The Status of Whistleblowing in South Africa: Taking stock – Patricia Martin

The Open Democracy Advice Centre is a legal advice centre whose mission is to promote democracy and encourage corporate and government accountability. Established in 2001, ODAC’s founding institutions are IDASA, the Black Sash Trust, and the Public Law Department of the University of Cape Town. The centre is a non-profit section 21 company based in Cape Town.
The Status of Whistleblowing in South Africa

Taking stock

Patricia Martin

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# Table of contents

Acronyms and abbreviations ....................................................... 4

Executive summary........................................................................ 5

Introduction ................................................................................. 12

Chapter 1 .................................................................................... 21
    Whistleblowing principles – an international, continental and regional review

Chapter 2 .................................................................................... 38
    The South African legal framework

Chapter 3 .................................................................................... 66
    Do the current laws create an enabling whistleblowing framework?

Chapter 4 ................................................................................... 114
    Recommendations

Selected references ........................................................................ 133
**Acronyms and abbreviations**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU</td>
<td>African Union</td>
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<td>CCMA</td>
<td>Commission for Conciliation, Mediation and Arbitration</td>
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<td>FICA</td>
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<td>National Anti-Corruption Forum</td>
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<td>Open Democracy Advice Centre</td>
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<td>OECD</td>
<td>The Organisation for Economic Co-operation and Development</td>
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<td>Prevention and Combating of Corrupt Activities Act No 12 of 2004</td>
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<td>Protected Disclosures Act</td>
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<td>SALRC</td>
<td>South African Law Reform Commission</td>
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<td>SAMWU</td>
<td>South African Municipal Workers Union</td>
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<td>UNCAC</td>
<td>United Nations Convention against Corruption</td>
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Executive summary

What is whistleblowing?
Whistleblowing enjoys a number of definitions. Definitions vary; depending on the role that whistleblowing is seen to play in society. A much–favoured definition is that whistleblowing is “Raising a concern about wrongdoing within organisations or through an independent structure associated with it.”

Why is whistleblowing important?
The South African Constitution is premised on the realisation of a “society based on democratic values, social justice and fundamental human rights” and seeks to “Lay the foundations for a democratic and open society in which government is based on the will of the people and every person is equally protected by the law”.

Whistleblowing is central to these constitutional principles. It is key in the fight against corruption and mismanagement, especially of public funds, and to strengthening transparency and accountability within organisations and society more generally.

Why is whistleblowing problematic?
Whistleblowing always involves two parties with opposing rights and interests; on the one hand there is the whistleblower who has a right to equality, freedom of expression and fair labour practices; and on the other hand there is the organisation against which an allegation is made which has rights to a reputation and to loyalty from staff.

The need for whistleblowing regulatory frameworks is premised on the recognition that neither sets of rights are absolute and that they need to be balanced appropriately and lawfully. The power imbalances in the relationship between whistleblowers and the organisations, against which allegations are made, require the governing framework to be especially strong and effective so that it may create a meaningful safe alternative to silence for the whistleblower. The experience of whistleblowers, even in a country such as South Africa which has a more advanced whistleblowing law than most other countries, does not bear testimony to

1  UK Committee on Standards in Public Life in Calland R and Dehn G, 2004
2  Act 108 of 1996: Preamble
the successful provision of a safe alternative to silence.

Whistleblowers can risk their livelihoods, their reputations, their lives and even the lives of their families to expose information of significant public importance, yet they do so at grave risk to themselves.

There is at this point in our history, a pronounced need for whistleblowers given the apparently elevated levels of corruption. At the same time, the livelihood of whistleblowers is more at risk than ever before given the recessionary economy and significant job losses we have seen.

The solution: A culture of disclosure

The Protected Disclosures Act, 2000 (the PDA) recognises the value of and need for whistleblowing in South Africa. It aims to:

Create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures.

The purpose of this paper

The purpose of this paper is to assess how far South Africa has progressed towards the realisation of a meaningful culture of disclosure. The realisation of a meaningful culture of disclosure requires an enabling whistleblowing legal framework, meaningful implementation and enforcement within all organisations of the practices and protections provided in terms of the enabling laws and a societal culture which is receptive to and respectful of whistleblowers.

Whistleblowing principles and practices: What is prescribed by international, continental and regional legal instruments?

International, continental and regional legal instruments, especially those pertaining to corruption, prescribe the development of enabling whistleblowing legal frameworks that will create a meaningfully safe alternative to silence for whistleblowers. The essential elements of such a framework are:

1. Features that together serve a dual purpose. On the one hand, proactive
features designed to compel/encourage the adoption, by organisations, of ethics and practices that make disclosure acceptable and which facilitate the disclosure of information about corrupt and otherwise tainted organisational activities; on the other hand, features that provide protections and incentives for whistleblowers to come forward without fear of being sanctioned.

2. The scope of the reach and protection provided by the laws must be sufficiently wide so as to:

2.1 Protect all potential holders of information about wrongdoing in an organisation in either the public or private spheres;

2.2 Protect disclosures about any conduct that may cause harm to fellow human beings;

2.3 Protect all disclosures of information that are disclosed in the reasonable belief that they are true.

3. The law must require organisations to introduce policies and processes that will facilitate and encourage disclosures by whistleblowers and which will oblige investigations and corrective measures in response to disclosures that are made.

4. The law must provide comprehensive protection to the whistleblower by:

4.1 Protecting the identity of the whistleblower.

4.2 Providing protection against all forms of harm, including dismissal, job sanctions, punitive transfers, harassment, and the loss of status and benefits.

4.3 Protecting the whistleblower against criminal or civil liability / sanction.

4.4 Placing the onus / burden of proof on the organisation to prove that any retaliatory conduct (for e.g. the dismissal) was not based on the disclosure.

4.5 Prohibiting any act or agreement which excludes any protection afforded by law to whistleblowers.

5. The law must provide accessible and effective enforcement mechanisms and remedies for whistleblowers, including:

5.1 Access to the country’s courts with a right of appeal.

5.2 A full range of remedies with a focus on interim and final interdicts, compensation for pain and suffering, for loss of earnings and status, mediation and legal costs.
5.3 Prohibiting any interference with the whistleblower’s disclosure.

6. The law must govern both public and private organisations in one consolidated whistleblowing law so as to subject entities to the same standards and obligations.

7. The law must facilitate public awareness and acceptance of whistleblowing and participation of civil society and the private sector in monitoring and review of the framework.

8. The law must be effectively implemented and enforced by all role players.

The South African whistleblowing framework

The whistleblowing framework in South Africa has developed over a number of years. It is currently primarily located in the Constitution of the Republic of South Africa, the Protected Disclosures Act 26 of 2000, the Labour Relations Act, the Companies Act 71 of 2008 and the body of jurisprudence that has been developed by the Labour, High and Supreme Courts of South Africa. The evolution of the laws in South Africa has resulted in four whistleblowing frameworks.

1. The first governs disclosures by the general public not protected by the PDA or the Companies Act.

2. The second is the framework created by the PDA which governs whistleblowing by employees in the public and private sectors.

3. The third is the framework created by the Companies Act which governs whistleblowing within all companies registered in terms of the Companies Act, including profit and not-for-profit companies.

4. The fourth is the framework of rights and obligations imposed on “public” and “state-owned” profit companies registered in terms of the Companies Act.

Do these four frameworks create an enabling legal environment that can foster a culture of disclosure?

A review of the frameworks against the international, continental and regional legislative principles reveals a number of policy and implementation gaps which prevent the realisation of a culture of disclosure, including the following:

1. The protective scope of the framework is too narrow.
1.1 The PDA limits the scope of protection to whistleblowers in a formal employment relationship and excludes citizen whistleblowers.

1.2 The PDA limits its protection to disclosures about the employer only. It does not cover a person or organisation closely associated with the organisation, other than an employee of the organisation.

1.3 Likewise, it only protects the employee against an occupational detriment committed by the employer or another employee of the organisation.

1.4 The range of recipients to whom a protected disclosure may be made is too narrow.

2. There is no express obligation in terms of the PDA on organisations, both public and private, to take proactive steps to encourage and facilitate whistleblowing in the organisation, or to investigate claims that are made by whistleblowers.

3. The Companies Act does create a number of positive obligations on private and state-owned companies to develop and implement whistleblowing policies and procedures. There is, however, no guidance provided for these companies or those which voluntarily choose to do so as to what the policies and procedures ought to contain and achieve.

4. The protection and remedies provided by the PDA are not strong enough to engender confidence in the ability of the law to protect whistleblowers.

4.1 The fora for the resolution of disputes related to whistleblowing are court-based. This is expensive and allows for delaying tactics by employers which amount to an abuse of process.

4.2 The protection that is provided by the PDA is limited to protection against occupational detriment only.

4.3 The PDA provides no immunity against civil and criminal liability arising out of the disclosure.

4.4 There is no express obligation on organisations in terms of the PDA to protect a whistleblower’s identity.

4.5 The remedies that are available in the case of a transgression of a whistleblower’s rights are insufficient. For example, damages are limited to the damages that may be awarded in terms of the LRA.

5. There is no consolidated and comprehensive whistleblowing framework. Instead, whistleblowing is regulated by a splintered series of different laws which apply different obligations to public and private entities and dif-
different levels of protection for different categories of whistleblowers. The effect of this is to create a risk of unequal protection for different whistleblowers.

6. There is no public body dedicated and able to provide regular advice to the public, to monitor and review whistleblowing laws and practices and to promote public awareness and acceptance of whistleblowing.

7. The lack of a dedicated monitoring body has contributed to the lack of regular and updated data tracking the prevalence of whistleblowing, the creation and practice of a culture of organisational disclosure and transparency and the protection of whistleblowers.

8. There are numerous implementation gaps and deficiencies in the use of the law. The overall picture that emerges from available statistics and studies is that we are not seeing a robust culture of disclosure in South Africa. Despite the fact that the PDA is now ten years old, we are seeing what appears to be a reversal of gains made in this regard.

Recommendations

The following policy and implementation changes must be made to South Africa’s whistleblowing framework:

1. There is a need to develop a consolidated and consistent whistleblowing framework that provides equal protection to all whistleblowers and which imposes the same effective duties on organisations, in both the public and private domains, to promote a culture of disclosure that protects whistleblowers.

2. The law must be made more comprehensive in the provision of an expanded scope of protection. It must draw all potential whistleblowers into its protective field and allow disclosures to any person or agency that is able to do something about the allegation concerned.

3. Knowledge, understanding and use of the PDA and related laws must be improved, with a specific focus on the most vulnerable, namely less wealthy working class employees.

4. Organisations must be compelled and/or encouraged to proactively promote a culture of disclosure, adopt more appropriate and expansive interpretations of the PDA, and to be more pro-active and attentive to effective implementation of obligations and protections provided by the law.
Vehicles for addressing policy and implementation gaps

The law reform process has stalled. All stakeholders, especially those who have participated in the development and review of the laws to date, must work together to move it forward. Moreover there is a need for the same stakeholders, including business, the public sector, trade unions and civil society to work together to ensure better knowledge and implementation of the PDA and related laws. They must advance common whistleblowing messages through awareness raising, capacity building and educational campaigns to improve complimentary implementation and use of the PDA. The messages must reach all potential whistleblowers, but must target those that are especially vulnerable, such as the unemployed and poorer working people, as well as those in positions that expose them to significant power imbalances.

These measures are not only necessary in the light of the current status of whistleblowing in South Africa; they are also prescribed by a number of international and continental conventions. The AU Convention requires that measures be taken to “Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media and the promotion of an enabling environment for the respect of ethics.”

The following vehicles are possible routes for the realisation of these objectives.

1. Union-led campaigns
2. A code of good practice
3. Whistleblowing support network.
Introduction

What is whistleblowing?

Whistleblowing enjoys a number of definitions. A much-favoured definition is that of the UK Committee on Standards in Public Life, which defines it as “Raising a concern about wrongdoing within organisations or through an independent structure associated with it.”4 The Council of Europe’s Resolution on “The protection of whistleblowers” builds on this so as to refer to the purpose of whistleblowing within the definition. It defines “whistleblowing” as “concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk.”5

Why is whistleblowing important?

The importance of whistleblowing is evident from the following cases reported to the Open Democracy Advice Centre (ODAC). The cases show not only the value, but also the challenges of whistleblowing in South Africa.

On the one hand, they show the value of whistleblowing. On the other, they also show the need for a stronger legal framework capable of providing effective protection for whistleblowers and that is capable of ensuring that the whistle is not blown for nothing; that is to say, one that is able to ensure that once the whistle is blown, appropriate and corrective action is taken by the relevant organisation.

The case of Mr M

Mr M, a long-standing employee of a national public transport company was concerned about the lack of adequate training given to new recruits on how to implement the company’s safety plan. He raised his concern with his senior managers, but they did nothing to remedy the situation.

The insufficient application of safety checks resulted in the floor boards of a vehicle deteriorating without anyone noticing this dangerous wear and tear. In consequence, a number of passengers fell through the floor boards while the vehicle was in motion, resulting in many deaths.

Mr M’s managers instructed him not to include details of the poor condition of

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4 UK Committee on Standards in Public Life in Calland R and Dehn G, 2004
5 Resolution 1729 (2010), Council of Europe
the vehicle in his safety report. Mr M refused to remain silent and asked his union representative to intercede and raise the issue with his managers. This angered the company managers who threatened Mr M. They issued an ultimatum that he either remain silent or resign. Mr M resigned and referred the matter to a labour tribunal on the grounds that he had been unfairly dismissed.

He won his case and was reinstated: But only after the loss of life, the loss of his job, damage to his rights of freedom of expression, dignity and fair labour practices, and after damage to his past and future working relationship with the organisation concerned.

The case of Mr A

Mr A blew the whistle on a long history of wasteful and fraudulent expenditure by a local municipality in the Limpopo province. He raised concerns about a series of unlawful practices and financial transgressions. These had been previously disclosed by the Auditor General and through internal memos to the municipal manager and to the executive mayor. Nothing had been done to remedy the situation.

The nature of the transgressions varied, but one that stood out as a particularly gross abuse of public resources related to the unauthorised use of a 3G card which was used to enter a competition to win a car, resulting in unlawful expenditure of almost half a million rand.

The long-standing duration of the irregularities, the repeated failure to address the issues and the spurious nature of the wasted expenditure stands out in stark relief against the levels of high poverty and poor access to basic municipal services by the people of Limpopo. Almost 25% of households in the province are dependent on government grants for their household income; only 12, 8% of households have their refuse removed by their local municipality; more than 19% of households do not have access to piped water and almost 10% (8, 8%) have no access to sanitation or only have access to the bucket system.

Mr Aphane, an employee of the municipality, sought and obtained the support of the South African Municipal Workers Union (SAMWU) to raise these concerns with the municipality. Repeated failures by the municipal managers and mayor to address the concerns led Mr Aphane to report these concerns to the Minister of Finance, request that a forensic audit be conducted and that the former executive mayor and municipal managers be held to account. The matter was referred by the National Treasury to the Limpopo Provincial Treasury. Mr Aphane and SAMWU have to date not received an acknowledgment of receipt of the complaint, let

6 General Household Survey, 2009
alone seen any investigation taking place.

The municipality’s continued failure and the failure of any other agency to act decisively saw SAMWU issuing a press statement further publicising the issues at hand. Mr Aphen was subsequently interviewed on SABC radio, where he spoke about the financial irregularities at the municipality.

He was subsequently issued a notice by the municipality advising him of its intent to suspend him on the basis that “he published information on [sic] the media about the Municipality thereby bringing the good name of the institution into disrepute”. He was not furnished with any information and was given only 12 hours’ notice to make written representations on his suspension.

Mr A approached the High Court, on an urgent basis, to interdict the Municipality from suspending him. The court did not grant the relief on the technical ground that the case was not urgent as defined at law. Mr A was subsequently dismissed by the municipality on the following charges of misconduct:

1. He spoke to the media and made public statements about financial mismanagement and theft at the municipality;
2. He wrote a letter to the National Treasury alleging financial mismanagement and requesting a financial audit;
3. He had brought the name of the municipality into disrepute.

His case is ongoing.

Mr M and Mr A’s cases illustrate the importance of whistleblowing in the fight against corruption and mismanagement, especially of public funds; the value of whistleblowing in strengthening transparency and accountability in respect of the use of public and private funds; the risk that whistleblowers face in making disclosures for the public good; the lack of accessible protection and forums through which relief may be obtained by whistleblowers; the impunity with which organisations may disregard disclosures, often made at a high personal cost to a whistleblower; tensions between competing rights to organisational or personal reputation and the constitutionally protected rights of the individual to freedom of expression, fair labour practices and equality before the law.

Moreover, the cases illustrate that given the power dynamics that prevail, cases of whistleblowing often result in unjustified and unlawful transgressions of the individual’s rights with little done to remedy the conduct disclosed. The power imbalances and tensions between competing rights are, as illustrated by the experiences of these and other whistleblowers, not sufficiently addressed or adequately balanced in terms of the legal protection provided, the obligations created
The Status of Whistleblowing in South Africa

to address concerns and in the remedies and fora made available for resolving whistleblowing disputes in South Africa.

Whistleblowing in South Africa – a constitutional imperative

The South African Constitution is premised on the realisation of a “society based on democratic values, social justice and fundamental human rights” and seeks to “Lay the foundations for a democratic and open society in which government is based on the will of the people and every person is equally protected by the law”. 7

Whistleblowing is at the heart of these fundamental constitutional principles aimed at fostering a just and democratic society. Whistleblowing is aimed at overcoming criminal and irregular conduct in organisations, both public and private. “Criminal and irregular conduct is detrimental to accountable and transparent governance in state institutions and good corporate governance in private bodies.”8 As such, it is central to the realisation of the governing constitutional principles of transparency, accountability and a just society based on democratic principles.

In addition to the constitutional democratic and social justice values, whistleblowing and the protection of whistleblowers is key to the realisation of a number of fundamental human rights, including the right to freedom of expression, equality and fair labour practices. Section 16 of the Constitution provides that “Everyone has the right to freedom of expression, which includes… (b) freedom to receive and impart information and ideas”. Section 23 provides that “Everyone has the right to fair labour practices” and Section 9 provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms.”

Inasmuch as whistleblowing is intrinsically associated with the positive values embedded in our Constitution, it has also been associated with less favourable aspects of our political history. Whistleblowing has not always been seen by everybody in a positive light. Whistleblowers have been reviled within segments of South African society. In some quarters, they have been associated with “impimpis”, that is the informers used by the apartheid-era repressive regime to ferret out the identity and location of political activists seeking to overthrow the illegitimate government of the day. This, together with the strong sense of duty of confidentiality on employees and others associated with organisations to protect

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7 Act 108 of 1996: Preamble
8 ODAC, Speak out for service delivery
its reputation has created environments that can be hostile to whistleblowers and the news they bear.

This has resulted in the often highly publicised cases of whistleblowers whose livelihoods and even their lives are placed at risk when making disclosures that benefit organisations and society as a whole. Given the essential link between whistleblowing and the realisation of fundamental constitutional principles and values, and given the risk that organisations and the people within them will shun, intimidate and otherwise discriminate against whistleblowers, the South African legislature has taken decisive steps in recognising the value of whistleblowing and to protect whistleblowers.

South Africa is one of only “a few countries that have adopted comprehensive laws on whistleblowing. The UK, New Zealand, Ghana and South Africa have the most developed laws that can truly be called comprehensive and apply to the public and private sector”.

Whistleblowing: A heightened imperative at this political and economic juncture

The current climate has created a heightened need for whistleblowing and at the same time exposes whistleblowers to greater risks than ever before. Reported corruption is rife. It appears to be on the rise in a society marked by high levels of poverty, continued extreme inequality, high rates of unemployment and job losses and social unrest.

Perceived corruption has increased over the last five to ten years. Transparency International’s 2009 Corruption Perceptions Index places South Africa as the 55th most corrupt country out of 180 countries. Any country falling below a rating of 5 on a scale of 0-10 is regarded as having unacceptably high rates of corruption. South Africa has slipped from a score of 5.1 in 2007 to 4.7 in 2009.

Unemployment is high and has increased in the last few years. South Africa has witnessed large numbers of retrenchments and job losses in the current economic recession. Following on Statistics South Africa Labour Force’s Survey of 28 July 2009 which confirmed that South Africa is in recession, the first in 17 years, the most recent Quarterly Employment Statistics (QES) released in June 2010, shows that 79 000 jobs were lost in the first quarter of 2010. These losses come on top of the 870 000 jobs lost in 2009. The unemployment rate has increased

9  Banisar D, 2006: page 9
10  Transparency International 2009
11  Quarterly Employment Statistics (QES), March 2010, Statistics South Africa
from 24% to 25%, 2% (and jumps even higher to 32.5% if one includes discouraged workseekers).

Those hardest hit by the combined forces of job losses and corruption are people living in poverty. Corruption results in a lack of public confidence in democratic processes, it entrenches elites, slows economic growth and deepens economic inequality as money continues to trickle up\(^\text{12}\): all of which can never bode well, but is especially harmful at this juncture in our history. The diversion of funds into deep and corrupt pockets means that public funds are diverted away from providing basic and necessary services and support to the most vulnerable.

An ISS survey shows that the poor are especially vulnerable to petty corruption and concludes that their inability to access services because they cannot pay bribes further deepens the socio-economic divisions in South African society and the alienation of the poor from the democratic process\(^\text{13}\). The cost of corruption to the poor, and ultimately, society is recognised in South Africa’s Public Service Anti-Corruption Strategy. It observes that:

\textit{Diversion of resources from their intended purposes distorts the formulation of public policy and the provision of services. This is as a result of bribe-extraction for delivery of services, poor quality of services and poor access to services. Petty corruption and bribes have a particular impact on the poor. Public programmes such as access to land, health services and the legal system are negated if bribe paying determines the allocation of these priorities and services. It has the effect of benefiting a few at the expense of the many and reinforces existing social and economic inequalities. This in turn undermines the credibility of government and public institutions.}\(^\text{14}\)

It is not just in the public sector that the poor are most impacted by corruption; it is also the case with corruption in the private sector. As pointed out by Mike Louw of Cosatu (Provincial organiser, Western Cape) in an interview with Voice of the Cape radio, the recent bread price fixing debacle impacted most heavily on the poor.

As such the need for whistleblowing is pronounced. The same economic forces creating this need make whistleblowing for employees, job seekers and others dependent on an economic relationship with organisations, both public and private, more risky than ever before.

\(^{12}\) Van Vuuren H, 2004: page 11

\(^{13}\) Van Vuuren H, 2004: page 16

\(^{14}\) Department of Public Service and Administration, January 2002: page 10
The solution: A culture of disclosure

The Protected Disclosures Act, 2000 (the PDA) recognises the value of and need for whistleblowing in South Africa. It recognises this in its express acknowledgement of the value and purpose of whistleblowing in relation to the broader underlying constitutional principles of human dignity, equality and freedom as well as the immediate role it has to play in stemming the tide of criminal and other irregular conduct in organs of state and private bodies.

The Preamble to the Act recognises that—

- The Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom; and that
- Criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and the potential to cause social damage.

The PDA acknowledges the link between these objectives and whistleblowing by seeking to address these imperatives through the enactment of the PDA which aims to:

Create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures.

Calland and Dehn observe that the emphasis within the PDA on the creation of an appropriate culture lies at the heart of the realisation of the objectives of a transparent and accountable society which is respectful of the constitutional principles of justice, freedom and equality. They argue that unless organisations take heed of the direction given by the PDA and “foster a culture that declares and demonstrates that it is safe and accepted to raise a genuine concern about wrongdoing, employees will assume that they face victimisation, losing their job or damaging their career.”

15 Calland R and Dehn G, 2004: page 3
Taking stock of the status of whistleblowing in the country, from a legal, practise and cultural perspective

The policy history of whistleblowing protection has been complex in South Africa. It has gone through a protracted period of development. It initially started as part of a bigger open democracy initiative when it was located in the Open Democracy Bill. It was however not to remain in the Bill. It was subsequently located in the PDA where it has been whittled down to a domain of regulation applicable to the workplace, more specifically to the relationship between the employer and employee. Since the enactment of the PDA there has been an ongoing process of review of the PDA and whistleblowing. South Africa is on the cusp of seeing the expansion of the scope of protection for certain whistleblowers associated with companies through a pending amendment to the Companies Act. It however remains limited in scope in the public sector domain. The extent and nature of these limitations have been the subject matter of an in-depth review by the South African Law Reform Commission (SALRC). The SALRC has developed an extensive body of recommendations to address the limitations of the PDA, but these recommendations are in stasis with no clear indication from the authorities as to the pace and the way forward towards a more vigorous culture of transparency in South Africa.

Whistleblowing in South Africa is in a state of flux. It is regulated and applied differently in different contexts and gaps and concerns remain at both a policy and implementation level. Whistleblowing barriers having been partially addressed at a policy level and remain obstinately prevalent on the implementation front. The result, at a glance, is a splintered, but interrelated body of laws cutting across different departments and disciplines that are applied erratically by public and private organisations in a manner that has left whistleblowers, at risk of “victimisation, losing their job or damaging their career.”

The Open Democracy Advice Centre has been at the forefront of the development, review and monitoring of the implementation of the Protected Disclosures Act and related laws in South Africa. It is concerned with the apparent stalling of the law, from both a law reform and implementation perspective, at the expense of whistleblowers brave enough to speak out against corruption. It has therefore commissioned this review of whistleblowing in South Africa.

The brief from ODAC was to pause at this point in our political, economic and legal history and take stock of the status of whistleblowing in the country, from a cultural, legal and implementation perspective, to piece together the shards of

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16 The recommendations are documented in the South African Law Reform Commission’s Report, August 2008, Project 123, Protected Disclosures

17 Calland R and Dehn G, 2004:page 3
law and assess how far we have come in the realisation of a culture of disclosure; how effective the overall framework of policies and laws are in fostering a culture of transparency and accountability through the encouragement and acceptance of practices of disclosure about unlawful conduct, corruption and abuse of power by private and public entities.

Methodology, scope and limitation of the project

This review commenced with a broad overview of the obligations and guidance provided to countries such as South Africa in the development and implementation of appropriate whistleblowing policies, laws and practices by international, continental and regional instruments and best practices.

This paper has sought, against this background, to describe the governing whistleblowing policies and laws in South Africa as understood by the courts, commentators and the South African Law Reform Commission. The review sought in the first instance to paint a picture of the current status of the law. In addition, it has sought to assess the sufficiency of the law, as measured against the body of international, continental and regional principles which constitute the “gold standard” for whistleblowing laws to foster a deeply entrenched culture of disclosure.

In addition to mapping and reviewing the sufficiency of the laws governing whistleblowing, this review has sought to provide an overview of the state and sufficiency of implementation of obligations imposed on organisations and use of the protections by whistleblowers provided by the laws. This stage of the review was conducted by reviewing literature, commentary and evaluation reports in respect of the implementation and use of the laws and consolidating the outcomes and conclusions to provide a snap shot of the progress that has been made, or not, in the development of a culture of disclosure.

The secondary research material was supplemented by primary research in the form of interviews with a cross section of role players in the public, private and civil society sectors on their respective roles and practices in the application, monitoring and enforcement of the governing whistleblowing laws. The number and range of interviews were limited by the nature and scope of the commission as well as the reluctance of many of the people and organisations approached to participate in the research to make themselves available for an interview.
Chapter 1

Whistleblowing principles and practices: An international, continental and regional review

Defining whistleblowing

In a review of best practices, Latimer and Brown observe that across the international landscape there is no common definition of “whistleblowing” or “whistleblowers”, neither of which constitute a technical term.

