷⁶ Although The Financial Intelligence Centre Act⁷⁷ is applicable mainly to financial institutions in an attempt to curb money-laundering, section 29 applies to all employees, placing an onus on them to report to the Financial Intelligence Centre

⁶⁵ Guy Dehn, speaking at the launch of the book by Calland et al (see note 8 at 3) on 20 April 2004 in Johannesburg

⁶⁶ Alant et al at 10

⁶⁷ Dehn *OECD* at 4 and Camerer *10th IACC* at 3: 'Whistleblowers are a means for promoting democratic accountability'

⁶⁸ Gobert et al at 38

⁶⁹ Guy Dehn, *Whistleblowing & Integrity: a New Perspective*, paper at the 10th International Anti-Corruption Conference, Prague, 2001, (hereinafter Dehn *Integrity*), at 3

⁷⁰ Calland et al *Introduction* at 6

⁷¹ Camerer *10th IACC* at 3

⁷² Open Democracy Advice Centre, Boardroom Brief, 2004, at 4

⁷³ *King Report on Corporate Governance for South Africa 2002*, (hereinafter King II) at 16

⁷⁴ King II at 80, 81 and 122. See also note 34 and 72

⁷⁵ Public Finance Management Act 1 of 1999, (hereinafter PFMA)

⁷⁶ PFMA ss 38(1)(c)(ii), 38(1)(g)&(h), 45(c), 50(1), 51(1)(a)-(c), 57(c)&(e), and 85(1)(a)&(b)

⁷⁷ Financial Intelligence Centre Act 38 of 2001, (hereinafter FICA)

any suspicious financial transactions. Failure to do so can lead to heavy penalties⁷⁸ and the Act provides immunity and protects confidentiality in respect of those who have made disclosures in compliance with its provisions.⁷⁹ The Prevention and Combating of Corrupt Activities Act,⁸⁰ effective as from 31 July 2004 and similar in purpose to FICA, applies only to persons holding a 'position of authority', i.e. CEO, MD etc, who are now obliged to report to the police any suspicions of corruption or fraud involving amounts of R100,000 or more⁸¹ or face penalties.⁸² The Act is silent however regarding any protection that might be given to persons suffering detriment as a result of complying with the Act.

There *is* thus a need, and in some cases a new legal obligation, for safe, confidential disclosures, in order to prevent or curb corruption or other activities which could pose risks on many levels. This obviously goes hand-in-hand with the modern trend towards open and accountable governance in many modern democracies and supports the focus on the access to information. A note of caution has, however, been sounded: whistleblowing could erode the culture of institutional commitment and team spirit which so many companies strive to inculcate,⁸³ and legislation giving protection to disclosures of wrongdoing in workplaces could be 'a step towards pervasive and intrusive private policing.'⁸⁴ Nazi Germany is the obvious example (we in South Africa might think of the previous totalitarian apartheid state) and the stigma attached to 'regimes which foster widespread informing by ordinary citizens,' where the ultimate victims of such regimes are social cohesion and trust.⁸⁵ It is perhaps a timely challenge to the stance that supports and encourages whistleblowing: '... the potential threat to the dynamics of the workplace, interpersonal trust and social cohesion posed by ...[protected disclosures legislation] should cause ... [us] to think carefully before proceeding further down this road.'⁸⁶ But the recent global money-laundering and anti-corruption measures indicate that governments worldwide feel the imperative to in fact travel down this road, albeit carefully and with minimal restriction on other rights.

⁷⁸ FICA s 68 – up to 15 years' imprisonment or a fine of R10 million.

⁷⁹ FICA s 38

⁸⁰ Prevention and Combating of Corrupt Activities Act 12 of 2004, (hereinafter Corruption Act)

⁸¹ Corruption Act s 34(1)

⁸² Corruption Act s 26(1)(b) – between 3 and 10 years, depending on the court

⁸³ Gobert et al at 52

⁸⁴ Gobert et al at 53

⁸⁵ Ibid

⁸⁶ Gobert et al at 54

2. Whistleblowing – The Statutes

The primary statute in South Africa regulating protected disclosures in the workplace is the Protected Disclosures Act⁸⁷, but there are other statutes, South African and international, which either contribute to the protection afforded to employees making such disclosures or put a positive duty on them to disclose regardless of available protection.

2.1 Various South African Statutes

2.1.1 The Constitution⁸⁸

The Constitution is the ‘supreme law’ of the Republic,⁸⁹ and, while it does not explicitly refer to protection for disclosures, the democratic values it promotes also underpin the protection provided in the PDA. The values of human dignity,⁹⁰ equality (including the prohibition of unfair discrimination),⁹¹ and freedom⁹² are key. Other rights that have bearing on a disclosure include: freedom of expression;⁹³ freedom of trade;⁹⁴ fair labour practices;⁹⁵ a healthy environment;⁹⁶ just administrative action;⁹⁷ and access to courts.⁹⁸ Thus the Constitution sets the tone for the kind of society in which protection for a disclosure made ‘in the public interest’ should be availed – and probably in a context broader than just the employment arena.

2.1.2 The Labour Relations Act⁹⁹

The LRA preceded the PDA but the 2002 amendments¹⁰⁰ added explicit sections outlawing any unfair dismissals or unfair labour practices on account of protected disclosures.¹⁰¹ Further, the 2002 amendments added a new ‘Presumption as to who is employee’,¹⁰² which hopefully will also guide the application of the PDA.

⁸⁷ Protected Disclosures Act No 26 of 2000, (hereinafter PDA)

⁸⁸ The Constitution of the Republic of South Africa, Act 108 of 1996, (hereinafter Constitution)

⁸⁹ Constitution Preamble and s 2

⁹⁰ Constitution ss 1(a), 7(1) & 10

⁹¹ Constitution ss 1(a), 7(1) & 9

⁹² Constitution ss 1(a), 7(1) & 12(1)(c) & (e)

⁹³ Constitution s 16(1)(b)

⁹⁴ Constitution s 22

⁹⁵ Constitution s 23(1)

⁹⁶ Constitution s 24(a)

⁹⁷ Constitution s 33(1)

⁹⁸ Constitution s 34

⁹⁹ Labour Relations Act 66 of 1995, (hereinafter LRA)

¹⁰⁰ Labour Relations Amendment Act 12 of 2002

¹⁰¹ LRA ss 186(2)(d) & 187(1)(h) respectively

¹⁰² LRA s 200A

2.1.3 *The Basic Conditions of Employment Act*¹⁰³

The BCEA stands chronologically in relation to the PDA as does the LRA, but, interestingly, the drafters of the 2002 BCEA Amendments¹⁰⁴ saw no need to add sections specifically endorsing the protection offered by the PDA. This may well be because the BCEA already had provisions which, though not specific, outlawed discrimination or prejudice related to disclosures¹⁰⁵ and allowed a breach of confidentiality in the employment context for legitimate and lawful purposes.¹⁰⁶

2.1.4 *The Employment Equity Act*¹⁰⁷ and the *Promotion of Equality and Prevention of Unfair Discrimination Act*¹⁰⁸

The EEA also preceded the PDA yet, the PDA refers instead to the Equality Act.¹⁰⁹ This is 'unexpected' and problematic¹¹⁰ as firstly the Equality Act does *not* apply to persons to whom the EEA applies,¹¹¹ i.e. employees, around whom the PDA is built; and secondly, the EEA gives more extensive provisions on unfair discrimination than the Equality Act. Even without the specific reference to protection for a disclosure regarding unfair discrimination in the PDA,¹¹² I would submit that the EEA on its own could be used to substantiate a claim for compensation for discrimination (occupational detriment) suffered on the grounds of having made a protected disclosure, as the list of discriminatory grounds is not closed¹¹³ and in fact the EEA has its own 'whistleblowing' procedures.¹¹⁴ Perhaps caselaw will guide in the interpretation of this somewhat unclear section of the PDA.

2.1.5 *The Occupational Health and Safety Act*¹¹⁵

Reference to disclosures relating to health, safety and environmental aspects are found in the PDA,¹¹⁶ but as early as 1993 OHSA itself also established certain 'whistleblowing' provisions,¹¹⁷ so there is dual security for such whistleblowers.

¹⁰³ Basic Conditions of Employment Act 75 of 1997, (hereinafter BCEA)

¹⁰⁴ Basic Conditions of Employment Amendment Act 11 of 2002

¹⁰⁵ BCEA s 79(2)(c)(ii)

¹⁰⁶ BCEA s 90(1) & (2)

¹⁰⁷ Employment Equity Act 55 of 1998 (hereinafter EEA)

¹⁰⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, (hereinafter Equality Act)

¹⁰⁹ PDA s 1(i)(f)

¹¹⁰ Rabkin-Naicker, H, *The Protected Disclosures Act: Challenges for labour law jurisprudence* (2000) 6 *Law Democracy & Development* at 142-3; (hereinafter Rabkin-Naicker), also quoting Carole Cooper

¹¹¹ Equality Act s 5(3)

¹¹² See note 109

¹¹³ EEA s 6(1)

¹¹⁴ EEA ss 34, 51(2)(b)(i) & 51(3)

¹¹⁵ Occupational Health and Safety Act 85 of 1993, (hereinafter OHSA)

¹¹⁶ PDA ss 1(i)(d)&(e)

¹¹⁷ OHSA ss 26(1)&(2)

2.2 International Instruments

There are few international instruments which guide protected disclosures and those references that apply are subtle rather than explicit. One such instrument is ILO C111¹¹⁸ which makes reference to discrimination other than on listed grounds,¹¹⁹ which could include having blown the whistle, and South Africa has already enacted national legislation to promote these principles.¹²⁰ Another less binding but more explicit international instrument is ILO R119,¹²¹ which forbids dismissal on the grounds of having made a good-faith disclosure re alleged unlawful practices¹²² and also forbids the issuing of an unfavourable reference.¹²³ Both these aspects are captured in the PDA,¹²⁴ following good international practice. The Revised Draft United Nations Convention against Corruption¹²⁵ provides for whistleblower protection under Article 16 by means of 'preventative measures'.¹²⁶ The UN Convention, which addresses the problem of combating global organised crime and money-laundering, thus goes far beyond the employment sphere, states the need to provide safe channels for reporting of suspect activities,¹²⁷ and seems already to have had an influence on South Africa's money-laundering and corruption legislation.

2.3 The Protected Disclosures Act (PDA)

In South Africa, the concept of whistleblowing is primarily governed by the PDA, also known as 'The Whistleblower's Act', which has an interesting genesis.

2.3.1 Background

In the 'New South Africa' post-1994, there was awareness that credibility of government institutions in particular and business in general was poor and that corruption was widespread. There was a need for a 'comprehensive overhaul of the governance system' and a need to vigorously eradicate the 'secrecy and lack of

¹¹⁸ ILO C111 Discrimination (Employment and Occupation) Convention, 1958, (hereinafter C111)

¹¹⁹ C111 Article 1(1)(b)

¹²⁰ LRA, EEA, Equality Act, PDA

¹²¹ ILO R119 Termination of Employment Recommendation, 1963, (hereinafter R119)

¹²² R119 Article 2(3)(c)

¹²³ R119 Article 8(2)

¹²⁴ PDA ss 1(vi)(b)&(f) respectively

¹²⁵ Revised Draft United Nations Convention against Corruption, A/AC.261/3/Rev 5 as at 15 August 2003, (hereinafter UN Convention)

¹²⁶ Drew at 37

¹²⁷ UN Convention Articles 7(4), 13(2), 43(1) and particularly Article 43 bis

accountability' prevalent in the public service.¹²⁸ The Interim Constitution¹²⁹ promised an 'open and democratic society' and it was in response to this that 'the then Deputy President, Thabo Mbeki, convened a team of senior government officials, academics and administrative law experts to conduct research and make proposals for legislation'¹³⁰ that would enable government to deliver on its promises.

This team, the Task Group on Open Democracy, submitted proposals for an Open Democracy Act, which resulted in the Open Democracy Bill.¹³¹ After it was tabled in Parliament in July 1998, an extensive public consultation process was undertaken, and submissions were received from a variety of public, private and NGO sectors. Calls for legislative protection for whistleblowers also came from the Public Protector¹³² and the topic was given further prominence at the National Anti-Corruption Summits in November 1998 and in April 1999. Resolutions from the latter summit included: 'To support the speedy enactment of the Open Democracy Bill to foster greater transparency, whistleblowing and accountability in all sectors,'¹³³ and: 'developing, encouraging and implementing whistle-blowing mechanisms, which include measures to protect persons¹³⁴ from victimisation where they expose corruption and unethical practices'.¹³⁵

2.3.2 *The Open Democracy Bill*

The Open Democracy Bill (ODB) focussed primarily on government bodies being more transparent and making information available to those who had a need or right to access it, and it was only Part 5, Protection of Whistle-blowers,¹³⁶ and one later section¹³⁷ that dealt with protected disclosures. The ODB only addressed whistleblowing in the public sector and two elements were required for a protected disclosure to prescribed bodies: good faith and reasonable belief.¹³⁸ Further criteria were imposed for making a protected disclosure to the news media: 'clear and convincing grounds' and a fairly onerous and serious element: the whistleblower bore the burden of proof.¹³⁹ A comprehensive list was given of occupational detriments

¹²⁸ Dimba et al at 144

¹²⁹ Interim Constitution, Act 200 of 1993

¹³⁰ See note 128

¹³¹ Open Democracy Bill, B 67-98, (hereinafter ODB)

¹³² Camerer, Whistleblowing: an effective anti-corruption tool? In *Nedbank ISS Crime Index, Vol 3 1999, No 3 May-June*, at 1 (hereinafter Camerer *Nedbank*).

¹³³ Dimba et al at 146

¹³⁴ Note: not just 'employees'

¹³⁵ Camerer at 3

¹³⁶ ODB ss 63-66

¹³⁷ ODB s 85

¹³⁸ ODB s 63(1)(a)

¹³⁹ ODB s 63(3)(b)

against which protection would be offered¹⁴⁰ and a whistleblower could also face criminal action if he/she failed to meet certain conditions.¹⁴¹

2.3.3 Public Submissions on the ODB

Public submissions on the Bill overwhelmingly asked for the scope of the Bill to be extended to the private sector.¹⁴² Camerer and The Institute for Security Studies urged that ‘the whistleblower protection section should be removed from the legislation dealing with freedom of information and be made separate legislation’, arguing that this would make ‘whistleblower protection ... more visible’.¹⁴³ Various submissions also wanted more detail and actual mechanisms to be specified; suggested the list of possible channels for disclosure be amended (some wanted more, some less); were concerned about confidentiality provisions; proposed greater tests for a wider public disclosure; suggested definitions of key terms and were concerned about the possible criminal liability that could arise.

2.3.4 Other influences on the ODB

Greater impetus was given to the development of the protected disclosures legislation when Advocate Johnny de Lange, Chairperson of the Portfolio Committee on Justice and Constitutional Development, (the Parliamentary Committee tasked with driving this legislation) met Guy Dehn in October 1999.¹⁴⁴ Guy was the Executive Director of Public Concern at Work, a London-based NGO¹⁴⁵ which was beginning to have global influence and which had been closely involved in the development of the UK Public Interest Disclosures Act¹⁴⁶ a few years previously. This contact impressed de Lange, as in May 2000 the Committee reported that it would draft separate legislation regarding protected disclosures,¹⁴⁷ which would widen its scope to include the private sector and be based on the UK Act.¹⁴⁸ In a parallel process, Richard Calland¹⁴⁹ and Lala Camerer¹⁵⁰ drafted a whistleblower protection

¹⁴⁰ ODB s 65(1)(a)–(c)

¹⁴¹ ODB s 85(b)

¹⁴² *Summary of Submissions on the Open Democracy Bill [B67-98] Prepared by Department of Justice* (www.pmg.org.za), (hereinafter *Summary of Submissions*) and COSATU’s *Supplementary Submission on the Open Democracy Bill, presented to the Portfolio Committee on Justice and Constitutional Development, 30 November 1999* (hereinafter *COSATU Submission*)

¹⁴³ See note 133

¹⁴⁴ Dimla et al at 147

¹⁴⁵ Public Concern at Work (PCAW), is a UK ‘whistleblowing’ charity established in 1993, primarily to promote ethical standards

¹⁴⁶ UK Public Interest Disclosures Act 1998, (hereinafter PIDA)

¹⁴⁷ Resolution of Protected Disclosures Bill from ATC of 12/05/00 (hereinafter *ATC Resolution*), from (www.pmg.org.za), at 1

¹⁴⁸ *ATC Resolution* at 2

¹⁴⁹ From the Institute for Democracy in South Africa (IDASA)

bill in a response to an invitation from the ANC group in the Portfolio Committee.¹⁵¹ This first draft, leaning largely on the UK Act but adapting it to South African conditions, formed the basis for the Portfolio Committee's second draft, the 'Protected Disclosures Bill', which was then made available for public scrutiny. The National Council of Provinces' Committee played a role here too, as it tightened up the role of the labour courts regarding disclosures (PDA, s 4).¹⁵²

2.3.5 ODB shortcomings

Interestingly, the Committee was already acknowledging possible shortcomings of their draft Bill; for example, that the Bill was limited to the relationship between employer and employee.¹⁵³ Drawing heavily on a submission by Calland,¹⁵⁴ the Committee recognised that the Bill would not assist insurance-seekers, pensioners and private contractors amongst others, but concluded that any extensions would require defining the different types of victimisation that could occur outside the employment relationship and that existing remedies might be inadequate for such extension.¹⁵⁵ The Committee argued that to extend the Bill further would need 'comprehensive and comparative research and that most foreign jurisdictions tend to limit legislation of this nature to the relationship between employer and employee'.¹⁵⁶ Secondly and for the same reasons the Committee accepted that the Bill limited protected disclosures to only those made about an employer (or fellow employee in the final instance) and thirdly the Committee decided not to exclude civil or criminal liability as provided in terms of s 63(1) of the ODB. They felt this inadvisable because the protection is 'confined to the relationship between employer and employee';¹⁵⁷ to avoid denying any third party their 'constitutional right to the adjudication of a justiciable dispute';¹⁵⁸ and the public interest would not be served if employees were able to use such immunity to conceal their own wrongdoing.¹⁵⁹ The Portfolio Committee further debated the 'creation of a new course of action' for victimised whistleblowers, including punitive damages or a claim for compensation or other relief, but believed this aspect should be 'approached with caution' and the possible creation of a dual system avoided.¹⁶⁰ Lastly the Committee discussed retaining the

¹⁵⁰ Of the Institute for Security Studies (ISS)

¹⁵¹ Dimla et al at 147

¹⁵² Camerer at 3

¹⁵³ See note 147

¹⁵⁴ See note 151

¹⁵⁵ *ATC Resolution* at 2

¹⁵⁶ *Ibid*

¹⁵⁷ *ATC Resolution* at 3

¹⁵⁸ *ATC Resolution* at 4

¹⁵⁹ *Ibid*

¹⁶⁰ *ATC Resolution* at 4-5

concept of criminal liability as per s 85(b) of the ODB. But they noted that, while it might be appropriate, other countries differed in this regard, such a clause might impact on existing employment law and practices and overall this aspect in particular needed more and careful research 'taking into account the government's 1995 decision to decriminalise labour legislation'.¹⁶¹ I find it strange that the Portfolio Committee seemed to rush the Bill through without any need for haste, now that the whistleblowing aspects had been divorced from the access to information thrust,¹⁶² and to be content to close their report off with the opinion that 'the South African Law Commission would be best suited to undertake research in all the matters referred to above',¹⁶³ and to request the Minister to consider such a referral. The minister did so several years later, and the process, although not yet complete, is underway and will be discussed in Section 6.

2.3.6 The Structure and Content of the Protected Disclosures Act

The final Protected Disclosures Act came into effect on 16 February 2001. The overall purpose of the Act is threefold: to provide procedures for disclosures of wrongful workplace conduct, to provide for protection of those employees who make such disclosures, and to provide for related matters, including remedies.¹⁶⁴ The Preamble of the Act sets the scene, quoting as a basis the Constitution; the detrimental effect of criminal or irregular conduct on South Africa's good governance, economic stability and social wellbeing; the lack of any existing mechanisms or legal protections for disclosures;¹⁶⁵ the respective duties of employees to disclose and employers to protect; and its overall aim to create an appropriate culture by providing comprehensive statutory guidelines and to promote the eradication of wrongful conduct in both the public and private sectors.¹⁶⁶

Section 1 provides a comprehensive list of definitions, and it is useful to examine two definitions in particular. A 'disclosure' in terms of this Act will 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;

¹⁶¹ *ATC Resolution* at 5

¹⁶² There was indeed a statutory imperative for this aspect: (Constitution ss 21 & 32(2)) - the Access to Information Act 2 of 2000 came into effect on 9 March 2001

¹⁶³ *ATC Resolution* at 5-6

¹⁶⁴ PDA Purpose

¹⁶⁵ Not necessarily true in the light of the other pre-existing statutes briefly discussed above; this view supported by Rabkin-Naicker at 141-2

¹⁶⁶ PDA Preamble

- (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 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;¹⁶⁷

The conduct defined in (a) to (g) above also provides the definition of 'impropriety',¹⁶⁸ and importantly does not have to occur within the borders of South Africa.¹⁶⁹ Employee' is defined in precisely the same terms as those used in both the LRA and BCEA (before the 2002 amendments) and also clearly excludes the 'independent contractor'.¹⁷⁰ Unusually, 'employer' is also defined,¹⁷¹ unlike in the LRA and BCEA.

An 'occupational detriment' (also broadly defined as 'victimization'¹⁷²) is very thoroughly defined as follows:

- (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 threatened with any of the actions referred to paragraphs (a) to (g) above; or
- (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;¹⁷³

This definition of occupational detriment is far broader¹⁷⁴ than that given in the LRA;¹⁷⁵ and it is therefore surprising that the drafters of the 2002 LRA amendments

¹⁶⁷ PDA s1(i)(a)–(g)

¹⁶⁸ PDA s 1(iv)

¹⁶⁹ PDA s 1(iv)(a)

¹⁷⁰ PDA s 1(ii)

¹⁷¹ PDA s 1(iii)

¹⁷² Adolf Landman, A Charter for Whistle Blowers – A Note on the Protected Disclosures Act 26 of 2000 (2001) 22 *ILJ* 37 at 42, (hereinafter Landman)

¹⁷³ PDA s 1(vi)(a)–(i)

¹⁷⁴ Rabkin-Naicker at 144

¹⁷⁵ LRA s 186

did not borrow from the PDA to flesh out this section. There is also a possible problem related to subsection (f) above, as, in terms of the BCEA, an employer is not obliged to provide a 'reference' on termination at all, but merely a 'Certificate of Service'.¹⁷⁶ This certificate is more a record of facts related to the period of employment and thus neither favourable nor adverse;¹⁷⁷ but perhaps the exact terminology is immaterial and one should abide by the spirit of the law.

Section 2 confirms the threefold purpose of the Act and expands on it:

2. (1) The objects of this Act are—

- (a) to protect an *employee*, 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* can, in a responsible manner, disclose information regarding *improprieties* by his or her *employer*,¹⁷⁸

Note that s 2(1)(c) above limits what was stated as the overall purpose of the Act, viz: that 'employees in both the private and the public sector may disclose information regarding unlawful or irregular conduct by their employers *or other employees* in the employ of their employers' (emphasis added). I am sure that the omission to mention again that the irregular conduct that may be disclosed and which may qualify for protection could be conduct *either* of an employer *or* fellow-employee was unintentional and perhaps indicative of the haste with which this Act was finalised and which has given rise to the current dissatisfaction. That the overall purpose should take pre-eminence is further supported by the fact that the definition of disclosure in s 1(i) also mentions the possibility that it could be a fellow-employee who is guilty of the alleged misconduct giving rise to the disclosure.

Section 2 provides a framework for the Act's operation, indicating from which date and regarding which improprieties it will have effect¹⁷⁹ and establishing the supremacy of this legislation with regard to contracts of employment.¹⁸⁰ Section 3 provides protection against occupational detriment for the employee making the protected disclosure and section 4 details all legal procedures and recourse which

¹⁷⁶ BCEA s 4(2) & Form BCEA5

¹⁷⁷ See note 172

¹⁷⁸ PDA s 2(1)(a)-(c)

¹⁷⁹ PDA s 2(2)

¹⁸⁰ PDA s 2(3)

may flow from such disclosures,¹⁸¹ linking this to the LRA provisions. What one could call the 'ultimate' occupational detriment, dismissal, will be considered automatically unfair and attract the remedies set out in the LRA,¹⁸² whilst any other form of occupational detriment is deemed to be an unfair labour practice,¹⁸³ with the associated consequences. 'Compensation' is thus limited to the maximum allowed by the LRA for an automatically unfair dismissal (i.e. 24 months remuneration);¹⁸⁴ and this has also given rise to dissatisfaction and swelled the growing movement to amend the Act. Section 4 concludes with encouraging a reasonable, practicable transfer if desired by the 'discloser'¹⁸⁵ and that such transfer must be on equally favourable conditions.¹⁸⁶

Sections 5 to 9 document the five broad categories of persons or bodies that are legitimate recipients of protected disclosures. These are, in order: a legal advisor, an employer, a Cabinet member or member of an Executive Council, other specified organs of state and finally a general disclosure. The five channels impose escalating conditions to be met to merit protection.¹⁸⁷ The disclosure to a legal advisor is much less onerous than the others in that it sets no basic criteria for the disclosure, merely that it should be made for the purpose of acquiring legal advice.¹⁸⁸ The disclosures made either to an employer (or person/body authorised by the employer) or to a very senior government official both require only 'good faith', sadly not defined; in these sections a whistleblower is taking the matter to the person who is responsible overall for the company/organ of state.¹⁸⁹ 'At the heart of the Act is the notion that prevention is better than cure. It strongly encourages whistle-blowers to disclose first of all to their employer, in order that the employer should have the opportunity to remedy the wrongdoing.'¹⁹⁰

From Section 8 onwards the conditions under which a disclosure receives protection become more stringent. To report a suspected impropriety to the Public Protector

¹⁸¹ PDA at 8 (Thanks to the NCOP - see note 152)

¹⁸² PDA s 4(2)(a)

¹⁸³ PDA s 4(2)(b)

¹⁸⁴ LRA s 194(3)

¹⁸⁵ PDA s 4(3)

¹⁸⁶ PDA s 4(4)

¹⁸⁷ The SALRC Discussion Paper No 107, 'Protected Disclosures', June 2004, (hereinafter SALRC 107), at 7, speaks of a three-stage approach: first employer/supervisor, then other prescribed body and finally media or parliament

¹⁸⁸ PDA s 5

¹⁸⁹ PDA ss 6 & 7

¹⁹⁰ Camerer at 4, quoting Richard Calland, then Executive Director of the Open Democracy Advice Centre (ODAC), an NGO dedicated to promoting democracy through access to information and protected disclosures

(PP), the Auditor-General (AG), or other persons as yet not stipulated,¹⁹¹ one must have, in addition to 'good faith' a 'reasonable belief' that firstly, such impropriety falls within the ambit of that state organ and secondly that the information is substantially true.¹⁹² This is clearly to try to minimise frivolous disclosures which could damage reputations as well as waste time. Section 8 also allows the body receiving the disclosure, i.e. the PP or AG, to in turn refer the matter to another body that may be more appropriate.¹⁹³

Section 9, dealing with a much wider 'general' protected disclosure, hedges this disclosure with many conditions, for obvious reasons. In addition to the 'good faith' condition, the employee making the disclosure must 'reasonably believe' that the information is 'substantially true';¹⁹⁴ and must not be making the disclosure for purposes of personal gain (excluding a reward payable in terms of any law).¹⁹⁵ The whistleblower must further ensure that at least one of four conditions exists;¹⁹⁶ and lastly must believe that it is reasonable to make the disclosure taking into account seven factors.¹⁹⁷ A disclosure is protected if at least one of the four possible conditions applies: the employee is likely to suffer occupational detriment if he/she makes the disclosure to the employer; evidence may be concealed or destroyed; a previous disclosure was made to the employer (or person authorised by the employer) and no action ensued; and the impropriety is 'exceptionally serious'¹⁹⁸ (also rather vague and broad). The seven factors an employee must consider when determining whether his/her proposed disclosure is 'reasonable' (not defined) are:

- (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 complied with any procedure which was authorised by the employee and

¹⁹¹ PDA s 8(1)(a)-(c)

¹⁹² PDA s 8(1)

¹⁹³ PDA s 8(2)

¹⁹⁴ PDA s 9(1)(a)

¹⁹⁵ PDA s 9(1)(b), although I find this problematic and debatable: a reward could surely move from being a reward and move into the realms of 'personal gain'? See also Section 6

¹⁹⁶ PDA s 9(b)(i)

¹⁹⁷ PDA s 9(b)(ii)

¹⁹⁸ PDA s 9(2)(a)-(d)

(g) the public interest.¹⁹⁹

Section 9 ends with guidelines on how previous/subsequent disclosures should be categorised.²⁰⁰

Section 10 contains the Regulations concerning later matters that may be prescribed by the Minister,²⁰¹ their approval and publication²⁰² and the onus on the Minister to also issue 'practical guidelines' to guide the interpretation and implementation of this Act which must be approved by Parliament and gazetted,²⁰³ and which has not been done as yet.²⁰⁴ Interestingly, section 10 ends by placing an onus on 'organs of state' to ensure that all their employees know the guidelines but does not place a similar onus on private bodies.²⁰⁵ This could merely be an oversight on the part of the drafters but could also be an attempt by the legislators to focus on the governmental accountability which gave rise to the Open Democracy Bill in the first place. In my view, this is a serious omission.

2.3.7 Comparison of PDA with ODB and with submissions

The first difference is that, instead of being a small section of a Bill mostly concerned with information held by government departments, protected disclosures now merit a stand-alone Act. The second and most important difference between the two, and an overriding concern of those who made submissions,²⁰⁶ is that the Act now applies to both the public and the private sectors, (although not the voluntary sector, as proposed by COSATU²⁰⁷). The ODB listed only four grounds for impropriety;²⁰⁸ – the PDA has fleshed these out to a comprehensive eight which are also more specific in nature and show the influence of the equality legislation.²⁰⁹

Originally the ODB only allowed three channels for disclosure: specific named bodies, the media, and any other authorised person.²¹⁰ The PDA has both expanded and contracted this list: important inclusions are those of a legal advisor and the

¹⁹⁹ PDA s 9(3)(a)–(g). Sadly, 'public interest' is also not defined and is open to interpretation.

²⁰⁰ PDA s 9(4)

²⁰¹ PDA ss 10(1)&(2)

²⁰² PDA s 10(3)

²⁰³ PDA ss 10(4)(a)&(b)

²⁰⁴ SALRC 107, at 57: Draft Guidelines have been produced but the consultation process is incomplete, a cause for concern so long after the enactment of the PDA

²⁰⁵ PDA s 10(4)(c)

²⁰⁶ See note 142

²⁰⁷ Ibid

²⁰⁸ ODB s 63(2)(a)–(d)

²⁰⁹ PDA s1(i)(a)–(g)

²¹⁰ ODB s 63(3)(a)–(c)

employer; the government committees previously mentioned now form a stand-alone group of senior government officials; the list of specific bodies has narrowed to only the PP and AG, i.e. losing the SAHRC and the Attorney-General;²¹¹ and the media disclosure is now broadened to a 'general' disclosure, albeit with many more tests and conditions.²¹² The whistleblower does, however, lose the burden of proof.²¹³ Interestingly, the original presumption that if an employee suffered an occupational detriment within 2 years of making a protected disclosure such occupational detriment would be deemed to be a result of that disclosure²¹⁴ has no equivalent in the PDA and is only covered by the broad prohibition.²¹⁵ This leaves the timeframe totally open and it remains to be seen whether and to what extent the courts will accept a putative connection between a protected disclosure and an occupational detriment several years later.

Importantly, the clause that concerned many in their submissions regarding the possibility of criminal liability²¹⁶ has been deleted.²¹⁷ The list of what constitutes occupational detriment has two new items: disciplinary action and being given either an adverse reference or refused a reference at all.²¹⁸ The section dealing with recourse to the courts has been expanded and closely follows the processes laid down in the LRA.²¹⁹ The new Preamble situates this legislation very clearly in South Africa's stage of democratic and economic development and overall the new PDA is much more-employment oriented, more detailed and applies more stringent tests in some cases.

However, there were some issues raised in the various public submissions²²⁰ that were not dealt with in the finalisation of the PDA and these are still giving rise to concern. The need to protect and ensure confidentiality is not addressed in the PDA. Not much more was provided by way of detailed mechanisms and practical guidelines;²²¹ some suggested recipients (such as the Public Service Commission, the Director of Public Prosecutions, the Special Investigating Unit, the Inspector-General of the Intelligence Services) were not included in the prescribed list although

²¹¹ Although I am sure the additional names that were to be prescribed by the Minister would have included such organs of state - see note 191

²¹² PDA ss 5-9

²¹³ ODB s 63(3)(b)

²¹⁴ ODB s 65(2)

²¹⁵ PDA s 3

²¹⁶ ODB s 85(b)

²¹⁷ More on this aspect in Section 6

²¹⁸ PDA 1(vi)(a) & (f). See also notes 172 & 176

²¹⁹ PDA s 4

²²⁰ See note 142

²²¹ Although according to the PDA these were to have followed via the Minister, see note 203

more names were to have followed later.²²² The current clause in the PDA allowing an employer to establish a preferred person or body for disclosure²²³ could however allow the employer, if appropriate, to designate such a body. Unions are not listed as such, although they could fall under the heading of persons giving legal advice if that aspect is complied with.²²⁴ Concerns regarding the damage that could be wrought by unfounded allegations could be aggravated by the removal of criminal liability²²⁵ – although the more stringent tests around general protected disclosure should afford some protection in this area.²²⁶ This may also be balanced by the exclusion of the indemnity of liability in respect of protected disclosures²²⁷ - whistleblowers do now *not* receive immunity for civil or criminal liability incurred relative to their disclosures,²²⁸ but at the same time this could act as a serious deterrent. ‘Public interest’ was not defined as suggested and neither was clarity given regarding a ‘secondary’ whistleblower or the supplier of the information. Suggestions regarding detailed mechanisms to ensure the wellbeing and security of the whistleblower, as well as giving him/her the freedom to cease blowing the whistle, were also not incorporated.

Overall, however, the PDA is a vast improvement on Part 5 of the ODB, expanded on most of the definitions, did incorporate most of the common submission points and also drew on foreign examples, particularly the UK Act (more about which in Section 5). It remains to be seen, both through caselaw and also by studying the current SALRC initiative, whether some of the submission points *not* incorporated and the shortcomings admitted to in the Portfolio Committee’s report²²⁹ have led to the Act being less effective in its purpose or even failing to achieve its stated objectives.

²²² See note 191

²²³ PDA s 6(2)

²²⁴ PDA s 5

²²⁵ ODB s 85(b)

²²⁶ PDA s 9

²²⁷ ODB s 63(1)

²²⁸ PDA s 1(ix)(e)(i)

²²⁹ See note 147

3. Whistleblowing – Caselaw

I studied three reported and one unreported case relating to the application of the PDA, which give an idea of how the courts are interpreting the PDA and on what basis they are deciding the matters before them.

3.1 *Rand Water Staff Association on behalf of Snyman v Rand Water*²³⁰

(Date of judgment: 14 April 2001)

Although the PDA was not applicable to this case, as the disclosures in question had been made prior to its enactment, because Rand Water had a confidential ‘hotline’ to achieve substantially the objectives of the PDA, the arbitrator considered it appropriate to apply the same rationale as in the PDA.

An employee of Rand Water suspected irregularities concerning the provision of housing and related benefits to certain managers and she reported her concerns using the confidential, anonymous hotline set up for this purpose. An investigation was carried out by Rand Water’s forensic unit and no foundation was found for her allegations. The whistleblower was not satisfied with this outcome, however, and urged that a more thorough investigation be undertaken, including a physical inspection of the relevant houses. This was subsequently done, much to the annoyance of the managers living there, who alleged invasion of their privacy and instituted grievance procedures. In the aftermath of all this, the whistleblower’s identity was revealed. She was subject to disciplinary action, mostly on the grounds of ‘deliberately giving untrue and misleading information’.²³¹ She was found guilty of the charges, dismissed, appealed unsuccessfully and then referred a dispute around unfair dismissal to private arbitration.

In assessing the matter, the arbitrator, Hutchinson, referred several times to sections of the PDA,²³² applying the principles he deemed relevant. Hutchinson first attempted to determine whether the disclosure was bona fide. While acknowledging the fact that the employee had only relied on hearsay evidence,²³³ and that she quite possibly had

²³⁰ *Rand Water Staff Association on behalf of Snyman v Rand Water* (2001) 22 ILJ 1461 (ARB), (hereinafter *Snyman v Rand Water*)

²³¹ *Snyman v Rand Water* at 1464B

²³² *Snyman v Rand Water* at 1465D-H

²³³ At 1466B

her own agenda, not qualifying for the same perks as other managers,²³⁴ the arbitrator could find no evidence to support Rand Water's charge that she had knowingly or intentionally provided false information.²³⁵ She had 'bona fide believed in the veracity of the information',²³⁶ at worst she was 'misguided', or 'guilty of negligence' in relying on hearsay evidence and in persisting with her allegations after the initial investigation.²³⁷ The arbitrator therefore found that a written or a final written warning would have sufficed; the dismissal was not appropriate or reasonable and therefore unfair, but left the parties to address the issue of compensation.

Like the PDA, the Rand Water hotline required firstly a bona fide belief in the information being disclosed and secondly provided no immunity against intentionally disclosing false or malicious information,²³⁸ and it was therefore on these two points that the arbitrator focussed. As discussed in Section 1 above, motives of whistleblowers are often mixed, and there is already an indication that identifying a bona fide motive will challenge the courts.