Different jurisdictions and authors favour different definitions of whistleblowing. The choice of definition offers insight into the role that the respective jurisdictions and authors see whistleblowing playing in society. Whistleblowing has many different facets. It can be seen as an act of free speech, an anti-corruption tool and an internal dispute mechanism. Banisar observes that the different definitions draw different boundaries in relation to the vision, scope and nature of the relevant whistleblowing frameworks.

Whistleblowing is, for some, seen as an anti-corruption tool with the emphasis on disclosure of illegal, immoral or illegitimate practices. It is in this context defined as a “public interest disclosure”, a “protected disclosure”, or the disclosure of “public interest information”.

Other definitions see whistleblowing in a similar, but slightly more restricted vein as addressing corruption internally within an organisation. An example is the UK Committee of Standards in Public Life’s definition of whistleblowing as “Raising a concern about malpractice within an organisation or through an independent structure associated with it.”

More recent definitions have focused on whistleblowing as a workplace
phenomenon in defining it as a disclosure made by an employees about an employer organisations. For example, the International Labour Organisation defines it as “The reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.”\textsuperscript{24} The latter definition is echoed in the view of whistleblowing favoured by Latimer and Brown which defines whistleblowing as “the disclosure by organisation members (former or current), of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.”\textsuperscript{25}

Others, such as the European Court of Human Rights\textsuperscript{26} and Vickers\textsuperscript{27}, see whistleblowing as an expression of dissent; as an element of free speech in the workplace.

The range of definitions illustrates that whistleblowing means different things in different jurisdictions and to different commentators. The underlying vision of whistleblowing and the role it has to play in society informing these differences cover a wide range - from being a means of regulating and encouraging disclosures within the workplace by employees about unlawful conduct about the employer organisation, to the more inclusive and expansive vision articulated by Banisar. He identifies whistleblowing as:-

\begin{quote}
\ldots a means to promote accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms. [He] recognises that whistleblowing relates to internal and external disclosures and should apply to all organisations, public and private. The disclosure can be internal to higher-ranking officials in the organisation but also to external bodies such as regulatory bodies, ombudsmen, anti-corruption commissioners, elected officials and the media. The focus of whistleblowing is thus a free speech right, an ethical release, and an administrative mechanism. The result is to ensure individuals have the ability to speak out in their conscience and that organisations are more open and accountable to their employees, shareholders and the greater public in their activities.\textsuperscript{28}
\end{quote}

\textsuperscript{24} ILO Thesaurus 2005 in Banisar, 2006 (updated in 2009), page 4
\textsuperscript{26} Guja v Moldova, European Court of Human Rights (14277/04), February 2008
\textsuperscript{27} Vickers L, 2002
\textsuperscript{28} Banisar, 2006, page 4
What is the role and scope of whistleblowing in terms of international, continental and regional instruments?

Given the range of possible definitions from which to choose, this paper now turns its attention to what the international, continental and regional instruments see as the role for whistleblowing in society. By extension, this inquiry will also provide guidance on what these instruments imply to be the correct or appropriate definition and the prescribed scope, nature and content of whistleblowing that should be enshrined in the whistleblowing legal frameworks of member and affiliated states.

Why is whistleblowing important? What are the values and objectives of whistleblowing in terms of international, continental, regional law and best practices?

_The United Nations Convention against Corruption, 2003_

The United Nations Convention against Corruption (UNCAC) was adopted by the General Assembly by resolution no. 58/4 of 31 October 2003. It was ratified by the South African government in November 2004. Whistleblowing is posited as an anti-corruption tool by the Convention.

The purposes of the Convention are, inter alia:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; and

(b) To promote integrity, accountability and proper management of public affairs and public property

The scope of the UN Convention is not only limited to the prevention of corruption in the public arena. Article 12 obliges state parties to take measures to prevent corruption in the private sector.

In terms of Article 5, each state party is required to establish and promote effective practices aimed at the prevention of corruption in the public and private arena. One of the obligations created by the Convention on state parties is the incorporation, into their domestic legal system, of appropriate measures to provide protection against any unjustified treatment of whistleblowers, regarded as “any person who reports in good faith and on reasonable grounds to the competent authorities in accordance with the Convention.”

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29 Article 1
30 Article 33
The OECD Convention on combating Bribery of Foreign Public Officials in International Business Transactions

The Organisation for Economic Co-operation and Development (OECD) is made up of 30 member countries, including South Africa. The member states share a commitment to democracy and the market economy to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist other countries’ economic growth and contribute to growth in world trade. The OECD, much like the UN Convention, views whistleblowing as essential to fighting corruption in a democratic society.

The OECD Convention on Bribery of Foreign Public Officials in International Business Transactions is an anti-corruption convention which provides a framework for developed countries to work in a co-ordinated manner to criminalise the bribery of foreign public officials in international business transactions. South Africa has ratified the Convention which has been in force since August 2007. In terms of the Convention, a further set of “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted by the Council on 26 November 2009 and is binding on all signatories to the OECD Convention.

Recommendation IX requires member countries to ensure that certain whistleblowing channels are in place and certain whistleblowers are protected. More specifically, member countries must ensure that:

1. Easily accessible channels are in place for reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities;

2. Appropriate measures are in place to facilitate reporting by public officials directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery...;

3. Appropriate measures are in place to protect from discriminatory or disciplinary action, public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

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31 http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/oecd_convention
32 http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html
33 http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/oecd_convention

The African Union Convention envisages whistleblowing as central to, not only the fight against corruption, but also to fostering accountability and transparency in the management of public affairs and socio-economic development on the continent. The African Union Convention regards corruption in both the public and private sector as damaging to economic development and commits member states to develop mechanisms to “detect, prevent, punish and eradicate corruption and related offences in the public and the private sectors”.

One of the central mechanisms required by the Convention is whistleblowing legislation. Article 5 requires members states to take legislative and other measures to:

1. Protect informants and witnesses in corruption and related offences;
2. Ensure that citizens report instances of corruption without fear of consequent reprisals

The SADC Protocol against Corruption
The Southern African Development Community (SADC) Protocol against Corruption (“the SADC Protocol”) takes it lead from the AU Convention and locates whistleblowing as a key ingredient within an effective anti-corruption framework. It recognises the negative impact of corruption in the public and private sectors on good governance, accountability and transparency. It commits member states, including South Africa, to create, maintain and strengthen systems for protecting individuals who, in good faith, report acts of corruption.

Although South Africa is not a member of the European Union and is not a signatory to the Council’s Conventions, the anti-corruption conventions and its whistleblowing resolution provide valuable guidance on international best practice. This is especially true given that both the criminal and civil conventions adopt a similar approach to whistleblowing as the UN, AU and SADC conventions against corruption. Like the latter, the European conventions recognise the harm

35  Preamble
36  Article 4(e)
that corruption does to democratic societies, the importance of whistleblowing in the fight against corruption and require member states to enact laws that protect whistleblowers against harm ensuing from the making of a disclosure. The Council of Europe’s Resolution 1729: The protection of whistleblowers aims to close the gap between the rhetoric of whistleblowing as contained in the Conventions and the practice in member states by providing guidance to members states on legislative principles that should be practiced to give meaning ful effect to the legal protections afforded to whistleblowers. The Resolution aims to provide guidance to member states on necessary legislative principles that will ensure a truly safe alternative to silence for whistleblowers rather than a “shield of cardboard” which would entrap them by giving them a false sense of security.

The resolution locates whistleblowing as central to accountability and the fight against corruption and mismanagement, both in the public and private sectors. Resolution 1 provides that:

*The Parliament Assembly recognises the importance of “whistleblowing” – concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk – as an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors.*

*The European Court of Human Rights*

In the case of *Guja v Moldova* the European Court of Human Rights confirmed that whistleblowing – the disclosure of information about illegal and corrupt activities in this case – constitutes an exercise of an individual’s internationally protected right of freedom of expression, in particular, the right to impart information. Moreover, that this right extends into the workplace where it may only be curtailed to the extent necessary in a democratic society.

*The International Chamber of Commerce*

The International Chamber of Commerce is an international voluntary membership-based organisation with members drawn from business in more than 130 countries. It sets international standards and policies governing business practice and ethics and monitors and enforces compliance amongst member organisations.

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37 Omtzigt P, July 2009
38 Case no 14277/04, February 2008
39 http://www.iccwbo.org
The ICC has developed guidelines on Whistleblowing. The guidelines recognise the risk that fraud and corruption present to organisational well-being. The guidelines recognise that it “destroys shareholder’s value, threatens enterprises development, endangers employment opportunities and undermines good governance.” Whistleblowing is recognised as a key internal risk-management tool to addressing this danger, given the fact that a company’s workforce is a valuable source of information that can be used to detect and prevent fraudulent behaviour in enterprises.

Whistleblowing objectives summarised

From the discussions above, it is clear that international, continental and regional laws recognise and prescribe the following value to and objectives of whistleblowing:

1. Whistleblowing is a key instrument in the fight against corruption and other unlawful conduct in both the private and public arena as it promotes a culture of openness and transparency.

2. It is fundamentally linked to ensuring transparency and political accountability in relation to the use and management of public and private resources and property.

3. By promoting responsible and accountable use of public resources and property, whistleblowing is causally linked to socio-economic development, especially in developing countries.

4. It is of great public value. It reduces the risk of harm to others. Whistleblowing often reveals information that is critically important for public life, such as the disclosures about the SARS virus in China.

5. Whistleblowing is of intrinsic value to organisations themselves. It promotes good organisational governance and is an effective internal risk-management tool. It is not only in the public interest, it is also an efficient tool for risk management within organisations. The UK Committee on Public Life elaborates further in its statement that whistleblowing is “both an instrument in support of good governance and a manifestation of a more open organisational culture”.

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40 ICC Guidelines on Whistleblowing
41 Banisar, D, 2006: page 6
42 Osterhaus A and Fagan C, 2009, page 7
43 Committee on Standards in Public Life (UK), Tenth Report, January 2005, quoted in Banisar, D, 2006, page 6
The “gold standard”: What must national legal frameworks governing whistleblowing look like to realise the full range of internationally, continentally and regionally prescribed principles and objectives?

To realise its potential role as envisaged to play by international conventions whistleblowing must be supported by an appropriate enabling legal framework. This must enable organisations to cultivate a culture of disclosure, provide whistleblowers with a safe alternative to silence, compel investigations into allegations and enable the meaningful protection of whistleblowers.

International, continental and regional conventions either specify minimum legislative requirements, or have been interpreted by commentators and experts to require a number of core legislative features necessary to create a framework that provides a comprehensive, effective, safe alternative option to silence. This paper now turns its attention to the essential elements of such a framework.

Transparency International’s *Recommended Principles for Whistleblowing Legislation* was developed with the support of leading experts and practitioners from around the world. They consolidated the dictates of international law and best practice into a body of principles deemed essential for a protective legal framework. Given the location of these principles in international law, as interpreted by practitioners from around the world, the Transparency International Recommendations are referred to extensively in the construction of the “gold standard” against which the South African whistleblowing framework can be measured.

Principles of an enabling whistleblowing legal framework: the gold standard

1. **An enabling legal framework must serve a dual purpose: combines a pro-active and protective purpose**

   A review of the international and continental obligations and best practices reveals that an enabling legal framework must exhibit two different, but inter-related enabling elements. These are described by Banisar, as:

   a. A pro-active element which attempts to change the culture of organisations by making whistleblowing acceptable and facilitates

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45  Banisar D, 2006: page 2
disclosure. This element is seen in pro-active provisions designed to compel/encourage a change in the culture of an organisation through the adoption of ethics and practices that make disclosure acceptable and which facilitate the disclosure of information about corrupt and otherwise tainted organisational activities.

b. A protective element made up of a number of protections and incentives for people to come forward without fear of being sanctioned.

2. Wide enough scope to realise the full range of underlying objectives

Whistleblowing laws are required to balance potentially competing rights and interests. On the one hand, there are the interests and the rights of the whistleblower and the public. On the other hand, there are the rights of the organisation and those associated with it about which the disclosure is made. One of the tensions at play here is between the rights of an organisation about which a disclosure is made, the value of disclosure and the need to promote disclosures and the whistleblower’s right to freedom of expression. Vickers argues that achieving this balance is particularly complex in the case of an employee blowing the whistle about an employer organisation. In this case, there is no doubt that employees enjoy a right to freedom of expression in the workplace, but as she points out, “in none of the conventions or constitutions is freedom of expression protected absolutely”.46 This right must be balanced against the employer organisation’s rights to privacy, security, the right to manage staff, to employee confidence and the right to a reputation.

It is the role of whistleblowing laws to strike a balance between these competing rights and interests through the chosen protective scope of the laws in question. The laws must set appropriate and legally determined protective boundaries. Vickers points out that the decision about what is an appropriate boundary is determined by a number of factors including the nature of the communication by the whistleblower, the subject matter of the disclosure, the motive for making the disclosure and the public importance of the information disclosed.47

We are provided with international guidance on where to draw these boundaries. The preference is for a wider scope of protection so that the legal frameworks are enabled to realise the full range of objectives of whistleblowing envisaged internationally, continentally and regionally and

46 Vickers I, 2002, page 15
47 Vickers L, page 16
The Status of Whistleblowing in South Africa

as determined by best practice. This requires that the framework cover both the public and private spheres; it must protect all whistleblowers in possession of relevant information about an organisation; must not be limited to disclosure of only criminal conduct and must include disclosures which are made in the honest belief that the allegation is true.

a. The framework must protect all potential holders of information about wrongdoing in an organisation in either the public or private sector

It is internationally recognised that a broader protective scope and definition of whistleblowing is needed for the realisation of the comprehensive range of whistleblowing objectives. To realise its full benefits the framework must be wide enough to “ensure individuals have the ability to speak out in their conscience and that organisations are more open and accountable to their employees, shareholders and the greater public in their activities.”\(^{48}\)

The UNCAC requires laws to protect “any person who reports in good faith and on reasonable grounds to the competent authorities in accordance with the Convention”\(^ {49}\). The AU Convention requires the whistleblowing framework to include all people in society. It requires that whistleblowing legislation in South Africa and other member states ensure that citizens report instances of corruption, in both the public and private domains, without fear of consequent reprisals. The Parliamentary Assembly of the Council of Europe’s Resolution for The protection of “whistle-blowers” opens with a wide framing of the scope of whistleblowing. It adopts a very broad definition of whistleblowers as “concerned individuals sounding the alarm in order to stop wrongdoing that place fellow humans at risk”. The broad definition and scope is fundamentally linked in the resolution to the realisation of the objectives of strengthening accountability and bolstering the fights against corruption and mismanagement in both the public and private sectors\(^ {50}\).

Transparency International’s Recommended Principles for Whistleblowing Legislation recommend that an enabling whistleblowing framework defines whistleblowing as “the disclosure of information about a perceived wrongdoing in an organisation, or the risk thereof, to

\(^{48}\) Banisar, 2006, page 4
\(^{49}\) Article 33
\(^{50}\) Resolution 1, Resolution 1729 (2010), Council of Europe
individuals or entities believed to be able to effect action[^51]^[^53]  

The breadth of the definitions and scope favoured internationally, continentally and regionally requires supporting whistleblowing laws not to limit whistleblowing protection and obligations to the public domain, but extend this to the private sphere. In addition, the law must protect all holders of pertinent information that are at risk of retribution in the event of disclosure. It ought not to be limited to protecting disclosures by employees or others in a traditional working relationship with the organisation in question.

b. The law must protect disclosures about any conduct that may cause harm to fellow human beings

If whistleblowing is to realise the objective contemplated in the definition preferred by the Council of Europe’s Resolution 1729, that is, “to stop wrongdoings that place fellow human beings at risk”, then whistleblowing laws must promote and protect the disclosure of information about a full and comprehensive range of conduct that can cause harm[^52]. The expansive breadth of the subject matter that should be protected is described in Transparency International’s recommended principles as ranging from criminal offences, breaches of legal obligations, miscarriages of justice, to dangers to health, safety or the environment and to the cover up of any of the identified acts.[^53]

Resolution 1729 echoes the need for the law to protect all information that applies to “bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies.”[^54]

c. The law must protect information if it is disclosed in the honest belief that it is true.

An internationally common principle which contributes to balancing competing organisational and whistleblower rights is the

[^52]: Transparency International: Principle 2
[^53]: Transparency International: Principle 4
[^54]: Article 6.1.1
requirement that whistleblowing laws only protect disclosures that are made in good faith as opposed to those that are driven by motives of personal grievance, malice or vindictiveness. The balance is weighted in favour of fostering a culture of disclosure by the proviso that is added to this requirement that the “requirement of good faith [be] limited to honest belief”.55

The European Council’s Resolution for the protection of whistleblowers56, the ICC’s Guidelines on Whistleblowing57 and Transparency International’s Recommendations58 require that whistleblowing legislation protect disclosures that are made in good faith, even if they prove to be incorrect due to an honest error. At the same time, the same international guiding documents, as well as the AU Convention59 and the SADC Protocol60 require that the relevant laws do not protect, and in fact, outlaw and sanction deliberately false and/or malicious disclosures.

3. **Must oblige organisations to introduce measures to facilitate and encourage disclosures by whistleblowers**

The Council of Europe recognises that the provision of a safe alternative to silence requires organisations to introduce policies and processes that will facilitate disclosures, oblige investigations and lead to corrective measures after disclosures are made.

Resolution 6.2 obliges “Whistle-blowing” legislation to focus on providing a safe alternative to silence. To do this “it should give appropriate incentives to government and corporate decision-makers to put in place internal “whistle-blowing” procedures that will ensure that disclosures pertaining to possible problems are properly investigated and relevant information reaches senior management in good time....”.

Transparency International has developed a number of recommendations, drawing on experience and international best practice which provides guidance on what the law should require of organisations to ensure a safe alternative to silence. The recommendations:61:

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55 Transparency International: Recommended Principles for Whistleblowing Legislation
56 Resolution 6.2.2: This legislation should protect anyone who, in good faith, makes use of existing internal “whistle-blowing” channels from any form of retaliation
57 Recommendation 7 requires that: All bona fide reports should be investigated by the enterprises whistleblowing unit
58 Recommendation 6 provides that: Requirement of good faith limited to honest belief
59 Article 5(7)
60 Article 4(f)
61 Recommended principles 7 - 11
The Status of Whistleblowing in South Africa

a. All organisations to implement disclosure policies and procedures.
b. All organisations to create internal whistleblowing systems that are safe and accessible.
c. Organisational procedures must oblige thorough, timely and independent investigation of allegations and adequate follow-up and enforcement mechanisms.
d. Internal reporting mechanisms be provided, but not at the expense of freely accessible external reporting routes.
e. The law must make provision for easy disclosure to external bodies. It does not preclude differentiated and elevated scales of care in reporting to these bodies, but does prohibit the imposition of an excessively onerous scale of care, so that a report may be made on the basis of suspicion alone.
f. Additional procedural safeguards may be adopted in cases of information relating to national security.
g. The law must require procedures to ensure that the whistleblower is kept informed of the progress of investigations and make him or her part of the process.

4. **Whistleblowing legislation must provide comprehensive protection for whistleblowers to ensure an effective safe alternative to silence**

The Council of Europe’s Resolution 1729 sums up both the similar international and continental recognition of the need for effective protection of whistleblowers against reprisals. It states that “Whistle-blowers should at least be given a fighting chance to ensure that their warnings are heard without risk to their livelihoods and those of their families. Relevant legislation must first and foremost provide a safe alternative to silence, whilst avoiding..... giving them a false sense of security.”

Almost all of the relevant international, continental and regional laws elaborate on what kind and level of protection would meet the prescribed standard. Transparency International has interpreted these requirements as follows:

a. The law must ensure that disclosure procedures guarantee the protection of the identity of the whistleblower. This requires that the identity of the whistleblower may not be disclosed without his or
her permission and the law must make provision for anonymous disclosures.\(^{63}\)

b. The law must protect the whistleblower against any disadvantage or reprisal suffered as a result of the disclosure. This must include protection against all forms of harm, including dismissal, job sanctions, punitive transfers, harassment, and the loss of status and benefits.\(^{64}\)

c. In addition, the law must protect the whistleblower from attracting criminal or civil liability / sanction as a result of making a protected disclosure.\(^{65}\)

d. The initial onus / burden of proof must be on the organisation to prove that their retaliatory conduct (for e.g. the dismissal) was not based on the disclosure by the whistleblower, but was based on a different motive.\(^{66}\)

e. The law must outlaw any act or agreement which excludes any protection afforded by law to whistleblowers.\(^{67}\)

5. The law must provide enforcement mechanisms and remedies for whistleblowers to guarantee the protection provided by the relevant laws

A secondary element of the provision of whistleblowers with meaningful protection against reprisals is the need to provide meaningful redress and access to adjudication forums if their rights are infringed.

This translates into the following legislative requirements.

a. The law must guarantee any whistleblower who believes he or she has been prejudiced because of blowing the whistle the right to a fair hearing before a court of law with a full right of appeal.\(^{68}\)

b. The law must provide a full range of remedies with a focus on interim and final interdicts, compensation for pain and suffering, for loss of earnings and status, mediation and legal costs.\(^{69}\)

c. The law must criminalise or otherwise sanction any interference by an employer or any other person with the whistleblower’s disclosure,

\(^{63}\) Recommended principle 12

\(^{64}\) Recommended principle 13

\(^{65}\) Principle 15

\(^{66}\) Principle 14

\(^{67}\) Principle 18

\(^{68}\) Principle 20

\(^{69}\) Council of Europe Resolution 1729, Article 6.2 and Principle 20 - 21
and any such interference must itself be subject to disciplinary proceedings and personal liability.  

6. Dedicated and consolidated whistleblowing legislation must provide the governing framework for both public and private organisations, rather than a number of different laws relating to different sectors.

The UNCAC, the AU Convention, the SADC Convention and the Council of Europe’s Resolution 1729 all require that whistleblowing legislation should cover both the public and private sectors. Transparency International has interpreted the relevant obligations and practices to translate into the need for “Dedicated legislation - in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach.”

Osterhaus and Fagan argue that this means that not only should both the public and private sectors be covered, but that they should be covered by “a single, comprehensive legal framework” for whistleblower protection. Their position is supported by Latimer and Brown in their observation of a need for greater consistency in the legal thresholds and operational requirements imposed by whistleblower laws. They argue that there is a need for common tests and processes covering both the public and the private sector. It is not enough simply to make both public and private organisations subject to whistleblowing laws. They must be made subject to the same law.

7. The law must facilitate public awareness and acceptance of whistleblowing and participation of civil society and the private sector in monitoring and review of the framework.

Transparency International recommends that the design and periodic review of any whistleblowing legislation should involve multiple stakeholders, including trade unions, business associations and civil society. The AU Convention as well as the SADC Protocol imposes similar obligations on government and other role-players in civil society to monitor the relevant processes and implementation of the relevant provisions in the conventions concerned. In addition to the monitoring and review obligations

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70 Principle 22
71 Transparency International, Recommended Principles for Whistleblowing Legislation, Recommendation 23
72 Osterhaus A and Fagan C, 2009: page 4
73 Latimer P and Brown AJ, 2008: page 766
74 Principle 26
75 Articles 12 and 4(i)
imposed, the AU Convention and the SADC Protocol call on government and civil society to be pro-active in the development and implementation of education and awareness-raising initiatives related to anti-corruption mechanisms, such as whistleblowing laws, adopted to further the Convention objectives.\textsuperscript{76}

Transparency International has interpreted this to require that:

a. The law must create a public body to provide general public advice on all matters related to whistleblowing, to monitor and review the whistleblowing framework, to promote public awareness-building measures to promote use of the whistleblowing provisions and broader cultural acceptance of whistleblowing.\textsuperscript{77}

b. The law must facilitate the collection and publication of whistleblowing data by requiring all bodies (of a certain size) to report regularly on disclosures made, any detriments, organizational disclosure procedures and outcomes.\textsuperscript{78}

c. The design and periodic review of legislation must involve key stakeholders, including trade unions, business associations and civil society organisations.\textsuperscript{79}

8. \textbf{Effective implementation and use of the law}

It is not enough to have laws that comply with some or all of the prescribed legislative principles. The laws must be known, respected, implemented and enforced by all role players.

The Council of Europe’s Resolution expressly states that the law must avoid offering potential whistleblowers a “shield of cardboard” which would entrap them by giving a false sense of security.\textsuperscript{80}

The following are some indicators of effective implementation of whistleblowing laws that should be evident in an organization and/or society marked by an emerging culture of disclosure\textsuperscript{81}.

a. A statistical increase in disclosures.

b. The existence of whistleblowing procedures in organisations.

\textsuperscript{76} Article 5(8) and 4(j)
\textsuperscript{77} Principle 24
\textsuperscript{78} Principle 25
\textsuperscript{79} Principle 26
\textsuperscript{80} Resolution 1729 (2010), resolution number 5
\textsuperscript{81} Banisar D, 2006: page 45
c. Are staff and the public aware of the whistleblowing laws, their rights and duties? Do staff and the public believe they will be protected? A belief by workers that they will not be protected can seriously undermine the effectiveness of any law.

d. How do organisations respond to outside disclosures: Is the predominant response one of seeking the source and reprisals or is the focus on the problem disclosed by the whistleblower?

e. What is the public’s predominant perception of whistleblowers – is it negative or positive?

An effective system will not only exhibit these indicators, but will be geared towards regular and systematic empirical monitoring of whistleblowing in society to track whether or not there is a steady transition from “symbolic” to more effective legal frameworks.  

82 Latimer P and Brown AJ, 2008: page 766
Chapter 2

The South African Legal Framework

What does the South African whistleblowing framework look like?

This section aims to provide a brief description of the relevant whistleblowing and related laws in South Africa, what they aim to achieve, and how they propose that their goals be achieved. The whistleblowing framework in South Africa is a product of the country’s history. The political history of South Africa has dictated the adoption of a wider approach to, and vision for whistleblowing in South Africa.

The Constitution: A legal foundation for an open, transparent and accountable democratic society

South Africa’s pre-1994 history left a legacy of a public and corporate culture of secrecy, unresponsiveness, corruption and a lack of accountability which created fertile soil for abuse of rights. At the same time, the repressive, covert and invasive nature of the regime that birthed this culture resulted in a societal suspicion of people who reported on others; of the motives of any person who disclosed information about their colleagues, employers, comrades and others.83

The post-1994 Constitution and complimentary policies and laws have been fundamentally shaped by a desire to foster a counter-culture that is able to realise the objectives of a democratic and open South African society based on social justice and fundamental rights and equality before the law. (The Preamble, The Constitution of the Republic of South Africa, 108 of 1996).

Energy and resources have been invested in developing an appropriate legal framework to foster and motivate the development of a culture appropriate to an open and democratic society. This investment has yielded a number of policies and laws which expressly aim to create an enabling environment within which a culture or transparency, responsibility, accountability, openness and disclosure can develop.

83 Dimba M, Stober L and Thomson P, 2004: page 143
The laws have sought to achieve this aim by imposing a number of obligations on stakeholders to engage in practices, which will over time, and accumulatively translate into a coherent body of laws and practices, and ultimately a societal culture of transparency and accountability that will displace the inherited historical culture.

Key policies in this regard, that together make up the whistleblowing framework in South Africa are:

1. The Promotion of Access to Information Act No. 2 of 2000;
2. The Protected Disclosures Act No 26 of 2000 and the LRA (Labour Relations Act 1996)
3. The precursor to the aforementioned acts, the Open Democracy Bill, and
4. More recently, the Companies Act No 71 of 2008.