3.2 *Grieve v Denel (Pty) Ltd*²³⁹

(Date of judgment: 30 January 2003)

In this well-publicised and 'historic test case',²⁴⁰ the PDA was applied for the first time in the Labour Court. Keith Grieve, a fairly senior manager at a division of Denel, acted as spokesperson for a group of employees who were concerned about possible wrongdoing and poor management on the part of a general manager and those closest to him. The admitted aim of this group of disaffected employees was to 'have the general manager removed'²⁴¹ and, after collecting sufficient evidence of wrongdoing, which included unauthorised expenditure, nepotism and financial wrongdoing,²⁴² Grieve disclosed this information to his immediate supervisor, who requested that Grieve prepare a report to the Board on the issues. Grieve did so, but during this time he was jointly involved in a work investigation with the said general manager, who had clearly heard something of what was pending, as he questioned Grieve about the allegations. Grieve duly submitted his report to the Board, but one

²³⁴ At 1465I-J

²³⁵ At 1466C-D

²³⁶ At 1462H

²³⁷ See note 235

²³⁸ At 1465H

²³⁹ *Grieve v Denel (Pty) Ltd (2003) 24 ILJ 551 (LC.)* (hereinafter *Grieve v Denel*)

²⁴⁰ Casper van Dyk, 'Whistleblower' gets protection, media article on www.news24.com, 31/01/2003

²⁴¹ *Grieve v Denel* at 551G

²⁴² At 551G-H

day later Grieve was suspended, pending a disciplinary enquiry into his own misconduct, allegedly his accessing pornographic websites and sending related emails, racism, breaching confidentiality, conspiracy, incitement and unauthorised access to others' emails.²⁴³ Later, whilst preparing his defence, Grieve and his attorney apparently 'identified' the PDA,²⁴⁴ which seemed to give them grounds for seeking an urgent interdict at the Labour Court, giving rise to this judgment.

The court took pains to go through each aspect of the PDA, setting very clear precedents for later cases. Firstly the court looked at whether or not it had jurisdiction to grant an interim interdict,²⁴⁵ and after finding in the affirmative Pillemer AJ found also that the criteria for the granting of such an interdict had been met.²⁴⁶ Despite clearly mixed motives, Grieve persuaded the court that that the content of the disclosures fell within the definition of impropriety - breach of legal obligations and possible criminal conduct²⁴⁷ and that his disclosures were prima facie bona fide.²⁴⁸ 'Although the disclosures are made in the process of what appears to be a campaign by employees to resolve difficulties they have with the management style of the general manager ... this in itself does not seem to me to be sufficient reason to find that the disclosures have not been made bona fide.'²⁴⁹

Further, Grieve had established a link between the disclosures and the subsequent charges against him: although the charges did not specifically mention the disclosures, they showed knowledge of the content of his disclosures, the manner in which he had obtained them and how he planned to use them.²⁵⁰ In particular the timing of the charges in relation to his disclosures gave a strong indication of the nexus.²⁵¹ The pending disciplinary hearing could be construed as disciplinary action in terms of section 1(vi)(a)²⁵² and in the view of the court no other option was open to the applicant.²⁵³

Important aspects of the case are firstly that the first real application of the PDA comes almost 2 years after its promulgation – the new statute clearly was not, and I

²⁴³ *Grieve v Denel* at 560E to 561E

²⁴⁴ At 554G-H

²⁴⁵ At 558B-D and relating to PDA s 4(1)(a)

²⁴⁶ At 558G-I

²⁴⁷ At 559B to 560A, applying PDA ss 1(i)(a)&(b) and (iv)

²⁴⁸ At 560A-D, applying PDA s 6(1)

²⁴⁹ At 560A-C

²⁵⁰ At 562C

²⁵¹ At 563B-D, applying PDA s 3

²⁵² At 563F-G

²⁵³ At 563F-H, applying PDA s 4(1)(a)

believe still is not, well-known. Secondly, no mention was made by Pillemer AJ at any stage regarding the *procedure* that Grieve had followed in making his disclosure – interesting particularly in the light of later judgments where procedural compliance has played a major role in the court’s analysis. Thirdly, the court made it clear that its granting of the interim interdict was conditional upon Grieve following through with an unfair labour dispute in terms of the PDA. Fourthly, already a certain amount of subjectivity and lack of clarity regarding the applicant’s motives was acknowledged – Grieve, with no prior awareness of the PDA before he blew the whistle, started off motivated by self-interest. The aim in collecting evidence was not so much to do the right thing but to get rid of an unpopular manager. It was fortuitous that in fact the information they dug up met the definition of impropriety as per the PDA. And fifthly, one already gets a sense of the power of the employer as referred to in Section 1 – the charges against Grieve seemed genuine and were sufficiently removed from the disclosures to make an obvious link difficult. Were it not for the suspicious timing the employer might have succeeded in cloaking the charges and completely weakening the connection to avoid allegations of occupational detriment arising from Grieve’s disclosures. The courts will often have to decide whether a whistleblowing employee has really been ‘singled out’ and ‘victimised’ on account of his disclosures,²⁵⁴ or was he really guilty of unrelated misconduct? And of course, also as discussed in Section 1 above, any reasonably intelligent and resourceful employee will try to allege that the charges are really only trumped up or exaggerated as a defence to charges against him.

It is interesting to note what transpired after this case. After the interim interdict, Grieve referred the dispute to the relevant bargaining council, where it was conciliated and he was reinstated. However, before long Grieve was victimised again, suspended and a disciplinary hearing conducted on charges apparently unrelated to his disclosures. He was found guilty of insolence and the trust relationship was found to have broken down. He was dismissed, and again referred a dispute regarding his alleged unfair dismissal to the bargaining council.²⁵⁵ As at April 2004 there had been no settlement at conciliation, and Grieve had reportedly referred the matter to arbitration. These later events give the lie to an earlier media article: ‘the “whistleblowing” legislation does protect employees in situations where, on the

²⁵⁴ *Grieve v Denel* at 562-3J

²⁵⁵ Whistleblowing Case Studies on CD supplied with Calland et al, (hereinafter Calland et al *Case Studies*)

face of it, they are exposed to victimisation for disclosing information which is embarrassing or awkward to the employer.²⁵⁶

3.3 CWU & another v Mobile Telephone Networks (Pty) Ltd²⁵⁷

(Date of judgment: 26 May 2003)

A supervisor working at MTN began to suspect that one temporary employment agency was being favoured above others, and he raised this in a management meeting. He later sent an email on the topic to a number of employees and managers, including the CEO. Having received no response to his email, he sent a second a few days later. Soon after the second email, the supervisor was suspended and a disciplinary enquiry was scheduled. He was charged with, inter alia, insinuating that MTN managers were corrupt, using abusive and insulting language, making unfounded allegations, bringing the company into disrepute, gross insubordination and abuse of company communication tools.²⁵⁸ At this point the supervisor sought an interdict against MTN and a rule nisi was granted.

The case in question arises on the return date, when the court had to establish primarily whether the applicant's communications i.e. his emails, constituted a protected disclosure in terms of the PDA, thereby meriting protection.²⁵⁹ The court went to some pains to set out the criteria necessary for protection under the PDA.²⁶⁰ The whistleblower must be an employee²⁶¹ and he must have reason to believe that the information to be disclosed fits the definition of impropriety.²⁶² The disclosure must be made in good faith,²⁶³ and it must be made substantially in compliance with any prescribed procedure.²⁶⁴ Lastly, the court, assuming that without occupational detriment no case would come before it, held that there must be 'some demonstrable nexus' between that occupational detriment and the disclosure.²⁶⁵

Having established the criteria necessary for a disclosure to be protected, Van Niekerk AJ noted that protection can only be applied to 'information' as opposed to

²⁵⁶ From VNH News, March 2003 at www.vnh.co.za

²⁵⁷ *CWU & another v Mobile Telephone Networks (Pty) Ltd (2003) 8 BLLR 741 (LC)*, (hereinafter *CWU*)

²⁵⁸ *CWU* at 743G to 744C

²⁵⁹ At 744C-D

²⁶⁰ At 746C-H

²⁶¹ Applying PDA s1(i) & (ii)

²⁶² Applying PDA ss1(i)(a)-(g) & (iv)

²⁶³ Applying PDA ss6(1), 7, 8(1) and 9(1)

²⁶⁴ Applying PDA ss 6-9

²⁶⁵ *CWU* at 746G, applying PDA ss 2(1)(a) and 3

mere rumour or conjecture.²⁶⁶ The court did not hold that actual proof is required before the whistle can be blown but good faith is non-negotiable.²⁶⁷ On analysis of the applicant's email disclosures, the court reached the conclusion that these were only expressions of a subjective opinion and not disclosures of information - there was no factual basis to support them.²⁶⁸ The court held further that the PDA promotes private rather than public disclosures and interpreted the applicant's disclosures at a meeting and via widely circulated emails as falling more under the wider, more general disclosure envisaged by the PDA section 9.²⁶⁹ For wider disclosures a more stringent criterion has to be met, that is of '... reasonable belief that any allegation is substantially true ...'.²⁷⁰ By failing to show evidence of this reasonable belief whilst making his wider disclosure and also by quite clearly failing to comply with MTN's established whistleblowing procedures, including a confidential hotline, the applicant '... removed himself from the ambit of the protection granted by the PDA.'²⁷¹

This judgment, whilst following that of Grieve, established further guidelines in its approach. The court focussed on two main issues: first, was the disclosure 'information' in terms of the PDA, and second, had the whistleblower followed any established procedure? Another interesting part of the judgment is van Niekerk AJ's discussion of the balancing of possibly conflicting rights: 'The PDA seeks to balance an employee's right to free speech, on a principled basis, with the interests of the employer',²⁷² which include the rights to dignity and reputation.²⁷³ Lastly, the court does reserve judgment to an extent, holding that the conclusions reached only apply to the merits of the applicant with regard to the interim interdict, and that it is possible that a different conclusion might be reached during evidence and cross examination during unfair labour practice proceedings.²⁷⁴

²⁶⁶ At 747A-E, interpreting 'reason to believe' s 1(i)

²⁶⁷ Ibid

²⁶⁸ At 747D-H

²⁶⁹ At 747I to 748A

²⁷⁰ At 748D-F

²⁷¹ Ibid

²⁷² CWU at 748A-B

²⁷³ Ibid

²⁷⁴ CWU at 748G-H

3.4 *Pienaar v BNK Landbou (Pty) Ltd*²⁷⁵

(Date of judgment: 12 January 2004)

The approach taken by the court in this case is very similar to that of *CWU*. The relationship between Pienaar, the company secretary for BNK Landbou, and senior management had seriously deteriorated and management expressed concerns regarding the adequacy of his performance to the extent that the MD had apparently offered him five months' salary to resign – which offer he had rejected.²⁷⁶ Matters seemed to reach a head in August 2003 when Pienaar's failure to perform satisfactorily was raised both verbally and then in writing. It was at this point that Pienaar decided to make a written disclosure to the BNK Board, alleging management's failure to comply with legal obligations in respect of income tax, UIF and the LRA and unfair labour practices with regard to himself. The Board undertook to give his allegations due consideration and supposedly carried out an investigation, finding no merit in his disclosures. Pienaar was subsequently suspended and a date set for a disciplinary enquiry into his work performance and capacity. At this stage he brought an urgent application to the Labour Court for an interdict.

Taking cognisance of both *Grieve v Denel* and *CWU*, the court first determined whether there was a prima facie case entitling the applicant to the protection of the PDA.²⁷⁷ Accepting that the information disclosed to the Board was in fact a 'disclosure' in the sense of the PDA, the court wished to probe deeper to ascertain if this was in fact a disclosure meriting protection.²⁷⁸ Van Niekerk held that the disclosure had not been made in good faith: the applicant had been aware of the alleged irregularities for some time and had probably even been involved in some of them. The fact that he was only prompted to disclose the alleged wrongdoing when he himself was faced with imminent disciplinary action led the court to deduce that he had ulterior motives and was acting out of a desire for retaliation.²⁷⁹ Pienaar himself admitted that the letter about his latest showing of poor performance was 'the last straw',²⁸⁰ and thus, in spite of his allegation of victimisation because of the irregularities which he sought to disclose,²⁸¹ the timing just does not support this contention.

²⁷⁵ *Pienaar v BNK Landbou (Pty) Ltd (2004) (LC) (unreported)*, (hereinafter *Pienaar v BNK*), kindly made available by Rod Harper, partner at sonnenberg hoffmann galombik

²⁷⁶ *Pienaar v BNK* at para 4

²⁷⁷ *Pienaar v BNK* at para 11

²⁷⁸ At para 12

²⁷⁹ At paras 13-14

²⁸⁰ *Ibid*

²⁸¹ At para 2

As in *CWU*, the court then turned its attention to the question of procedure, and held that the applicant had not complied with BNK's disclosure procedure, which had been formally adopted even if not previously put into practice.²⁸² The court concluded that the applicant had failed to satisfy the two primary criteria of good faith and procedural compliance and hence his disclosures did not merit protection. The application for the interdict was dismissed.

The most useful aspect of this judgement is the very logical and methodical approach taken by the court in deciding whether the application presented a *prima facie* case meriting an interim interdict. Essentially van Niekerk AJ proceeded according to what could be described as a simple flow chart diagram, as follows. Question 1: Was 'information' disclosed in terms of the PDA? (If response is no, as in *CWU*, the analysis would virtually end here.) If yes, Question 2 ensues: Did this information merit protection in terms of the PDA? This question in turn has 2 components: a) Was the disclosure made in good faith? and b) Was there substantial compliance with any established procedure? If the answer to either a) or b) is in the negative, the disclosure will be held *not* to merit protection.

'I have formed the view that despite the low threshold the Applicant must cross to make out a case for protection, he has not done so because his disclosure was neither *bona fide* nor in accordance with the ... prescribed procedure.'²⁸³

A good example of the 'low threshold' referred to above could be *Grieve v Denel*, where Grieve's motives were not purely altruistic but whose disclosure met the basic criteria applied by the court.²⁸⁴ A very fine line has to be drawn – it can easily be said that Grieve was, in the words of this judgment, trying to 'discredit other members of management'²⁸⁵ and perhaps van Niekerk AJ would have been less sympathetic than Pillemer AJ. The timing of the disclosure is of critical importance and can be taken as an indicator of good faith as well as providing the *reason* (ulterior motive) for the disclosure.²⁸⁶

²⁸² At paras 15-16

²⁸³ *Pienaar v BNK* at para 12

²⁸⁴ See section 3.2 above

²⁸⁵ At para 14

²⁸⁶ *Ibid*

4. Whistleblowing in South Africa today

4.1 Whistleblowing case studies

The CD previously referred to as part of Calland et al²⁸⁷ contains short case studies of whistleblowing in South Africa from the confidential whistleblowing advice helpline run by the Open Democracy Advice Centre (ODAC).²⁸⁸ Some of their cases concern public-spirited community members or aggrieved entrepreneurs/self-employed persons, i.e. persons currently *not* covered by the PDA. It is nonetheless interesting to note that, acting on the advice from ODAC, the whistleblowers acted constructively and, without suffering any personal detriment, were sometimes able to bring about an end to corrupt practices, mostly within government departments, although in one case the pace of the investigation is frustratingly slow.²⁸⁹

Of the five short case studies concerning employees, one was happily resolved with no occupational detriment and hence no need to use the labour tribunals. In this case, a coloured clerical worker noticed that her name and those of two other coloured non-managers appeared on the company letterhead as 'directors'. Being afraid to raise the issue with management, who were presumably doing this deliberately to qualify for government projects, the employee referred the matter to the National Tender Board, where it was satisfactorily resolved.²⁹⁰

A second whistleblower, an accident investigator at a big public transport company, was unable to comply with safety measures due to enforced cost savings. He raised the issue with senior management, who failed to address his concerns. After several near misses, a major accident occurred, involving loss of life, and the investigator was instructed not to mention the poor condition of the vehicle in his report. He took the matter up with his union, which tried unsuccessfully to mediate. The complainant was then given an ultimatum – shut up or resign. He resigned but referred his unfair

²⁸⁷ See note 255

²⁸⁸ See note 190. It seems about half the calls received by the ODAC Helpline are about grievances or labour relations rather than whistleblowing. Whistleblowing queries come from all over South Africa, range from administrative through to professional level, are also predominantly male, and from all races but with a majority of black - Lorraine Stober, Whistleblowing Helpline Advisor, via email on 4 June 2004 and telephonic interview on 16 July 2004.

²⁸⁹ Calland et al *Case studies* at 2 and 4. The need to extend the scope of the PDA will be discussed in greater detail in Section 6.

²⁹⁰ Calland et al at 2

dismissal dispute to a labour tribunal, where the matter was settled and he was reinstated.²⁹¹

A less successful third case study concerns a financial clerk at a school with concerns regarding financial mismanagement, which he reported to the Department of Education and the Provincial Forensic Unit. His life thereafter became very difficult: allegations of his own financial mismanagement were made, he was ostracised and moved to a poky office. No investigations were carried out. At this point he applied successfully for a transfer to another school, but before long he became aware of financial irregularities at this school too. He reported these concerns as before and again suffered occupational detriment: relegated to a cramped work area, plagued by smoke and noise and no longer informed of meetings. Investigations were however carried out at the second school, and a secretary was charged with financial misconduct. Our whistleblower has ended up a very disillusioned man, believing that the Department of Education, while encouraging good financial practices and the reporting of wrongdoing on paper, actually does very little if anything is reported. He also suspects that there is a closed clique of higher officials who will support each other regardless of wrongdoing and seems to have resigned himself to the status quo.²⁹² This case study supports the position put forward in Section 1, where cultural and other impediments to whistleblowing are discussed. It appears this employee has not yet made use of any labour tribunals or unions – perhaps he might have had more success if he'd obtained better support or used different channels?

In a fourth case, a potential whistleblower ended up walking away. A very senior employee in a large private company became aware of and even involved in price fixing with the other major supplier of the same product. Eventually the employee felt that he was no longer prepared to be part of this illegal activity and requested that his job be changed. The MD agreed to this but gradually the employee felt that he was being sidelined and 'worked out of the company'. The employee was torn between blowing the whistle and losing his job completely and finally was able to negotiate a retrenchment package with the firm, but as this came with a gagging order he will not be blowing the whistle at all.²⁹³ This also reinforces that notion, previously submitted, that a whistleblower is at a great disadvantage due to the unequal resources and

²⁹¹ Calland et al *Case Studies* at 3. One does cynically wonder, however, to what extent effective changes have been made regarding safety and to what extent he has made himself unpopular with management, thereby possibly limiting his future career advancement?