The Open Democracy Bill

It is not a coincidence that both the Promotion of Access to Information and the Protected Disclosures Acts have their roots in the Open Democracy Bill (67 of 1998).

The Open Democracy Bill articulated key elements deemed necessary for an open and democratic South African society. The Bill was the product of a government commissioned Task Group on Open Democracy that was mandated to conduct research and make proposals for legislation which would ensure that the government does deliver on the constitutional promises of openness, accountability and transparency.

The collective wisdom of the Task Team placed the guarantee of the public’s access to information (held by both private and public bodies) and the protection of the public and employees of the state who seek to disclose information about unlawful conduct by private and public bodies at the pinnacle of open and accountable society. In other words, access to information and whistle blowing were seen as complimentary and inter-dependent essential practices necessary to foster a culture of openness, transparency and accountability.

The Open Democracy Bill which represented a consolidated response to the historically secretive and unresponsive public and corporate culture was never enacted into law. Instead it was split into two subsequent acts dealing independently with access to information and protection of whistleblowers, namely the

84 Dimba M, Stober L and Thomson B, 2004: page 143

The Promotion of Access to Information Act

The preamble to this Act consciously places itself at the centre of a culture of transparency and accountability. The preamble to the Act states that it aims to:

1. Foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information,
2. Actively promote a society in which people in South Africa have effective access to information to more fully exercise and protect their rights.

The objectives of the Act are to give effect to the right of everyone to access information held by both public and private entities and to regulate the procedures for applying for information from these bodies. (Section 9)

The Protected Disclosures Act (PDA) and the Labour Relations Act (LRA)

The vision and scope of the Act

The language of the preamble to the Protected Disclosures Act envisages whistleblowing playing a wider, rather than a narrow role in society. It is fundamentally linked, through the language of the preamble, with the realisation of the democratic values of human dignity, equality, freedom, transparent and accountable governance.

It recognises that “the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom.” It further recognises that “criminal and other irregular conduct in organs of state and private bodies are detrimental to good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies and can endanger the economic stability of the Republic and have the potential to cause social damage.” In consequence, the PDA aims to:

1. Create a culture which will facilitate the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosure, and
2. Promote the eradication of criminal and other irregular conduct in organs of state and private bodies”.

The Labour Court of South Africa summed up the envisaged role of the PDA as follows:

The PDA ... affirms the “democratic values of human dignity, equality and freedom”. In this respect its constitutional underpinning is not confined to particular sections of the Constitution such as free speech or rights to personal security, privacy and property. Although each of these rights can be invoked by whistle-blowers, the analysis in this case is from the perspective of the overarching objective of affirming values of democracy, of which the particular rights form a part. Democracy embraces accountability as one of its core values. Accountability, dignity and equality are the main themes flowing through the analysis that follows85.

This broad vision of whistleblowing alluded to in the preamble is belied in the substance of the Act. It draws a limited protective boundary for whistleblowers in South Africa. It is primarily concerned with protecting whistleblowers who are employees from harmful retaliatory conduct by the employer organisation and with establishing procedures for disclosure within the confines of this relationship. The stated objectives of the Act are:

1. 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;

2. To provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure, and

3. To provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer.

The focus of the Act is on protection for whistleblowing. As noted in the Tshishonga judgment, “The overarching motivation for the PDA ... is to protect employees who disclose information about improprieties by their employers or other employees.”

The PDA seeks to create an enabling whistleblowing environment by ensuring that an employee who makes a disclosure about conduct within his or her organisations is not subjected to an “occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.” (Section 3).

85 Tshishonga v Minister of Justice and Constitutional Development and another (JS898/04) [2006] ZALC 104 (26 December 2006)
The status of whistleblowing in South Africa

The scope of protection in the PDA

Who qualifies for protection?

Only employees clearly qualify for protection for making a protected disclosure about an employer organisation or another employee of the organisation.

An employee is defined by the PDA as “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any person who in any manner assists in carrying on or conducting the business of an employer”.

An employer is defined as “any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business including any person acting on behalf or on”.

As such, paid employees, excluding independent contractors and volunteers, in the employ of a private organisation or an organ of state can make protected disclosures.

When is a disclosure protected?

Whether or not a disclosure is protected or not depends on the subject matter of the disclosure, the nature of the information provided, the basis for the conclusions drawn by the employer on what the disclosure is based, the disclosure procedure followed by the employee, and the person /agency to whom or which the disclosure is made.

What is a protected disclosure?

A disclosure is defined by the Act as any disclosure of information regarding any conduct of an employer, or an employee of the employer, made by an employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

a. That a criminal offence has been, is being committed or is likely to be committed

b. That a person has failed, or is likely to fail to comply with any legal obligation to which that person is subject

c. A miscarriage of justice has occurred, is occurring or is likely to occur
d. The health or safety of a person is endangered

e. The environment is likely to be damaged

f. Unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

g. Or any of these matters have been, or will be concealed.

The Labour Court, in the case of Radebe and another v Mashoff Premier of the Free State Province and Others⁸⁶ indicated that this means that for a disclosure to be a disclosure as contemplated by the PDA, the employee/applicant must show that the disclosure exhibits all of the following elements. If one is absent, it is not a disclosure in terms of the PDA:

1. There must be a disclosure of information.

2. It must be information regarding any conduct of an employer or an employee of the employer.

3. It must be made by an employee (or shop steward) who has reason to believe.

4. That the information concerned shows, or tends to show one or more of the improprieties listed in a-g. above.

What constitutes a disclosure of information that may be found to be a protected disclosure about an irregularity?

In order for the disclosure to be regarded as protected, it must qualify as a disclosure of “information”. Employers hostile to disclosures that have been made about them by employees have sought to limit the kind of information that qualifies for the purposes of protection of the Act. Employers have sought to entrench a narrow interpretation of the word “information” so as to exclude, for example, an employee’s opinion.

For example, in the case of City of Tshwane Metropolitan Municipality and Engineering Council of South Africa and another⁸⁷, the Tshwane Municipality sought to argue that a letter written by Mr Weyers to the Engineering Council and others in which he alleged that incompetent people were about to be appointed as systems operators did not constitute information as the allegation was based on a subjective opinion rather than a fact or similar form of information. The Municipality relied on an earlier judgement in CWU and another v Mobile Telephone Networks (Pty) Ltd [2003] 8 BLLR 741 (LC).

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⁸⁶ (2528/2006) [2006] ZALC, paras 53 and 60 (Saflii)
⁸⁷ (532/08) [2009] ZASCA 151 (27 November 2009) at page 27, para 41
The Supreme Court of Appeal in the Tshwane Municipality case found the ruling on the CWU case to be wrong in so far as it held that a subjective opinion cannot be information. More fundamentally however, the SCA poured cold water on the trend of adopting a narrow interpretation of the PDA so as to exclude certain information from its ambit and in so doing limit the scope of its protective net. The SCA ruled that a narrow interpretation of the PDA is contrary to the underlying constitutional purpose of the act to foster a culture of disclosure and accountability in its statement that:

A further difficulty with this approach to the nature of information under the PDA is that its narrow and parsimonious construction of the word is inconsistent with the broad purposes of the Act, which seeks to encourage whistleblowers in the interests of accountable and transparent governance in both the public and the private sector. That engages an important constitutional value and it is by now well-established in our jurisprudence that such values must be given full weight in interpreting legislation. A narrow construction is inconsistent with that approach.

On the construction contended for by Mr Pauw the threat of disciplinary action can be held as a sword of Damocles over the heads of employees to prevent them from expressing honestly held opinions to those entitled to know of those opinions. A culture of silence rather than one of openness would prevail. The purpose of the PDA is precisely the opposite.

The Supreme Court Appeal found that an opinion does constitute information and does qualify as information that may legitimately found a protected disclosure about an irregularity, provided it is premised on facts.

The Supreme Court of Appeal held that a person’s opinion is itself a fact that if disclosed will constitute a disclosure of information; that “the state of a man’s mind is as much a fact as the state of his digestion.” Moreover, “an opinion often relates to a fact the existence of which can only be determined by considering the views of a suitably qualified expert.” On the other hand, merely “smelling a rat” is not information, nor are unsubstantiated rumours.

The Labour Court had an opportunity to elaborate further on the nature of information that qualifies as a disclosure in terms of the PDA, especially in so far as the information is an opinion. The court focussed on the need for a factual basis supporting the information, whether it is an opinion or some other form of information.

88 Page 27, footnote 18
89 Page 28-29, para 42
90 Page 28, para 41
91 Tshishonga v Minister of Justice and Constitutional Development and another (JS898/04) [2006] ZALC 104 (26 December 2006) paras 81 and 82
The court based its decision in part on the view in the Tshishonga judgment that information includes inferences and opinions that are based on facts which show that the suspicion is reasonable and sufficient to warrant an investigation. In elaboration of these points, the court quoted the following excerpt from the judgment in *Vumba Intertrade CC v Geometric Intertrade CC 2001(2) SA 1068 (W)* with approval:

*If there are no facts at all on which the belief can be based then it is not information. The reason to believe must be constituted by facts giving rise to such belief and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice. In short, there must be facts before the court on which the court can conclude that there is reason to believe.*

The court in the Vumba matter understood this to mean that the court must be satisfied that there are facts upon which reason to believe could be based. Baseless speculations or opinions will not qualify as information. The belief, opinion or conclusion must be premised on a factual basis which reasonably found the conclusion drawn.\(^92\)

**To whom or what bodies may a protected disclosure be made?**

Disclosures are regarded as protected if they are made to the following narrow closed list of recipients. Disclosures made to:

a) A legal adviser with the object of and in the course of obtaining legal advice;\(^93\)

b) An employer, substantially in accordance with any prescribed procedure, or to the employer where there is no procedure provided;\(^94\)

c) A member of Cabinet or of the Executive Council of a province about an employer that is either an individual or a body, the members of which are appointed in terms of legislation by a member of Cabinet or the Executive Council of a province, or an organ of state falling within the area of responsibility of the member concerned;\(^95\)

d) The Public Protector, the Auditor-General or a person or body prescribed by regulation in accordance with section 8;

e) Any other person or body, including sectoral regulatory bodies and the

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\(^{92}\) Para 50  
\(^{93}\) Section 5  
\(^{94}\) Section 6  
\(^{95}\) Section 7
media provided the following conditions are met:

i) The disclosure must be made in good faith and be founded on information the whistleblower reasonably believes to be substantially true;

ii) It may not be made for purposes of personal financial gain

iii) Moreover, the employee must have reason to believe that he or she will be subjected to an occupational detriment and that relevant evidence will be concealed or destroyed if the disclosure were to be made to the employer.

Are disclosures to the media protected?

In summary, in South Africa, the laws allow for disclosure to the media, only as a last resort if a procedure or a series of conditions have been satisfied. The higher threshold that these disclosures are subject to is “intended to make it more difficult for whistleblowers to obtain protection to discourage public disclosures and encourage internal disclosures.”

The Labour Court in the matter of Tshishonga V Minister of Justice and Constitutional Development and Another was faced with the question of whether a disclosure to the media qualified as a protected general disclosure in terms of Section 9 of the PDA. The court established a link between the PDA and the Constitution and stressed that in interpreting the PDA, this link requires that “accountability, dignity and equality are the main themes” that should guide the court in its analysis and interpretation. In line with the governing constitutional principle, the court recognised the intrinsic link between disclosures to the media and the underlying constitutional principles informing the PDA. The media was recognised as one of the pillars that promote and uphold democracy in the face of corruption. At the same time, the court expressed sensitivity to the right of the employer to dignity and its reputation. It recognised that a disclosure to the media or society at large is embarrassing for the employer and can cause significant harm.

The court sought to balance the competing rights of the employer and the whistleblower by specifying that the following requirement must be met before disclosures to the media will be protected:

96 Tshishonga V Minister of Justice and Constitutional Development and Another JS898/04) [2006] ZALC 104 (26 December 2006)
97 Section 9 of the PDA
98 Banisar D, 2006: page 27
99 JS898/04) [2006] ZALC 104 (26 December 2006)
100 Paras 93 - 97
1. The disclosure must be made in good faith. This goes to the motive behind the disclosure. Was it in good faith or was there an ulterior motive. In the case of mixed motives, one has to ask what the dominant motive was.

2. It must be based on a reasonable belief that the information is substantially true.

3. It may not result in personal gain. That is to say, the employee may not gain a commercial or material benefit or advantage as a *quid pro quo* for the disclosure.

Conditions 1-3 must be interpreted narrowly and in favour of the employee so as not to defeat the objects of the PDA of eliminating crime, promoting accountable governance and protecting employees against reprisals.

4. The disclosure must meet one or more of the four conditions set out in Section 9(2) of the Act. That is the employee must, at the time of the disclosure, have believed that he or she would suffer an occupational detriment if the disclosure were made to the employer; the employee must have reason to believe that relevant evidence will be concealed or destroyed; the employee previously made a disclosure to his or her employer but no action was taken; the impropriety is of an exceptionally serious nature.

5. It must be reasonable to make the disclosure and reasonableness must be assessed against the criteria in Section 9(3). Section 9(3) provides that the reasonableness or otherwise of making a general disclosure must be determined by the following factors:

   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
   e. any action the employer has taken or might reasonably be expected to take in response to the disclosure that was first made to the employer. The Tshishonga judgement ruled that a disclosure to the media, if preceded by a disclosure to the employer or a regulatory body, will only be protected if either the employer or regulatory body had taken no action in response to the complaint.
   f. were there any internal disclosure procedures available to the employee and did he or she take them.
   g. is the disclosure in the public interest. The Labour Court in the
The defence that any of the requirements have not been met so as to disqualify the disclosure as a protected disclosure must be pleaded and proved by the employer. The employee does not bear the onus to prove good faith. To saddle the employee with a burden of proof would set too high a standard, which if not met, could disqualify the disclosure and bar an enquiry into whether the employer breached the PDA by subjecting the employee to an occupational detriment. Unfair labour practices and unfair dismissal are occupational detriment. Ultimately the employer bears the burden of proving that it did not commit an unfair labour practice or dismiss the employee unfairly.

Use and exhaustion of internal organisational remedies

The PDA encourages internal procedures and remedies to be exhausted before the disclosure is made public by:

1. Only recognising disclosures outside of the organisation as protected if an internal disclosure has first been made, unless the organisational processes permit external reporting as the port of first call;

2. And by introducing graduated tests / requirements of belief on the part of the employer founding the allegation of impropriety, proportionate to the risks of making a disclosure.

The requirements for a disclosure to be protected were neatly summarised by the Labour Court in the case of Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC)

1. The disclosure must be made by an employee.

2. The employee must have reason to believe that information in his or her possession shows, or tends to show, the range of conduct that forms the basis of the definition of ‘disclosure’.

3. The employee must make the disclosure in good faith.

4. If the employer has a prescribed internal reporting procedure or a procedure for remedying any impropriety, then there must be substantial compliance with the procedure.

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101 Para 97
102 Para 97
103 Tshishonga v Minister of Justice and Constitutional Development and another (JS98/04) [2006] ZALC 104 (26 December 2006), paras 96-97
5. If there is no procedure, then the disclosure must be made to the employer. In addition to these requirements, a general disclosure in terms of Section 9 to for example, to the media, may not be made for purposes of personal gain (Section 9(1) (b).

What is the standard of ‘proof’ necessary to found a ‘protected disclosure’ by an employee104?

1. **Good faith** is not a requirement for disclosures to a legal adviser.

   Good faith is a requirement for any disclosure to the employer, to a member of Cabinet, to the Public Protector and Auditor-General and any other person or body. Malcontents and employees who slander the employer without foundation or disagree on the way the organisation is managed do not enjoy whistle-blower protection.

   Good faith is a finding of fact. The court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there is mixed motives, what the dominant motive is. Moreover the employee does not bear the onus to prove good faith. An allegation of lack of good faith must be pleaded and proved by the employer.

   *Tishongha v Minister of Justice and Constitutional Development and Another (JS898/04) [2006] ZALC 104 (26 December 2006)*

2. Disclosure to the Public Protector and the Auditor-General and general disclosures also require an employee to “reasonably believe” that the information is “substantially true” to be protected. Disclosures to the employer do not have to be “substantially true”.

   The text “any employee who has reason to believe” pitches the test as subjective in that the employee who makes the disclosure has to hold the belief. It is objective in the sense that the belief has to be reasonable. Whether the belief is reasonable is a finding of fact based on what is believed105.

As explained by the Labour Court in the Tishongha case:

> *The tests are graduated proportionately to the risks of making disclosure. Thus the lowest threshold is set for disclosures to a legal advisor. Higher standards have to be met once the disclosure goes beyond the employer.*

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104 *Tishongha v Minister of Justice and Constitutional Development and Another (JS898/04) [2006] ZALC 104 (26 December 2006)*

105 *Tishongha v Minister of Justice and Constitutional Development and Another (JS898/04) [2006] ZALC 104 (26 December 2006)*
The most stringent requirements have to be met if the disclosure is made public or to bodies that are not prescribed, for example the media.

If the disclosure is protected, what harm is the employee protected from?

The PDA recognises that employers and employees are compelled to disclose information about criminal and other irregular conduct within an organisation. It further “recognises that disclosures are frequently not welcome to an employer and seeks to protect the employee who makes a protected disclosure from retribution from their employer in consequence of having made a protected disclosure.” (Tshishonga quoted in City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and another (532/08) [2009] ZASCA 151 (27 November 2009), page 22).

Section 3 provides that:

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

An “occupational detriment” is defined as:

1. Being subjected to any disciplinary action;
2. Being dismissed, suspended, demoted, harassed or intimidated;
3. Being transferred against one’s will
4. Being refused a transfer or promotion
5. A unilateral altering of a term or condition of employment or retirement to the employee’s disadvantage
6. Being refused a reference or provided with an adverse reference by the employer
7. Being denied appointment
8. Being threatened with any of these actions
9. Being otherwise adversely affected in respect of his or her employment, profession or office

If there is a demonstrable nexus between the making of the disclosure and the occupational detriment, then the employee is entitled to protection, remedial action and compensation. Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC).
Jurisdiction, onus, remedies and compensation

It has taken a number of years for South Africa’s jurisprudence to clarify the forum and content of the protection afforded by the PDA as these are determined by the location of jurisdiction, onus, remedies and compensation. There has been uncertainty about the scope and application of the Act in respect of:

1. Which court(s) have jurisdiction to decide on cases of occupational detriment or threatened occupational detriment pursuant to a disclosure. Whether the High Court has concurrent jurisdiction with the Labour Court.

2. What constitutes appropriate relief? There has been uncertainty as to whether an interdict may be granted by the High Court in the face of a pending disciplinary process / occupational detriment in response to a disclosure, despite alternative remedies being available in the Labour Relations Act, such as re-instatement and/or damages.

3. Whether the matter may be heard on an urgent basis in the case of a pending disciplinary inquiry / other occupational detriment.

4. What is appropriate compensation in the case of an unlawful occupational detriment being imposed?

Jurisdiction

Section 4 of the PDA provides that:

1. Any employee, who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may (a) approach any court having jurisdiction, including the Labour Court established by Section 151 of the Labour Relations Act, 1995 for appropriate relief; or (b) pursue any other process allowed or prescribed by any law.

2. For the purpose of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court –

   a. Any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter VIII of that Act; and

   b. Any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in S186(2)(d) of ChV11 of the LRA, dispute about such an unfair labour practice must follow the procedure set out in that Part: provided that if the matter fails to be resolved through conciliation, it may be referred to
the Labour Court for adjudication.

Even though the PDA expressly provides that an employee may approach any court having jurisdiction, including the Labour Court, it has been interpreted in the past to limit jurisdiction to adjudicate and grant relief in respect of occupational detriments, to the CCMA, in so far as it has jurisdiction and the Labour Court. This is largely because the primary cause of action has been framed, in the main, until recently, as a question of the fairness of the dismissal (or any other relevant detriment) or otherwise, rather than whether the disclosure was one protected by the PDA; because disputes regarding protected disclosures have been viewed as a ‘quintessentially labour matter’.

This limitation of jurisdiction was recently aired, tested and rejected by the Supreme Court of Appeal, in the case of City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and another (532/08) [2009] ZASCA 151 (27 November 2009). The SCA has endorsed the earlier decision by the Eastern Cape High Court in Young V Coega Development Corporations (Pty) Ltd and decided that the High Court does have concurrent jurisdiction in matters involving “occupational detriment” in terms of the PDA. As Mischke notes, it is hoped that at least this jurisdictional issue has been put to rest. His note of caution is prompted by the fact that:

> The whistleblower saga at the Tshwane Metro Council has reached the Constitutional Court where the council is appealing against the rulings by the North Gauteng High Court and the SCA...suspended engineering manager, A J Weyers, is still at home pending the outcome of the latest appeal. The council is arguing that the matter is a labour dispute and should never have been heard in the High Court.

In summary, the current status of the law regarding jurisdiction is that the High Court enjoys concurrent jurisdiction with the CCMA (legal conciliation only) and/or the Labour Court in all matters of “occupational detriment” involving the PDA. A whistleblowing employee seeking relief because their employer has retaliated with an “occupational detriment” as defined in the Act, or who has been threatened with an “occupational detriment”, or who may be subject to an “occupational detriment”, may approach either the CCMA (where appropriate), the Labour Court or the High Court for appropriate relief.

The law as it currently stands is founded on the following interpretation of Sections 4 (1) and (2) of the Protected Disclosures Act by the Supreme Court of Appeal:

106 Mischke C, 2009: page 41
107 [2009] 6 BLLR 597 (ECP) High Court
Section 4(1) specifically states that an employee who may be subjected to an occupational detriment by his or her employer in consequence of having made a protected disclosure may approach ‘any court having jurisdiction’. In principle that is the appropriate High Court bearing in mind the jurisdiction conferred on High Courts by section 169 of Constitution, read with section 19 of the Supreme Court Act 59 of 1959, and that the reference to ‘any court’ is extremely broad. There is nothing in section 4 to excludes that jurisdiction. Instead the section says that the Labour Court will also be included as a court having jurisdiction. Bearing in mind that the Labour Court’s jurisdiction is carefully circumscribed in sections 156 and 157 of the LRA that statement alone might have occasioned some difficulties in understanding the precise extent of the Labour Court’s jurisdiction under the PDA. Accordingly the legislature went on in section 4(2) to place any dismissal in the category of automatically unfair dismissals and any occupational detriment in the category of unfair labour practices, thereby locating the jurisdiction of the Labour Court under the PDA within the framework of its existing jurisdiction in respect of unfair dismissals and unfair labour practices. Subsequently it introduced sections 186(2)(d) and 187(1)(b) into the LRA to harmonise the two statues. There is nothing in any of this to indicate that it was intended to deprive the High Court of jurisdiction in these matters.

The Court was faced with a counter-argument that this straightforward reading of section 4 was incorrect because section 4(2) created what ‘was referred to as LRA rights and remedies that meant that the Labour Court has exclusive jurisdiction’.

In answer to this argument, the court had the following to say:

The answer is that this [argument] inverts the language and structure of the section. The section starts by saying that all employees may have resort to any court having jurisdiction. It then says that the Labour Court is included in that broader category presumably because otherwise it would have no jurisdiction at all in respect of cases arising under the PDA. Perhaps the effect is that for these purposes employees otherwise excluded from the LRA [for example members of the SADF] may have resort to its provisions and the Labour Court or the CCMA, but it cannot mean that they are obliged to do so. Nor can it mean that employees otherwise subject to the LRA are deprived of the right to approach ordinary courts for relief under the PDA. (my stress). The language of the
section is simply not apt for that purpose. There was a strong body of authority prior to the Constitution that held that the jurisdiction of the then Supreme Court was not lightly excluded. That is now reinforced by the Constitution, which provides in section 169(b) that the High Court may decide any matter not assigned to another Court by an Act of Parliament. Where the statute in question gives the right to approach any court having jurisdiction and then adds by way of inclusion the Labour Court that is not an assignment of the matter to the Labour Court. Had the intention been as suggested the section would have started by referring all cases under the PDA to the Labour Court and then, if necessary, dealing separately with the few employees who fall outside the purview of the LRA. It does not do so.

The primary cause of action for determination in matters related to the PDA is “not about disciplinary proceedings and whether the [disclosure] in fact constituted misconduct or whether the [employee] received a fair hearing. [The primary question] to determine is whether the [relevant disclosure] was protected by statute.” In fact the SCA went as far as to say that, given the primary cause of action and the matters that require consideration and adjudication in the context of the PDA, the High Court is the preferable, if not the holder of exclusive jurisdiction in many PDA cases. The SCA referred to the broader underlying purpose of disclosures identified in the Act, namely the question of accountability of the organisation in respect of which a disclosure is made and concluded that in this context, the High Court is a more suitable forum than the Labour Court. The purpose of the PDA and the consequent matters that fall within its ambit are not ‘quintessential labour-related issues’. The SCA said that:

*The issues... whilst arising in the context of employment, relate to questions of public safety and the professional obligations of persons in the position of Mr Weyers in the context of accountability of a municipality [or any other organisation] for proper service delivery of electricity within its municipal area. Those issues are by no means solely or at all labour related matters. The questions that can arise in relation to a protected disclosure, such as whether the person concerned had reasonable grounds for believing that a criminal offence had been committed or that a miscarriage of justice had occurred or that the environment is likely to be damaged are not labour-related issues and are more appropriately dealt with in the ordinary courts.*

110 Page 24: para 37
111 City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and another (532/08) [2009] ZASCA 151 (27 November 2009): page 21
112 Page 26: para 39
Onus

The Labour Court in the Thsishonga matter indicated that any inquiry in terms of the PDA has four stages:

1. The first constitutes an analysis of the information by the court to determine whether it is a disclosure.
2. The second stage requires an inquiry into whether the disclosure is protected.
3. The third question is whether the employee was subjected to an occupational detriment.
4. The fourth concerns the question of the appropriate remedy.

If the employer contests claims by the employee that the information in question is a protected disclosure, any defence that any of the requirements have not been met so as to disqualify the disclosure as a protected disclosure must be pleaded and proved by the employer.

The employee does not bear the onus to prove good faith. To saddle the employee with a burden of proof would set too high a standard, which if not met, could disqualify the disclosure and bar an enquiry into whether the employer breached the PDA by subjecting the employee to an occupational detriment. Unfair labour practices and unfair dismissal are occupational detriment. Ultimately, the employer bears the burden of proving that it did not commit an unfair labour practice or dismiss the employee unfairly\(^\text{113}\).

The employee bears only the minimal onus of showing a demonstrable nexus between the making of the disclosure and the occupational detriment. Communication Workers Union v Mobile Telephone Networks (Pty) Ltd (2003) 24 ILJ 1670 (LC). Once that nexus is shown to exist, there is a presumption in favour of the employee in terms of Section 4(2) (a) and (b) of the PDA that any dismissal or any other occupational detriment in breach of Section 3 is deemed to be either an unfair dismissal or an unfair labour practice and the matter must proceed through the prescribed labour procedures. At any such dispute, the employer will, in the light of the presumption, bear the burden of proving that it did not commit an unfair labour practice or dismiss the employee unfairly. In other words, the employer bears the burden to prove that the disclosure was not protected so as to rebut the presumption that the dismissal was unfair or that the practice constituted an unfair labour practice.
Relief for occupational detriments in the case of protected disclosures

Section 4 of the PDA provides that any employee that is subject or may be subjected to an occupational detriment may approach any court, including the Labour Court, for appropriate relief.