²⁹² Ibid

²⁹³ Calland et al *Case Studies* at 4 and in fact contrary to the PDA s 2(3)

power base of the two protagonists and he or she may quite possibly choose self-preservation rather than a long and bitter struggle.²⁹⁴

The fifth and last case study received much publicity and is both ongoing and controversial. This concerns the head of Grootvlei Prison, Setlai, who seemingly helped four prisoners to videotape corrupt warders accepting bribes for the provision of sexual favours, alcohol and drugs.²⁹⁵ This video was then aired on national television – a wider disclosure in the widest possible sense. An investigation ensued and over 20 warders were disciplined. But Setlai was treated like a pariah and was transferred to another prison. He objected to this in terms of the PDA and was reinstated. But a few months later he was suspended, charged with corruption and began waging a costly legal battle in his own defence.²⁹⁶

There are many media articles on this case which gripped the public interest – the summary given above is bald and does not indicate the very real depths of corruption and danger that the whistleblowers had to face in jail, including attempts on their lives allegedly master-minded by implicated warders.²⁹⁷ The publicity surrounding the case also drew attention to the need for widening the scope of protection of whistleblowers: ‘Whistleblowers should be encouraged to expose corruption and complicity by state officials.’²⁹⁸ Despite this, there were unexplained aspects of Setlai’s behaviour, such as allegedly keeping a stolen gun without reporting it, not involving the police in setting the trap for the alleged corrupt warders and possibly even committing a crime whilst setting up the warders.²⁹⁹ Setlai was arrested in January 2003 and charged with corruption and contravening the Correctional Services Act. Predictably, some sources alleged Setlai was set up as revenge for his role in exposing the corruption of others, whilst the investigators claimed that they had many witnesses and that he was getting what he deserved.³⁰⁰ A more recent TV news bulletin indicated that the criminal case against Setlai had collapsed, amidst

²⁹⁴ See Section 1.7 and notes 48, 42, 50

²⁹⁵ I shall not discuss the prisoners as whistleblowers as firstly they are not employees and secondly there seems to have been some self-interest in their actions: a possible reduction of sentences - see Michael Schmidt, Video-sting prisoners say they’ll bite the bullet, *Sunday Times* 23 June 2002. But the head of the prison is indeed an employee who blew the whistle.

²⁹⁶ Calland et al *Case Studies* at 2

²⁹⁷ *Grootvlei prisoners stop their transfer*, media article at www.iol.co.za, 21 June 2002

²⁹⁸ Bonile Ngqiyaza, Scorpions must probe Grootvlei, *Business Day* 21 June 2002, quoting the chairman of the Law Society’s Committee on Human Rights, urging protection for the prison whistleblowers

²⁹⁹ Jovial Rantao, The hero of Grootvlei prison could soon become the villain, *Sunday Independent* 22 June 2002

³⁰⁰ ‘Police: we have had our eye on Setlai for a while’ and ‘Setlai likely to be suspended after arrest,’ Media articles on www.sabcnews.co.za, 15 and 16 January 2003

allegations that witnesses had made false statements.³⁰¹ This case shows how complex whistleblowing is, how mixed motives can be and the challenge of really establishing guilt with any degree of certainty.

4.2 Responses to a media article

Rod Harper³⁰² had a short article on whistleblowing published,³⁰³ and subsequently received about a dozen calls from whistleblowers. Rod shared some information with me,³⁰⁴ giving further insight into whistleblowing in the South African workplace today. The reason for their calls was either to raise their concerns about the way they had been treated after blowing the whistle or to clarify their rights in terms of the PDA. All the callers were from the private sector, all had blown the whistle internally and most were white males at managerial level. Some companies had whistleblowing procedures in place but these procedures were either not well-known or not correctly followed. At least half the callers had suffered occupational detriment as a result of their disclosures; some had been dismissed. One case of suspected fraud was later referred to the criminal court, but on the whole all said they had serious concerns about the protection supposedly offered by the PDA, having found it ineffective. The only caller who was happy to give his name and contact details, as his case had already been featured in the media, was John Carr, with whom I subsequently had several telephone interviews.³⁰⁵

John's case, whilst still unresolved and controversial, gives substance to the 'textbook' descriptions of employer power and types of occupational detriment discussed in Section 1.7. John, a Director of the Department of Mineral Affairs and Energy (DME) in the Eastern Cape, refused to sign off an Environmental Management Plan after changes had been made. Construction of a reservoir as part of the Coega development seemingly went ahead irregularly without this approval or compliance with the relevant regulations. After trying to report the irregularities to various very senior government officials with no action being taken, John made his disclosure more widely, i.e. to regulatory bodies and to the media. At this point he alleges a 'witch-hunt' ensued, he was suspended, and although the suspension notice mentioned Coega, at the actual disciplinary hearing he was charged with

³⁰¹ SABC 3 News, at 19:15 on 28 July 2004

³⁰² See note 275

³⁰³ Rod Harper, Whistleblowers need backing from employers, in *The Sunday Times Business Section*, 9 May 2004

³⁰⁴ Interview with Rod on 26 June 2004

³⁰⁵ Telephone conversations with John on 5 and 6 July 2004

other, unrelated charges, found guilty, demoted and transferred to Pretoria against his wishes. There he was assigned a very small office, ostracised, and was given neither a job description nor any work to do. Further occupational detriment included loss of earnings, mental anguish, violation of his dignity and damage to his reputation. He referred a dispute to the CCMA, where he alleges the Commissioner misinterpreted the PDA, holding that disclosure had to be internal to qualify for protection. The CCMA thus upheld the dismissal, finding him guilty of three charges, but John describes the entire CCMA experience as a 'farce', alleges the DME had no real evidence to support their charges and that his post was filled even before the conclusion of the case.

John eventually resigned in January 2003, alleging intolerable working conditions but has not let matters rest there. He is convinced that the DME has contravened three relevant pieces of legislation and alleges improprieties at the CCMA. John also alleges family connections and bias between officials of the DME and the Public Prosecutor's Office in the Eastern Cape. He has tried to get action from regulatory bodies as well as the Scorpions and the Director of Public Prosecutions and on a personal level is pursuing a civil claim for relief in terms of the PDA. John knows the criteria necessary for a section 9 wider disclosure and believes that his disclosure met these criteria. He has spent over R75 000 in legal costs, would never blow the whistle again and would advise a potential whistleblower to 'shut up'! John suggests that contravention of the PDA be made a criminal offence. Not knowing all the facts of the matter, we will have to wait for further cases, if any, but on the face of it his disclosure and subsequent occupational detriment seem to be a textbook case.

4.3 Responses to an advertisement

I decided, after hearing about the response to Rod's article, to place a small advertisement,³⁰⁶ inviting whistleblowers to contact me, in confidence, to share their stories. I was both gratified and alarmed by the response I received – twelve calls, of which six were from genuine whistleblowers, another three who were thinking about blowing the whistle and three callers who were actually 'blowing the whistle' to me regarding unfair labour practices. These alleged unfair labour practices were quite horrifying in this day and age, relating to, amongst other matters: illegal overtime and salary deductions, retrenchment with no fair consultation process, 'retrenchment' after probation when, coincidentally, assigned projects had been completed,

³⁰⁶ In The Star Workplace on 7 July 2004

withholding of pension benefits, dissatisfaction with or non-performance by unions, alleged non-eligibility for UIF and breach of contract. Perhaps worse, these employees had no idea of their rights nor where to go for help. Sadly, in all cases, too much time had lapsed for referrals to the CCMA, and I had no real solutions to offer the callers, who all felt betrayed by employers and let down by institutions or channels that should have helped redress workplace wrongs. I also realised, however, that I was hearing only one side of complex cases, and that in many instances the problem might have been as simple as misunderstanding the terms and conditions of a contract or a failure to communicate in terms the employee understood.

The twelve whistleblowers came from a variety of sectors: government, banking, retail, manufacturing, construction, travel and recruitment; their employee levels ranged mostly from supervisory to senior managerial; there was a mix of races but a majority of whites and all but two were male. All evidenced very little knowledge of the PDA, if any; most had suffered (or were afraid of suffering) very real detriment (not just occupational) and many also did not have any knowledge of, or faith in, the labour tribunals they could approach for relief. I shall briefly summarise the experiences of the nine more typical whistleblowers.³⁰⁷

Whistleblower Caller 1, a forensic investigator, had discovered fraud and corruption at a very high level in a government body. He attempted to report his concerns to the Chairman of the Audit Committee and to a regulatory body, but no investigative or disciplinary action ensued. It was instead he who was sidelined, excluded from meetings, refused approvals for necessary business trips, his credit standing was prejudiced, and, worst, he received death threats.³⁰⁸ He resigned, had to sell his car and house, and although he was afraid to approach the CCMA because of the death threats, he has written to the relevant Cabinet Minister.

Whistleblower 2 worked in the retail industry and became aware that the store owners were dealing in stolen goods. He refused to get involved but, although unhappy, took no action as the dealings were initially small-scale. But later a container of very expensive computer goods was received, apparently the result of an armed robbery. At this point he complained to the boss and allegedly was offered 20% of the takings to participate or told to (quote) 'go to hell!' He shared the problem

³⁰⁷ The following stories were told to me in confidence during telephone conversations between 7 and 17 July 2004 – I obviously have no means of verifying them

³⁰⁸ The 'textbook' scenario again, as per John Carr in Section 4.2

with a detective friend, on whose advice he disclosed his suspicions to the SAPS computer crime section, whereupon a raid took place and the stolen goods were seized. But the whistleblower believes his identity was revealed to the store owners by the SAPS, whom he alleges accepted a bribe to drop the case, as thereafter he was put under pressure at work, verbally abused and his family threatened. He resigned, but again was afraid to pursue the issue at the CCMA. He suspects that a large syndicate is involved, which has blackened his name so that he is unable to find work in the same sector. He has tried unsuccessfully to get the Organised Crime Unit involved, but they seem to view the matter as too insignificant. He told me that he has never heard of the PDA but would blow the whistle again, saying that all he wanted was to 'be a law-abiding citizen'.

Whistleblower 3 believed that, as her company disciplined people for petty theft, her disclosure regarding possible fraud by her boss would be positively received by the senior manager. She was not aware of any procedure she should have followed and suspects that the senior manager told her boss, as she and a driver, who would have been a key witness, were 'retrenched' soon afterwards. She consulted a lawyer and her case has been referred to the Labour Court.³⁰⁹ She has since found employment in a completely different sector, having to take a huge salary cut. She told me her lawyer does not hold out much hope in terms of the PDA because of her failure to comply with procedure, in spite of her ignorance of any such procedure. She has spent R60 000 on legal fees to date but, because she believes strongly in honesty, said she would blow the whistle again, but would ensure she followed procedure.

Whistleblower 4 suspected that his boss was using the company telephone to run his own business on the side and reported this openly to the senior manager and to the internal forensic unit. The only result, however, was that the whistleblower became unpopular and was later retrenched, he believes as a result of his disclosure. He did not pursue the matter and has been able to find alternative employment.

Whistleblower 5 is a graduate involved in a learnership scheme, where he alleges abuse of learnerships, illegal and breached contracts, and irregular practices by employment agencies, including 'selling' of students. He has reported this to the relevant SETA, whose subsequent investigation is frustratingly slow. He has not suffered any occupational detriment, although he has been offered bribes, presumably to 'fall in line'.

³⁰⁹ I will look out for it with great interest

Whistleblower 6, a marketing manager, made a disclosure to a senior manager regarding irregularities in the company's recruitment procedures and its failure to comply with the Employment Equity Act. He was victimised, refused a bursary, accused of 'trumped-up' charges and dismissed. He referred an unfair dismissal dispute to the CCMA and was successful at arbitration, receiving 24 months' remuneration. It seems that the case has now been referred to the Labour Court.

Potential Whistleblower 1 (and his wife) shared a very frightening scenario with me. He claimed his previous boss was 'murdered' in very suspicious circumstances, and that another manager, who had been threatened, resigned. He said he had become aware of serious fraud and that he personally was being followed. He was due to attend a 'disciplinary' meeting the day after he phoned me, but seemed completely unaware of his rights to fair disciplinary procedures. In the light of the situation he described I urged great caution, suggested he urgently consult a lawyer and perhaps the police and do no whistleblowing at all until he obtained expert advice or protection.

Potential Whistleblower 2 described the plight of a junior manager at his company, whom he claims was 'set up' as having been involved in theft. The associated disciplinary processes were irregular and procedurally incorrect. Other employees were allegedly being intimidated not to talk to the 'accused', nor to act as his representatives or witnesses at the hearing. The junior manager was found guilty and dismissed, after which he referred a dispute to the relevant bargaining council, where my caller alleged the company 'prosecutor' lied at arbitration. It seems the union cannot help due to the managerial status of the employee and my caller was unsure of how or to whom he could blow the whistle.

Potential Whistleblower 3 was too afraid to give any details at all and I referred him to ODAC³¹⁰ for free legal advice.

In the light of the above empirical evidence, obviously not on a large enough scale to be authoritative, it would seem, without being unduly pessimistic, that whistleblowers in South Africa today do stand a very good chance of being victimised in some way: losing their jobs, standing, possessions and even living in fear of their lives. This issue will be taken further in subsequent sections but clearly there is a very real need

³¹⁰ See Section 4.1 and note 190 & 288

for wide education on employee rights and the role of the labour fora generally and specifically on the PDA: its scope, provisions, its limitations and how to apply for protection and/or relief. Some of the callers mentioned above would not be covered by the PDA in its current form – hence the need for the extension of its scope, also to be fleshed out later in this paper.

4.4 Anonymous Hotlines

In South Africa of late there is a growing prevalence, in the private sector at least, of the confidential and anonymous ‘hotlines’ provided by the big auditing firms.³¹¹ There are also the provincial hotlines instituted by the Public Service Commission. I interviewed key people³¹² involved in the four main private hotlines, which have come into being at various times between 1996 and 2004. They are unanimous in holding that, with experienced call centre operators, who have standard questions (and also questions tailored to each client’s organisation) and who prompt the often anonymous caller for vital details, they usually manage to obtain sufficient information to carry out an investigation if necessary. Three hotlines record the toll-free calls – Ernst & Young alone does not. Several operate in most of the official languages and some are available 24 hours a day, or at least to cater for shift changes in the clients’ environment. Many report frequent use early in the morning, at lunch-time or shift changes and on Saturday mornings, and many callers prefer the safety of a public phone booth. All generate reports for the client, also analysing trends, and all preserve the caller’s identity and even gender, even if the caller has given their name to the hotline operator. Number of clients using the various schemes vary from 5 in the case of a very new hotline to over 200, and, while public companies do feature, most clients are private; often the very big multinationals. Some encourage and manage rewards or incentives while others dissuade clients from going this route.

Without exception, all four firms stressed the need for the hotline to form part of a holistic approach, with a strong internal PR drive and ongoing promotion, Secondly there must be visible top management buy-in and action needs to be seen to be taken, else disillusionment sets in and use of the hotline will wane. The ratio of

³¹¹ Deloitte & Touche: Tip-offs Anonymous, KPMG’s Ethics Line, Ernst & Young’s Fraud Hotline and Price Waterhouse Cooper/Justicia’s Whistle Blowers (Pty) Ltd

³¹² Herman De Beer, Forensic Director at KPMG, interviewed on 5 July 2004; Guy Brazier, Executive at Deloitte’s Tip-Offs Anonymous, on 29 July 2004; Wayne Fergusson, of the Ernst & Young Fraud-Line on 21 July 2004; and Christelle Horne of Justicia Investigations / Price Waterhouse Coopers’ Whistleblowers (Pty) Ltd on 25 August 2004.

frivolous or malicious calls is very low and all firms report a heightened interest and use lately as companies improve their standards of corporate governance and fraud prevention. Obviously, feedback to the caller is impossible, unless he/she can be persuaded to call again after a reasonable interval, which does happen.

The Public Service Commission, tasked with taking practical steps to reduce corruption in the public service after the national anti-corruption summits in 1999,³¹³ has tried to establish hotlines in every province. From a report in 2002 it seems that the system has not been working very well – they came to the conclusion that one national hotline was needed for consistency, that standardised data management, training and investigation were vital; that senior management had to ‘buy-in’ and that extensive infrastructure was necessary.³¹⁴ The PSC Report further submitted that confidential hotlines would be covered by the PDA ss 6(1)(a) and 6(2), which I agree with, and makes the point that, although protection should not be necessary if the caller remains anonymous, it might be wise for a caller to keep sufficient proof of his call so that, in the event of being identified, he can at least prove that he made a disclosure according to approved procedures and thereby qualify for protection.³¹⁵

There seem to be two schools of thought with regard to the efficacy and/or desirability of these confidential hotlines which allow or even encourage anonymous reporting. What one might call the whistleblowing ‘purists’³¹⁶ do not approve of anonymous blowing: ‘the lazy, counter-productive route of outsourcing, typically with external so-called “hotlines”’,³¹⁷ ‘anonymity makes it harder to address the message and can also harm the messenger’; ‘...anonymity will always be the cloak preferred by a malicious person’; and ‘Anonymity ... fuels mistrust and makes the powerful unaccountable.’³¹⁸ Also on the negative side is the fact the Enron had a confidential hotline, and, when calls to the hotline increased by 300% in 2002-2001 by staff observing irregular transactions, no appropriate investigative or disciplinary action was taken; rather, the guiding rules were changed in that the daily trading limit was raised.³¹⁹ The cynical comment was also made that far fewer whistles were blown at performance review time.

³¹³ See Section 2.3.1

³¹⁴ Public Service Commission Report on Anti-corruption Hotlines, April 2002, at 5 and 7, (hereinafter PSC Report)

³¹⁵ PSC Report at 27

³¹⁶ Richard Calland and Guy Dehn

³¹⁷ Richard Calland, It takes guts to speak out, *Mail & Guardian online*, June 29 2004

³¹⁸ Calland et al *Introduction*, at 8-9

³¹⁹ Lynn Brewer, lecture in Sandton, 1 July 2004. See also note 26

In my opinion, there is no doubt that the confidential hotlines are meeting a need in South Africa's current drive to prevent and deal with corruption. Perhaps the firms that run the hotlines are not the most unbiased to assess their real worth,³²⁰ but I also interviewed one of the big corporates using a hotline. Malcolm Hutton,³²¹ said that, used as part of a holistic 'Code of Good Conscience' initiative, their hotline has been successful, with very few malicious calls, bringing to the attention of management all sorts of issues that can then be further investigated and resolved.³²² The initial resistance and fear has been overcome and Malcolm feels the hotline 'helps to keep people honest'. This firm includes details of the number of calls to the hotline and active investigations in their internal newsletter, so that a whistleblower can be reassured that his call has been taken seriously and acted upon appropriately.

There is clearly growing interest in both private and public sectors in instituting confidential reporting structures,³²³ but, and this is the worrying aspect, it seems that the cultural climate here does not yet support the ideal type of open disclosure that we strive for via the PDA, hence the need to disclose in confidence or anonymity.

³²⁰ Although Herman de Beer of KPMG indicated that the hotlines are not a lucrative source of revenue and more of a service to their clients

³²¹ Compliance Officer at a large insurance broking firm, Glenrand MIB, that uses the Deloitte Tip-offs Anonymous reporting system, interviewed on 9 July 2004

³²² Some are just perceptions, but which nevertheless adversely affect the working environment if not addressed.

³²³ As encouraged in King II

5. Whistleblowing elsewhere

It is logical to first look at whistleblowing in the United Kingdom, as our South African legislation is very closely modelled on the UK statute, and the UK has more experience, extensive case law and varied expressions of public opinion on whistleblowing. Secondly, I shall look at the situation in Australia, comparing the various Australian laws with our PDA and possible reasons for the lack of case law and mostly negative perceptions of whistleblowing and its prospects for success.

5.1 The United Kingdom

5.1.1 The UK Public Interest Disclosure Act³²⁴

As the SA PDA is so similar to this statute in almost every aspect,³²⁵ I shall focus only on the differences. The UK Act, the PIDA, came into force in most parts of the UK in July 1999, nineteen months before the SA PDA, and the impetus for this legislation came from public concern about major national disasters in the early 1990s.³²⁶ This background immediately sets it in a different sphere to the SA PDA, which arose out of the strong anti-corruption drive in the late 1990s.³²⁷ Having said that, however, the UK Act also met the needs expressed by the UK Committee on Standards in Public Life,³²⁸ and unusually therefore, the PIDA, starting off as a private members Bill, received support from a broad base: multiple political parties as well as industry captains and labour.³²⁹ Trade unions have been important in both campaigning for and supporting the PIDA,³³⁰ sadly in South Africa, although there was some public consultation at the time of the Open Democracy Bill (ODB), neither the unions nor NEDLAC have been involved to the same extent, which could contribute to the lack of knowledge, buy-in and application of the PDA in SA. In the UK, the PIDA is firmly rooted in employment law, having become a new section in the Employment Rights

³²⁴ United Kingdom Public Interest Disclosure Act 1998, (hereinafter PIDA)

³²⁵ See Section 2.3.4 for the UK influence on the evolving SA statute

³²⁶ Examples are the Clapham Rail crash, the Piper Alpha disaster and the Zeebrugge Ferry tragedy, all leading to extensive loss of life; on the financial side the collapse of BCCI and Barings Bank; and politically the 'Arms to Iraq' inquiry, as well as concern over abuse and malpractice in the health and social care sectors. From *Annotated guide* [to PIDA] (hereinafter *PCAW Annotations*), published by Public Concern at Work (PCAW), see note 145

³²⁷ As previously discussed in Section 2

³²⁸ Set up by then Prime Minister John Major under Lord Nolan in 1994 to examine conduct of public officers and public bodies: Anna Meyers, Whistleblowing – the UK Experience, (hereinafter Meyers), at 104-5, in Calland et al

³²⁹ *PCAW Annotations* at 5-7, and Sheryl Groeneweg, *Three Whistleblower Protection Models: A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom*, October 2001, (hereinafter Groeneweg), at 16

³³⁰ Drew at 34

Act 1996, while in South Africa, the PDA was originally part of government's initiative to increase public accountability via the ODB and the subsequent Access to Information Act,³³¹ but is now independent and fully integrated with employment statutes such as the LRA.

The focus in the PIDA on disclosing internally first, with more stringent criteria for wider disclosures, was echoed in the SA Act, but one important difference is that the UK Act applies to a 'worker,' which has a much broader definition than the current SA 'employee'. The UK term encompasses also contractors, agency workers, trainees, home-workers and every professional in the National Health Service.³³² It does not cover the genuinely self-employed, volunteers, intelligence or defence services members; police officers have very recently been brought under its cover.³³³ Further, 'detriment' is not defined as in the PDA, save to say: 'any detriment by any act, or any deliberate failure to act, by his employer ...',³³⁴ for example, as suggested by academics, an employer's failure to act which causes detriment, such as refusing promotions, salary increases, training or facilities.³³⁵ The UK employment tribunals have interpreted the PIDA in this manner, accepting as detriment offering less work, disclosing a whistleblower's identity contrary to assurances, failing to investigate a concern or failing to inform the whistleblower of the progress of an investigation.³³⁶ This notwithstanding the fact, that, as in the SA statute, there is no express duty placed on the recipient of the disclosure either to investigate or to give feedback to a discloser. The South African statute does define 'occupational detriment' which, although it is fairly comprehensive as discussed in Section 2, is still a closed list and therefore possibly limiting.³³⁷

As in SA, the UK statute requires 'good faith' for every disclosure channel and also does not define the term; PCAW helps by describing this as 'honestly'.³³⁸ Interestingly though, and contrary to the stance the SA courts have taken,³³⁹ the actual motive of a UK whistleblower seems almost irrelevant.³⁴⁰ All that is required is

³³¹ The Access to Information Act 2 of 2000

³³² PIDA s 43K, as explained in PCAW *Annotations* at 8

³³³ April/May 2004, PCAW *Annotations* at 8

³³⁴ PIDA s 47B(1)

³³⁵ John Bowers Q.C, Jeremy Lewis & Jack Mitchell, *Whistleblowing: The New Law*, 1999, at 49-50, (hereinafter Bowers et al)

³³⁶ PCAW *Annotations* at 42

³³⁷ See Section 6

³³⁸ PCAW *Annotations* at 8

³³⁹ See Section 3

³⁴⁰ Bowers et al at 74; Meyers at 106; and Drew at 31, who quotes UK academic David Lewis: 'if workers have reasonable grounds ... why should their motive for disclosing be relevant' -

an 'honest and reasonable suspicion of malpractice ...'.³⁴¹ This will be borne out when we take a superficial look at UK caselaw. The acceptable channels for disclosure, as in SA, are very strictly defined, and trade unions are not specifically mentioned.³⁴² Actions in terms of this Act can only be brought via the employment tribunals,³⁴³ whereas in South Africa, although the labour fora are the most appropriate, other courts with equivalent jurisdiction can also be approached.³⁴⁴ The last and very important difference between the two statutes is that, in the UK, awards are uncapped,³⁴⁵ and have also been widely interpreted in the tribunals to include damages for injury and feelings.³⁴⁶ In South Africa, an employee suffering occupational detriment other than dismissal can receive up to twelve months' remuneration, and up to twenty-four months for an automatically unfair dismissal.³⁴⁷

There are positive opinions of the PIDA: 'skilfully achieving the essential but delicate balance ... between the public interest and the interests of employers',³⁴⁸ and 'one of the most far-reaching whistleblower protection laws in the world.'³⁴⁹ However, several criticisms have also been voiced: the PIDA is said to be 'seriously flawed' and 'very complex'; and the strict hierarchy of permissible UK disclosure channels may inhibit disclosure rather than facilitate it.³⁵⁰ Other weaknesses are the exclusion of non-employees and security personnel, the omission of trade unions as a prescribed disclosure channel, its limited disclosure routes, the lack of provisions for class action and for monitoring, the influence of a culture of secrecy, and its promotion and

Lewis argues that whistleblowers may be deterred from exposing the truth due to fear of their motives being examined

³⁴¹ Meyers at 106

³⁴² Although PCAW expects that disclosure to a recognised trade union would be protected as a body authorised by the employer in terms of PIDA s 43(C)(2) - PCAW *Annotations* at 22

³⁴³ PIDA s14, referring to s 205 of the UK Employment Rights Act 1996, as explained in PCAW *Annotations* at 56

³⁴⁴ PDA s 4

³⁴⁵ PIDA s 4 and UK Employment Rights Act 1996 s 49, based on 'what is just and equitable in all the circumstances'

³⁴⁶ According to PCAW *Annotations* at 2, the highest recorded award as at January 2003 was £805, 000, while supposedly some out-of-court settlements have reached the million pound level.

³⁴⁷ PDA s 4(2)(a) and LRA ss 187(1)(h) and 194(3)&(4). See also Section 2.3.6

³⁴⁸ Lord Nolan, Hansard HL, 5 June 1998, col 614, as quoted in PCAW *Annotations* at 4

³⁴⁹ Evelyn Oakley and Anna Meyers, *The UK: Public Concern at Work*, (hereinafter Oakley et al), at 169, in Calland et al

³⁵⁰ De Maria), at 5, 8, 10, 14 and 15. Dr Brian Martin describes de Maria as 'Australia's leading researcher on whistleblowing' in *Solution illusions*, a paper on Brian's website, <http://www.ouw.au/arts/sts/bmartin/pubs> (hereinafter Martin Illusions). Brian Martin is associate professor in Science, Technology and Society at the University of Wollongong, New South Wales and is international president of Whistleblowers Australia.

implementation.³⁵¹ While the PIDA has stimulated compliance policies, there is inadequate training and support for these policies.³⁵²

5.1.2 UK caselaw

On the Calland et al CD, summaries are given of 62 ‘notable decisions’ under PIDA.³⁵³ Analysing these case studies, I found that in ten of the cases, the alleged ‘detriments’ were found not to be linked to any disclosures, and in nine cases the detriment was not found to be the *causa causans*. In another nine cases, dismissals were presumed to be on the grounds of a disclosure and in seven the tribunals found that an employer’s failure to act appropriately constituted a detriment. Other interesting aspects from these cases were that the question of good faith received low priority, disclosures that were part and parcel of someone’s job (i.e. ‘involuntary’ disclosures) did not receive protection under the PIDA, compensation for injury to feelings and aggravated damages were awarded and whistleblowing to the media was accepted under certain circumstances.

An interesting recent case, *Virgo Fidelis Senior School v Mr Kevin Boyle*,³⁵⁴ was an appeal brought by the school after an employment tribunal awarded Boyle compensation of £47,755 for an unfair dismissal related to his protected disclosures. Although the Appeal Tribunal actually reduced the total amount of compensation, the case set some valuable precedents. Firstly, detriment on account of a disclosure was deemed to be a ‘very serious breach of discrimination legislation’.³⁵⁵ Secondly, the tribunal allowed damages for injury to feelings but suggested that this be within reasonable bounds, for example a maximum of £25,000.³⁵⁶ The court also held that an employment tribunal can award aggravated damages and did so here.³⁵⁷ In theory the court saw no reason why exemplary damages could not be awarded under the correct circumstances, although this did not apply to *Virgo Fidelis*.³⁵⁸ The court further allowed expenses and loss of wages in addition to the basic award.³⁵⁹ So although Mr Boyle’s final award was £39,465, slightly lower than that of the first tribunal, compensation was awarded in categories previously excluded from

³⁵¹ Groeneweg at 35. De Maria makes similar submissions at 6, 8 and 23, particularly in relation to the UK Official Secrets Act

³⁵² Drew at 34-35

³⁵³ Calland et al *Case Studies*

³⁵⁴ *Virgo Fidelis Senior School v Mr Kevin Boyle*, UKEAT/0644/03/DM, date of judgment 23 January 2004, (hereinafter *Virgo Fidelis*)

³⁵⁵ *Virgo Fidelis* para 45

³⁵⁶ *Virgo Fidelis* paras 55 & 56

³⁵⁷ *Virgo Fidelis* paras 63 & 65

³⁵⁸ *Virgo Fidelis* para 66-82

³⁵⁹ *Virgo Fidelis* para 86

consideration, setting important guidelines for future disclosure cases where an argument for aggravated or exemplary damages can be made.

In the first three years after the PIDA came into effect over 1,200 claims were lodged alleging victimisation for whistleblowing.³⁶⁰ Employment tribunals reached full decisions in 152 of these cases but more than half were unsuccessful. Of the roughly 50% of successful claims, half the applicants succeeded under the PIDA, whilst half succeeded under other employment or discrimination law, and 66% of the PIDA claims are settled or withdrawn without any public hearing.³⁶¹ This is of concern to Public Concern at Work,³⁶² as it means there is no way to assess the issues raised, the extent of the malpractices and hence no way to assess the success or otherwise of the UK PIDA.³⁶³

5.1.3 UK perceptions of whistleblowing

The UK employment tribunals do appear to be applying the provisions of PIDA 'in a robust and purposive manner'.³⁶⁴ Particularly in the National Health Services, where much whistleblowing awareness work has been conducted, there have been very few cases, suggesting a shift in culture in this and other industry sectors.³⁶⁵ Some UK regulatory bodies (such as the Audit Commission and the Financial Services Authority) have encouraged their member companies to establish 'open and confidential reporting' mechanisms as part of the recent drive to achieve good and accountable governance.³⁶⁶ While some sectors still lag behind, a 2002 survey found that half of the randomly selected respondents (public and private) had a whistleblowing policy – this is mandatory in all government departments.³⁶⁷ Private sector companies that are more at risk³⁶⁸ are more inclined to carry out awareness-raising and put confidential reporting mechanisms in place, while smaller companies do not.³⁶⁹ 'The number of frauds exposed in Whitehall have risen from 480 as

³⁶⁰ Meyers at 111

³⁶¹ It seems UK employees are still finding it difficult to distinguish between conduct which is appropriate as subject matter for a protected disclosure and conduct which is best dealt with by means of a grievance procedure – Meyers at 114

³⁶² The UK 'whistleblowing' charity - see note 145

³⁶³ Meyers at 111. Although PCAW won a High Court challenge in 2000 against keeping the details of PIDA cases secret, the government changed the regulations to ensure that no details are available, and PCAW is campaigning to reverse these regulations.

³⁶⁴ Ibid

³⁶⁵ See also note 61

³⁶⁶ Meyers at 112-3

³⁶⁷ Meyers at 114-5

³⁶⁸ For example very large organisations and financial and insurance institutions

³⁶⁹ Meyers at 116

reported in 1995/96 to 898 in 2002/03 – with 427 of these frauds discovered by whistleblowing...³⁷⁰

However, a different picture is also painted: ‘The UK law is ... very nearly useless. ... the law has had quite a bad press over the last two or three years. Its greatest success ... has been in simply using its very existence (regardless of merits/demerits) to threaten ignorant employers with.’³⁷¹ The whistleblower group, Freedom to Care (FtC), carries summaries of whistleblower cases on its website, describing the overall situation as fairly bleak: ‘The Employment Tribunal system may be getting more responsive but, sadly, what all the cases referred to ... have in common is that ethical employees have lost their jobs - whatever recompense they may now be getting - and the bullying and malpractising organisations they worked for have succeeded in getting rid of them.’³⁷² A similar view is expressed in a media article about the disciplinary processes faced by James Cameron, a diplomat who exposed a British immigration scandal that led to a minister’s resignation: ‘The heroic honourable people are punished and the guilty go free ... they are trying to punish him for telling the truth.’³⁷³

While I do not decry the success that has been achieved in the UK regarding the protection of public interest whistleblowers by means of the PIDA, supported by the work of PCAW, I submit that one should take the opinions of PCAW personnel with a pinch of salt. Anna Meyers is a senior officer of PCAW, which had a big part in developing the PIDA itself,³⁷⁴ and is now monitoring it. PCAW’s advocacy work is laudable,³⁷⁵ but I question whether its directors are able to be objective enough to effectively assess the PIDA and review its implementation. However, as a charity, they receive no state aid and are thus independent in that sense.

When whistleblower stories make the headlines, it is usually because things have ‘gone very badly wrong’, thereby reinforcing public perception that whistleblowing is

³⁷⁰ ‘Whistleblowers exposing 30% more Whitehall frauds’, *AccountancyAge.com*, 15/06/2004

³⁷¹ Geoff Hunt in an email to Dr Brian Martin copied to me on 13 July 2004. Brian describes Geoff as ‘the key figure in the UK whistleblower group Freedom to Care’.

³⁷² ‘Some recent cases in which FtC has been involved’, at <http://www.freedomtocare.org>

³⁷³ ‘Whistle-blowing Diplomat Punished for Serving his Country’, quoting David Davis, at <http://news.scotsman.com>. But, in the same way that the motives of whistleblowers may be mixed, the motives of those supporting a ‘victimised’ whistleblower are probably equally mixed – the quotes are attributed to the shadow home secretary trying to gain mileage by pointing fingers at the Labour government in power

³⁷⁴ PIDA is described as a ‘key milestone in the work of PCAW’ Oakley et al, at 173

³⁷⁵ PCAW has published good practice guidelines and a whistleblowing ‘Policy Pack’, runs a policy and research programme, offers training and runs a PIDA helpline – they believe that to be truly effective, PIDA must be accompanied by a shift in culture. Much of ODAC’s advocacy work in South Africa has been based on that promoted by PCAW.

neither safe nor really acceptable.³⁷⁶ However, there has been a recent shift in public attitude towards whistleblowers since the Time Magazine cover article of December 2002, naming three female US whistleblowers as ‘Persons of the Year’.³⁷⁷ ‘Once pariahs, whistle-blowers are increasingly seen as a key check on public and private companies.’³⁷⁸ The UK government has been accused of having done little to promote the PIDA and, while it is globally hailed as ‘a benchmark of public interest whistleblowing’, it is not well-known or understood.³⁷⁹ Hopefully the post-Enron emphasis on accountability and governance, supported by civil society initiatives, will remedy this.

5.2 Australia

5.2.1 Australian statutes

In Australia, all six states and one territory have enacted legislation to protect whistleblowers, a Commonwealth bill is in draft form and one other territory is debating the development of such legislation.³⁸⁰ The seven statutes, enacted within a ten-year period from 1993-2003, and the draft bill have many aspects in common.³⁸¹

All the Australian statutes focus on ‘disclosable’ conduct within the public service and all are employment-oriented. Most also allow disclosures regarding dangers to public health, safety or the environment, or about reprisals for disclosures. Only South Australia allows for disclosures regarding general corruption or illegal conduct, i.e. in the private sector.³⁸² The definitions of this disclosable conduct are very similar in all

³⁷⁶ Meyers at 117. One can also think of the suicide of Dr David Kelly, allegedly linked to his whistleblowing over the Iraq Arms debate

³⁷⁷ Ibid. See also 53

³⁷⁸ Megan Lane, The rise of the whistle-blower, *BBC News Online Magazine*, 26/02/2004.

Megan claims in the same article that the number of persons phoning PCAW’s helpline has more than doubled in the past five years

³⁷⁹ See note 377

³⁸⁰ South Australia was the first state to have whistleblower legislation: *Whistleblowers Protection Act No 21 1993*; then the *Whistleblowers Protection Act 1994* (Queensland), the *Protected Disclosures Act 1994* (New South Wales) and the *Public Interest Disclosure Act 1994* (Australian Capital Territory); the *Whistleblowers Protection Act No 36 2001* (Victoria); *Public Interest Disclosure Act No 16 2002* (Tasmania) and *Public Interest Disclosure Act 2003* (Western Australia). There is a Draft Commonwealth *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002* (said by its promoter, Senator Murray, at its second reading, to be largely based on the ACT statute) and the Northern Territory issued a *Whistleblowers Protection Legislation Discussion Paper* in June 2004.

³⁸¹ De Maria submits, at 3, that there is a ‘high level of mimicry’ in whistleblowers laws, and that if the base statute is ‘flawed’ subsequent acts modeled on it will of course contain the same flaws. See also Kirsten Trott, ‘The Australasian perspective’ at 136, (hereinafter Trott), at 141, in Calland et al.