The Act proceeds to say that:

For the purposes of the Labour Relations Act...... any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in Section 187 of that Act, and the dispute about such a dismissal must follow the procedure set out in Chapter V111 of that Act, ... and any other occupational detriment in breach of section 3 is deemed to be an unfair labour practice as contemplated in Part B of Schedule 7 ... and the dispute must follow the procedure set out in that Part: provided that if the matter fails to resolved through conciliation, it may be referred to the Labour Court for adjudication. (Section 4(2)).

The permitted relief in cases of unfair dismissal is reinstatement and/or the payment of compensation for non-patrimonial losses up to a maximum of the equivalent of 24 months’ salary, plus any patrimonial losses suffered114.

In the case of an unfair labour practice, the revision of the conduct and/or compensation for non-patrimonial loss up to a maximum equivalent to 12 month’s salary, plus any patrimonial losses115.

In determining the amount of compensation for an ‘occupational detriment’, the following are aggravating factors which will count against the employer organisation in the assessment of compensation116:

1. A failure by the employer to investigate the disclosure and subsequent retaliation.
2. The more serious the nature of the occupational detriment, the greater the compensation that will be awarded.
3. The level of risk that the employee takes in making the disclosure.
4. The longer the dispute endures, the greater the stress on an employee, which ought to result in higher compensation.
5. The conduct of the employer in resolving / not resolving the dispute. IF the dispute is unduly protracted by the employer, this is to be seen as a

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115 Ibid
continuation of the retaliation against the respondent.

6. A failure on the part of the employer organisation to testify or offer any explanation if the matter goes to arbitration or court aggravates the claim against them.

7. Additional insults to and ill-treatment and impairment of the respondent’s dignity are elements of ‘occupational detriment’ which must be taken into account in determining compensation.

**Does the Act permit the granting of either a temporary or permanent interdict prohibiting the employer from proceeding with the occupational detriment?**

The SCA held that the High Court has the jurisdiction to interdict an employer from proceeding with a planned or anticipated ‘occupational detriment’. Under section 3 of the PDA an employee who makes a protected disclosure may not be subjected to an occupational detriment by his or her employer on account of having made the disclosure. An occupational detriment includes being subjected to any disciplinary action. This means that if a disclosure made by an employee is a protected disclosure, then the employer has no right to even initiate disciplinary proceedings against the employee, the Labour Relations Act does not apply and the Labour Court by extension ought not to have jurisdiction, the High Court enjoys jurisdiction and can grant an interdict prohibiting the disciplinary proceedings from taking place (page 27). The protection afforded by the PDA becomes effective before the protection afforded by the LRA is applicable.

An employer organisation must first decide if a disclosure is protected or not, and if the decision is that it is not a protected disclosure, and that decision is correct, they would be entitled to initiate disciplinary processes against the employee, which in this case would not constitute an occupational detriment. The forum for the decision as to whether the disclosure was protected or not may not be the disciplinary inquiry; it must take place earlier than that. If the employee believes that the employer erred in its decision at this earlier stage and in consequence erred in its decision to initiate a disciplinary process, the employee is entitled to apply to the High Court to interdict the employer from proceeding with the disciplinary inquiry and ask the High Court to decide on the protected disclosure (page 27). If the High Court finds that the disclosure is protected, then as in the case of the Tshwane municipality, the employer will not be entitled to institute disciplinary proceedings and will be interdicted from doing so. The High Court enjoys exclusive jurisdiction in respect of this prior decision and in respect of granting an interdict as it is entirely a PDA issue and not a labour issue at all. (This judgment appears to expose a legislative conundrum: All matters involving a dispute about whether or not the disclosure was protected ought never to be within the
The Status of Whistleblowing in South Africa

jurisdiction of the Labour Court, even if it ends up in an unfair dismissal case, yet the PDA specifically requires these disputes to be dealt with in terms of the LRA and the procedures provided for therein. Section 4(2) of the PDA).

To successfully apply for an interdict, the applicants must show:\(^{117}\):

1. A prima facie right.
2. Irreparable harm, or reasonable apprehension of the harm if the interdict is not granted.
3. No adequate alternative remedy.

Can an application for relief be brought on an urgent basis?

An applicant can bring an application on an urgent basis, provided that the employee can show that the application is urgent. A key factor in successfully arguing urgency is whether or not the employee had or had not taken any steps immediately, or very soon after becoming aware of the disciplinary charges. So for example, in the case of Govender v Minister of Defence the employee failed to discharge his duty of showing why the case deserved preferential treatment because after having become aware of the intended disciplinary process as early as June 2009, and was suspended on 26 August 2009, he only brought the court application on 15 September 2009\(^{118}\). In a similar vein, the Pretoria Labour Court dismissed an urgent application brought on behalf of Mr Aphane against the Greater Sekhukhune District Council on 27 November 2009 seeking to interdict the disciplinary hearing scheduled for 20 December 2009. The Court held that the matter before it was not urgent, that the urgency raised in the papers was self-imposed and in the absence of urgency, the application seeking to interdict the disciplinary hearing could not succeed. The applicant had knowledge of the intention to suspend him on 25 September and was indeed suspended on 28 September 2009 and was charged with serious misconduct. The disciplinary hearing was scheduled for 30 November 2009. (Patrick Aphane v Greater Sekhukhune District Council)

The Companies Act

Recent amendments to the Companies Act have seen the introduction of a

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117 Young v Coega Development Corporation (Pty) Ltd [2009] 6 BLLR 597 (ECP) High Court, as elaborated on in an ODAC case note
118 Govender v Minister of Defence, unreported case 695/09 of 8 October 2009, discussed in Mischke, 2009: Page 48
whistleblowing clause into the Act. The whistleblowing provisions in the Companies Act supplement the protection and procedures provided for in the PDA. Section 159 of the Companies Act: Protection for whistleblowers provides that:

To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 –

a. That right or protection is in addition to, and not in substitution for, any right or protection established by that Act; and

b. That Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective whether that Act would otherwise apply to that disclosure.

The amended Act has not come into effect as at April 2010. It is expected to come into effect towards the end of 2010.

In summary:

1. The amended Companies Act extends the scope of protection to a wider group of whistleblowers operating in the private (not the public) sector, functioning within companies. It includes a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier (Section 159(4)). The defining feature is that they must bear the designated relationship to a company.

A company is defined in the Companies Act as:-

a. A juristic person incorporated in terms of this Act, or

b. One that was registered in terms of the Companies Act, No 61 of 1973, other than as an external company as defined in that Act, or

c. A juristic person registered in terms of the Close Corporations Act and subsequently converted in terms of Schedule 2; or

d. A company which was deregistered in terms of the [previous] Companies Act and has been re-registered in terms of this Act.

As such the protection afforded to whistleblowers by the relevant provision extends to employees and the other designated officers and agencies related to profit and not-for profit companies registered in terms of the Companies Acts. It does however exclude external companies as defined
60 The Status of Whistleblowing in South Africa

in the Companies Act No 61 of 1973, that is to say, “a company or other association of persons incorporated outside of the Republic of South Africa which .... has established a place of business in the Republic.”

2. The Act expands the range of disclosures that qualify as protected by:
   a. Expanding the number or agencies / individuals to whom/which the disclosure may be made, and
   b. By expanding the kind of information that warrants protection, and
   c. By lowering the burden of proof for the whistleblower in respect of drawing the conclusion of impropriety.

Disclosures are protected if they are made to one of the following specified offices, people, structures:
   a. The Companies and Intellectual Property Commission established in terms of Section 185 of the Act;
   b. The Companies Tribunal established in terms of Section 189 of the Act;
   c. The Takeover Regulation Panel established in terms of Section 196 of the Act;
   d. Any regulatory authority established in terms of national or provincial legislation responsible for regulating and industry, or sector of an industry, an exchange as defined in the Securities Services Act, a legal adviser, a director. Prescribed officer, company secretary, auditor, board or committee of the company concerned.

The Act expands the number of recipients that qualify disclosures for protection to include both recipients within and outside of the organisation. Moreover, there is no obligation or onus on whistleblowers to disclose to internal recipients before disclosing externally to specified external recipients. There is also no elevated burden of proof on whistleblowers seeking to make use of external routes for their disclosures.

Regarding the burden of proof, there is one governing standard for disclosures to all recipients. All disclosures must be made in good faith (even those to a legal adviser) and the person making the disclosure must have reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, has committed one
of the following specified acts:\footnote{Section 159(3)(a) and (b)}:

a. Contravened the Companies Act or a law mentioned in Schedule 4;
b. Failed to comply with any statutory obligation on the company;
c. Engaged in conduct harmful to the health and safety of an individual or to the environment;
d. Unfairly discriminated against any person as contemplated in Section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act;
e. Contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

3. The Act expands the kind of protection that is available for whistleblowers beyond protection from occupational detriment.

a. The Act protects the identity of the whistleblower by introducing a “qualified privilege” in respect of the disclosure (Section 159 (4) (a)). The Act does not define the meaning of “qualified privilege”. However one can turn to the SALCR’s discussion in respect of the PDA regarding privilege for guidance on the matter\footnote{SALRC, 2008}. The SALRC argues that there is a need to balance the protection of the identity of whistleblowers with competing interests. It proposes that the way to achieve this balance is through the introduction of a qualified protection of the identity of the whistleblower. The SALRC is of the view, which appears to inform the approach adopted in the Companies Act, that a blanket protection of the identity of the whistleblower would not be conducive to the proper investigation of disclosures. Instead, the whistleblower should enjoy a qualified protection, that is to say his or her identity will be protected, subject to the legitimate discovery of certain records which may include the identity of the whistleblower and the right of the person implicated or identified by the whistleblower to be informed of the disclosure with sufficient detail to answer the charge and in order to exercise the right to adduce and challenge evidence\footnote{SALRC, 2008: page XVI}.

b. The Act protects whistleblowers from criminal charges and civil claims

\footnote{Section 159(3)(a) and (b)}\footnote{SALRC, 2008}\footnote{SALRC, 2008: page XVI}
that may arise out of the disclosure. Section 159(4) provides that whistleblowers who make a protected disclosure are “immune from any civil, criminal or administrative liability for that disclosure”.

c. Moreover, it protects the whistleblower from victimization and threatened victimisation by any person (not just those in the company) that is linked to the disclosure. The whistleblower is entitled to claim punitive damages from any person (not just the employer) for any acts of victimisation or threatened victimisation if the disclosure is a protected disclosure (Section 159(5)). I.e., it introduces a new and extended remedy. However, once again this only applies to protected disclosures made in the private rather than the public realm.

4. The Act creates a rebuttable presumption of proof in favour of the victimised whistleblower who seeks to sue a company for victimisation as a result of a disclosure. Section 159(6) provides that “Any conduct or threat in subsection (5) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.

In other words, there is no onus on the whistleblower to prove a causal nexus between the disclosure and the victimisation. The onus is on the victimiser to prove that it is not connected.

5. The Act creates an express positive obligation on “public” and “state-owned” companies to pro-actively foster practices facilitating and encouraging disclosure\(^{122}\). It requires that these companies either directly or indirectly:

a. “Create and maintain a system to receive disclosures contemplated in this section confidentially”, and

b. To “act on them”, and

c. “Routinely publicise the availability of that system to the categories of persons contemplated in sub-section (4)”

The obligations that are imposed are not limited to only creating disclosure processes, but in addition, require that the processes guarantee confidentiality. Moreover, it is not enough, in terms of the Act, to facilitate receipt of

122 Section 159(7)(a) and (b)
disclosures. Designated companies are also required to publicise the procedures to the protected class of whistleblowers, and when they receive any disclosures, they are required to investigate disclosures and notify employees of the outcomes of such investigations.

As such, the Act imposes a number of positive obligations on certain companies, not just to refrain from taking adverse action against a whistleblower, but in fact to facilitate, encourage and act on disclosures made. This expanded obligation, so necessary to creating an organisational culture of disclosure, is imposed only on “public” and “state-owned” companies. The pre-fixes “public” and “state-owned” do not appear in the general protection clauses of the whistleblowing provision of the Companies Act which seeks to protect disclosures about a company (not specified as a public or state-owned company) in terms of Section 159(3).

The express inclusion of the pre-fixes “public” and “state-owned” in relation to the obligation on companies to take pro-active steps creates the risk that this provision will be interpreted restrictively so as not to apply to non-profit companies and state-owned enterprises that are not registered as companies in terms of the Companies Act. This risk is created by the potentially limiting definitions of:

a. A public company, which is defined in the Companies Act as “a profit company that is not a state-owned company, a private company or a personal liability company”.

b. A private company is in turn defined as “a profit company that is not a company or a personal liability state-owned company”.

c. A state owned company is defined as “an enterprise that is registered in terms of this Act as a company, and either falls within the meaning of ‘state-owned enterprise’ in terms of the Public Finance Management Act, 1999, or is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000”.

The two key potentially limiting features of these definitions are the emphasis, in the otherwise confusing, definitions of a public and private company on the profit-making nature of the enterprise and the requirement that state-owned enterprises must be registered as a company in terms of the Act.

Given the express inclusion of these pre-fixes and their related definitions it will be difficult to sustain an argument that non-profit companies and entities such as trusts, closed corporations, voluntary associations and other entities not registered as companies in terms of the Act, or state entities
not registered as a company are obliged to directly or indirectly:

1. Create and maintain a system to receive disclosures confidentially, and
2. to “act on them”, and
3. to routinely publicise the availability of that system to the categories of persons contemplated in sub-section (4).

6. All companies must ensure that their memos and articles, rules or agreements do not limit or negate the protective measures for whistleblowers in Section 159 (Section 159(2)).

Disclosures by the general public

The Auditor-General observed, in its submission to the SALRC, that in the field of auditing and audit related special investigations, their experience has shown that a valuable and frequent source of information is not from ‘persons within the normal employer/employee relationship, but rather independent contractors or members of the public’\textsuperscript{123} (My stress) This observation is echoed in the Association of Certified Fraud Examiners’ Report which notes that tip offs from, not only employees, but also customers, outsiders and other anonymous sources are a common source of information about fraudulent schemes\textsuperscript{124}.

The PDA does not regard disclosures by the general public about corruption and other unlawful activities by state officials or private company officials as protected disclosures. Even the Companies Act, which extends the ambit of protection to outsiders who have a trade relationship with the private company such as independent contractors and a supplier of goods or services to a company, does not draw the general public into its protective ambit.

As observed by Thornton and the SALRC, disclosures by the public (and others) about corruption and unlawful activities in state and private entities is not just desirable and valuable. It is in fact obligatory in terms of a variety of laws. Laws such as the Prevention and Combating of Corrupt Activities Act No 12 of 2004 (PCCAA) and the Financial Intelligence Centre Act, 2001 (FICA) require any person “who holds a position of authority”\textsuperscript{125} and “who carries on, manages or is in

\textsuperscript{123} SALRC, 2008: page 7
\textsuperscript{124} The Association of Certified Fraud Examiners’ Report to the Nation, 2002, quoted in Thornton G, 2005: page 1
\textsuperscript{125} The Prevention and Combating of Corrupt Activities Act, section 34
charge of, or is employed by a business\textsuperscript{126}" and who knows or suspects that any other person or entity is guilty of unlawful and/or corrupt activities to report the person or institution to the South African Police and other designated officials. In addition to the imposition of this obligation, the laws make it a criminal offence, subject to imprisonment, should this obligation not be met\textsuperscript{127}.

Over and above the designated officials identified in the aforesaid Acts to whom disclosures may be made, there are a vast array of structures that have been established with the express objective of facilitating the making and receipt of disclosures by the public of wrong doing by, especially state agencies and employees. These include: the Public Protector’s office, the Auditor-General, the Public Service Commission and the National Anti-Corruption Hotline and anonymous reporting ‘hotlines’ within government departments, such as the hotline established within the Department of Health.

Over and above these structures, there are a host of sector-specific bodies which are mandated to receive complaints from the public about unlawful, unethical, corrupt and/or otherwise criminal behaviour. In the health sector for example, these include: the Health Professions Council of South Africa, the Council of Medical Schemes, the Hospital Association of South Africa, the South African Medical Association, the South African Nursing Council, the Dental Ombudsman, the South African Dental Association and the South African Pharmacy Council.

Whistleblowers from the general public who make disclosures to any of these general or sector-specific bodies are not effectively protected from reprisals, discrimination, intimidation, law suits or other adverse action arising out of the disclosures made by the current whistleblowing framework.

It is therefore not surprising that the bulk of the disclosures made to these structures, where the relevant procedures allow for it, are made anonymously. The general structures allow for anonymous disclosures to be made. This is however not the case for many of the sector specific bodies. For example, the ‘Guidelines for the Lodging of a Complaint with the South African Pharmacy Council\textsuperscript{128}’ require that “the complaint must be in writing and signed by the complainant, his or her legal representative, or any other person lodging the complaint on behalf of the complainant” and the complaint itself must provide the complainant’s name, mail delivery address and contact telephone number.

\textsuperscript{126} The FICA Act, section 29 and others
\textsuperscript{127} FICA, Section 52 and Section 34(2) of the PCCAA
\textsuperscript{128} http://www.pharmacycouncil.co.za/content.asp?CotentID=35
Chapter 3

Do the current laws create an enabling whistleblowing framework?

Barriers inhibiting disclosure

An enabling framework is one which addresses the barriers, or has the potential to address the barriers inhibiting disclosures about wrong doings and which contribute to a culture of silence.

Some of the barriers that must be addressed include cultural barriers linked to people’s and organisation’s attitudes to and perceptions of whistleblowing and whistleblowers. Linked to this is the duty of loyalty and confidentiality, fear of reprisals, insufficient knowledge of the law, restrictive interpretations and implementation of obligations by organisations and employers. Related to the latter point is the belief that the law is unable to protect whistleblowers and that there is no point in disclosing information as nothing is likely to be done about it once the disclosure is made. These barriers are discussed in more detail in the course of this chapter.

Summary of the current whistleblowing framework(s) of laws

There is not just one policy framework, but four concurrent frameworks governing whistleblowing in South Africa. They are treated as different frameworks for the purpose of this paper as they create a different and an ever increasing field of protection for whistleblowers and correlating obligations on the relevant agencies and companies. In ascending order, the least protection and most minimal obligations apply to whistleblowers from the general public, whereas the most expansive rights and obligations apply to employees and others within private and state-owned profit companies.
1. The first is the framework governing all disclosures by the general public not protected by the PDA or the Companies Act.

2. The second is the framework created by the PDA which governs whistleblowing by employees in the public and private sectors.

3. The third is the framework created by the Companies Act which governs whistleblowing by employees and certain other specified officers/people within all companies registered in terms of the Companies Act, including profit and not-for-profit companies.

4. The fourth is the framework of rights and obligations imposed on “public” and “state-owned” profit companies registered in terms of the Companies Act.

1. **Disclosures by the general public**

Disclosures by the general public (“external disclosures”) enjoy the least protection, if any at all.

Members of the general public are, in many cases, compelled by laws such as the PCCAA and the FICA to report corrupt and other unlawful conduct of individuals and organisations with which they may well have no employment or other commercial relationship. However, they enjoy no protection in terms of either the PDA or the Companies Act from possible adverse consequences arising out of them fulfilling their duty of disclosure. Equally, there are no incentives to encourage voluntary disclosures by the
public who are not obliged by law to disclose information about unlawful and otherwise irregular conduct within organisations. A survey conducted by the Institute for Security Studies on victims of crime in South Africa in 2003 revealed that many citizens are confronted with corruption on an almost routine basis, especially when applying for services and employment in the public sector. Corruption is also prevalent in the private sector, especially in cases where citizens were applying for employment. At the same time, most of the citizens who were subjected to corrupt conduct did not report the crime. The reasons included the fact that many did not know how to do so, who to report it to, and more importantly, many of the victims feared reprisals and/or felt there was no point in doing so as there would be no follow up129.

The public have access to either (a) a number of corruption hotlines which allow for anonymous disclosures of irregular and unlawful conduct, or (b) a number of sectoral complaints mechanisms which require the disclosure of the name of the whistleblower and offer little protection in return.

Neither of these forms of disclosure is regarded as a “protected disclosure” by the PDA. The Companies Act recognises disclosures to sectoral regulatory authorities as protected, but not if made by the general public, only if they are made by one of the identified protected groups of people with a commercial relationship with the company. Moreover, there is no obligation on recipients of information from the public to follow-up on allegations made by the public. In the case of anonymous disclosures, this creates structures that are not accountable to whistleblowers or society at large. Anonymity being the only safe alternative, most disclosures by the public are made anonymously using the hotlines that are made available to them.

2. Disclosures by employees in terms of the Protected Disclosures Act

In summary, the PDA provides that:

1. Employees in the employ of private and state entities may make certain disclosures, in the first instance, internally to their employer about irregular or unlawful conduct in the workplace.

2. The PDA protects employees from retaliatory conduct by the employer that amounts to an “occupational detriment”.

3. Employees may only make disclosures outside of the employer

129 Van Vuuren H 2004, page 15
organisation to certain identified recipients, such as the Public Protector and the Auditor-General once the disclosure has been made internally and no action has been taken by the employer. Only in exceptional circumstances are general disclosures to sectoral oversight bodies and/or the media permitted and protected.

4. The only obligation on employers in respect of disclosures is not to retaliate against the employee whistleblower. It is obliged not to take retributive action against the employee that amounts to prejudicing the employee’s rights as provided for in terms of our governing labour laws.

5. There is no express obligation on the employer to develop and implement a whistleblowing policy or to establish procedures to receive publish and/or act on disclosures by employees in the workplace.

6. Where however an organisation fails to act on a disclosure made by an employee, this may very well result in a subsequent disclosure by the employee to the media or some other external disclosure being regarded as reasonable and hence a protected disclosure. In addition, a failure to investigate and/or otherwise respond to a disclosure made by an employee will be regarded as an aggravating factor in the subsequent determination of damages against an employer that has retaliated against the employee.

7. If the employer retaliates in a way that constitutes an “occupational detriment”, then the employee may approach the High Court or the CCMA (for reinstatement and/or damages) or the Labour Court for an interdict preventing the retaliatory conduct and/or to claim patrimonial and non-patrimonial damages from the employer.

8. Patrimonial damages include legal costs incurred by the employee in defending his or her rights. Non-patrimonial damages are limited in quantum to the maximum damages that may be awarded for an unfair dismissal or unfair labour practice in terms of the Labour Relations Act. In other words, to a maximum quantum equivalent to 12 months’ salary for unfair labour practices, and to a maximum of 24 months’ salary for an unfair dismissal because of the disclosure.

3. Disclosures made by employees and certain other designated persons about irregular conduct within private profit and not-for-profit companies

In summary, the Companies Act extends the ambit and extent of protection
for whistleblowers which enjoy a labour or commercial relationship with all companies registered in terms of the governing Companies laws.

1. An employee, a shareholder, a director, a company secretary, prescribed officer, a registered trade union representative of employees of a company, a supplier of goods or services to a company, or an employee of such a supplier have the right to make a disclosure, within defined limits, about the company having broken the law or having acted irregularly.

2. They are entitled to make the disclosure internally to the company or externally to a number of identified agencies and structures, provided the disclosure is made in good faith and the whistleblower reasonably believed that the information tended to show the irregularity concerned. There is no obligation to exhaust internal remedies within the company.

3. There is no right in the Companies Act to make a general disclosure to the media or society at large.

4. Whistleblowers making disclosures in terms of section 159 of the Companies Act are protected through the imposition of a number of obligations on the company concerned.

5. The Company may not limit, set aside or otherwise contravene the whistleblowing provisions and protection provided in terms of Section 159 of the Companies Act.

6. The whistleblower has qualified privilege in respect of the disclosure. This appears to amount to a qualified protection of the whistleblower’s identity, subject to the legitimate discovery of certain records which may include the identity of the whistleblower and the right of the person implicated or identified by the whistleblower to be informed of the disclosure with sufficient detail to answer the charge and in order to exercise the right to adduce and challenge evidence.

7. Moreover, the whistleblower may not be prosecuted or sued by any person as a result of the disclosure.

8. The whistleblower may however sue any person who, in consequence of the disclosure, acts in a retributive manner, or threatens to act in a retributive manner which will result in a detriment to the whistleblower. The protection afforded against detrimental retribution is

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130 SALRC, 2008: page XVI
strengthened by a rebuttable presumption in favour of the whistleblower. Any retribution is presumed to be causally linked to the disclosure.

4. **Additional obligations on profit public and state-owned companies**

   The Companies Act makes the rights and obligations under the previous heading applicable to all companies, both private and public. It does however impose the following additional obligations (and correlating protections) only on profit-making companies that are state-owned or privately owned.

   1. They are obliged to act proactively and develop and implement whistleblowing policies and practices that will facilitate receipt of confidential disclosures.

   2. They must publicise the policies and procedures to the categories of whistleblowers protected by the Act.

   3. Moreover, they are obliged to act on the allegations made.

   **Do these four frameworks create an enabling legal environment that can foster a culture of disclosure?**

   Do these frameworks create an enabling legal environment that has the potential to address the barriers inhibiting disclosures? Furthermore, is that potential being realised through adequate implementation of the law? This enquiry consists of two parts:

   a. Are the laws sufficient to foster a culture of disclosure in private and state owned organisations?

   b. Are the laws implemented and used correctly and vigorously by organisations and whistleblowers so as to realise the inherent legislative potential to foster a culture of disclosure?

   More specifically, do the laws and the way they are implemented engender confidence amongst whistleblowers, thereby encouraging them to disclose information; do they cultivate, within organisations, a recognition of the value of whistleblowing to their own organisational well-being and good governance so that organisations welcome and facilitate disclosures?
1. **Are the laws sufficient to foster a culture of disclosure?**

The overarching question that must be asked in terms of internationally accepted standards is whether the current frameworks are sufficiently comprehensive. That is do they contain both:

a. Pro-active provisions to compel/encourage a change in the culture of an organisation through the adoption of organisational policies and practices that encourage and facilitate the disclosure of information about corrupt and otherwise tainted organisational activities.

b. A series of protections and incentives for whistleblowers to encourage them to come forward without fear of being sanctioned.

The answers to these broader questions depend on a number of subsidiary questions related to the presence or absence of the specific enabling features deemed necessary by experts to achieve the desired results. This paper will review the frameworks for the presence or absence of the legislative features, which if respected and promoted, will create an enabling pro-active and protective whistleblowing framework that complies with the three key enabling principles, namely:

1. A framework that is sufficiently expansive in its scope of application, determined largely by the operating definition of whistleblowing, to achieve the underlying objectives of the promotion of a culture of openness and accountability.

2. A framework that promotes disclosure of information by any person in possession of relevant information, to any person or body able to address or remedy the concern.

3. A framework that provides comprehensive protection for whistleblowers against all forms of harm and/or prejudice that they may suffer in consequence.

Subsidiary questions: The presence or absence of enabling features?

A: **Is the scope of application of the framework sufficiently wide to provide a safe alternative to silence?**

The sufficiency of the scope of the laws is determined by two elements. The first is the breadth of the objectives of the law. The second is the substantive reach of the law vis-a-vis the number and nature of whistleblowers that are acknowledged and protected, the range of recipients recognised as
being able to receive protected disclosures, and the range of unlawful or irregular conduct that may found a protected disclosure.