³⁸² *Whistleblowers Protection Act No 21 1993* (South Australia) s 3. The draft *Commonwealth Bill* allows for disclosure regarding the improper conduct of anyone insofar as it affects public functions: s 5

the Acts, and so are the definitions of detriment: all occupation-related. All protect the confidentiality of the whistleblower, all give him indemnity from liability, all make taking reprisal on the whistleblower an offence and all require feedback to be given to him.³⁸³ All identify very specific channels for disclosure, depending on the public sector where the disclosable conduct occurred, but some states allow more latitude.³⁸⁴ All put a duty to investigate on the body receiving the disclosure.³⁸⁵ No statutes make provision for a dedicated, independent whistleblowing authority to receive disclosures, although bodies such as an Ombudsman and Corruption Commissions exist.

In most jurisdictions, the whistle can be blown by anyone who suspects public service misconduct, in Tasmania a contractor can report possible misconduct and in Queensland anyone who suspects misconduct relating to a person with a disability, danger to health or the environment or who suspects a reprisal for whistleblowing can make a protected disclosure.³⁸⁶ Seven statutes allow for either damages or compensation,³⁸⁷ and six require a whistleblower to 'believe on reasonable grounds' that the information shows or tends to show wrongdoing. Queensland alone has a criterion similar to that of 'good faith' – here the whistleblower has to '*honestly* believe on reasonable grounds.'³⁸⁸ In New South Wales there is no such onus, although there is for disclosures to the media or to an MP; this is the only jurisdiction to allow wider disclosures, but under more stringent conditions, as in South Africa.³⁸⁹ In six statutes knowingly making a false disclosure is an offence;³⁹⁰ all except South Australia require annual reports to be provided in respect of disclosures; and only Queensland protects involuntary disclosures.³⁹¹ Most jurisdictions allow contravention of secrecy acts in making a disclosure³⁹² and five provide absolute privilege for defamation.³⁹³ A majority allow whistleblowers to obtain an injunction, and four stipulate that procedure must be followed if one exists. Most allow anonymous

³⁸³ Some only if requested, i.e. Queensland, ACT and Commonwealth

³⁸⁴ South Australia, Queensland and Australian Capital Territory (ACT).

³⁸⁵ Four implied and four express: Victoria, Tasmania, Western Australia and Commonwealth. All statutes, however, allow for discretion, i.e. for the non-investigation of frivolous, vexatious or previously investigated complaints.

³⁸⁶ *Whistleblowers Protection Act 1994* (Queensland), ss 9, 19, 20. It is only in New South Wales that disclosure can only be made by a public official.

³⁸⁷ New South Wales is the only exception

³⁸⁸ *Whistleblowers Protection Act 1994* (Queensland), s 14(2)

³⁸⁹ *Protected Disclosures Act 1994* (New South Wales) s 19

³⁹⁰ In Victoria it is an offence to give false information during the course of an investigation - *Whistleblowers Protection Act No 36 2001* (Victoria), s 60, while the ACT statute is silent on this aspect

³⁹¹ *Whistleblowers Protection Act 1994* (Queensland), s 22

³⁹² South Australia makes no mention of this aspect

³⁹³ Western and South Australia and Tasmania do not

disclosures.³⁹⁴ Some later acts³⁹⁵ spell out in great detail the obligations of the recipient authority regarding investigation, powers, actions and reporting.

Only three statutes make provision for the relocation of the whistleblower, if desired,³⁹⁶ and only two require regular reviews of the legislation.³⁹⁷ In South and Western Australia a whistleblower stands to lose protection if he/she fails to assist with the investigation, in Western Australia also if he/she discloses more widely than allowed, whilst in New South Wales protection is forfeited if disclosure is an attempt to avoid disciplinary action.³⁹⁸ In Tasmania the whistle can be blown only in respect of conduct no more than three years retrospectively, and the courts will allow protection if a 'substantial' reason for the detriment is the disclosure. i.e. it does not have to be the only or even primary cause.³⁹⁹ The draft Commonwealth bill is the only statute that makes provision for counselling for whistleblowers⁴⁰⁰ – possibly a response to the lobbying by Whistleblowers Australia.⁴⁰¹

As there are so many small variations, it is difficult to say which is the 'best' Australian statute.⁴⁰² I shall rather list those provisions where I believe South Africa's PDA is superior and then those points we could profitably copy from Australia.

The fact that the South African PDA covers the private sector is laudable, and also that relocation is mentioned. Wider disclosures, including to the media, are catered

³⁹⁴ Although then of course neither protection nor feedback is possible, and in ACT there is no duty to investigate if the disclosure is anonymous. South Australia, New South Wales and Western Australia do not specify that anonymous disclosures may be made

³⁹⁵ ACT, Victoria, Tasmania, Western Australia and Commonwealth

³⁹⁶ Queensland, ACT and Commonwealth

³⁹⁷ New South Wales and Western Australia

³⁹⁸ *Whistleblowers Protection Act No 21 1993* (South Australia) s 6; *Public Interest Disclosure Act 2003* (Western Australia) s 17; *Protected Disclosures Act 1994* (New South Wales) s18

³⁹⁹ *Public Interest Disclosure Act No 16 2002* (Tasmania) ss 10 and 19(3).

⁴⁰⁰ *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002* (Commonwealth) s 27(2)

⁴⁰¹ Whistleblowers Australia (WBA) is a national organisation of whistleblowers and their supporters that encourages self-help and mutual help, produces a whistleblowing newsletter and supports campaigns on issues such as free speech for employees and whistleblower legislation. WBA is similar to the UK group, Freedom to Care. Source: Dr Brian Martin, *The Whistleblower's Handbook – how to be an effective resister*, 1999, at 149-150 (hereinafter Martin Handbook). See also note 371

⁴⁰² South Australia, the first state to enact such legislation, has the most latitude regarding disclosure channels – 'a person to whom ... it is reasonable and appropriate to make the disclosure.' *Whistleblowers Protection Act No 21 1993* (South Australia) s 5(2)(b). Martin sees South Australia as having 'one of the best laws on paper', but which is not really invoked by the government – Martin Illusions, at 2. Sadly most of the later Australian statutes have become increasingly unwieldy, cumbersome and complex in their strict regulation of which body is appropriate to receive which disclosure. Personally I would suggest that the Draft Commonwealth Bill, having been under development for more than a decade is able to combine the best aspects of all other statutes and more, such as relocation and provision for counseling.

for, and the permissible SA channels, whilst not ideal, seem less rigid than their Australian counterparts. It is debatable whether the decision not to make false disclosures an offence is an advantage: in Australia I believe the inclusion of this offence helps to balance the less rigorous criterion of 'belief on reasonable grounds', but may also deter potential disclosers. The Northern Territory has listed as perceived weaknesses of Australian whistleblower laws the lack of an independent whistleblower authority, lack of application to the private sector, not offering support services to whistleblowers, some excluding disclosures re members of Parliament and not allowing media disclosures (apart from NSW),⁴⁰³ as: '... publicity opens the case to a wider audience, putting the whistleblower and bureaucratic elites on a more even playing field.'⁴⁰⁴

The best parts of Australian legislation we could mimic in South Africa include the paramount importance of confidentiality (and provision for anonymous disclosures); making reprisals an offence; allowing for compensation and damages (not capped as at present); putting an onus on the receiving agent to investigate, to act appropriately and to give feedback; less focus on procedure and motive and more on the subject of the disclosure; the instituting of regular reviews of the legislation as well as annual reporting on disclosures made to legislative or oversight bodies; indemnity and privilege against defamation; protection against contravention of secrecy acts; provision of counselling, protection of involuntary disclosures; and the possible inclusion of contractors and citizens as whistleblowers.

5.2.2 Australian caselaw

Although there are some reported cases applying whistleblower legislation in Australia, they are few and far between, and opinion seems unanimous that there has been not one single prosecution of an employer for victimisation of a whistleblower, even though indubitably victimisation is prevalent and there have been civil or equal opportunity cases or out-of-court settlements.⁴⁰⁵ One recent research study found only seven cases applying whistleblowing statutes,⁴⁰⁶ supporting the view that the laws are not working well. Of these seven cases, one plaintiff was held

⁴⁰³ NT *Discussion Paper* at section 4.3

⁴⁰⁴ Martin, *Illusions*, at 4

⁴⁰⁵ Kim Sawyer, '*Why Australia needs a PIDA and a False Claims Act*', presentation to the Transparency International Whistleblowing Conference in July 2003, (hereinafter Sawyer), and Trott at 139. Brian Martin (see note 371) confirmed this in an email to me on 13 July 2004: he does not personally know of any Australian case where a genuine whistleblower has been protected, reinstated or compensated in terms of any whistleblowing legislation. He said: 'Whether Australia's whistleblower laws actually help anyone is very hard to judge (and sometimes they are damaging to whistleblowers) ...' – email 29 June 2004

⁴⁰⁶ Trott at 140

not to be a whistleblower, another was found to be vexatious; and one was trying to use the law as a defence. The remaining four cases involved whistleblowers taking action against their employers for alleged reprisals, and in two the dismissals were held not to have been on account of the disclosures. In the last two, the issue was the vicarious liability of the employer for acts of reprisals allegedly committed by its employees; a very interesting concept which has not yet been explored in the South African courts.

In *Howard v State of Queensland*,⁴⁰⁷ the allegations of vicarious liability could not be sustained and the appeal was dismissed. In *Reeves-Board v Qld Uni of Technology*,⁴⁰⁸ Ms Reeves-Board, an animal technician, reported what she suspected to be failure to comply with University regulations concerning animal experimentation on the part of a senior lecturer. She believed that this lack of compliance posed a substantial health risk. After her disclosures, Ms Reeves-Board was allegedly subject to various serious forms of reprisal from several senior academic staff members, including the subject of her disclosure, and was ultimately sidelined into a less appropriate field of work.⁴⁰⁹ She claimed damages from the University itself in terms of s 43(2) of the *Whistleblowers Protection Act 1994* (Queensland), because the alleged perpetrators of the reprisals were senior staff members and she alleged that the University knew of the reprisals and failed to protect her from them.⁴¹⁰ Although the court accepted one of the University's arguments relating to a different statute, it rejected the two arguments in which the University sought to have the aspects relating to vicarious liability for whistleblower reprisal struck out of the statement of claim by the respondent (Ms Reeves-Board).⁴¹¹ Vicarious liability of an employer for acts of reprisals by senior employees thus remains a question for another court to decide.

Another case shows that the common law may in fact be helping whistleblowers more than the specific whistleblowing statutes. *Wheadon v State of NSW*⁴¹² is described as showing the common law duty of care that employers have towards their employees.⁴¹³ A policeman, who had reported suspected corrupt conduct on the

⁴⁰⁷ *Howard v State of Queensland* [2000] QCA 223

⁴⁰⁸ *Reeves-Board v Qld Uni of Technology* [2001] QSC 314, (hereinafter *Reeves-Board v Uni*)

⁴⁰⁹ *Reeves-Board v Uni* paras 9-12

⁴¹⁰ *Reeves-Board v Uni* paras 13-14

⁴¹¹ *Reeves-Board v Uni* paras 34 & 44

⁴¹² *Wheadon v State of NSW (District Court Judge Cooper 2/2/01)*

⁴¹³ David Landa, 'Whistleblowing: Betrayal or Public Duty?', opening speech at the Transparency International Whistleblowing Symposium in Sydney, August 2002, at 2-3., (hereinafter Landa). Landa was NSW Ombudsman from 1988-95, and has a particular

part of a senior police officer, alleged victimisation over the next decade and sued his employer for compensation on the grounds of the breach of its duty to care for him as an employee. Breaches in the judgment related to whistleblowing included failure to properly investigate Wheadon's allegations, to assure him he had done the right thing by reporting corruption, to offer him guidance or support and failure to protect him from harassment and persecution. The damages awarded exceeded \$ (Australian) 650,000, but many similar cases, especially in the police service, may remain unreported as they are settled with undisclosed terms.⁴¹⁴

5.2.3 Australian perceptions of whistleblowing

It is difficult to know how many whistleblowing 'cases' are in fact successfully resolved or settled out of court in Australia, but the onus is still on the whistleblower, *after* he has suffered detriment, to bring a legal action for damages – the laws do not seem to prevent the detriment. Comments from the Australian media, academics and the experiences of whistleblowers certainly seem to paint a bleak picture of the prospects of successful whistleblowing in a country where seven jurisdictions have enacted whistleblower legislation (albeit mostly only for the public sector) and where the earliest statute preceded the UK PIDA by five years.

The first difference between the UK and Australia is that there is no equivalent to Public Concern at Work, the active charity which has provided both input to and monitoring of legislation, conducts advocacy and training around the PIDA and operates a whistleblowing helpline. The closest such organisation in Australia is Whistleblowers Australia,⁴¹⁵ whose website features stories of victimised whistleblowers, many of whom are highly traumatised and feel let down by the system.⁴¹⁶ The common cry seems to be the need for a truly independent 'Whistleblower Protection Authority', due to corruption and inefficiency having permeated throughout the very organisations which are meant to be dealing with whistleblowers complaints.⁴¹⁷ Even the most efficient ombudsman is heavily

interest in whistleblowing. It would be interesting to see if this concept could be successfully applied in South Africa.

⁴¹⁴ Ibid

⁴¹⁵ See note 401

⁴¹⁶ Brian Martin, 'Whistleblowers Australia', in Calland et al, (hereinafter Martin Whistleblowers). Brian quotes the case of Bill Toomer, a whistleblower who has been fighting an uphill battle for over two decades for appropriate official action and redress for victimization, at 196-7. Also discussing Toomer's case, an article in the September issue of *The Whistle*, (WBA's newsletter) alleges ongoing government cover-ups, 'window-dressing' and non-implementation of the Royal Commission's recommendations in the Toomer matter – Bulletproof government lies: how much longer?, Keith Potter

⁴¹⁷ *Whistleblower cases of national significance*, article from the Whistleblowers Australia website

overloaded and whistleblowers who have tried to use the various anticorruption bodies have been dissatisfied with their responses and even recommend against using them.⁴¹⁸ The failure of authorities to conduct timely and competent investigations is a major source of whistleblower grievance and a deterrent to other whistleblowers.⁴¹⁹ The various state, territory and Commonwealth parliaments are being lobbied to create a national whistleblowing authority, independent of all other governments and authorities, reporting directly to parliament, with sufficient powers and resources to carry out its mandate and to help create a climate conducive to respected and effective whistleblowing.⁴²⁰ Australia 'has failed its whistleblowers', and proposals have been put forward for a 'Public Interest Disclosure Agency' as well as a False Claims Act, similar to that in the USA.⁴²¹

In Australia, as in South Africa, the cultural impediments to whistleblowing are immense. 'Being classed a "dobber" in Australia is a serious insult and "dobbing" ⁴²² is considered a betrayal in a culture where "mateship" is often omnipotent' and 'speaking out has strong social disincentives'.⁴²³ Research in 1997 indicated that two-thirds of those who formally reported malpractice experienced reprisals.⁴²⁴ Cultural impediments to whistleblowing include informal sanctions, a culture of secrecy and fear, authoritarian management practices, absence of sufficient proof, a lack of legal protection and an absence of anonymity.⁴²⁵

The Australian imperatives are for internal or regulatory disclosures, with only NSW allowing limited external disclosure, but the media can play a valuable role: 'If an internal alert has met with rejection, external disclosure may be the only way to prevent an event from occurring.'⁴²⁶ A television programme featured an interview with one current and one former manager of Legal Aid, Queensland.⁴²⁷ Although hired to identify and address workplace problems, the two managers' insights were not welcome and they were subjected to abuse, obstructions and direct opposition at executive level. One manager was eventually fired, and suffered health problems, whilst the other, still employed, is experiencing ongoing reprisals. They have both

⁴¹⁸ Martin handbook, at 149-150

⁴¹⁹ De Maria at 17

⁴²⁰ See note 417

⁴²¹ Sawyer, presentation: see also note 405

⁴²² Australian slang for 'inform', 'betray'

⁴²³ Trott at 119 and 124

⁴²⁴ Stuart Dawson, of the School of Management, Victoria University of Technology, 'Whistleblowing: a broad definition and some issues for Australia', Working Paper Series, March 2000, at 4, (hereinafter Dawson), giving results of a survey by De Maria and Jan

⁴²⁵ Dawson at 7

⁴²⁶ Dawson at 13

⁴²⁷ Arguably the last place where you'd expect to find victimisation of whistleblowers

lodged complaints with the Legal Aid Board, the Queensland Ombudsman and the Crime and Misconduct Commission, but had no action or response for more than three years. It was only when one of the managers, in desperation, had a media article published, that the Board announced it would investigate her case, but she expressed doubts as to the likely fairness of this investigation.⁴²⁸

Articles in the Australian media overwhelmingly depict the dire consequences of whistleblowing (noting the journalistic predisposition for sensation and tragedy) while viewing those who blow the whistle as heroes. I found only one article which indicated that whistleblowing had made a positive difference and where the whistleblowers appear to have emerged unscathed. It seems that whistleblowing by eight nurses in New South Wales has resulted in the establishment of a commission of inquiry into healthcare conditions, many cases pending against doctors and nurses and one confirmed 'sacking'.⁴²⁹ Most other articles show the downside of whistleblowing, for example the suicide of a young librarian at the NSW Parliament after depression and a relationship breakdown, possibly due to the consequences of his having reported irregularities in the discounted sales of over 3,000 historic books, whilst investigations and reports into the matter over the past three years have never been made public.⁴³⁰ Another recent article featured a RAAF whistleblower, who alleged being threatened and beaten after disclosing his suspicions of drug use and missing weapons at an air base in 2003. Air Defence Guard Moore claimed he lived in fear of his life and had gone into hiding, although it seems the military watchdog body, the Inspector-General of Defence is conducting an investigation into Moore's allegations.⁴³¹

It is possible that whistleblowing in Australia could be helped by greater uniformity amongst Australian laws or one national law. Other improvements could be the single independent watchdog authority being called for; acceptance of the valuable role the media can play, even if hedged with more stringent conditions; the political will to raise awareness, conduct training and provide guidelines for the laws, (i.e. attempting to create a more whistleblowing-friendly culture); and extension to the private sector in line with recent global imperatives. 'Things have improved here in the last decade, because now there's regular media attention to whistleblowing: issues are more

⁴²⁸ Interview of Bonnie Hampson and Sharnie Makenson by Steve Austin on ABC 612 Brisbane, at 09:20 on 23/06/2004

⁴²⁹ Megan Saunders, 'Cases against 32 doctors, nurses', article in *The Australian*, 3 June 2004

⁴³⁰ 'Death of a whistleblower', article dated 26 April 2004, at www.smh.com.au

⁴³¹ Paul Osborne, 'RAAF whistleblower inquiry', *The Sunday Mail*, 11 July 2004

frequently in the public eye',⁴³² 'though most whistleblowers still have a very tough time.'⁴³³ Post-Enron, there is much more interest in corporate governance in the private sector and more of the consultancy-run hotline services are being set up.⁴³⁴

⁴³² Email from Brian on 29 June 2004

⁴³³ Email from Brian dated 24 August 2004

⁴³⁴ Trott at 123-4

6. Whistleblowing – the way forward

6.1 Amendments to the PDA

Although some academics express doubts that amending (or indeed drafting) whistleblower protection laws achieves much,⁴³⁵ this makes a good place to start, particularly in the light of the current SALRC initiative.