1. Are the frameworks premised on realising the broad objectives of:
   i. Fostering an accountable, transparent and open society;
   ii. Facilitating disclosures of information of wrongdoing;
   iii. Providing protection to whistleblowers against retribution for disclosures made;
   iv. Promoting the eradication of criminal and other irregular conduct in organisations?

2. Does the substance of the laws give effect to these objectives by:-:
   i. Being sufficiently wide in the range of whistleblowers protected by the law, and
   ii. Being sufficiently wide in the range of wrongful conduct in respect of which disclosures are protected, and
   iii. Providing protection in respect of information that is disclosed in the honest belief (even if it is an erroneous belief) that it points to criminal or other irregular conduct in an organisation?

A disjuncture between the purported objectives and the substantive provisions determining the scope of application and protection of the PDA

At first glance, the informing principles, the aim and the objectives identified in the PDA (the primary whistleblowing law in South Africa from which all other laws take their lead) are, in principle, sufficiently wide to found a comprehensive enabling framework. As discussed in chapter 1, the preamble expressly links the PDA with the realisation of the constitutional principles of open, transparent and accountable governance. In addition, it recognises that unlawful and irregular conduct in organisations as anathemas to these objectives. The objectives of the PDA are accordingly identified as:

1. Creating a culture which will facilitate disclosure of information in the workplace
2. Providing guidance on disclosure procedures
3. Providing protection against retribution for making a disclosure
4. Promoting the eradication of criminal and irregular conduct in both organs of state and private bodies.

The courts have in turn confirmed the expanded scope of the governing framework in their repeated interpretations of the PDA in accordance with the constitutional principles of transparent and accountable governance of organisations. The courts have rejected narrow interpretations, often advanced by employers in the face of a disclosure, which have sought to restrict the scope of application and protection of the PDA. These have been rejected on the grounds that a narrow interpretation is contrary to the purpose of the Act, which is to encourage more, rather than fewer disclosures in the interests of accountable and transparent governance in both the public and the private sectors. This has been the approach adopted by the Labour Court, the Labour Appeal Court, the High Court and the Supreme Court of Appeal of South Africa in cases such as Tshishonga v Minister of Justice and Constitutional Development and another [2006] ZALC 104 (26 December 2006), City of Tshwane Metropolitan Municipality and Engineering Council of South Africa and another [2009] ZASCA 151 (27 November 2009), The Minister for Justice and Constitutional Development and another v Tshishonga [2009] ZALAC (2 June 2009).

Having set generous boundaries in the preamble and stated objectives, the remainder of the PDA does not follow suit in the limited scope and reach of the substantive provisions of the Act.

Limited scope of application: – Not all whistleblowers are protected

The scope of application of the PDA and the Companies Act is limited to a number of narrow classes of whistleblowers.

1. It is limited to either (a) employees of the state or private organisation accused of misconduct, or (b) prospective employees of companies, agencies representing employees of companies as well as persons external to the company, but only those who enjoy a commercial relationship with the company concerned.

2. The whistleblowing framework excludes “citizen whistleblowers” as expressly required by the AU convention and implicitly required by the Council of Europe’s Resolution 1729.

These limitations result in the framework falling short of the minimum protection required to create an enabling legal environment.
The status of whistleblowing in South Africa

The scope of application of the PDA is limited to disclosures made by employees about their employer organisations in both the public and the private sectors. The PDA expressly excludes independent contractors. It also excludes agency workers (part-time and temporary workers), volunteers, job seekers, former employees, trade union representatives and suppliers of goods and services to the organisation concerned unless they can prove that they are employees under section 200A of the Labour Relations Act. The Protected Disclosures Act excludes significant groups of people who may have knowledge of wrongdoing by or within an organisation who are at risk of significant harmful retribution by the organisation if they were to blow the whistle.

The PDA seeks to overcome a key barrier preventing disclosures, namely a fear of retaliation. This barrier however remains intact in the case of non-employees. The Auditor-General has noted that valuable information in the fields of auditing and audit related special investigations are sourced from precisely these non-employees, that is to say, from independent contractors or members of the public. The Public Protector shared details of a case that it investigated with the South African Law Reform Commission (SALRC) which showed that former employees (those who have retired or resigned) shared similar fears as employee whistleblowers, for example fears of retaliation through litigation for defamation and breach of confidentiality.

The number of potential whistleblowers who are excluded by this limitation is significant when one considers the many temporary employment contracts (fixed term) where the person does not qualify as an employee and the use of independent consultants by organisations, especially in the current economically depressed climate which not only creates greater job insecurity, but also sees less permanent placements being made.

This limitation of the scope of the PDA thus undermines one of the express objectives of the Act, namely promoting the eradication of unlawful and irregular conduct within organisations. The SALRC notes that the wording of the Act clearly indicates that the aim of the Act is to eradicate malpractice in the workplace and not to regulate the employment relationship. There is a disjuncture between this express objective of the Act and the limitation of the protection afforded by the Act to the employer/employee relationship.

The whistleblowing provision in the Companies Act does expand the protective reach of the whistleblowing framework to include not only employees, but

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131 SALRC, 2008: pages 6-9
132 SALRC, 2008: page 7
133 SALRC, 2008: page 8
134 SALRC, 2008: page 9
representatives of employees as well as people who enjoy a commercial relationship with companies. The Act protects a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of a company or another representative of the employees of that company, a supplier of goods or services or an employee of such suppliers.

However, the extended scope only applies to companies. It does not include public bodies and private entities that are not registered as companies in terms of the Companies Act, nor does it include foreign companies operating in South Africa, but not registered in terms of the Companies Act. As such, trade union representatives, independent consultants and others in the list that are in a working or commercial relationship with an organ of state, a trust, a CC, a partnership, a sole proprietorship and other associations remain unprotected in terms of the current whistleblowing framework.

Moreover, not even the Companies Act extends the scope of its application to former employees, prospective employees, volunteers or company pensioners.

Neither the PDA nor the Companies Act provides a safe alternative to silence for the general public or “citizen whistleblowers”. A number of respondents that submitted commentary to the SALRC on the PDA raised concerns about this gap and the problem that it presents for fostering a widely accepted culture of disclosure. This concern is well illustrated by the results of the ISS National Victims of Crime Survey which found that an unacceptably high number of, often the most vulnerable citizens, are victims of corruption within both the public and private sectors. The survey found that many citizens, when applying for basic services such as their grants, identity documents and pensions, and when applying for employment, often are subjected to corrupt conduct, bribery being at the forefront. The same study found that there was a dominant culture of silence among these citizens. The majority (98%) did not blow the whistle on the corruption experienced by them or their family members. The three main reasons for their reluctance to blow the whistle were because 21% did not know whom to blow the whistle, 46% of respondents did not blow the whistle because they did not think it would change anything and as many as 27% said they did not do so for fear of reprisals.

The SALRC responded negatively to these submissions, preferring not to recommend the amendment of the PDA to make provision for the protection of “citizen whistleblowers”. The grounds for the position taken by the SALRC were that there are many routes and procedures available for the public to disclose relevant information, such as the Public Protector, the Auditor-General and others.

135 Van Vuuren H, 2004: page 11
136 Van Vuuren H, 2004: page 14
Moreover, that a host of other laws, both at a statutory and common law level, offer protection to “citizen whistleblowers” in the form of civil and criminal remedies and that “extending the PDA by duplicating existing remedies and protection available to the general public would not enhance such remedies or protection”\(^{137}\).

The questions that need answering are whether these alternative whistleblowing protections provide a safe alternative to silence and whether they contribute to creating a comprehensive and enabling whistleblowing framework for the general public.

The ISS survey results discussed above clearly indicate that citizens do not feel sufficiently protected by the law, that it is not seen to provide a safe alternative to silence. Citizens’ lack of confidence in the law is further illustrated by the strong trend amongst citizens who do report, to do so anonymously. For example, 50% of alleged corruption cases reported to the South African national anti-corruption hotline were reported by anonymous callers\(^{138}\). The tendency for members of the public to make anonymous disclosures is linked to a lack of confidence in the ability of the laws to protect the whistleblower’s identity and to protect them against retaliation. The New Zealand review\(^{139}\) notes that confidentiality is “perhaps the most significant protection” in fostering confidence in the law and a culture of disclosure. As much as the protection for whistleblowers incentivises blowing the whistle\(^{140}\); a failure by the law to protect, or a perceived failure of the law to do so, disincentivises blowing the whistle, and in the long-run is contrary to fostering a societal culture of whistleblowing.

Anonymity as the norm runs counter to cultivating a deep-rooted culture of disclosure for a number of reasons. One of these is that anonymity as the norm may feed the historical mistrust of whistleblowers, thereby further entrenching a key cultural barrier to the realisation of a culture of whistleblowing. Banisar\(^{141}\) notes that there is an air of mistrust of anonymous disclosures, and that this is probably linked to historically discredited techniques such as secret informants used by totalitarian regimes [like apartheid South Africa]. Calland and Dehn note that anonymous disclosures will forever be tainted “by the fact that anonymity will always be the cloak preferred by a malicious person”. Moreover, “anonymous information can give the organisation that receives it unaccountable and unlimited power over what to do with it”. Anonymity thus not only fuels mistrusts, but

\(^{137}\) SALRC, 2008: page 48
\(^{138}\) Public Service Commission, 2008: page 13
\(^{139}\) At 4.25 quoted in Banisar D, 2006: page29
\(^{140}\) SALRC, June 2004, at 4.52 in Banisar, D: page 29
\(^{141}\) Page 30
also makes the powerful unaccountable\textsuperscript{142}.

The scale of anonymous disclosures made by the public is further cause for concern because of their compromised value. Anonymity “makes the concern more difficult to investigate, the facts more difficult to corroborate and excludes the possibility of clarifying any ambiguous information or asking for more”\textsuperscript{143}.

This was confirmed by a member of the secretariat of the National Anti-Corruption Forum housed within the Public Service Commission who shared the following concerns with the writer about anonymous disclosures made to the National Anti-Corruption hotline:

\begin{quote}
People are confident to make anonymous allegations. However this method of reporting can be problematic. Investigations are a dead duck if you don’t get enough information from the person reporting the wrongdoing when they make their anonymous call. Anonymous callers make their allegations and run, often leaving no tangible leads for investigation and no telephone number at which they may be contacted for supplementary information. Even though the call centre staff have been trained and better questionnaires have been developed to try and get all relevant information during the one anonymous phone call, the anonymous method of disclosure still remains an issue.
\end{quote}

A formal evaluation of the hotline draws a similar conclusion:

\begin{quote}
While anonymous reporting of corruption is promoted through the NACH, this does create practical difficulties in that crucial information or evidence, if not supplied in the first instance, is difficult to obtain as callers cannot be traced for follow-up purposes\textsuperscript{144}.
\end{quote}

Given that the same report indicates that 50% of alleged corruption cases were reported by anonymous callers, this means that half of the disclosures made by the public are at risk of not being followed up because of an inability to obtain supplementary and sufficient information from the whistleblowers. This in turn feeds into the public’s perception that there is no point in blowing the whistle because nothing is done about the corrupt conduct. The NACF secretariat member who was interviewed for the research confirmed that many of the anonymous allegations reported through the hotline suffered this fate, in view of the inherent investigative difficulties.

The argument by the SALRC that the public enjoy sufficient protection and that extending the PDA to cover this group would simply duplicate that protection
does not appear to be entirely correct. The protection afforded by the PDA (and now the Companies Act) is stronger than the protection provided, for example, through the criminal justice system. The PDA and the Companies Act create a number of presumptions which automatically entitle the whistleblower to the protection of the Acts and appropriate relief. On the other hand, the “citizen whistleblower” would presumably have to show, first and foremost that he or she falls within the ambit of the law concerned and then prove that he or she merits the protection or relief sought. The nature or reprisals, such as refusal to employ a job seeker or refusing to deliver a service, does not fit comfortably within the ordinary criminal or civil legal framework. Moreover, the onus of proof and evidentiary burden on the whistleblower is deliberately lower for those protected by the PDA and the Companies Act so as to incentivise and encourage disclosures, whereas the citizen whistleblower does not enjoy a preferred onus. Likewise, members of the public do not enjoy a blanket protection from civil claims and criminal prosecution for disclosures, as is provided by the Companies Act.

Thornton points out that laws such as the FICA and the PCCAA mean that “Cultural, moral, religious and ethical grounds aside, reporting of unlawful activities is no longer just the right thing to do but, when facing the alternative of criminal prosecution and the imposition of severe penal sanctions, it may also be the only thing to do." Given the lack of choice about whether to report or not, it is only fair, cultural, moral, religious and ethical grounds aside, for the law to reciprocate with equal and strengthened protection for all whistleblowers, including citizen whistleblowers.

Overall, one cannot really speak of a “citizen whistleblower framework”. The law governing public disclosures in South Africa is more akin to the situation in various European countries (unfavourably) reviewed in the Transparency International’s report, “Alternative to Silence: Whistleblower protection in 10 European Countries”. The primary criticism of the whistleblowing laws reviewed in this report is equally pertinent to the law in South Africa for public whistleblowers. That is to say, the laws regulating disclosures by the public do not create an enabling framework capable of fostering a culture of disclosure because they are “generally fragmented and weakly enforced. There is no single, comprehensive legislative framework in place. [Citizen whistleblowing] relies on a patchwork of legislation that falls under different sectors and existing laws... the rights [of the public] to report and to have protection tend to be included in or derived from public servant acts and criminal codes.... these laws do not have explicit language on whistleblowing, but do have measures that could provide de facto coverage." The law is failing to create a culture of disclosure among citizens. Less than 2%
of citizens in a survey conducted by the Institute for Security Studies had ever reported corruption, which at the time of the survey was the second most common crime in South Africa.\textsuperscript{147}

Van Vuuren correctly argues that South African citizens, many of whom have been victims of corruption at the hands of civil servants, empowered by the Constitution, ‘should be at the forefront of the ensuring clean governance’. Latimer and Brown likewise argue that there is (as yet unclaimed) space for whistleblowing laws to encourage and protect disclosures by members of the public who often are in the best position to see that services are not being delivered due to wrongdoing.\textsuperscript{148}

However, this space has remained unclaimed in South Africa (and other jurisdictions). There is little promotion of citizen’s involvement in combating petty corruption. In order to foster a culture of disclosure which will see citizens at the forefront of addressing corruption they must be provided with adequate protection through an amended PDA. Van Vurren argues that “a failure to achieve this may prove the Achilles heel of sustained attempts to combat corruption in South Africa.\textsuperscript{149}”

Not all disclosures about unlawful or irregular conduct by organisations, officials or people linked with organisations are protected

Once again the limitation of the scope of the protection of the PDA to the formal employer/employee relationship makes itself felt in the limitation of disclosures that will qualify for protection. As pointed out by the Institute of Development and Labour Law at the University of Cape Town to the SALRC, the disclosure must relate to the conduct of the employer or an employee of the employer. The limitation is illustrated by the case of an employee who makes a disclosure to the employer about the corrupt activities of a client, and the employer chooses to for example, transfer the employee rather than antagonise the client. The PDA (and in fact the Companies Act) does not provide the employee with protection.

\textsuperscript{147} Van Vuuren H, 2004: page 16
\textsuperscript{148} Latimer P and Brown AJ, page 772
\textsuperscript{149} Van Vuuern H, 2004: page 16
The range of recipients to whom protected disclosures may be made is too limited

The South African regulatory framework is populated by a host of constitutional oversight and investigative bodies such as the Public Service Commission, the Human Rights Commission and others, a host of statutory regulatory bodies such as the Financial Services Board, the National Nuclear Regulator, the National Electricity Regulator, the Independent Complaints Directorate, the Finance Intelligence Centre, the Pension Fund Adjudicator, and many others, as well as a host of professional oversight bodies such as the Health Professions Council of South Africa, the Council of Medical Schemes, the Hospital Association of South Africa, the South African Medical Association, the South African Nursing Council, the Dental Ombudsman, the South African Dental Association and the South African Pharmacy Council.

These structures all share two things in common. First, all of these structures are mandated to receive and act on complaints of irregularities and corruption within various structures and organisations. Second, disclosures to all of these structures are not protected by the PDA. The PDA only permits disclosures, under an elevated burden of proof, to two investigative agencies, namely the Public Protector and the Auditor-General. Section 8 of the PDA does indicate that other bodies may be prescribed by regulation. However, as pointed out by the SALRC, to date no regulations have been issued in terms of the PDA and consequently the list of qualified recipients remains limited to the Public Protector and Auditor-General.

This limitation inhibits disclosure and the regulation of corruption within sectors by experts and bodies dedicated to precisely this role. This constitutes an impediment in the development of a culture of disclosure and ought to be remedied by widening the list of recipients to whom a protected disclosure may be made to any body regulated by statute and which is mandated to receive and address complaints of corrupt, criminal and otherwise irregular conduct.

The Companies Act has widened the scope in this regard by recognising as protected, disclosures about private companies that are made to dedicated bodies set up by the Act for these purposes as well as regulatory bodies. Section 159 (3) (a) provides that disclosures of information in terms of subsection (4) that are made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory body, an exchange, a legal adviser, a director, a prescribed officer, company secretary, auditor, board or committee of the company concerned, are protected.

150 Comments made by various respondents to the SALRC, 2008: pages 30 -34
151 Section 8
152 SALRC, 2008: page 34
B: Do the frameworks encourage or compel organisations to take pro-active measures to create an internal organisational culture of disclosure that encourages and welcomes disclosures about irregularities within the organisation?

1. Are organisations compelled or encouraged to create and implement internal whistleblowing policies and procedures?

2. Are organisations compelled or encouraged to investigate the allegations founding the disclosures, to follow-up with the whistleblower on progress and outcomes of the investigations?

3. Are organisations compelled or encouraged to create mechanisms to monitor and enforce compliance with the policies and procedures and are they required to report on their policies and procedures?

4. Are whistleblowers given the option of internal and external reporting, even if the latter is subject to conditions aimed at balancing competing interests?

5. Are organisations compelled to protect the identity of whistleblowers?

A failure to compel pro-active measures by organisations

The PDA emphasises the protection of the whistleblower through a series of prohibitions on retributive conduct by employers once a disclosure has been made. The PDA does not include any provisions to compel positive pro-active conduct or changes in organisational cultures that apply before the disclosure is made. If the underlying objective of the Act is to promote a culture of disclosure one would expect the law to compel, or at the least, encourage through the provision of direction to employers on what is required of them in terms of the policies, processes and practices regarded as necessary to encourage, receive and act on disclosures in a way that would serve to foster a culture of disclosure in the workplace.

There is no duty on organisations to be pro-active in the creation of an appropriate culture. The reservation expressed about the Public Interest Disclosure Act (PIDA) in the United Kingdom, which adopts a similar approach, is equally applicable to the PDA in South Africa. The Committee on Standards in Public Life expressed the concern that the PIDA (and by extension, the PDA):

..is a helpful driver but must be recognised as a ‘backstop’ which can provide redress when things go wrong and not as a substitute for cultures that actively encourage the challenge of inappropriate behaviour153

The Publicly Available Specification: PAS 1998:2008: Whistleblowing Arrangements Code of Practice, British Standards (PAS) observes that having a sound and quality internal whistleblowing policy and process is a key ingredient to creating a culture of whistleblowing as opposed to a culture of silence; it will allow employees to feel confident and safe in making a disclosure, and it allows for the organisation to manage the process in a constructive manner. On the contrary, if there is no policy and process, this contributes to a culture of silence.

Case studies in Britain have shown that the absence of adequate organisational mechanisms for raising concerns lead to misunderstanding, confrontations, victimisation of the whistleblower and adverse publicity because the concern was raised externally and genuine opportunities for averting damage and disaster were lost\textsuperscript{154}. In addition, an absence of a process and an obligation on the organisation to investigate the disclosure is a significant barrier to whistleblowing. As the Labour Court indicated in the Tshishonga matter, “\textit{The trauma which a whistleblower undergoes can come to naught if nothing is done to investigate the disclosures or act against wrongdoers. Any remedy awarded to the whistleblower ultimately by a court is in that instance a pyrrhic victory.}” The ISS National Victims of Crime Survey found that a key reason why almost half (46\%) of the respondents did not report corruption was their belief that it would not change anything\textsuperscript{155}. The alternative to silence in the face of an organisation failing to act on a disclosure, as observed by the ODAC helpline, is that the employee, out of frustration blows the whistle outside the organisation which generates substantially more bad publicity than an internal disclosure and this in turn feeds excessive levels of intimidation by the employer against the employee.

It does appear that there is a need for the law to impose an obligation on companies to take pro-active action to develop and implement whistleblowing policies and processes and to take action when a report is made. In the absence of legislative obligations, organisations are not likely to create appropriate policies and procedures and in the absence of appropriate policies and procedures, it is unlikely that we will see an improved culture of transparency and positive receptiveness to whistleblowers within organisations. In South Africa organisations have, in the main, not responded positively to whistleblowers and do not appear to have institutionalised whistleblowing within their risk management, communications and related organisational policies. (The responses of organisations are discussed in more detail below under the review of implementation of the law in South Africa.) Uys argues that this failure to institutionalise whistleblowing lies at the heart of the poor whistleblowing track record of South African organisations. Organisations have not, in the absence of a definite obligation, acted pro-actively.

\textsuperscript{154} Oakley E and Myers A, 2004, page 169
\textsuperscript{155} Van Vuuren H, 2004: page 15
There is a need for the PDA and related laws to be strengthened.

Uys echoes the arguments put forward by Van Vuuren, that the PDA must be strengthened so as to compel more pro-active whistleblowing policies and processes. Uys argues convincingly that the “strengthening of the PDA through the creation of proper legal remedies and penalties similar to those instituted by the US Sarbanes-Oxley Act (SOX Act) could encourage South African organisations to take the implementation of corporate governance seriously and could promote the structuring of organisations in such a way that conflicting loyalties are avoided.”

Uys’s argument that the PDA should, in a similar vein to the American Sarbanes-Oxley Act (15 USC 7201) (SOX Act), impose clear obligations to mainstream whistleblowing into corporate governance policies and processes finds support in the experience of a multi-national corporation operating in South Africa. The corporation in question is subject to both South African PDA and the American SOX Act. The internal audit officer of the multi-national in question, who is responsible for its whistleblowing policies and processes, observed that prior to the introduction of the SOX Act, when the organisation was only subject to the PDA which does not require policies and procedures, the organisation did not have any whistleblowing policies and procedures in place. However, once the SOX Act came into law, the corporation in question created a sophisticated set of whistleblowing policies and procedures. The pro-active stance came about pursuant to the obligation to do so as created by the SOX Act.

The Council of Europe’s Resolution supports the argument that whistleblowing laws should expressly require pro-active measures by organisations to create an environment that provides a safe alternative to silence. Resolution 6.2.1 requires that “Whistleblowing legislation should focus on providing a safe alternative to silence. It should give appropriate incentives to government and corporate decision makers to put in place internal “whistle-blowing” procedures that will ensure that disclosures..... are properly investigated.”

The South African courts and the Companies Act have recognised and moved to address this legislative gap to varying degrees. The courts have interpreted the PDA to impose an indirect obligation on organisations to act on allegations. The obligation is created by the fact that the courts regard a failure to act as an aggravating factor in the award of damages. Unfortunately this is not common knowledge or publicised and companies are likely to discover this obligation only once they are in court for the adjudication of a dispute – that is if the matter ever gets to court.

The Companies Act remedies this legislative gap by placing an express duty on
private companies and state-owned companies to create appropriate procedures for receiving and dealing with disclosures, to publicise these procedures to the targeted beneficiaries and to investigate disclosures and notify employees of the outcomes of such investigations\textsuperscript{157}. Furthermore, companies must ensure that their memorandum of association and articles, rules or agreements do not limit or negate the protective measures for whistleblowers created by Section 159 (Section 159(2)).

However, as discussed in the previous chapter, not all companies are subject to this obligation. Public entities that are not registered as a company in terms of the Companies Act, private entities that are not companies, such as trusts, closed corporations and other as well as non-profit companies (S 21) companies appear, from the wording of the Companies Act, to remain unencumbered and under no express obligation to create whistleblowing policies and procedures, to investigate and follow up on allegations made or ensure that their founding documents do not limit the provisions of Section 159 of the Companies Act.

The implications of the exclusion of non-profit companies, private entities that are not registered in terms of the Companies Act and public entities that are not registered as companies are profoundly limiting of the framework’s capacity to foster transparency and accountability in relation to the management and disbursment of public funds. This is not only the case for public entities, but also a consequence of the exclusion of non-profit companies. The government social services service delivery model in South Africa relies heavily on the subsidised services of civil society. Many NGO’s provide statutory services either with government funds or donor funds. The preferred organisational structures of these NGO’s are non-profit companies, trusts and voluntary associations. They provide a range of essential services such as healthcare and social welfare services and often receive budgets of significant proportions from the state or donors to provide these services. Given the current limited reach of the PDA and the Companies Act, whistleblowers blowing the whistle on corruption by these entities would not enjoy any protection as they are not, by definition, profit or private companies registered in terms of the Companies Act.

Even though the UK’s comparable law adopts a similar approach to the PDA in failing to compel pro-active policies and processes, companies and organisations in the UK are advised, through the PAS (code of good practice) to adopt appropriate policies and procedures and are given guidance on what they should look like. The PAS sets out good practice for the introduction, revision, operation and review of effective whistleblowing arrangements within organisations\textsuperscript{158}. It has

\textsuperscript{157} Section 159(7)

\textsuperscript{158} PAS, page 8
been developed to assist organisations across the public, private and voluntary sectors. It is informed by the PIDA, but not dictated by it. The PAS indicates that organisational policies should exhibit certain features so as to realise an organisational culture of disclosure. Policies should, according to the PAS:

1. Provide examples that distinguish whistleblowing from grievances;
2. Give employees the option of raising concerns outside line management;
3. Provide access to an independent helpline offering confidential advice;
4. Offer employees a right to confidentiality;
5. Explain how and when it is acceptable to raise a concern outside the organisations;
6. Provide that it is a disciplinary matter to victimise a whistleblower and to make a false allegation.

There is no comparable guidance available for organisations in South Africa on how to develop a good and enabling policy that is a fundamental part of the organisational map of good governance, that is of value to the organisation and which will engender confidence in the employee to blow the whistle. There are a number of vehicles which could have (and should have) provided some guidance, but have missed the opportunity to promote the integration and mainstreaming of whistleblowing into the organisations governance map and culture. Examples include the King III report, the King Code of Governance and Practice Notes. The King III report\(^{159}\) is a statement of good governance principles. It applies to all companies (not just those registered in terms of the Companies Act) in South Africa. It was preceded by the King I and II reports. The King III report was developed specifically in response to the innovations introduced by the amended Companies Act with a view to providing guidance on how a company’s governance should accommodate these changes. It is supported in the more specific guidance provided to companies by the King Code of Governance and various Practice Notes, such as the Practice Notes on the Internal Audit Charter and the Risk Committee Terms of Reference. Given that these documents seek to provide guidance on innovations in the Companies Act and speak to issues of good governance, effective leadership, sustainability, responsibility, accountability and transparency. Given further that the whistleblowing provision in the Companies Act is an important innovation and given its relevance to the focus in the King documents on mainstreaming and the integration of sustainability and risk management into all levels of corporate governance, one would expect to see guidance given on governance in relation to whistleblowing policies and processes. There is

\(^{159}\) King III Report on Governance for South Africa, 2009
no such guidance, and in fact no mention of the whistleblowing provision or even the word whistleblowing in any of the King III documents. There is a not only a policy lacunae, but a real gap in the provision of an appropriate implementation framework, such as the PAS in the UK.