6.1.1 *The SALRC Issue Paper*⁴³⁶

As already discussed, even at the drafting stage of the PDA it was acknowledged that certain aspects were perhaps not ideal and should be researched further by the SALRC.⁴³⁷ The Minister referred these aspects to the Commission in July 2000, and an Issue Paper was distributed for public comments late in 2002. The Issue Paper was in the form of a questionnaire; its broad purpose to investigate extending the ambit of the PDA.⁴³⁸ Five main areas were studied for possible reform: whether to allow disclosures outside the narrow employment relationship; whether to exclude criminal and civil liability; whether to provide for new remedies and if so whether these would apply to a perpetrator and/or the employer and should they be punitive; and lastly whether offences should be created for causing occupational detriment and/or making a false disclosure.⁴³⁹

6.1.2 *The SALRC Discussion Paper*⁴⁴⁰

After studying the submissions received,⁴⁴¹ and undertaking its own research, the SALRC released a Discussion Paper in June 2004, including thirteen provisional recommendations based on the submissions received and perceived international 'best practice', and inviting public comment on various other issues. I shall critically analyse these recommendations and suggestions in the light of my research findings as set out above.⁴⁴²

⁴³⁵ For example, Brian Martin, *Illusions of whistleblower protection*, paper for the Right to Know Conference, September 2002, at 1 and 3 (hereinafter *Martin Illusions*), and De Maria at 6.

⁴³⁶ *SALRC Issue Paper 20, November 2002, Project 123: Protected Disclosures*, (hereinafter *SALRC Issue Paper*)

⁴³⁷ See Section 2.3.5

⁴³⁸ *SALRC Issue Paper* at 1

⁴³⁹ *SALRC Issue Paper* at 5

⁴⁴⁰ *SALRC Discussion Paper 107, June 2004, Project 123: Protected Disclosures* (hereinafter *SALRC Discussion Paper*)

⁴⁴¹ A rather disappointing number – only 12 individuals/bodies made submissions - *SALRC Discussion Paper* at 76

⁴⁴² I have submitted a personal response to the SALRC based on the outcomes of my research for this paper.

The first SALRC Provisional Recommendation is to extend the protection of the PDA beyond the narrow employer-employee relationship.⁴⁴³ I support this, and suggest a broader scope in line with the UK PIDA, which covers contractors, agency workers, trainees, home-workers and every NHS professional.⁴⁴⁴ In Tasmania too, a contractor doing work for the public sector can report possible misconduct.⁴⁴⁵ Empirical evidence also seems to indicate that many persons disclosing fall outside the umbrella of PDA protection,⁴⁴⁶ and, if government is serious about stamping out corruption, the PDA should be extended accordingly. Perhaps we should even cover consumers, students, retired persons, the unemployed and prisoners.⁴⁴⁷ Recommendations 2 and 3 follow on from this first one, that is, re-defining 'employee' and the SALRC suggestion of the term 'worker' seems appropriate, as does an amended definition of 'employer', including a reference to 'client'.⁴⁴⁸

Further, recently promulgated Acts such as the Financial Intelligence Centre Act and the Prevention and Combating of Corrupt Activities Act⁴⁴⁹ place a positive duty on persons to report suspected corruption or dubious financial transactions and in fact it now becomes an offence *not* to report such conduct. It is thus imperative that persons disclosing in terms of these statutes should receive full protection for any detriment that may occur. The PDA may need to be extended to cover these statutes and these acts should likewise provide a cross-reference to the PDA.

Recommendation 4 suggests adding items to the list of occupational detriments, such as actions for defamation, breach of confidentiality clauses, non-award/loss of a contract, and also leaving the list open-ended. This is supported and would be in line with the wider scope as in the first recommendation. My analysis of the various Australian statutes⁴⁵⁰ leads me to submit that the Queensland statute has the broadest definition of detriment, which could be applied to SA, as follows:

"detriment" includes--

- (a) personal injury or prejudice to safety; and
- (b) property damage or loss; and
- (c) intimidation or harassment; and
- (d) adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; and

⁴⁴³ SALRC Discussion Paper at xii

⁴⁴⁴ See Section 5.1.1 and note 332

⁴⁴⁵ *Public Interest Disclosure Act No 16 2002* (Tasmania), s 6

⁴⁴⁶ See Section 4

⁴⁴⁷ De Maria at 19

⁴⁴⁸ See note 443

⁴⁴⁹ See Section 1.8 and notes 77 and 80

⁴⁵⁰ See Section 5.2.1 and note 380

- (e) threats of detriment; and
- (f) financial loss from detriment.⁴⁵¹

I would also suggest adding, from the NSW Statute: 'disciplinary proceeding',⁴⁵² as well as leaving it open-ended and submit that the above definition could be generalized to cover non-employees or citizens.

SALRC Provisional Recommendation 5 proposes extending the list of permitted recipients of disclosures, and I agree with this recommendation, with reservations. We have a proliferation of constitutional and other state bodies with specific functions in South Africa and, with respect, I have a strong sense that, almost without exception, they are all overloaded and seriously under-resourced. I also doubt if they have any real 'teeth'.⁴⁵³ Further, as media reports⁴⁵⁴ and my personal experience show,⁴⁵⁵ these South African oversight bodies are themselves not immune from corruption and/or victimisation. This is the experience in Australia too, and, as suggested by academics and borne out by anecdotal evidence, whistleblowers need to see appropriate action being promptly taken by recipient bodies, otherwise credibility suffers, and people will be even less inclined to blow.⁴⁵⁶ I would also submit that other appropriate bodies be allowed, especially if the scope is broadened beyond the employment relationship,⁴⁵⁷ and that some latitude be allowed, as in South Australia: which affords protection if "the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure."⁴⁵⁸ Perhaps South Africa should consider one dedicated independent body as being pushed for in Australia.⁴⁵⁹

The sixth Provisional Recommendation speaks to the possible exclusion of civil and criminal liability on making a protected disclosure. I agree that civil and criminal immunity should be given to a whistleblower for any 'offences' he may commit in the

⁴⁵¹ *Whistleblowers Protection Act 1994* (Queensland), Schedule 6

⁴⁵² *Protected Disclosures Act 1994* (New South Wales), s 20(2)(e)

⁴⁵³ I speak from my own experience here, as I previously worked for the South African Human Rights Commission and, while there is no doubt that many persons there are competent and committed to the SAHRC's mandate, their budget and authority are so limited that they struggle to make any real impact.

⁴⁵⁴ Phomello Molwedi, HRC suspends finance head who reported irregularities, *Sunday Independent* 21 August 2004

⁴⁵⁵ See note 453

⁴⁵⁶ See Section 5.2.3 for the Australian experience of ineffectual institutional investigations, and also notes 417, 419 and 421, as well as Section 4 for the South African workplace realities

⁴⁵⁷ Such as perhaps the Competition Commission, consumer bodies etc

⁴⁵⁸ *Whistleblowers Protection Act No 21 1993* (South Australia), s 5(2)(b)

⁴⁵⁹ See Section 5.2.3 and De Maria at 14

process of making a protected disclosure, and, further, that he be indemnified both against defamation action and against charges of contravening any confidentiality or secrecy agreements. I also submit that any associated limitation to the pursuit of other civil disputes would be reasonable and justifiable. In Australia, all jurisdictions give civil and criminal immunity and five jurisdictions provide absolute privilege for defamation.⁴⁶⁰ A balance could be achieved to protect the reputation of individuals or organizations against whom the whistle is blown if the whistleblower stood to lose protection under the PDA and perhaps immunity as well if it can be shown that he lacked good faith, made a frivolous or vexatious disclosure, failed to assist the investigating agency with its investigation,⁴⁶¹ or perhaps made the disclosure purely in an effort to avoid disciplinary action.⁴⁶²

Recommendation 7 discusses protecting the confidentiality of a whistleblower and I strongly agree with this. All the Australian jurisdictions protect confidentiality, most even making it an offence to reveal a whistleblower's identity unless under very specific conditions and further, most allow anonymous disclosures.⁴⁶³ Section 4.4 discussed the growing use and role of the anonymous hotlines in South Africa, and as previously submitted, I believe that we, in our 'young' South African democracy, coming out of a long period of authoritarianism and secrecy, are not yet 'mature' enough for the ideal kind of open disclosure normally recommended.⁴⁶⁴ Thus, whilst it is not ideal, I believe the PDA should also allow anonymous disclosures. In spite of the SALRC's expressed fears, anonymous hotlines do not seem to encourage malicious disclosures.⁴⁶⁵ But, as discussed, more 'discloser-friendly' PDA provisions might obviate or at least reduce the need for anonymous whistleblowing.

The eighth recommendation deals with the removal of the ceiling for compensation in the case of an occupational detriment and for linking this to the actual loss. I submit that compensation should be uncapped, as in the UK,⁴⁶⁶ and that a victimised 'worker' or citizen should be able to pursue a claim for the actual loss or damage

⁴⁶⁰ Western and South Australia and Tasmania do not

⁴⁶¹ *Whistleblowers Protection Act No 21 1993* (South Australia), s 6, and *Public Interest Disclosure Act 2003* (Western Australia), s 17

⁴⁶² *Protected Disclosures Act 1994* (New South Wales), s 18

⁴⁶³ See Section 5.2.1 and note 394

⁴⁶⁴ De Maria at 4: 'whistleblowing is really only ... suitable ... in democratic systems of governance', Professor Paul Latimer, Presentation at '*Turning whistle-blowing legislation to your advantage*' Panel Discussion, Monash South Africa, 2 September 2004: 'whistle-blowing is a sign of the health of a democratic system', and Jan Bezuidenhout, at the same Panel Discussion: for disclosures to work, 'you need maturity in an organisation'

⁴⁶⁵ See Section 4.4

⁴⁶⁶ That is, not limited as at present to 12/24 months' remuneration. See also Sections 5.1.1 and 5.1.2 for a more detailed discussion of the UK law and its application

suffered, and in addition be allowed some compensation for injury to feelings, as in the UK,⁴⁶⁷ and possibly also costs could be awarded. Under the current SA regime, there are many cases where a victimised whistleblower has to pursue his case via the labour or other courts, for which there is at present no legal aid. Many of the whistleblower callers referred to in Section 4.3 had spent much money on legal costs, some having even lost a home or a car in the process. If the government is as serious about its anti-corruption endeavours as would seem from the recent money-laundering and corruption legislation, and if we really want to protect whistleblowers, then, as already expressed, there has to be greater protection and by the same token recompense for all quantifiable losses, costs and damages.

An interesting aspect that has not yet arisen in South African case law is the question of vicarious liability; that is, an employer possibly being held liable for reprisals or detriment caused to one employee by another employee or manager of the same employer. If, as seems to be the trend with sexual harassment cases,⁴⁶⁸ an employer can be held liable for the wrongful acts of an employee which the employer did nothing to prevent nor took appropriate disciplinary steps, it will probably not be too long before this is argued in a protected disclosure case. Australia already has some examples of this, and, although none has been completely successful yet, the employment tribunals have not dismissed the possibility.⁴⁶⁹

Recommendation 9 goes to the issue of more specific remedies such as orders and interdicts, and I submit that both interim and permanent interdicts, and orders, should be provided for. A majority of Australian statutes provide for this, and in South Africa the labour court has already interpreted the legislation in this spirit.⁴⁷⁰

The tenth Recommendation discusses punitive damages, which the SALRC does not recommend. I submit that this stance is appropriate, and that compensation, damages and costs as discussed above should be deterrent enough.

Recommendation 11 suggests that knowingly making a false disclosure should not be an offence. I agree, and although in six Australian statutes knowingly making a

⁴⁶⁷ See Section 5.1.2 and note 354 re *Virgo Fidelis*

⁴⁶⁸ *Grobler v Naspers Beperk and Gasant Samuels (SCA) Case No 1853/00*, date of judgment 19 March 2004

⁴⁶⁹ See Section 5.2.2 and *Reeves-Board v Uni*

⁴⁷⁰ See Section 3, especially *Grieve v Denel (Pty) Ltd (2003) 24 ILJ 551 (LC)*, *CWU & another v Mobile Telephone Networks (Pty) Ltd (2003) 8 BLLR 741 (LC)*, and *Pienaar v BNK Landbou (Pty) Ltd (2004) (LC) (unreported)*, where the application did not meet the criteria for the granting of an interdict, but the court held that it did have jurisdiction to grant one should the merits of the case have warranted it.

false disclosure is an offence,⁴⁷¹ the low number of cases and the seemingly poor protection available to whistleblowers there perhaps shows that this is not conducive to effective whistleblowing. I submit that the prospect of losing protection and/or immunity under the PDA for knowingly making a false disclosure, or for that matter making a frivolous, vexatious or 'bad faith' disclosure should be deterrent ('punishment') enough, as discussed above.

SALRC Provisional Recommendation 12 also discourages making it an offence to subject an employee to occupational detriment, and here, with respect, I disagree. I submit that causing an occupational detriment and/or taking reprisals on someone for having made a protected disclosure *should* be an offence. Almost five years after the PDA, very few employers, whether public or private, have ensured that they have effective and safe confidential reporting lines in place, nor have they carried out awareness or training programmes on the PDA for their managers or staff. Whistleblowers in South Africa continue to suffer detriment – as evidenced by courtcases, media articles and empirical evidence. If we in South Africa really want to address corruption, there must be a sanction for employers who contravene the Act. It will take time, and much effort to change the culture, but at least the legislative framework must be in place. If we compare the PDA to the Employment Equity Act, compliance is equally disappointing several years after the implementation of the acts. Clearly laws must contain a penalty to force employers to take them seriously and these laws must be complemented by promotional work, and perhaps a specialized court.

The last SALRC Recommendation, 13, has two aspects. I emphatically disagree with making it mandatory for a potential whistleblower to have 'good faith' at the early stage when he/she gets more information from a legal advisor about if, how, and to whom to disclose. This would defeat the entire object of being able to get this advice. If in fact 'good faith' is retained as a prerequisite for the actual disclosures as per sections 6 to 9 of the PDA, a person seeking advice should be allowed to do so, partly to in fact be informed that, if he/she proceeds to disclose according to the PDA and any relevant procedures, he/she must evidence good faith. After studying the Australian statutes, I question whether in fact we should make 'good faith' mandatory. Six jurisdictions require a whistleblower to 'believe on reasonable grounds' that the information shows or tends to show wrongdoing. Queensland alone has a criterion similar to that of 'good faith' – here the whistleblower has to '*honestly*

⁴⁷¹ In Victoria it is an offence to give false information during the course of an investigation - *Whistleblowers Protection Act No 36 2001* (Victoria), s 60, while the ACT statute is silent on this aspect

believe on reasonable grounds.⁴⁷² Australian academics have submitted that it is absurd for authorities to require 'good faith' from an employee (or concerned citizen) disclosing suspicions of misconduct: police informers or criminals who turn 'state-witnesses' are burdened with no such requirement.⁴⁷³ Even in the UK, the employment tribunals have not placed much emphasis on the motive of the whistleblower.⁴⁷⁴ If in fact what we are trying to achieve is to prevent and curb corruption, does it really matter what motivated the disclosure, if it results in actual serious misconduct being exposed and dealt with?

On the other hand, obtaining advice and/or support from trade unions would be beneficial and is supported. In the UK the PIDA seems to work relatively well and has much support from the trade unions; this support would bolster the meagre resources of a lone whistleblower, often pitted against the much greater resources of a large organisation.⁴⁷⁵

I shall now discuss some areas that the SALRC invited comments on as well as other aspects I would recommend. The South African media today not only shows the ever-increasing prevalence of corruption,⁴⁷⁶ particularly in government bodies, but, of greater concern, the victimization of whistleblowers attempting to expose this corruption.⁴⁷⁷ Very vigorous action must be taken to halt this trend and encourage buy-in to the anti-corruption drive that gave birth to the PDA back in 1999.

The SALRC invited comment on a possible onus on employers to inform their workers of their rights and duties under the PDA, i.e. helping to 'move towards a culture in which disclosures would be dealt with responsibly.'⁴⁷⁸ This aspect is vitally important, and we should include in the PDA imperatives for all employers, in both the public and private sectors to ensure their employees are aware of the PDA and their rights and duties in terms of it;⁴⁷⁹ put in place confidential reporting procedures

⁴⁷² *Whistleblowers Protection Act 1994* (Queensland), s 14(2)

⁴⁷³ For example, De Maria at 16

⁴⁷⁴ See Section 5.1.1 and notes 340 and 341

⁴⁷⁵ De Maria at 26, Martin *Illusions* at 2. See also Section 1.6

⁴⁷⁶ It could of course also be that there is more awareness lately of whistleblowing and perhaps greater exposure of corruption previously undisclosed and unreported

⁴⁷⁷ One has only to think of recent media articles concerning the soccer referees' 'matchfixing', at the lower end of the scale, the roadworthy certificate scam, and the Parliamentary 'Travelgate' fraud at the other, and regarding the occupational detriments being suffered by whistleblowers such as Glen Chase and Mike Tshitshonga – Jovial Rantao, 'Is this how ANC fights corruption?' *The Star*, 20 August 2004 at www.thestar.co.za, amongst many others.

⁴⁷⁸ SALRC *Discussion Paper* at 74-5 and 32

⁴⁷⁹ i.e. perhaps display a shortened version of the PDA as is mandatory in the case of the BCEA and EEA

and educate and train their staff are in terms of these procedures; and include in their Disciplinary Codes that it is an offence to take reprisals for any protected disclosures.

Further amendments to the PDA should include essential definitions for basic terms such as 'good faith', 'reasonable belief', 'personal gain', 'exceptionally serious' and perhaps also 'public interest' if the ambit of the PDA is broadened. If need be, such definitions could be in the 'Regulations' or 'Practical Guidelines' referred to in PDA s 10 – in my opinion it is unacceptable that almost five years after the PDA was enacted these are still not in place. Perhaps a body like the SALRC or ODAC should be charged with this by the Minister – they would perhaps produce them more expeditiously. Small discrepancies such as the confusion, previously mentioned, between 'reference' and 'Certificate of Service' and blowing in respect of a fellow-employee as well one's employer could be clarified.⁴⁸⁰ The position regarding 'rewards' (s 9(1)(b)) should also be clarified – it seems to me that some rewards could definitely be interpreted as being 'for personal gain' and thus constitute a grey area, while perhaps a timeframe within which a detriment could be linked to a disclosure would be helpful.

The Queensland Statute has a very useful section of actual case study examples;⁴⁸¹ this would be helpful. Due to the often very distressing effects of whistleblowing, South Africa could profitably emulate the draft Australian Commonwealth Bill and make provision for whistleblowing wellbeing mechanisms such as counselling.⁴⁸² There should be an express duty placed on the receiving body to investigate, with some discretion as in Australia.⁴⁸³ There should also be a duty on the recipient of the disclosure to give feedback to the whistleblower, both regarding whether or not his complaint merited investigation, to inform him of the progress and outcome of the investigation, and perhaps to allow him to discontinue blowing at any stage. Evidence seems to suggest that many damaging wider disclosures are made in desperation by whistleblowers who believe nothing is being done as they are given no feedback.⁴⁸⁴

Ideally, agencies that receive disclosures should report on the number of disclosures received and investigated annually to a suitable oversight body or directly to

⁴⁸⁰ See Section 2.3.6

⁴⁸¹ *Whistleblowers Protection Act 1994* (Queensland), Schedule 4

⁴⁸² Draft Commonwealth *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002*, s 27

⁴⁸³ Expressly stated in Victoria, Tasmania, Western Australia and Commonwealth. All statutes, however, allow for discretion, i.e. for the non-investigation of frivolous, vexatious or previously investigated complaints.