C: *Do the frameworks provide sufficient protection for the whistleblower?*

1. Does the law guarantee whistleblowers the right to a fair hearing before a court of law?

2. Is the whistleblower protected against all forms of potential harm, including immunity from civil and criminal liability and exclusion of legal protection in terms of a governing contract?

3. Is the whistleblower’s protection supported by a favourable onus of proof which sees the organisation bearing the onus to prove his or her conduct was not in retaliation for the disclosure?

**Inadequacy of the forums to resolve disputes**

The Supreme Court of Appeal has put to rest the question of whether whistleblowers have access to all courts of law to adjudicate on matters arising in terms of the PDA. As discussed in some detail in chapter 1, the prior restrictive interpretations which sought to limit disputes to the jurisdiction of the Labour Court have been rejected. The SCA has confirmed that the High Court enjoys concurrent jurisdiction with the Labour Courts on matters relating to the PDA.

The difficulty with available forums is that they are all court-based. Victims of occupational detriment may choose the various forums provided by the LRA, that is to say conciliation through the CCMA. However, any further disputes about decisions and awards made by the CCMA must be referred to the Labour Court. The limitation of jurisdiction to the courts, rather than making an independent agency such as an ombud or the CCMA available to determine disputes in terms of the PDA, makes justice inaccessible to whistleblowers, especially those living in poverty. Courts and litigation are prohibitively expensive.

There is a need for alternative dispute resolution forums. Transparency International recommends the creation of an independent body to receive and investigate complaints of retaliations and/or improper investigation as a means of providing effective and accessible enforcement mechanisms for whistleblowers.160
ODAC has noted a further concern with regards to the available forum for the determination of disputes in terms of the PDA. ODAC has received complaints and experienced a failure on the part of employers to heed Labour Court, CCMA and Bargaining Council judgments, rulings and arbitrations. Some employers tend to abuse the processes that are available by unnecessarily prolonging disputes by indicating that they will be appealing judgements or reviewing awards as an excuse for not complying with orders, but then fail to do so.

Limitation of protection against an “occupational detriment”

The Council of Europe’s Resolution 1729 recognises that whistleblowers are often discouraged by fear of reprisals and in the light of this, calls on member states to strengthen protection for whistleblowers. More specifically it requires that legislation should provide reliable protection against any form of retaliation, including interim relief and appropriate financial compensation161.

The PDA falls significantly short of providing the prescribed standard of protection. It only provides protection against retaliation that takes the form of an “occupational detriment”, which as discussed in some detail in the previous chapter, is limited to retribution that impacts negatively on the employment relationship and/or rights of the employee whistleblower. This means that the PDA does not provide sufficient reassurance against the full range of possible reprisals, the fear of which, as has been discussed, is one of the primary causes of silence.

There is no protection provided against a host of detriments that may occur outside the strict and narrow labour relations construct of the PDA and the protection it provides.

In consequence, Van Vuuren observes that “Despite good whistleblower provisions (South Africa is one of only seven countries with legislation protecting whistleblowers) as many as 27% [of respondents who did not report bribery in the ISS study] said they are afraid of reprisals."162"

On a national scale, almost half the population do not have confidence in the law. The Markinor study commissioned by ODAC found that 43.1% of the respondents felt that the law does not adequately or effectively protect whistleblowers. In the absence of safe routes for disclosure, people will choose to either remain silent, or to make an anonymous disclosure. Both these options are not conducive to a culture of disclosure. As discussed previously, anonymity creates real problems as it “makes the matter more difficult to investigate, the facts more difficult
The Status of Whistleblowing in South Africa

to corroborate and excludes the possibility of clarifying any ambiguous information or asking for more.” 163

The fear of reprisals must be addressed at a policy level. The law must, as prescribed by the AU Convention, “ensure that citizens report instances of corruption without fear of consequent reprisals” 164 through the provision of sufficiently wide and strong protection to whistleblowers. This means that the law must be strengthened to provide protection against forms of reprisal and discrimination currently not contemplated by the Act, such as refusing to do business, violence and intimidation. In addition, the PDA must afford protection against civil and criminal liability arising out of the disclosure 165 as well as protection for family members and other associated with the whistleblower who can fall prey to victimisation.

A failure to protect the confidentiality of whistleblowers

On the protection front, the PDA is further deficient in the confidence it inspires in potential whistleblowers in that it fails to compel organisations and others receiving the disclosure to protect the confidentiality of the whistleblower. Contrary to the obligation created by the AU Convention that country laws “protect informants and witnesses in corruption and related offences, including protection of their identity” 166 and the direction given by Resolution 1729 that the identity of the whistleblower be protected 167, the PDA fails to compel protection of the identity of the whistleblower.

Confidentiality must be distinguished from anonymity. An anonymous disclosure is one “sent in a brown envelope or a message left on an answering machine, with little or no possibility of identifying or contacting the whistleblower or verifying the information. By contrast, a confidential disclosure is where the recipient knows the identity of the person, but agrees not to disclose it if and when the information is used.” 168 The New Zealand review described confidentiality as “perhaps the most significant protection” 169. The SALRC recognises the value of protecting confidentiality, but also recognises the need for balancing the need for protection of confidentiality against the need for proper investigation of the matter and the rights of the “accused” to have sufficient detail about the charge so as to defend

163 Calland R and Dehn G, 2004: page 8
164 Article 5(6)
165 SALRC, 2008: page 2
166 Article 5(5)
167 Article 6.2.1.2
168 Calland R and Dehn G, 2004: page 8
169 In Baniser D, 2006: page 29
The Status of Whistleblowing in South Africa

him or herself. The SALRC recommends that the PDA be amended to introduce a qualified protection of confidentiality.

Remedies for whistleblowers are insufficient

The remedies available to a whistleblower in terms of the PDA in the case of his or her right against occupational detriment being infringed are also unduly limited by the narrow boundaries of the LRA which is incorporated by reference.

A claim for damages in terms of the PDA is limited; it is capped in accordance with the maximum awards that may be made for either automatically unfair dismissal or an unfair labour practice in terms of the Labour Relations Act. In other words, damages may not exceed the equivalent of 12 months’ salary for an occupational detriment that amounts to an unfair labour practice and 24 months for an automatically unfair dismissal. This is inadequate as the damage suffered by whistleblowers is often severe and warrants awards of more substantial damages. This is especially problematic in the case of lower paid workers (who are already vulnerable and less likely to blow the whistle according to a study conducted by Markinor on behalf of ODAC). The damages framework does not foster confidence to disclose and perpetuates the built-in class fault-line that is seen in the present framework which is discussed in more detail later in this chapter on knowledge and application of the law.

The limitations of the labour relations framework is further felt in the context of damages as it precludes punitive damages, leaves no room for civil liability and is limited to claims against the employer only. The PDA does not allow claims against a third person, other than the employer or an employee of the employer that victimises or otherwise contravenes the PDA in the response to a disclosure of information.

Expanded protection and remedies provided by the Companies Act

The Companies Act remedies many of the deficiencies in the protection and remedies provided by the PDA, but only in respect of a company (both public and private) registered in terms of the Companies Act. It introduces the following innovations:

1. It significantly expands the ambit of protection against reprisals beyond

170 See discussion under chapter 1 under remedies and the Tshishonga judgement by the Labour Appeal Court.

171 Greyling A, 2008
an “occupational detriment” to include reprisals that cause any detriment as well as an express or implied threat to cause any detriment (Section 159 (5)).

2. It expands the remedies that are available. Remedies and damages are not limited by the scope of the LRA as in the case of the PDA. The determination of damages for reprisals is left to general damages principles. This does create the danger of inequity as an action brought under the Companies Act as opposed to the PDA is likely to attract a more substantial and equitable damages award than a claim brought under the PDA. Likewise, Companies are likely to attract more severe punitive damages than state entities.

3. It allows a whistleblower to claim punitive damages from any person for victimising, or even threatening to victimise the whistleblower if such a disclosure is a protected disclosure (Section 159(5)).

4. It introduces immunity from criminal, civil and administrative liability that may arise out of a discourse made by one of the protected categories of people (Section 159(4)(b)).

5. It introduces a “qualified protection” of the whistleblower’s identity (Section 159 (4) (a)).

Abiding concerns with the Companies Act

Section 159 (3) (b) introduces a “reasonably believed” test. It requires that “the person making the disclosure reasonably believed at the time of the disclosure that information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity has...” The Freedom of Expression Institute (FXI) has argued that this test creates too onerous a burden on the whistleblower, that it sets the threshold for protection too high and will inhibit disclosures and the cultivation of a culture of disclosure in companies. The FXI, in its submission on the Companies Bill, argued that the “reasonable suspicion test” is more appropriate. It pointed out that:

The term “reasonable grounds to suspect” has enjoyed considerable attention by our courts. In R v Van Heerden 1958 (3) SA 150 (T) at 152 E, Galgut AJ as he then was, stated that: “these words must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have suspicion.

The FXI submission advocates that this “reasonable suspicion test” is more appropriate to fostering confidence in whistleblowers to disclose and to foster a
culture of disclosure, that it offers more protection because it never involves certainty as to the truth, as does the “reasonably believed” test. “Since suspicion is based on conjecture it can never point unerringly and exclusively in a particular direction only (See S v Ganyu 1977 (4) SA 810 (RA) at 813 C-E). The test therefore encourages disclosure of concerns and supports the notion of creating a culture of openness.”\(^1\)

The Companies Act does not provide sufficient protection of the identity of the whistleblower to meet the international and regionally prescribed levels of protection. Although Section 159(7)(b) does require public and state-owned companies to establish and maintain a system to receive disclosures confidentially, it does not expressly prescribe that the recipient of the disclosure must keep the identity of the whistleblower discreet unless the whistleblower gives his or her written consent to publicising his or her identity\(^2\). This is contrary to the legally prescribed confidentiality principle as interpreted by Transparency International, namely that “the law shall ensure that the identity of the whistleblower may not be disclosed without the individual’s consent.”\(^3\)

FXI expresses a further concern with the insufficiency of the remedies made available by the Companies Act. It points out that the Act makes no provision for whistleblowers to apply for interdictory relief in the case of a threatened detriment\(^4\).

**D: Do the laws provide a consolidated and comprehensive whistleblowing framework that covers public and private entities?**

The AU Convention and the Council of Europe’s Resolution 1729, 2010 require that whistleblowing legislation should cover both the public and private sectors. Osterhaus and Fagan argue that not only should both the public and private sectors be covered, they should be covered by “a single, comprehensive legal framework” for whistleblower protection\(^5\). Transparency International has interpreted the relevant obligations and practices to translate into the need for “Dedicated legislation - in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach”\(^6\).

\(^{172}\) FXI, 2008: page 7  
\(^{173}\) FXI, 2008: page 7  
\(^{174}\) Principle 12  
\(^{175}\) FXI, 2008: page 7  
\(^{176}\) Osterhaus A and Fagan C, 2009: page 4  
\(^{177}\) Transparency International, Recommended Principles for Whistleblowing Legislation, Recommendation 23
As discussed at the beginning of this chapter, although the current legal framework does encompass both the public and private sectors, it is splintered between different laws which govern different relationships; which offer varying levels of protection to different whistleblowers and impose different obligations on public and private organisations. It cannot be described as “Dedicated” legislation providing a “single, comprehensive legal framework”.

It is not just the lack of a comprehensive framework that is necessarily problematic, it is what this means from an equality perspective. The legal framework(s) as it stands, infringes the rights of whistleblowers to equality. The different laws create different standards for different stakeholders and varying degrees of protection and remedies are made available for the same transgressions. For example, retaliation in terms of the PDA attracts damages to a maximum amount determined by the LRA, but there is no such limit in terms of an action brought under the Companies Act. There are also different standards of proof in terms of the two acts and employees in private companies may demand and make use of policies and procedures that will make whistleblowing easier and a safer alternative to silence than employees in public entities and private concerns not registered under the Companies Act.

*Does the law make provision for a public body to provide general advice to the public, to monitor and review the framework, to promote public awareness and acceptance of whistleblowers?*

Transparency International recommends that a “Whistleblowing body should be established to provide general public advice on all matters related to whistleblowing, to monitor and review periodically the operation of the whistleblowing framework, and to promote public awareness-building measures with a view to the full use of whistleblowing provisions and broader cultural acceptance of such actions.178 This recommendation is legally supported by the AU Convention and the SADC Protocol which call for the adoption and strengthening of educational and awareness-raising amongst the public to respect the public interest and to promote an enabling environment for the respect of ethics,179 and which calls for civil society to participate in monitoring anti-corruption processes and to hold governments to account in the management of public affairs.180

The Protected Disclosures Act does not make provision for a public body to provide guidance and advice, education and awareness-raising or to oversee implementation, monitoring and compliance with the whistleblowing framework.
in South Africa. Furthermore, it does not require public or private entities to self-report, regularly or otherwise, on disclosures made, any detriments suffered or on organizational procedures and outcomes.

This failure to create appropriate mechanisms to educate and raise awareness about the laws and to monitor implementation of and compliance with the PDA (whether externally or through self-monitoring processes) has resulted in a lack of regular, sufficient and reliable data against which to assess the realisation or otherwise, of a culture of disclosure and transparency in society and within organisations in South Africa. This gap in the whistleblowing framework is discussed in more detail under the review of the implementation of the PDA which follows later in this paper.

There is space in the Companies Act to create an obligation for regular self-reporting on whistleblowing progress and uptake through the annual statutory company reporting requirements. In terms of the King III report, companies ought to report on risk management and sustainability strategies and how these have been mainstreamed at all organisational levels. This reporting domain offers an ideal space to require whistleblower reports, but it is not likely that this will happen unless there is express direction given in this regard.

There is a need for legislative guidance obliging companies, government agencies and other organisation to report on their whistleblowing policies, provisions and implementation as part of this

The design and review of whistleblowing legislation in South Africa has been highly consultative, but there is no provision for ongoing periodic review, and no structural guarantee to ensure that review takes place regularly and does involve relevant key stakeholders.

**Corruption oversight bodies in South Africa**

There are a number of bodies that have been established in South Africa to provide guidance, to oversee the development, implementation and monitoring of corruption in the public and the private sector. Given their purpose in relation to the underlying objectives of the PDA and related legislation, namely overseeing anti-corruption, accountability and transparency measures in organisations, their mandate potentially (should or could) encompass oversight, implementation and monitoring of effective whistleblowing policies and practices. Some of these structures, like the Public Service Commission, do require intermittent reporting from public organisations as part of the monitoring process, which includes reporting on whistleblowing policies and processes.
Some of the main public bodies are:

1. The Public Service Commission
2. The National Anti-Corruption Co-ordinating Committee
3. The Inter-Ministerial Committee on Corruption
4. The National Anti-Corruption Forum

The Public Service Commission

The Public Service Commission is an independent body established in terms of Chapter 10 of the Constitution. It is in terms of Section 196 (2): “independent and impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service”.

The vision of the Public Service Commission (PSC) is

_To enhance excellence in governance within the public service by promoting a professional and ethical environment and adding value to a public administration that is accountable, equitable, efficient, effective, corruption-free and responsive to the needs of the people of South Africa._

The PSC mission is to promote the constitutional principles governing public administration by investigating, monitoring, evaluating, communicating and reporting on public administration and ensuring the promotion of excellence in governance through research.

Its vision and mission are translated into the following objectives:

1. Build professional ethics and risk management;
2. Investigate allegations of corruption;
3. Monitor labour relations and improve human resource management and development;
4. Monitor and evaluate service delivery and improve its management.

With its emphasis on the underlying constitutional principles of accountability, transparency and good governance informing the PDA and its compliance,
monitoring and investigative role, the Public Service Commission is ideally placed to provide guidance and advice, oversee implementation, monitoring and compliance with the whistleblowing framework in South Africa.

The PSC has fulfilled a key oversight role in its evaluations of compliance with various laws and policies. It has, for example, conducted evaluations of the implementation of the Promotion of Access to Information Act in the Public Service (2007) and one on the Promotion of Administrative Justice Act (2007) as well as one of the state of professional ethics in the various provinces in the South Africa\(^{183}\). The latter set of evaluations included an assessment of the effectiveness of whistleblowing practices, as part of a suite of “ethics imperatives”.

The PSC is thus ideally placed to provide general public advice on all matters related to whistleblowing, monitor and review the whistleblowing framework, promote public awareness-building measures to promote use of the whistleblowing provisions and broader cultural acceptance of whistleblowing. This potential has not been effectively realised, in part because of the wide range of responsibilities enjoyed by the PSC, resulting in it not being able to focus its energies on one particular area of the law or public administration, whether that be corruption or more specifically whistleblowing. This means that any evaluations that are conducted in respect of a particular subject are not conducted regularly, but rather randomly. The same applies to the awareness raising campaigns and capacity building initiatives run by the PSC. As a result the PSC is not able to provide sufficiently regular and in-depth promotion of whistleblowing and tracking of whistleblowing information to assess progress towards a culture of disclosure. Moreover, the PSC lacks any policing authority to require public entities to remedy any deficiencies found or to revise deficient policies and practices itself. The PSC’s role is limited to making recommendations, which appear largely not to be taken very seriously.

One of the core functions of the PSC is to serve as the secretariat for the National Anti-Corruption Forum (NACF).

The National Anti-Corruption Forum

The National Anti-Corruption Forum was established in 2001. It is a multi-sectoral body enjoying representation from government, business and civil society. It too is ideally placed to act as an independent whistleblowing monitoring, advocacy and support body.

\(^{183}\) See for example: An assessment of the State of Professional Ethics in the Limpopo Provincial Government, March 2009
Unfortunately the forum is regarded as toothless and unable to fulfil its mandate to devise and oversee a co-ordinated response to corruption. The comments made by Richard Levin, the former director-general of the Department of Public Administration that the forum needs revitalisation; that at the moment it is an organisation that is simply parked out there serving little real purpose in relation to its intended mandate. “His comments followed a dismal lack of activity by the Forum, which confessed in October [2009] that it was unable to produce an annual report. This was not a matter of time or money; there was nothing to report on.”184

The Anti-Corruption Inter-Ministerial Committee

The Inter-Ministerial Committee was set up by the Cabinet to deal with corruption in the public service. This Committee “will study the report and recommendations on corruption issued by the Public Service Commission and other reports. [It] will ensure that action is taken against all persons who are involved in corrupt practices involving public finances”.185

The researcher sought to obtain documentation as to the Committee’s mandate, strategic and/or operational plans, only to be advised that there are no such documents other than the statement made after the Cabinet meeting in November 2009 during which the Committee was established. As such it is difficult to assess the potential for this body to advance whistleblowing and a culture of disclosure in South Africa.

The Anti-Corruption Co-ordinating Committee (ACCC)

The Anti-Corruption Coordinating Committee is an intergovernmental structure made up of departments and agencies that have anti-corruption work as one of their functional mandates. It was established in terms of the Public Service Anti-Corruption Strategy to co-ordinate the implementation of anti-corruption work in the country. The ACCC is also a platform where information on anti-corruption best practice, including initiatives on prevention, detection and investigation of corruption can be shared among departments and agencies.186

The ACCC is restricted to co-ordinating and guiding anti-corruption initiatives in the public sector and as such has no mandate to engage or guide the private

184 Tilley A and Levy E, 2010
185 Statement on the Cabinet Meeting Held on 18 November 2009
186 DPSA – Anti-Corruption Coordinating Committee
sector. A member of the ACCC’s secretariat advised that even though whistleblowing is part of the national anti-corruption strategy it does not occupy a dedicated space on the ACCC’s agenda. She said that “it is always discussed, but it does not move further than this.” Apart from the lack of focus on whistleblowing the potential of the ACCC to advance whistleblowing in South Africa through collective co-ordinated action is severely limited by the “lack of capacity to implement the work in terms of the national anti-corruption programme.” (Member of the ACCC secretariat).

In summary

There are a number of structures with the potential to become a national monitoring, oversight, advisory and whistleblowing support structure. However, the potential in all of them remains unrealised at the expense of the cultivation of a culture of disclosure in South Africa.

2. How effectively is the law being implemented and used?

Are the laws implemented correctly and used vigorously by organisations and whistleblowers?

The law does in principle, to varying degrees, address some of the barriers which discourage disclosure, including a fear of reprisals, fear of litigation and prosecution, and the duty of loyalty and confidentiality employees have to their employer organisations. Not all barriers are addressed by the law and there is an urgent need for law reform. The law must, in the words of Mike Louw, the provincial organiser for Cosatu in the Western Cape, be tightened up to provide more protection for whistleblowers, especially in the light of increasing corruption and poverty in South Africa.187

However, no matter how good the law is, and comparatively speaking, South Africa has a progressive whistleblowing framework, or how good it may become, the law will never be enough on its own to cultivate and support a culture of disclosure in South Africa. The law can only enable the relevant actors to realise a culture of disclosure. The law must be diligently and pro-actively applied and used in order to realise its potential. Despite the limits on the current legal framework, it does hold significant potential to foster a culture of disclosure.

187 In an interview on Voice of the Cape, January 2010
The question to which this paper now turns its attention is whether that potential is being realised and whether we are, in consequence, seeing an emerging culture of disclosure.

This question will be answered by reviewing available data to determine:

1. How whistleblowers are viewed in general? Are they seen in a positive or negative light?
2. If potential whistleblowers are blowing the whistle?
3. If there is widespread public knowledge of the right to blow the whistle and the rights of whistleblowers?
4. If there is public confidence in the law’s ability to protect whistleblowers from reprisals?
5. How have organisations responded in the first instance to the laws and the obligations on them to facilitate disclosures, and secondly to disclosures made in terms of the law.

One of the key challenges in answering these questions is the limited data that is available. There is no routine and regular monitoring and reporting on the implementation and use of the South African whistleblowing framework. This is despite the fact that internationally there is recognition of the need for, and an obligation on law and policy makers and implementers to regularly monitor, preferably through an independent observer body, the incidence of whistleblowing, the prevalence of retaliation against whistleblowers and the general operation of the framework. This requirement and the level of compliance with it is discussed in more detail below. Civil society has sought, within the means available to it, to fill the data gap left in the absence of a dedicated monitoring body. It has taken the lead in monitoring the implementation of the framework. The Institute for Security Studies undertook a survey in 2003 which sought to review the levels of whistleblowing taking place amongst the public. ODAC has taken on the responsibility of more regular monitoring and commissioned national surveys in 2007 and 2008 to assess perceptions of whistleblowing, the prevalence of whistleblowing and knowledge of relevant laws and protections available to whistleblowers in South Africa. These surveys are supplemented by a more recent (yet to be completed) survey by ODAC to establish whether a number of larger South African companies have whistleblowing policies in place. In addition, there are ad hoc reviews that have been conducted by academics such as Tina Uys.

188 ISS, 2003, National Victims of Crime Survey
189 Greyling A, 2008, Whistleblowing, the Protected Disclosures Act, accessing information and the Promotion of Access to Information Act: Views of South Africans, 2006 – 2008, ODAC and Ipsos Markinor
190 Uys T, 2008
which have sought to gain insight into whistleblowing practices and experiences in organisations, by interviewing smaller samples of whistleblowers.

This review has drawn on the available data available from this selection of sources. It must be borne in mind that some of the data is based on surveys that were conducted some years ago and there is no data for some years at all. Conclusions that have been drawn from the data may thus be open to debate in the future, but until such time as there is a dedicated body conducting regular (preferably annual) surveys of whistleblowing in South Africa on which such future discussions could be based, the conclusions, which are discussed in detail below, are not encouraging. Whilst whistleblowing is regarded more positively by the public than in previous years, the rate of whistleblowing, the rate of retaliation by organisations against whistleblowers, the level of knowledge of the law and confidence in the ability of the law to protect whistleblowers does not paint a positive picture of the operation of the whistleblowing framework in South Africa in 2010. There is much work to do if the leading and sophisticated legal framework we have in South Africa is to become more than a “shield of cardboard” and create a truly safe alternative to silence for whistleblowers in South Africa.

What is the public’s perception of whistleblowers?

The answer to the question is an indicator of progress or otherwise on two fronts. One, the success of the law in contributing to overcoming the cultural barrier to whistleblowing located in the historically negative perception of whistleblowers. Secondly, it is an indicator of the extent to which we are seeing an emerging culture of disclosure.

Even though the value of whistleblowers is patently clear in terms of the benefits for organisations and society as a whole, there is nonetheless a tenacious opposition to whistleblowers in many societies. Cultural and political factors contribute to this significant barrier to effective implementation of even the most progressive whistleblowing laws. In many societies, especially those with a repressive political history, whistleblowing and whistleblowers are viewed in a negative light\textsuperscript{191}. South Africa falls into this category. There is evidence in South Africa of whistleblowers having a bad reputation as troublemakers, busy bodies and disloyal employees. Our history has left a legacy of intrinsic scepticism and denial of the value of whistleblowing, Holtzhausen points out that a major cause of this is linked to the inappropriate confusion of whistleblowers with apartheid-era informants who betrayed their comrades.\textsuperscript{192}

\begin{footnotesize}
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\item 191 Osterhaus and Fagan, 2009, page 4
\item 192 Auriacombe 2004 and Camerer 2000 in Holtzhausen, 2007: page 5
\end{itemize}
\end{footnotesize}
This legacy has provided fuel for a tenacious culture of silence, in both South African society and organisations. Some ten years after the introduction of the PDA, there is still widespread evidence of a strong culture of silence in society generally and within organisations. Thornton observes that most people have been brought up in an environment where the concepts of loyalty and peer support are highly valued. And a principle of this ‘loyalty’ is not to inform on another member of your group. This attitude remains dominant in a significant number of organisations in South Africa today. Uys observes, in an article documenting her findings from a series of interviews with eighteen whistleblowers in South Africa, that whilst “the act of whistleblowing is generally viewed as making an important contribution in the fight against corporate misconduct, a more ambivalent attitude is demonstrated towards whistleblowers themselves. At organizational level, whistleblowers generally pay a heavy price for what they perceive to be organizational wrongdoing”. The manner in which this plays out in organisations was illustrated in an observation made by Ingrid Gardener, the risk manager at Soul City Institute, Health and Development Communication, a leading health promotion not-for profit association, in a conversation about whistleblowing policies and practices at Soul City. She observed that even though they have an in-house procedure for anonymous reporting of irregular conduct within the organisation, this facility has never been used. She believes that the failure to disclose is attributable to a number of factors, including the still very strong sense among some employees that “you are an ‘impimpi’ if you disclose information about a colleague, “that you are letting the side down if you blow the whistle on your brothers”. She emphasised that this remains a very strongly-held belief amongst employees. William Thompson, an advocate and a part-time senior commissioner at the CCMA echoed that in his dealings with labour matters, in both his capacity as advocate and commissioner, “whistleblowers are not seen as heroes”.

It is encouraging to see that there is evidence of a growth in positive attitudes amongst the public towards whistleblowers in South Africa. There is evidence of a move towards overcoming this barrier. The Markinor survey conducted on behalf of ODAC in 2008 revealed an upward trend in the prevalence of positive attitudes to and perceptions of whistleblowers and whistleblowing among South Africans. The survey showed a year-on-year increase in the percentage of South Africans in favour of protecting whistleblowers. In 2006 69.7% were in favour of protection, while this figure has increased to 74.5% in 2008.

Despite this upward swing, it is still great cause for concern that 1 in 4 (25%) of

193 Thornton G, 2005
194 Uys T, 2008
195 Greyling A, 2008: page 4
the respondents in the Markinor study felt that whistleblowers ought not to be protected. If 25% of South Africans still do not see the value in whistleblowing and the need to protect whistleblowers, we cannot speak of a culture of transparency, accountability and disclosure. We still have some way to go to reach this objective. We need to see a much broader public valuing of transparency and disclosure before we can conclude that we have successfully achieved this objective. We need to see something close to the level at which the public value the right to ask for information, which is in the region of 88%, before we can start speaking of a societal culture of transparency, accountability and disclosure.

Are potential whistleblowers blowing the whistle?

An obvious indicator of the effectiveness of the use and implementation of whistleblowing laws and of a growing culture of disclosure is a statistical increase in whistleblowing in a society or organisation. On the whole, the statistics are not encouraging. They tend to show a decrease, rather than an increase in whistleblowing within the governing framework.

The Markinor study commissioned by ODAC in 2008 sought to establish if, and how many South Africans are blowing the whistle. The study defined “whistleblowing” as the disclosure of wrongdoing in the workplace by a person to their boss or to other people. The results showed a statistical decrease in whistleblowing. One in five, or 21.7% of respondents indicated that they had blown the whistle. 78.3% said that they had not done so. This number has decreased, rather than increased, since 2007. Given the increase in corruption, and more importantly, in the perceived level of corruption amongst the public in South Africa, we should be seeing an increase in the rate of whistleblowing. South Africa is currently listed 55th out of 180 countries on Transparency International’s 2009 Corruption Perceptions Index which measures perceived levels of public sector corruption. What is noteworthy is that in 2009, South Africa scored below 5, on a scale of 0-5. Transparency International regards any country falling below 5 as having unacceptably high rates of corruption. South Africa has slipped from a score above 5, at 5.1 in 2007, when it was much lower on the list of corrupt countries at 43, in 2007. South Africa joins the ranks of all other countries in Sub-Saharan Africa, bar three, falling below 5 and leading to the conclusion that the “overall picture remains one of serious corruption challenges across the region.”

196 Page 10
197 Greyling A 2008
198 Banisar D, 2006: page 45
199 Transparency International 2009
200 Corruption Perceptions Index, 2009: Regional Highlights, Sub-Saharan Africa.
clear indicator of increased perceptions of corruption in the country has been acknowledged by the South African government which has responded with the establishment of an inter-ministerial committee on corruption.

The rate of whistleblowing as more broadly defined, that is to say amongst the public, was most recently assessed in 2003 by the Institute for Security Studies in its National Victims of Crime Survey. Unfortunately the same or a similar study does not appear to have been conducted in any of the following years, so it is not possible to assess if these figures have decreased or increased since 2003. The ISS study found that less than 2% of citizen respondents had ever tried to report a corrupt official, despite the unacceptably high rate of corruption perpetrated against them by public servants.

There are signs of improvement in the rate of whistleblowing by the public if one has recourse to the statistics provided in the 2008 evaluation report on the National Anti-Corruption Hotline administered by the Public Service Commission. The report records an increase in the number of reported cases of corruption between 2004 and 2008 from 14% to 37%. The report acknowledges that reasons for this increase could be because of an increase in actual corruption. An important observation to make in response to this increase is that the increase in whistleblowing appears to be limited to the route that offers anonymity (and the limitations on investigation and follow up that go with that) that does not fall within the confines of the current whistleblowing framework. This may well indicate an increase in the recognition of the mind of the public to report corruption, and a willingness to do so, but at the same time it is indicative of an abiding discomfort with the level of protection provided by the current PDA framework. There may be more “whistleblowing”, but if so, it is of the anonymous variety.

In summary, the statistics that are available tend to show that the current framework is not adequate to meet the challenges of growing corruption and fear of retribution in South Africa in 2010. The current whistleblowing framework does not appear to be fostering a culture of disclosure at a sufficiently rapid rate to counter the rapidly growing culture of corruption in South Africa.

The reasons for the declining and/or insufficient rates of whistleblowing in South Africa are summed up in Van Vuuren’s analysis of the ISS National Victims of Crime Survey. In essence, despite good whistleblower provisions, people were not making use of the procedures and protections provided by the governing laws, most notably the PDA and organisations were not pro-actively acting on reports that were made. The reasons for the public’s failure to blow the whistle are on the one hand, that they simply did not know the laws, procedures and

201 Van Vuuren H, 2004: page 14
202 Public Service Commission, 2008: page 15
The Status of Whistleblowing in South Africa

protections that were / are provided, and on the other hand, for those who know of the law, they were/are put off by the perceived inadequacy of the legal framework to guarantee the necessary action and protection. The survey showed that in the face of escalating corruption, less than 2% of respondents blew the whistle because they (1) lacked knowledge of how to blow the whistle and to whom they should blow the whistle, (2) were afraid to blow the whistle for fear of the consequences if they did report the corrupt conduct, and (3) believed that there was no point in reporting because it was unlikely to change anything\textsuperscript{203}. These three reasons for insufficient application and use of the governing whistleblowing laws will be explored in more detail under the following three headings.

Lack of knowledge of the laws, rights and protections afforded by whistleblowing laws

In 2003, the ISS found that a significant number (two thirds) of the 98% of respondents who had never reported corruption lacked the necessary knowledge about how and where to blow the whistle\textsuperscript{204}. At the time, Van Vuuren strongly recommended that this lack of knowledge could be remedied in the short term through a sustained awareness campaign by the public service. He suggested that the campaign should emphasise why citizens need to counter corruption, and in so doing, popularise a whistleblowing culture, as well providing information about how and where to report corruption.

Given the escalating scope of corruption in South Africa since 2003, one would have hoped that these recommendations were taken to heart and we would have seen committed efforts to ensuring knowledge and utilisation of whistleblowing laws in South Africa so that by 2008/2009 we would be seeing a significant increase in knowledge of the PDA and of other whistleblowing mechanisms,

Credit must be given the Public Service Commission for the improvements in the use of the anonymous national anti-corruption hotline reported on under the previous heading, which increase is attributed in part, by the PSC, to awareness raising campaigns about the hotline through advertisements in the media and salary slips of public servants\textsuperscript{205}.

Unfortunately, there has not been the same energy and resources invested in awareness raising of whistleblowing and whistleblowing laws, processes, rights and protections in the context of the PDA. There is no evidence of comparable

\textsuperscript{203} Van Vuuren H, 2004: pages 12 - 13
\textsuperscript{204} Van Vuuren H, 2004: page 14
\textsuperscript{205} Public Service Commission, 2008: page 15
awareness raising initiatives by public entities, employers or trade unions on a national scale. Trade unions in South Africa have been key drivers in advancing awareness and take-up of the rights and protections provided for workers in many arenas. At a national level, the trade unions have not yet fully grasped the opportunity to do the same for whistleblowers and the PDA. COSATU in the Western Cape has showed what is possible in this regard in partnering with the ODAC to run a training and awareness campaign. In addition, trade unions have played a very supportive role for whistleblowers, as in the case of Mr A discussed in the introduction to this paper. This potential within union structures to support the growth of a workplace culture of disclosure and transparency has however not yet been fully grasped. This view was supported by a national collective bargaining officer of SAMWU interviewed for this research. He sees the PDA as providing a protective framework for the broader political and social functions of whistleblowing and that given the domain in which it is played out, namely the employment relationship, he thinks that unions are ideally placed, and in fact compelled to raise awareness of the PDA, encourage whistleblowing and support whistleblowers. He said:

Unions have not yet focussed their attention on it like they have on matters such as sexual harassment and gender equality in the workplace. In these latter arenas, the unions have led the way, they have set up specific structure within the union and internal procedures for dealing with workplace concerns related to these issues and they have run successful dedicated education and awareness raising campaigns.

The lack of national awareness-raising, education and support campaigns, which are in fact required by the international and continental conventions, give some insight into why, in 2008/2009, some five years after the ISS study, we have not seen an improvement in the level of awareness and knowledge of the PDA and the rights and procedures provided by it. In fact, the contrary is true. Evidence from the Markinor study shows a decline in the public’s knowledge of the PDA and related laws and the protection available for whistleblowers from 31,5% in 2007 to 26,4% in 2008. This lack of knowledge was recorded by the Public Protector’s office in its submission to the SALRC on the PDA which noted that the majority of whistleblowers that were interviewed by the Public Protector’s office raised a concern about their lack of knowledge about the requirements and procedures necessary for making disclosures as well the rights they have to protection for victimisation and harassment.

It is not just that there is scant knowledge of the detailed provisions of the law, the ignorance is more profound. The majority of respondents in the Markinor
study (73.6%) had in fact never heard of the PDA. This was confirmed by William Thompson, an advocate and a part-time senior commissioner at the CCMA. He said from his experience of labour disputes and matters that end up before the CCMA, “very few people know about the PDA or refer to it. If it arises, this is purely by chance.”

A further relevant observation in the Markinor study is that the profiles of those who know about the PDA, who are in support of whistle blowing and the right to ask for information reveals a class fault-line. Those in the know are generally educated, older people, especially males, with a matric or a tertiary qualification. This means that people who are especially vulnerable, due to imbalances of power at work, given differences in educational qualifications between themselves and the organisational managers and who are as such in most need of the knowledge and protection afforded by the Act are the least likely to know about and enjoy the benefit of the Act, and are least likely to blow the whistle. The latter point is confirmed by the income profile of whistleblowers. The Markinor study shows that whistle blowers are more likely to be middle to high income earners as opposed to low income earners. If the evidence is damning of the exclusion of poor working class members of society from the protective ambit of the PDA, it is even more problematic for a group of people even more at risk than the employee working class, that is to say the unemployed poor. The ISS study revealed a high level of corruption in response to job applications to both public and private enterprises, and an equally low level of reporting of these instances for fear of not getting the job in question.

As such, there is a strong class dimension to the whistleblowing dilemma we face in South Africa. Much of the advocacy and energy must bring the poorer working class members of society with lower educational status, less money and less power into the whistleblowing framework. Given the very high levels of unemployment and retrenchment in the current economic climate, the impact this has on the most poor and the consequences of this for fostering a whistleblowing culture in South Africa, there is a need to strengthen the protection afforded to the most vulnerable in South Africa through improved awareness raising and the strengthening of the law to include those not in the employment relationship.

This lack of knowledge constitutes a significant barrier to the realisation of a culture of whistleblowing in the country. While many people may value

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206 Greyling A, 2008: page 4
207 Greyling A, 2008: page 5
208 Greyling A, 2008: page 10
209 Van Vuuren H, 2004: page 13
210 See the introduction for details. The unemployment rate is as high as 32.5% and more than a quarter of a million people lost their job in the three months leading up to June 2009.
whistleblowing more now than in the past, lack of knowledge of the Act and the protection it affords means that fears about the consequences of whistleblowing for employees cannot be addressed and people will rather remain silent. In other words, lack of knowledge results in the PDA and other laws not providing a safe alternative to silence, a concern that will be dealt with in more detail under the next two headings.

Lack of confidence in the law’s ability to protect whistleblowers from reprisals

*The largest barrier to whistleblowing is the concern that retaliation will result from the disclosure. Retaliation can vary from minor harassment at the workplace to much more severe consequences. Typically, once an employee has blown the whistle, increasing pressure will be placed on them to rescind their statement and refrain from further disclosures.*

Banisar goes on to note that “Fear of retaliation is still common even in jurisdictions with well established systems for protecting whistleblowers.” In essence, what he is saying is that it is not just good enough to have laws that provide good protection against retaliation, as is the case in South Africa. Van Vuuren observes that “Despite good whistleblower provisions (South Africa is one of only seven countries with legislation protecting whistleblowers) as many as 27% [of respondents who did not report bribery in the ISS study] said they are afraid of reprisals.” On a national scale, almost half the population do not have confidence in the law. The Markinor study commissioned by ODAC found that 43.1% of the respondents felt that the law does not adequately or effectively protect whistleblowers.

As argued by Van Vuuren, on the one hand this barrier requires redress at a policy level. The law must provide sufficiently strong protection to a sufficiently wide range of whistleblowers. If the scope of the law is insufficient, people will not be protected and will therefore not have faith in the law. For example, citizens and others in a commercial or potential commercial relationship with an organisation that does not amount to formal employment must be included and protected against a full range of reprisals, not just those linked to one’s employment status. On the other hand, it is not just about law reform, it is also about ensuring better utilisation and implementation of the existing law to guarantee maximum protection of whistleblowers in the workplace. This depends on employees

211 Banisar D, 2006: page 7
212 Page 15
213 Van Vuuren, H, 2004: page 16
214 Van Vuuren, H, 2004: page 16
on the one hand knowing about and exercising their rights. This is however not sufficient to ensure confidence in the protection provided by the law. It is critically important that employers in both the public and private sectors respond positively and pro-actively to the spirit and the letter of the PDA and other laws such as the Companies Act in a manner that not only enables, but also encourages employees to blow the whistle in confidence that they will not be harmed or discriminated against in any number of ways. The attitude and response by organisations to the law and whistleblowers is critical. It can constitute a significant barrier to disclosure and stifle the development of an organisational culture of disclosure. Likewise, an appropriately positive response and attitude can engender confidence in the law, encourage disclosure, eradicate irregular conduct in the organisation and foster an entrenched organisational culture of disclosure. In short, organisational responses and attitudes to whistleblowers, the law and their obligations is the essential determining factor in the success or failure of the objectives of the whistleblowing framework in South Africa. The next section will look at this matter in more detail.

Organisational responsiveness to the law and to the rights of whistleblowers

A key indicator of how enabling a legal framework is and of how far a culture of disclosure has been advanced is the responses of organisations to the law, to whistleblowing and disclosures. Are organisations positive about whistleblowing and proactive in their development and implementation of appropriate policies and procedures; do they welcome disclosures in recognition of the fact that it is of value to the organisation concerned; that it is an early warning system, an integral part of an organisation’s risk management and sustainability strategies? Or is the predominant response one of hostility, suspicion and reprisals against the whistleblower?

What must organisations do to foster a culture of disclosure?

The law is not enough on its own. Organisations must take decisive and appropriate action to realise the potential that is created through an enabling whistleblowing framework. “Unless organisations foster a culture that declares and demonstrates that it is safe and accepted to raise a genuine concern about wrongdoing, employees will assume that they face victimisation, losing their job or damaging their career.”215 Uys argues that the realisation of legislative potential can only be achieved if organisations “institutionalise rational loyalty.” What she means by this is that the conflicting loyalties and rights that play out in whistleblowing must be

acknowledged and addressed through appropriate negotiated organisational whistleblowing policies and processes. The policies and processes must be premised on agreed organisational values and mediate the whistleblowers concerns about conflicting loyalties as well as the organisation’s concerns about obedience, confidentiality, accountability and reputation.\textsuperscript{216}

A doctoral thesis by Natasja Holtzhausen sheds some light on what it will take to undertake a process of institutionalising rational loyalty. She sought to identify distinguishing features of an organisational culture of disclosure by identifying, describing and analysing “the determinants of the phenomenon of whistleblowing”\textsuperscript{217}. Some of the pertinent “determinants of ....whistleblowing in organisations” include the following.

The internal policies and processes must address the fears of all stakeholders, not just the employees. The employer / organisational concerns about bad publicity, harm to reputation, and related matters must be acknowledged, addressed alongside recognition and protection of the fears and concerns of the employee whistleblower. The corollary of this is that internal policies must be developed through a process of consultation of all affected role-players in an organisation.

Organisations must make the positive connection, at the highest decision-making level, between organisational well being and disclosure and the value of disclosure for organisations. That recognition must infiltrate the entire organisational matrix, informing governance at all levels, including, but not limited to human resources or labour relations, risk management, information management, internal audit, external relationship management etc. Thus it is not enough to have whistleblowing endorsed at top governance levels, it is critical that that endorsement is implemented and respected through strong organisational leadership at all management levels in an organisation. This was stressed by a representative from a multi-national organisation that has endorsed whistleblowing at the highest levels, but which has not seen universal realisation of an organisational culture of disclosure in all of its country offices. She indicated that this is largely because of the different levels of leadership in the promotion and prioritisation of whistleblowing in the different locations.

For Uys, it requires far more than just setting up an anonymous hotline (which is all that she understands the PDA to insufficiently require). She argues that it requires the mainstreaming of a whistleblowing ethic as part of the organisation’s risk management policy and processes. She argues that it requires, inter alia, the establishment of a written compliance programme, the training of employees regarding compliance, the appointment of staff with sufficient autonomy to

\textsuperscript{216} Uys T, 2008, page 917  
\textsuperscript{217} Holzhausen, 2007: pages vi-vii
monitor compliance and the maintenance of strong auditing. She argues that unless this process of internal rationalisation takes place, organisations will remain hostile to whistleblowers and the messages they bring.\textsuperscript{218}

Transparency International notes that the fact whistleblowing is an efficient tool for risk management is often not recognised by organisations\textsuperscript{219}. The PAS in the United Kingdom stresses the value of whistleblowing to organisations in the guidance it provides for the development and implementation of whistleblowing policies and practices. It identifies the following values:

1. It deters wrongdoing.
2. It picks up potential problems at an early stage, in other words it is “good risk management”.
3. It enables critical information to get to the right people who can do something about it.
4. It demonstrates to stakeholders, regulators and the courts that organisations are accountable and well-managed.
5. It reduces the risk of anonymous and malicious leaks.
6. It minimises the cost and compensation arising from accidents, investigations, litigation and regulating inspectors.
7. It maintains and enhances reputation.

An appropriate organisational culture requires that organisational governance, leadership and management is informed by a range of appropriate principles, drawing on the underlying values of transparency and accountability as made relevant to the well being of the organisation in question. This will create an enabling organisational environment which will create fertile ground for cultural traction within the organisation. However, organisational policies alone are not enough, there must be ongoing mainstreaming, implementation and prioritisation of practices that respect and promote the informing principles. Moreover, where there is a failure to do so, the organisation should be seen to sanction such transgressions.

In short, organisations must identify, mainstream and perpetuate policies and practices that promote a culture of transparency and disclosure.

\textsuperscript{218} Uys T, page 917
\textsuperscript{219} Osterhof A and Fagan C, 2009: page 7
**Assessing organisational responses in South Africa**

It is beyond the scope of this research to conduct primary quantitative research in the form of a national survey of public and private organisational responses to whistleblowing. However, a review of a (as yet incomplete) survey conducted by the Open Democracy Advice Centre of whether private companies have adopted whistleblowing policies, together with a range of other secondary sources listed at the start of this section of the review, does provide insight into some foundational organisational attitudes to whistleblowing in South Africa.

At the outset, the indications are quite positive in that a substantial number of private entities appear to have adopted whistleblowing policies and processes. For example, of the 96 private companies surveyed by ODAC, 39 have policies, 23 do not and the policy status of the remaining 34 is unknown. There are also positive signs of pro-active development of policies by government departments (although this is not universal). For example, the Public Service Commission found in its Assessment of the State of Professional Ethics in the Limpopo Provincial Government, that eight out of 11 government departments have developed policies on whistleblowing.220

These numbers are useful but leave a number of questions unanswered. For example, how comprehensive these policies are; do they simply provide an anonymous hotline, or do they “institutionalise rational loyalty”? Do they create an obligation on companies to not only make reporting mechanisms available, but whether the policies make whistleblowing an organisational cultural norm and practice which is integrally part of the organisational governance structures of the company. Is it integrated into the risk management policy, into the internal audit policy, into the communications policies and strategies, the external stakeholder relations etc; whether, in the case of private companies, the policies are in response to international laws or South African laws; and most importantly, how effectively and pro-actively the policies are implemented and enforced?

ODAC cautions that the presence of a policy is not enough as:

> Often companies have very good intentions and they do have very good policies, but it is lower down the chain, at middle and lower management level, where the irregular conduct takes place. We find that companies tend to still have a tick box mentality – yes we are complying with the Employment Equity Act, LRA, PDA, Companies Act etc, but there is no real commitment to engage with the spirit of the legislation which in the PDA’s case would be to create a culture in the workplace that would facilitate the disclosure of information.” (ODAC presentation on whistleblowing)

220 Public Service Commission, March 2009: page 31
The researcher sought to have sight of a number of policies and submitted a number of requests to both private and public organisations to share copies of their policies to assess the potential within operational policies to create an enabling framework for organisations. At the time of writing this report not one of the requests had been honoured.

The next level of enquiry to determine organisational responses sought to establish how organisations respond to whistleblowers and the disclosures they make. More specifically, to establish if disclosures are welcomed, if whistleblowers are made to feel safe, if organisations require and act on the requirement that disclosures be investigated and reported on.

Once again the research was constrained by insufficient primary material. The researcher requested interviews with a significant number of private and entities to discuss their policies and practices. The only positive response was from Anglo-Gold Ashanti who shared their information and insights generously. The researcher also sought to have a conversation with a leading consulting firm which purports, on its website, to provide professional organisational support in the development of whistleblowing policies and practices. This request was unfortunately either denied or ignored.

In the absence of primary sources, the researcher had recourse to the case studies depicted in the various law suits/ reported judgments relating to whistleblowing, the information gained from the ODAC whistleblowing help desk and a number of evaluation reports, such as that of the Public Service Commission on the National anti-corruption hotline and the state of ethics in the provinces. Unfortunately the two prior sources are all negative in that they only end up at these destinations when there is a negative response to whistleblowing. Thus the observations made cannot be seen to be equally applicable to all organisations. On the other hand, the sheer number of cases that end in the courts and the ODAC hotline do indicate that there are a substantial number of public and private organisations that are not responding positively and appropriately to whistleblowing in the country and that we are not realistically speaking, seeing an entrenched culture of whistleblowing emerging in South Africa.

Mischke observes that the cases that are brought before the Labour and High Courts reveal a strong negative trend to whistleblowing within both public and private organisations. The cases reveal that there are real sensitivities when it comes to blowing the whistle. Employees still have a legitimate apprehension, when one considers the response of employers in the many cases brought before the courts, that making a disclosure, even a real, legitimate and good faith disclosure, remains hazardous. Uys concurs in her observation, on the basis of the eighteen case studies investigated by her and on the basis of other publicised
cases of whistleblowing, that the public and private organisational track record in South Africa to whistleblowers is not positive. An overwhelming number of organisations, even some of those who have explicitly committed themselves to values of honesty, respect for employees and integrity, tend to retaliate against whistleblowers with vindictiveness and a transgression of their rights.  

The key negative organisational responses that need remediying in order to realise adequate implementation of the law and policies and to see a more robust culture of disclosure are:

1. A tendency to interpret the protection provided by the PDA too narrowly so as to exclude disclosures and whistleblowers from its protective ambit. This was discussed in chapter one in relation to the attempted narrow interpretation of the meaning for example of “information” and a narrow interpretation of jurisdiction of the ordinary courts. In both instances the courts rejected the narrow approach adopted by employers as being contrary to the spirit and intent of the PDA which requires greater, rather than less protection to be afforded to whistleblowers.

2. A failure to sanction middle and lower management’s failure to apply whistleblowing policies properly or at all. The ODAC help line has received a number of calls which relate to whistleblowers being subjected to discrimination and retribution by middle and lower management. This was attributed by one of the respondents who heads the whistleblowing process within a multi-national corporation operating in South Africa to a lack of appropriate organisational leadership. The UK PAS Code of Good Practice also recognises this manifestation of inadequate implementation and recommends that organisations adopt a policy which makes a failure to respect and promote whistleblowing laws, policies and procedures a disciplinary offence.

3. A failure by organisations to follow up on allegations made by investigating and reporting back on alleged cases of corruption is perhaps one of the most damaging of responses. It is the primary cause of lack of confidence in the law and the primary reason why, as concluded by Van Vuuren, people choose to remain silent rather than blow the whistle. A failure to act is a common response in both public and private organisations. The PSC notes in its various evaluation reports on the state of ethics in a number of provinces, such as Limpopo province, that while eight out of 11 departments have whistleblowing policies, the value of these is undermined by an overwhelming failure by departments to act on reported cases of corruption. Limpopo is not alone in this regard; the same conclusion is drawn in respect of the Free State and KwaZulu Natal.

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222 Uys T, 2008: page 906
223 PSC, 2007; March 2007 and March 2009
Chapter 4

Recommendations

Policy and implementation gaps summarised

Having reviewed the South African whistleblowing framework against a number of essential enabling legislative principles, the following policy and implementation gaps have been identified which prevent the realisation of a culture of disclosure:

Policy gaps

1. The protective scope of the framework is too narrow.
   1.1 The PDA limits the scope of protection to whistleblowers in a formal employment relationship. It excludes all persons in any other commercial relationship with the relevant organisation such as customers, independent contractors. Furthermore, the PDA and the Companies Act exclude citizen whistleblowers.

   1.2 The PDA limits its protection to disclosures about the employer only. It does not cover a person or organisation closely associated with the organisation, other than an employee of the organisation. Likewise it only protects the employee against an occupational detriment committed by the employer or another employee of the organisation.

   1.3 The range of recipients to whom a protected disclosure may be made is too narrow. It excludes bodies and organisations, other than the Public Protector and the Auditor-General, that are capable of doing something about allegations and which are mandated to receive and act on allegations of corruption and irregular conduct. Thus regulatory bodies, the Human Rights and Public Service Commission and similar bodies are excluded.

2. There is no express obligation in terms of the PDA on organisations, both public and private, to take pro-active steps to encourage and facilitate whistleblowing in the organisation.

2.1 There is no obligation on organisations to develop whistleblowing policies and procedures and to publicise them internally to all
potential whistleblowers.

2.2 There is no express obligation on organisations to act on disclosures made by investigating the matter and reporting to the whistleblower. Transparency international regards this as “the single most important barrier to effective whistleblowing.”\textsuperscript{224} The Courts have interpreted the PDA to impose an implied duty to act on allegations, but this is not a widely known or publicised principle that organisations are necessarily aware of.

2.3 There is no obligation on organisations, in terms of either the PDA or Companies Act to report regularly on their policies, procedures and disclosures made and their responses thereto.

3. The Companies Act does create a number of positive obligations on private and state-owned companies to develop and implement whistleblowing policies and procedures. There is however no guidance provided for these companies or those which voluntarily choose to do so as to what the policies and procedures ought to contain and achieve.

4. The protection and remedies provided by the PDA are not strong enough to engender confidence in the ability of the law to protect whistleblowers.

4.1 The fora for the resolution of disputes related to whistleblowing are court-based. This is expensive and allows for delaying tactics by employers which amount to an abuse of process.

4.2 The protection that is provided by the PDA is limited to protection against occupational detriment, which is situated within the LRA. In other words, it is only where an employer’s retaliation prejudices an employee’s labour rights that the PDA protection becomes available.

4.3 The PDA provides no immunity against civil and criminal liability arising out of the disclosure.

4.4 There is no express obligation on organisations in terms of the PDA to protect a whistleblower’s identity.

4.5 The remedies that are available in the case of a transgression of a whistleblower’s rights are insufficient. For example, damages are limited to the damages that may be awarded in terms of the LRA.

5. There is no consolidated and comprehensive whistleblowing framework. Instead, whistleblowing is regulated by a splintered series of different laws.

\textsuperscript{224} Osterhaus A and Fagan C, 2009: page 3
which apply different obligations to public and private entities and different levels of protection for different categories of whistleblowers. The effect of this is to create a risk of unequal protection for different whistleblowers.