⁴⁸⁴ Prof Allan Fels AO, *Whistleblowing: opportunity or threat?* paper presented to the Transparency International Whistleblowing Conference in July 2003, at 13, (hereinafter Fels)

Parliament.⁴⁸⁵ Also ideally, the PDA should provide for regular review of the legislation.⁴⁸⁶ Involuntary disclosures, (that is those disclosures that fall within the scope of someone's job), should be protected as they are in Queensland.⁴⁸⁷

6.2 Application of the PDA

Although there are only a few cases, we can nevertheless see what is purposive in the court's interpretation of the PDA and where they could perhaps be more lenient. One of the most important aspects of *Grieve v Denel* is the fact that the court interpreted the PDA s 4(1)(a), which is rather vague as it stands, such that not only did the Labour Court hold it had jurisdiction to grant an interim interdict but further set out clear criteria an application should meet to qualify for such an interdict.⁴⁸⁸ Other precedents set were that a disclosure had to be examined to see if it was indeed a 'disclosure' in terms of the PDA, was the disclosure bona fide, was there a link between the disclosure and the detriment (and disciplinary action was interpreted as a detriment) and the importance of the timing of the detriment in relation to the disclosure.⁴⁸⁹

This, the very first Labour Court case two years after the PDA, made no mention of procedure, made the interim interdict conditional upon the employee following through with his PDA dispute, already indicated that subjectivity regarding motives would become an issue and also showed the power of the employer. Although the court applied the PDA as purposively as one could wish, this judgment was unfortunately not the final word, as later events showed. Reprisal continued and the matter remains unresolved twenty months later, at huge cost to the employee. Hence the need, as will be discussed, to complement the law with other measures, but as far as the application of the PDA is concerned, in my opinion *Grieve v Denel* is the best example.

In *CWU*, further guidelines were given in the application of the PDA, for example the nature of a communication that could qualify as a disclosure, and a clear setting out of the criteria necessary for this.⁴⁹⁰ The court held firmly that rumour, conjecture or subjective opinion could not be deemed a disclosure for the purposes of protection

⁴⁸⁵ In Australia, all jurisdictions except South Australia and New South Wales require regular reporting re disclosures and investigations

⁴⁸⁶ New South Wales and Western Australia provide for regular legislative reviews.

⁴⁸⁷ *Whistleblowers Protection Act 1994* (Queensland), s 22

⁴⁸⁸ *Grieve v Denel* at 558B-D and G-I

⁴⁸⁹ See Section 3.2 for full judgment references.

⁴⁹⁰ Disclosure by an employee, in good faith, believing it concerns an impropriety, following procedure and linking to a detriment. See full discussion at Section 3.3

and further held that an email sent to many recipients had to be considered a Section 9 wider disclosure. Thus being the case, the applicant neither merited protection nor qualified for an interim interdict as he had neither a reasonable belief in the veracity of the email's content nor procedural compliance. The court took a slightly harder approach than that in *Grieve v Denel*, looking not only at the interests of the employee but at those of the employer as well. For the first time more emphasis was placed on procedure, an element destined to become a stumbling block.

In *Pienaar v BNK Landbou*, the strictest application yet of the PDA is seen. A very structured, 'flow-chart' type approach was taken, with successive criteria having to be met to eventually merit protection. As in *Grieve v Denel* and *CWU*, the court first established whether or not the content of the communication was 'information and thus a 'disclosure'. In a second stage, having deemed the communication a disclosure, the court applied the various criteria to be met to qualify for protection: was there good faith and was there procedural compliance? The court held that both these aspects had to be present for protection to be granted, and this application failed. I find this approach rather harsh, although it must be said that the timing does support the court's view that the 'protected disclosure' application might have been a defensive move.

As will be borne out in other sections, I submit that, if, as stated, the overall purpose of the PDA is to promote a culture to eradicate corruption, then I do not believe that such an emphasis either on the motive of the whistleblower nor on procedural compliance will be helpful. Obviously each case must be considered on its merits, but I would urge that, in the application of the PDA in the labour tribunals, the focus be taken off the motive and whether or not the whistleblower disclosed exactly as per the prescribed procedure and to the exact recipient – the important thing is the *content* of the disclosure and *what is subsequently done* about it. This is the only way that corruption can be effectively addressed. Especially if a person tried to disclose internally or to a regulatory body first, I submit that the court should be sympathetic. Often employers do not ensure their policies and procedures are well-known or understood by staff – why should a well-meaning employee be held accountable for some minor procedural non-compliance when the spirit of the disclosure was in keeping with the PDA? I would also submit that the courts could copy the approach taken in Tasmania, where the courts will allow protection if a 'substantial' reason for the detriment is the disclosure. i.e. not just the only or even primary cause.⁴⁹¹

⁴⁹¹ *Public Interest Disclosure Act No 16 2002 (Tasmania)* s 19(3).

6.3 Workplace realities

The Case Studies from ODAC, the responses to Rod Harper's article and the responses to my advert all reflect a common reality in the South African workplace today.⁴⁹² There is an appalling low level of knowledge of employees' labour rights generally or where to go for help in employment matters; either little knowledge of or little trust in the labour tribunals; and in many cases unions are also not much help. Very few whistleblowers actually knew about the PDA or their rights in terms of this Act; there were also very few whistleblowing procedures or policies in place at most organisations – or if there were, employees were ill-informed about them. Those that did know of the PDA were critical of it, calling it ineffective. Very little appropriate action, if any, ensued when disclosures were made to regulatory bodies, senior government officials or police services. This could be due to inefficiency, lack of real commitment, nepotism or even corruption. 'Boys' clubs' or cliques seem to be a reality and the superior power of the employer is evident in gagging orders or trumped-up cases against the whistleblower. Detriments abound in spite of the PDA; disillusionment sets in for the whistleblower; he feels betrayed not only by the employer but perhaps also by the system and he needs to spend much effort and money in defending his sanity and his career. Fear of reprisals and fear of powerful syndicates seem in some cases to be stronger than fear of the law and this does not bode well for our new anti-corruption laws. The prevalence of the anonymous hotlines, the preference for calling after hours and from phone booths are all proof of widespread reluctance to disclose openly – people are just not prepared to put their jobs or lives on the line.

6.4 Creating an appropriate culture

Laws can provide a 'backstop or safety net' but, no matter how good, do not in themselves promote whistleblowing.⁴⁹³ Also: 'Legislation may protect whistleblowers, but there is no law that can protect the whistle blower from the corporate environment he or she has to continue to work in.'⁴⁹⁴ Often, laws come ahead of a culture change – one has only to look at South Africa today to see that, many years after the Constitution and the Equality Act, we are still battling deeply-ingrained racism, xenophobia and homophobia. Why should acceptance of a 'snitch' be any easier?

⁴⁹² For details see Sections 4.1, 4.2 and 4.3

⁴⁹³ Dawson at 8

⁴⁹⁴ Mark Keohane, *Whistleblowing around the World launch*, speech at the launch of the Calland/Dehn book in Cape Town in April 2004, found at www.opendemocracy.org.za

Laws can foster an environment conducive to disclosures but need to be complemented by other initiatives,⁴⁹⁵ and the same I am sure will be true of the new anti-corruption laws. Society has to absorb the new imperatives, preferably with awareness-raising and education, and slowly start living in accordance with them.

Even with a good legal framework, if the cultural climate in a country is not conducive to open reporting of wrongdoing, potential whistleblowers will not dare to blow. This is a major sociological study in itself as many academics have discussed cultural and other impediments to whistleblowing, globally and in South Africa in particular.⁴⁹⁶ In South Africa we have unique cultural impediments to blowing the whistle, coming out of our history of apartheid and authoritarianism as well as current financial disincentives in the light of our high unemployment figures.⁴⁹⁷ It has been suggested that we should not just tamely follow in global footsteps if the legislation we are adopting does not fit our particular cultural climate.⁴⁹⁸ Academics have submitted various explanations for our unacceptably high current rate of corruption: 'Corruption is generic and endemic in a society in transition.'⁴⁹⁹ A even more sobering proposition has been voiced: now that the 'liberation struggle' is successfully over, the old concern for the collective good has been replaced by an obsession with personal advancement and enrichment, manifested by state power and access for personal gain: 'an ethical problem that presents a major challenge for the new South African democracy'.⁵⁰⁰ Levin goes on to say that these are challenges that 'can only be resolved through exemplary political commitment and leadership.'⁵⁰¹ A recent media article supports this: 'the idea ... that some are getting away with corruption generates a strong impetus for others to become corrupt.'⁵⁰²

Having looked at the UK and Australia, we can perhaps identify aspects in those countries that contribute to the success or otherwise of their whistleblowing legislation and apply the same principles in South Africa. The greater success of PIDA in the UK can, at least in part, be attributed to the strong role played by Public

⁴⁹⁵ Elaine Kaplan, 'The International Emergence of Legal Protections for Whistleblowers', *The Journal of Public Inquiry, Fall/Winter 2001*, (hereinafter Kaplan), at 37

⁴⁹⁶ See Section 1.4

⁴⁹⁷ Ibid

⁴⁹⁸ Professor Louis de Koker at the Monash Whistleblowing Panel Discussion referred to in note 464

⁴⁹⁹ Roy Cokayne, 'Denel sacks two more managers in corruption probe', *The Star Business Report 1 September 2004*, at 5, quoting Victor Moche, Denel's CEO

⁵⁰⁰ Richard Levin, Anti-corruption and Ethics, First Management Conversation in *Conversations, SDR Vol 1 No 3 2002*, at 78. Anyone following the current 'Travelgate' can relate to this opinion.

⁵⁰¹ Ibid

⁵⁰² Editorial, 'Blind Justice', *Business Day 4 August 2004*.

Concern at Work (PCAW) – their advocacy work is laudable. They have written useful Annotations to PIDA, keep statistics of PIDA cases, monitor its implementation, lobby for improvements to its application, publish good practice guidelines and a whistleblowing ‘Policy Pack’, run a policy and research programme, offer training and run a PIDA helpline. They believe that to be truly effective, PIDA must be accompanied by a shift in culture.⁵⁰³ The recent success in the UK health sector is attributed to promotional and training work.

In Australia, even though only applicable to the public sector, some of the laws are excellent – on paper. It seems that there is no real commitment or political will to actually implement the laws: ‘whistleblowing is often a dialogue between the hearing impaired and the inarticulate’.⁵⁰⁴ The culture is probably more resistant to such laws than in the UK, and I would guess very similar to ours in South Africa, thus needs extra advocacy and PR work. Whistleblowers Australia tries to do some of the same work as PCAW but is more of a self-help and lobbying group, and it does not seem to have the same influence on government as PCAW. From what writers say, the most helpful avenue for whistleblowers is the media, which is not even a legitimate channel.

In South Africa the closest equivalent we have is the Open Democracy Advice Centre (ODAC) in Cape Town. ODAC’s advocacy work has been based largely on that carried out in the UK by PCAW, but ODAC is a much smaller organisation, with I suspect much less by way of income and resources. If we really want to achieve the stated purpose of the PDA, i.e. to create an appropriate culture by providing comprehensive statutory guidelines and to promote the eradication of wrongful conduct in both the public and private sectors,⁵⁰⁵ I submit that the government should dedicate greater resources and authority to a body such as ODAC (or a new dedicated agency) to not only offer advice but also carry out awareness-raising, training, lobbying, promotion and monitoring of the PDA, and also think about alternative fora for pursuing PDA disputes and of extending legal aid for such proceedings. There is absolutely no doubt that for effective knowledge of, understanding and application of and compliance with whistleblowing legislation awareness-raising, promotion, training, vigorous implementation and monitoring are critical. Trade unions can also play a valuable role in this process.

⁵⁰³ See Sections 5.1.1 – 5.1.3

⁵⁰⁴ Ron McLeod, Commonwealth Ombudsman, ‘*Blowing the official whistle*’, Address to Transparency International Whistleblowing Symposium, Sydney, 6 August 2002, at 4

⁵⁰⁵ PDA Preamble

It is easy to blame the South African culture, but other reasons have been suggested for the lack of whistleblower success. Any employee knows that a workplace policy is not worth the paper it's written on if there is no top management 'walk the talk' or obvious buy-in and commitment. 'Many reasons are ascribed to the failure, the most being related to "the culture". Why not bad management, poor leadership and failed values?'⁵⁰⁶ As previously discussed, Enron had a great 'Code of Conduct', inspiring quotes on notepads and an active hotline – but if top management are perpetuating the frauds, supported by conniving auditors, how can corruption be addressed? Ethics becomes a community responsibility – not just that of the government and the CEOs: 'The realisation that corruption robs them of their rightful services and improved livelihood should prompt the "silent majority" to join hands with NGOS and media establishments to report and expose the corrupt elements ... who wrongfully benefit through corrupt means.'⁵⁰⁷

Is all doom and gloom? Luckily, not, there *is* hope. In spite of negative media headlines: 'Beige fraud still unpunished after 5 years',⁵⁰⁸ 'Chase dismissed after blowing the whistle',⁵⁰⁹ and 'Law fails citizen who blows the whistle: South Africa's whistleblowers report being harassed, sidelined and financially ruined for exposing corruption, fraud and other crimes – despite laws that are supposed to protect them',⁵¹⁰ there is some light breaking through. One cheerful if ironic headline reads: 'Anti-corruption unit is busted' – discussing the exposure of vehicle-testing corruption by two former co-offenders who blew the whistle.⁵¹¹ The most triumphant headline to date: 'Bank staffer coins it after spotting fraud',⁵¹² about a Standard Bank employee who won an award of R1 million after being drawn from a pool of 26 employees who had all qualified for the draw, having helped prevent frauds of R100,000 or more.⁵¹³

⁵⁰⁶ Landa, at 2 (see note 413)

⁵⁰⁷ Hennie van Vuuren, Responses to Richard Levin's Paper, in *Conversations, SDR Vol 1 No 3 2002*, at 83. See also note 500

⁵⁰⁸ Marcia Klein, *Business Day*, 2 August 2004

⁵⁰⁹ *SABC News online*, 17 August 2004

⁵¹⁰ Edwin Lombard, *Sunday Times*, August 8 2004, at 7, in fact discussing Professor Tina Uys, author of works quoted in this paper with her husband Nico Alant, who was himself victimized and financially ruined after blowing the whistle at the Reserve Bank

⁵¹¹ Gill Gifford, *The Star*, July 30 2004

⁵¹² Gill Gifford, *The Star*, August 25 2004

⁵¹³ I imagine this is the sort of climate our money-laundering and anti-corruption legislation aims to cultivate, and a few more headlines like this may make whistleblowing start to seem attractive. Herman de Beer at KPMG confided that there is one particular employee at a large company who reportedly earns more from rewards for exposing corruption than he earns doing his job! Hence my point about the blurred lines between rewards and personal gain.

All sources agree that the Times Magazine cover featuring three whistleblowers as 'Persons of the Year'⁵¹⁴ marked a turning point in media and public perception of whistleblowing. Instead of being traitors, they are now heroes. 'Whistleblowing' as such is a fairly new concept, and has become more acceptable, in English-speaking countries at least in the past decade.⁵¹⁵ Further, while whistleblowing laws are not enough on their own, they still 'reflect social expectations that something be done about organisational abuses'; prescribed channels acknowledge that whistleblowing is a legitimate and socially valued activity; and global sharing of experiences encourages whistleblowers, who usually suffer isolation, to realise they are not alone and to benefit from the experience of others.⁵¹⁶

With enhanced legislation, ongoing efforts to create a culture more conducive to whistleblowing ('ringing the bell?'),⁵¹⁷ a firm focus on ethics and good governance, strong and committed leadership, 'moral regeneration', prompt, effective and appropriate action by investigating bodies,⁵¹⁸ whistleblowing *can* make a difference. 'In short, statutory protection for whistleblowers is only part of the equation, albeit an important part. Cultural change and top down support must accompany whistleblower protection laws in order for them to achieve their objectives.'⁵¹⁹

We hope that our esteemed Speaker of Parliament really meant it when she was quoted as saying recently: 'We will stop at nothing in fighting corruption and promoting the rule of law', and the article continued: 'These words must be backed up by tough, transparent action.'⁵²⁰ And, developing a comment by Sherron Watkins, may we all have the courage to tell the emperor when he has no clothes on.

⁵¹⁴ See Section 1, notes 15 and 16

⁵¹⁵ Martin *Illusions*, at 5

⁵¹⁶ *Ibid*, and at 6

⁵¹⁷ See Section 1

⁵¹⁸ With feedback to the blower

⁵¹⁹ Kaplan at 42

⁵²⁰ Jovial Rantao, 'MPs can't cry foul when it suits them', Opinion, *The Star*, August 27 2004

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- 3.3 Mukelani Dimba, Lorraine Stober and Bill Thomson, The South African Experience, (Dimba et al), in Calland et al
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- 3.8 Evelyn Oakley and Anna Meyers, The UK: Public Concern at Work (Oakley et al) in Calland et al
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- 4.2 Professor Tina Uys, *Corporate Loyalty: Whistleblowing in the Financial Sector*, paper to be presented at RAU, 13 September 2002 (Uys)
- 4.3 Dehn, Discussion Paper at the OECD Labour/Management Programme: *Whistleblowing to combat corruption*, Paris 16 December 1999 (Dehn OECD),
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- 5.2 David Landa, 'Whistleblowing: Betrayal or Public Duty?', opening speech at the Transparency International Whistleblowing Symposium in Sydney, August 2002, (Landa).
- 5.3 Kim Sawyer, 'Why Australia needs a PIDA and a False Claims Act', Presentation to the Transparency International Whistleblowing Conference in July 2003 (Sawyer)
- 5.4 Professor Paul Latimer, *Presentation at 'Turning whistle-blowing legislation to your advantage'* Panel Discussion, Monash South Africa, 2 September 2004

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- 5.7 Mark Keohane, *Whistleblowing around the World launch*, speech at the launch of the Calland/Dehn book in Cape Town in April 2004, found at www.opendemocracy.org.za
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- 7.3 *Summary of Submissions on the Open Democracy Bill [B67-98] Prepared by Department of Justice* (www.pmg.org.za), (Summary of Submissions)
- 7.4 *COSATU's Supplementary Submission on the Open Democracy Bill, presented to the Portfolio Committee on Justice and Constitutional Development, 30 November 1999* (COSATU Submission)
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- 7.8 *Annotated guide [to PIDA] (PCAW Annotations)*, published by Public Concern at Work (PCAW)
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