6. **There is no public body dedicated and able to provide regular advice to the public, to monitor and review whistleblowing laws and practices and to promote public awareness and acceptance of whistleblowing.**

7. **The lack of a dedicated monitoring body has contributed to the lack of regular and updated data tracking the prevalence of whistleblowing, the creation and practice of a culture of organisational disclosure and transparency and the protection of whistleblowers.**

8. **Implementation gaps and deficiencies in the use of the law**

   The overall picture that emerges from available statistics and studies is that we are not seeing a robust culture of disclosure in South Africa. In fact, to the contrary, despite the fact that the PDA is now ten years old, we are seeing what appears to be a reversal of gains made in this regard. Whistleblowing rates and knowledge of the law are declining.

1. **There is evidence that a substantial number of people in South Africa continue to have a negative perception of whistleblowers and believe that they are not deserving of legal protection. Unless this is addressed, there is little hope for overcoming some of the other barriers discussed below.**

2. **The number of people blowing the whistle does not appear to be increasing, except in the case of those making anonymous disclosures. In fact, the evidence suggests that the rate of whistleblowing is declining although there are more news reports of whistleblowing.**

3. **There is widespread ignorance of whistleblowing laws, rights and protections. In fact, the level of knowledge is reportedly declining.**

4. **Poor working class people are less likely to know the law, their rights and to blow the whistle than their wealthier well-educated colleagues.**

5. **Significant numbers of people do not have confidence in the ability of the law to protect whistleblowers. This is not only due to the limited protection that the law provides, but also due to the ineffective, and even reluctant implementation of the law by organisations.**

6. **Many organisations are not implementing the PDA effectively, and some are opposed to implementing it at all.**
6.1 Based on the number of calls to the ODAC helpline and the numbers of reported disputes before the Labour and other courts, retribution against whistleblowers remains a common practice. The lack of a duty on organisations to report on disclosures and results of relevant investigations and related matters means that we do not know what percentage of whistleblowers face retribution. Given the number of cases referred to the CCMA and courts, we can assume that the practice is common. Banisar confirms that in the absence of an entrenched culture of disclosure, retaliation is too common, even in jurisdiction with a well established system for protecting whistleblowers. For example, a review by the Ethics Resource Centre in the UK found that 12 percent of whistleblowers experiences retaliation\(^\text{225}\).

6.2 Many organisations do not have whistleblowing policies and processes in place, and many that do, see them as something to be applied to regulate the relationship with the employee once the disclosure is made, rather than something to encourage and facilitate disclosures. “The fact that whistleblowing ... constitutes an efficient tool for risk management within organisations is often not recognised.”\(^\text{226}\) As a result, whistleblowing policies and procedures are often seen as part of the dispute resolution machinery of labour relations rather than an integral part of the organisation’s risk management, sustainability, information management and governance domains and the scope of the whistleblowing in organisations is too narrow to foster an organisational culture of disclosure.

6.3 When disclosures are made, many organisations adopt overly restrictive interpretations of the protective measures in the PDA to justify their negative response and discrimination against the whistleblower. This results in the transgression of the rights of whistleblowers, not just to fair labour practices, but equal protection of the law and their right to freedom of expression. For example, organisations have sought to discredit disclosures on the grounds that an opinion is not “information”, that only the Labour Court has jurisdiction to determine disputes and that disclosures to the media are not protected under the general disclosures clause. As illustrated

\(^{225}\) Banisar S, 2006: page 7
\(^{226}\) Osterhaus A and Fagan C, 2009: page 7
in some detail in chapter one, all of these narrow constructions have been rejected by the courts as contrary to the spirit and intent of the PDA. The liberal approach adopted by the courts is clearly not the dominant view shared by organisations, given the number of whistleblowing disputes that have been heard by the courts.

6.4 Organisations do not have policies or are not implementing them properly because of a failure to recognise the intrinsic value of whistleblowing to organisations.

What is required to address these policy gaps and implementation barriers and how best can the requisite changes be achieved?

This chapter will propose recommendations and initiate discussion about appropriate vehicles to effect the requisite changes. The overarching recommendations are that the following policy and implementation changes must be made:

1. There is a need to develop a consolidated and consistent whistleblowing framework that provides equal protection to all whistleblowers and which imposes the same effective duties on organisations, in both the public and private domains, to promote a culture of disclosure and protect whistleblowers.

2. The law must be made more comprehensive in the provision of an expanded scope of protection. It must draw all potential whistleblowers into its protective field and allow disclosures to any person or agency that is able to do something about the allegation concerned.

3. Knowledge, understanding and use of the PDA and related laws must be improved, with a specific focus on the most vulnerable, namely less wealthy working class employees.

4. Organisations must be compelled and/or encouraged to pro-actively promote a culture of disclosure adopt more appropriate and expansive interpretations of the PDA, and to be more pro-active and attentive to effective implementation of obligations and protections provided by the law.

1. **A consolidated legal framework**

The South African whistleblowing framework does not meet the ideal that “there should be a single, comprehensive legal framework for whistleblower
protection [which] should include the private and public sectors.”

South Africa started with a consolidated framework in the Open Democracy Bill, but has since then moved in the opposite direction. Whistleblowing may be governed by a dedicated law, but it is not the only law governing whistleblowing. Whistleblowing is governed by the PDA, the Companies Act, the LRA, and the common law related to delict and criminal law as well as criminal codes.

Despite the fact that South Africa is relatively progressive compared to most other countries in the fact that it has a dedicated whistleblowing law, this splintering of the framework makes it subject to the same criticism as many countries that do not have dedicated whistleblowing legislation.

The splintering effect of the multiple governing laws leads one to draw the same (unfavourable) conclusion about the South African whistleblowing framework that Transparency International draws about a number of European whistleblowing frameworks; that it is “generally fragmented and weakly enforced. There is no single comprehensive legislation framework in place”.

The laws making up the framework must be made to work synergistically within a common whistleblowing framework. If the law is to enable the development of a common organisational and societal culture of disclosure, it must be developed and implemented within a common framework premised on common principles, objectives, obligations and protections.

2. The law must be made more comprehensive through amendments to the PDA

In consequence of the splintering of the whistleblowing framework, the protection that is provided is diluted. Existing legal provision does not adequately protect whistleblowers. It is inadequate in terms of outlining the processes, establishing appropriate channels for disclosure, enforcing protection and setting out follow-up procedures for disclosure. It also fails to ensure effective sanctioning of reported wrongdoing.

In large part, the weak protection mechanisms are intrinsically linked to the fact that the nature and scope of the framework is informed and determined by labour law, rather than whistleblowing principles. Transparency International notes with caution the inherent limitations of imposing the

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227 Osterhaus A and Fagan C, 2009: page 4
228 Osterhaus A and Fagan C, 2009: page 3
labour law model on the whistleblowing framework, although South Africa has best-practice labour law that is far more widely implemented than in many other jurisdictions. It means, for example, that only employees have some form of recourse, damages are limited; forum for the resolution of disputes are potentially limited as are the protections and remedies that are available. 229

The constraints of the labour law framework and the resultant policy gaps and limited interpretation and application of the PDA are recognised by various commentators in their submissions made to the SALRC during the recent review of the PDA. Organisations opposed to whistleblowing and whistleblowers have used the weakness and space created by this feature to argue for more limited interpretation of the PDA, advancing arguments more in line with the narrower contractual /employment principles of labour laws, as opposed to the broader constitutional principles underpinning whistleblowing laws. The Courts have recognised the limits of the labour framework and indicated repeatedly that “The questions that can arise in relation to a protected disclosure ..... are not labour-related issues and are more appropriately dealt with in the ordinary courts” and a “narrow and parsimonious construction of [PDA] is inconsistent with the broad purposes of the Act, which seeks to encourage whistleblowers in the interests of accountable and transparent governance in both the public and the private sector.” 230

This concern does not mean that the PDA should be abandoned or that the protection provided to employees should be reversed. Employees remain an especially vulnerable group of whistleblowers and the implementation of the PDA must be strengthened to ensure their protection in accordance with the current framework (which is discussed in more detail under the next heading). However, the PDA must be amended so as to expand the scope of protection provided for employees and all other whistleblowers.

The PDA must be amended as per the SALRC’ recommendations as a matter of some urgency. The SALRC review of the PDA was comprehensive and highly consultative. The resulting recommendations were premised on inputs made by the private sector, trade unions, organs of state and civil society. Many common concerns were raised pointing to deficiencies in the law which must be remedied for the PDA to provide an enabling framework capable of fostering a culture of disclosure. The need for actioning the SALRC’s recommendations is made even more pressing by the introduction of the of the new whistleblowing provision in the Companies Act.

229 Op cit: page 9
230 City of Tshwane Metropolitan v Engineering Council of South Africa and another, (532/08) [2009] ZASCA 151 (27 November 2009)
The Companies Act incorporates many of the changes recommended by the SALRC, but these are only operative in the private sector, resulting in different whistleblowing laws, thereby splintering the whistleblowing framework, as discussed previously.

The changes that must be made to the PDA include the following:

1. The range of protected whistleblowers must be expanded to include all persons with knowledge about unlawful, corrupt or otherwise irregular conduct within an organisation.

2. The PDA must recognise disclosures made to any agency or organisation capable of addressing the allegation as a protected disclosure.

3. The PDA must address the abiding lack of confidence in the law to provide protection from reprisals by recognising all potential reprisals as grounds for action against the organisation concerned, rather than limiting this to prejudicial conduct in relation to the employment contract.

4. The PDA must make express provision for organisations and other recipients of disclosures to protect the confidentiality of whistleblowers.

5. Remedies must be extended to include immunity from civil, criminal and administrative prosecution and damages must not be limited by reference to the LRA, but rather left subject to ordinary damages principles.

6. It would be preferable for the PDA to establish a dedicated adjudication body which must be vested with investigative and enforcement powers to overcome the cost barriers and to prevent abuse of the current judicial process by reluctant employers.

7. The PDA must create an obligation on all organisations to develop whistleblowing policies and procedures, to publicise these internally and to external entities in a commercial or other relationship with the organisations, to act on disclosures by conducting investigations and reporting back to the whistleblower on progress that has been made.

8. Moreover, the PDA must require all organisations to submit annual reports on their policies, procedures, disclosures received and their responses thereto, as well as details of the number and nature of any reprisal against whistleblowers.

9. The PDA must assign a body or bodies responsible for receipt of
the reports described under point 8 above, to provide advice to the public and to promote awareness, knowledge use and implementation of whistleblowing laws.

10. In addition to the introduction of a statutory obligation to take pro-active measures to enable and encourage disclosures, a Code of Good Practice, similar to the British PAS or Schedule 8 of the Labour Relations Act (Code of Good Practice: Dismissal) must be developed to give guidance to organisations on how best to fulfil their responsibilities in terms of the PDA. This would help to facilitate the development of a culture of disclosure within organisations and society as a whole.

3. **Implementation of the obligations in the PDA in its current form must be strengthened and guidance given regarding implementation of the obligations in the Companies Act**

   Laws are not enough on their own; there must be a shift in organisational culture to a culture of disclosure through development of appropriate policies and procedures and the prioritisation and strengthened implementation of these practices.

   1. Organisations must be supported and encouraged through awareness raising, capacity building, and advocacy initiatives, and through the development of a code of good practice, to adopt and implement whistleblowing policies and practices in the workplace that comply with the law and which will foster a culture of disclosure. These initiatives must advance awareness of the value of whistleblowing for organisations.

   2. More specifically a Code of Good Practice must provide guidance on the implicit obligations contained in the Act which have been articulated by the courts, such as the duty to investigate allegations, and must spell out the consequences of a failure to comply.

   3. The Code of Good Practice must provide clear guidance to employers on how to interpret the various provisions, protections and obligations created by the Act so that implementation gives effect to both the broad underlying constitutional principles and the labour relations objectives which have guided many organisations to date.

   4. Van Vuuren recommends that in order to foster more confidence in the law, the public needs to believe that their actions will result in speedy investigations and prosecution. One way of doing this is to
inform citizens of convictions achieved as a result of the information provided\textsuperscript{231}. This is a role that could be played by either a civil society or public agency dedicated to whistleblowing advocacy.

5. Potential whistleblowers must be enabled to make regular and better use of the various whistleblowing laws. Lack of knowledge of the law is a primary barrier to use of the law. This requires national awareness-raising and training campaigns to be run by a multiplicity of role players that come into regular contact with potential whistleblowers. This includes trade unions, civil society organisations and employers.

6. In addition to training, organs of state and constitutional structures like the PSC and Public Protector’s offices must prioritise the development and running of awareness-raising campaigns in the media and through various government departments, branches and agencies. Where education and awareness-raising campaigns have been run, they have shown promising results in addressing the level of knowledge, awareness and positive attitude to whistleblowing and whistleblowers. The PSC in its report on the National Anti-Corruption hotline note the positive impact of media campaigns on the number of calls to the hotline\textsuperscript{232}. Further evidence of the value of capacity building and training of workers is to be found in the overwhelmingly positive responses to the training provided to workers in the Western Cape in a joint initiative run by ODAC and Cosatu. 80% of the workers said that the training had improved their knowledge of the PDA and were overwhelmingly positive about the impact this would make in their work environment. For example, one participant indicated that: “The workshop was helpful to me as a shop-steward and CWIC leader. I will pass the information I gather to other people”.

7. The feedback from the Cosatu/ODAC training workshops also pointed to the need for simple guides on the PDA for workers on the shop floor. In the words of one participant, “The Act must be simplified for workers on the shopfloor to understand”. The same participant indicated that improved knowledge does not depend on elaborate workshops but can be achieved by simple steps such as displaying simple summaries on the company notice board (as is required in relation to the Basic Conditions of Employment Act).

\textsuperscript{231} Van Vuuren H, 2004: page 15
\textsuperscript{232} PSC, December 2008: page 15
8. The workers who participated in the workshops expressed a strong opinion that trade unions and companies themselves must be at the forefront of raising awareness and knowledge of the Act and relevant procedures. This sentiment was echoed by a collective bargaining officer with SAMWU who indicated that trade unions have not as yet, but should lead awareness-raising and capacity-building in the workplace in relation to whistleblowing protections and processes, in a similar way that they have championed sexual harassment and gender issues.

Vehicles for addressing policy and implementation gaps

The Law Reform process has stalled. To move it forward, as must happen as a matter of urgency, there is a need for all stakeholders, especially those who have participated in the development and review of the laws to work together in bringing pressure to bear on the relevant decision-makers.

Moreover, there is a need for the same stakeholders, including business, the public sector, trade unions and civil society to work together to ensure better knowledge and implementation of the PDA and related laws. They must advance common whistleblowing messages through awareness-raising, capacity-building and educational campaigns to improve complimentary implementation and use of the PDA. The message must reach all potential whistleblowers, but must target those who are especially vulnerable, such as the unemployed and poorer working people, as well as those in positions that expose them to significant power imbalances.

These measures are not only necessary in the light of the current status of whistleblowing in South Africa; they are also prescribed by a number of international and continental conventions. The AU Convention requires that measures be taken to “Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media and the promotion of an enabling environment for the respect of ethics.”233 Moreover, the AU Convention requires that the state, the private sector and civil society work together towards the stated goals and objectives. More specifically, it requires that “State parties create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs.” Civil society is required to take up the space created and participate in the monitoring of the Convention

233 Article 5(8)
and participate in the review of the implementation of the Convention. This encouragement of joint participation and monitoring of the implementation of anti-corruption initiatives like whistleblowing frameworks is echoed in the SADC Protocol which requires the creation and strengthening of “mechanisms to encourage participation by the media, civil society and non-governmental organisations in efforts to prevent corruption” and “mechanisms for promoting public education and awareness in the fight against corruption.”

The following vehicles are possible routes for the realisation of these objectives.

1. Union-led campaigns
2. A code of good practice
3. Whistleblowing support network

1. **Trade union-led advocacy campaigns**

There are compelling reasons for trade unions to be at the vanguard of whistleblowing advocacy. These include the strong class faultline in the need for and the application of whistleblowing laws, the fact that the whistleblowing framework has developed and is very often, played out in the labour, employer/employee relationship, the extension of whistleblower protection to trade union representatives by the Companies Act, and the close alliance between the political role played by trade unions in South Africa and the broad political accountability purpose informing whistleblowing in the country.

Trade unions are ideally placed to advance whistleblowing in South Africa by:

a. Improving knowledge and raising awareness among workers. As previously stated by a trade union representative who participated in ODAC training on the PDA:

“This Act must be simplified for workers on the shop floor to understand. It should be displayed on companies’ notice boards. There must be ongoing education and it must be on the agendas of unions and companies’ meetings”.

b. Providing support to workers in the protection and exercise of their whistleblowing rights. “The trade unions must play a more proactive role. They must focus their attention on whistleblowing as they have done with other issues like sexual harassment. They must set up specific

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234 Article 12(2) and (3)
235 Articles 4 (1) (i) and (j)
structures to support workers; they must run awareness raising campaigns in the work place”. (National collective bargaining officer of SAMWU).

c. Negotiating enabling workplace policies and processes within private and public entities through, for example, collective bargaining so as to ensure that the policies and practices comply with the strict letter of the law and give effect to the broader purpose of the PDA and other acts: to cultivate a culture of disclosure and in so doing promote an accountable, transparent and just society

“Trade unions are ideally placed to negotiate collective agreements in specific sectors between employers and employees which include whistleblowing policies and procedures, definitions, processes, the regulation of confidentiality and expected consequences. They must be based on the Act but be self-governing and sector-specific, for example, the Health sector, the HIV/AIDS sector. This will give workers greater levels of confidence in the whistleblowing laws and it is a means of ensuring that workers participate in the development of workplace policies and procedures and it would make the PDA a pro-active tool.” (Collective bargaining officer, SAMWU)

d. Acting as intermediary whistleblowers.

e. Advocating for amendments to the current Acts so that they are more effective in compelling the creation of a culture of disclosure, so that they afford better protection to whistleblowers and so that they are in closer alignment with the whistleblowing objectives in South Africa.

2. **A Code of Good Practice to govern the implementation of the PDA and related acts**

There is a paucity of guidance on best practice with regard to optimising the enabling potential within the governing laws so as to realise an organisational culture of disclosure. In the United Kingdom, the PAS provides such guidance in the form of a code of good practice.

There is significant value in following the UK example and developing a South African Code of Good Practice to guide implementation of the PDA, the LRA and the whistleblowing provisions of the Companies Act.

A review of a number of codes of good practice has revealed the following features which could potentially be harnessed in a whistleblowing code to
The purpose of codes includes:

1. The provision of guidance on the correct interpretation and application of specific legislation.

2. To facilitate and accelerate sustainable implementation of legal obligations in a manner that will respect and promote the principles underlying the governing legislation.

3. The codes are designed to help employers and employees understand their rights and obligations, promote certainty and reduce disputes to ensure that targeted beneficiaries can enjoy and exercise their rights. (For example the Code of Good Practice on Key Aspects of Disability in the Workplace, in terms of the Employment Equity Act, 55 of 1998).

4. To provide good practice guidelines for the preparation, implementation and monitoring and evaluation of policies and plans that must be developed in terms of the governing legislation by different sectors (possibly through NEDLAC) and by individual organisations within the different sectors: so as to ensure that the sectoral and individual plans give effect to the underlying principles. (For example, the Code of Good Practice for Employment and Conditions of Work for Special Works Programmes).

5. Guidance is provided through common features, such as summaries of governing legislation, the provision of a glossary of terms defining key phrases, words and concepts, statements of key underlying and governing principles that ought to be advanced in the implementation of the governing act(s).

6. Providing guidance on how for example NEDLAC stakeholders ought to take into account related legislation and codes of good practice. In so doing, various laws are brought together through an explanation of how they pertain to the practices at hand. A key example of a code seeking to achieve broader legislative synergy is the Code of Good Practice for Employment Conditions of Work for Special Works Programmes (in terms of the Basic Conditions of Em-

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236 Codes of good practice that were reviewed, include: The Code of Good Practice on the interpretation, implementation and monitoring of an Employment Equity Plan, The Code of Good Practice for Employment and Conditions of Work for Special Works Programmes, The Codes of Good Practice on Broad-Based Black Economic Empowerment, Code of Good Practice on Key Aspects of Disability in the Workplace.
pployment Act, 1997) which seeks to promote uniformity between different Special Works Programmes. It recognises that employers must comply with a host of laws, and it provides guidance on how, in the development, implementation, monitoring and regulation of the employment relationship in SPWS’s, all stakeholders ought to conduct themselves so as to fulfil their obligations in terms of the various laws governing the issues at hand.

**In summary**

Codes of Good Practice hold the potential to address some of the implementation gaps plaguing the PDA and related laws, such as lack of knowledge of the law and how to apply it and lack of knowledge of rights and obligations.

In addition, a Code of Good Practice in the context of protected disclosures, holds the potential to address some of the limited interpretive approaches of the Act seen in disputes to date, which have sought to adopt a narrow interpretation of the law which is not in accordance with the broader underlying objectives of fostering a culture of disclosure, transparency, accountability and a corruption-free society. This could be achieved by stating governing principles, incorporating supporting and complimentary principles, as stated in the Constitution, the Promotion of Access to Information Act and other laws, and provide guidance on how NEDLAC stakeholders can and should develop policies and practices so as to realise their obligations and rights as prescribed by the relevant laws, in accordance with the restated underlying and informing principles.

**What are the ingredients of a code of good practice that works to achieve these outcomes?**

Ensuring adherence to codes is one of the greatest limitations of these tools. In order to overcome this inherent limitation, it is essential that there is a sense of ownership of, responsibility for and accountability to the code by all stakeholders.

This requires that the code be developed through consultations with all affected stakeholders, including government agencies and organs of state, the business sector, the NGO sector, trade unions and other employee organisations, and any other affected stakeholders. A consulted code will not hold a better prospect of compliance, it will provide better, appropriate and sound practical guidance as it will reflect the concerns, experiences and expectations of all relevant sectors and stakeholders beholden by the code.

237 Code of Good Practice for NGO’s responding to HIV/AIDS: Options and Recommendations, 2004
Codes that have a built-in monitoring and evaluation and policing mechanism, for example section 203 of the Labour Relations Act which says that a code of good practice must be taken into consideration, are stronger tools of accountability238. Have a policing and a reporting /accountability mechanism for stakeholders ensures a greater degree of compliance. So, a code should include a dedicated agency to whom transgressions of the code may be reported to and which can hold the transgressor accountable. In addition, codes that have regular reporting processes for stakeholders to report on their compliance and progress in implementation is a valuable mechanism to encourage compliance. For example, The Code of Good Practice could stipulate (as should all guiding documents for companies in terms of complying with the Companies Act) that the Annual Transparency and Accountability report required in terms of the most recent amendment to the Companies Act should include information about processes and steps taken within the company to foster a culture of disclosure by employees and others; the number of whistleblowing allegations; and responses by the company to this.

In addition, the Code of Good Practice must under, as in the case of the various codes enacted in terms of governing labour legislation, require arbitration and adjudication forums, such as the CCMA and other adjudicating bodies to take the codes into account in the determination of the merits of the matters and in the determination of compensation.

Specific barriers and impediments that a code of good practice may address:

Synergising the various whistleblowing framework

There are different whistleblowing laws – one for employees, one for company affiliates and one for the public generally (the latter offering the least protection and regulation). There are different standards for public and private entities and civil society organisations.

There is a need to synergise the laws, bring them closer together to make up a coherent and consistent legal framework that promotes the same underlying message and practices so as to foster a coherent culture across organisations and to standardise the level of protection across sectors. The different laws, cultures and practices applicable across different segments of society and across different types of organisations must be harmonised: A vehicle for achieving this is a code

238 Code of Good Practice for NGO’s responding to HIV/AIDS: Options and Recommendations, 2004
of good practice, which can as in other codes, draw a coordinated and coherent frame of reference around related but different laws. The code of good practice, in the absence of an entirely new consolidated law on whistleblowing holds the potential to synergise the laws, cultures and practices.

William Thompson, an advocate and CCMA officer sees great potential for a code that adopts this approach and which is designed to fulfil this function being the next step in the law reform process.

Law reform is an evolutionary process. The code is the next step. It can be developed to address implementation and policy gaps, it can bring together the different strands of the law, it can synergise and consolidate whistleblowing practices and laws, and in that format it can eventually become the new whistleblowing law. (William Thompson)

A code has the potential to supplement / address policy gaps that emerge in the case of narrow interpretations of the law

The code can indicate what it means in practice to foster a culture of disclosure, in terms of what the Act requires. It can summarise the jurisprudence on the matter, indicating for example that responsiveness and follow-up to allegations are critical to foster such a culture and to avoid onerous damages in the case of a lawsuit.

A culture is created through replication of a common practice or set of practices: A code of good practice can facilitate common cultural practices within a common agreed framework

A code of good practice can take the extended duties relating to disclosure in the Companies Act whistleblowing provision and make them more broadly applicable to all entities and organisations, on the grounds that this constitutes good organisational and ethical governance. This could be duplicated in other regulatory guides on good governance, such as the King codes of good practices.

More broadly, the code can provide guidance to a range of stakeholders, functionaries and organisational structures and divisions on what can be done, within their domain, to develop, entrench and promote the organisational culture of transparency and disclosure. It can spell out in more detail and make visible the real value of whistleblowing for organisations and provide guidance on how best to maximise this value within organisation through whistleblowing policies and processes.
A code can provide interpretive guidance and assist organisations to avoid litigation

The case law on protected disclosure shows that “dismissal is not the only issue in the context of protected disclosures.” Litigation is forcing the issue much earlier, at the stage when the employer is considering its options and best course of action when a disclosure is made: on the basis of the employer’s interpretation of whether the disclosure is protected or not. Litigation at this earlier stage is concerned with the accuracy, or otherwise of the employer’s decision about whether or not the disclosure is protected. As such it is not necessarily a question for the Labour Court, in the first instance, but one for all courts and indeed a question for affected employers: a question they must ask and answer, at the latest, once the disclosure is made. Employers need expert help, not only in conducting their litigation, but in avoiding the litigation in the first place by determining whether what their employee said fell within the ambit of the Protected Disclosures Act. The Code can provide this guidance.

A code can provide more detailed and practical guidance on balancing competing rights in the grey areas that do not qualify as instances of whistleblowing

A dominant theme informing the development of an appropriate whistleblowing framework is the need for balancing potentially competing rights, such as the right to freedom of expression and the rights to loyalty, reputation and the right to manage staff in the workplace. Uys has argued that reaching consensus amongst the different role players on where the boundary lines ought to be drawn and the practices that ought to be adopted to mediate the competing interests is critical for more widespread organisational acceptance and promotion of whistleblowing. In the context of the right to freedom of speech, Vickers points out that there has to be legally informed determination and documentation of what is legally permissible and appropriate speech and what is organisationally and culturally permissible and appropriate speech by the employee in the workplace. An appropriately designed whistleblowing law ought to provide guidance in regard to what is legally permissible and appropriate. However not all speech or expressions in the workplace amounts to a protected disclosure, and will as such not be regulated by the law. A code of good practice can provide guidance on appropriate and permissible conduct, such as speech, that falls outside of the strict boundaries of whistleblowing. Such guidance can be used by organisations in the development of their more detailed internal communications and information management policies and practices.

239 Mischke C, 2009: page 41
240 Mischke C, 2009: page 41
3. A whistleblowing network as a vehicle to overcome barriers and impediments to realising a culture of disclosure

There is an urgent need to reinvigorate the stalled law reform process. Realising this objective is going to take strong collective action by the full range of sectors that have participated in the development and review of the law to date. That is to say, business, labour and civil society must exercise their collective rights, as contained in the various international and continental Conventions to participate in the review, monitoring and awareness-raising initiatives around the PDA and related laws. They must heed Transparency International’s recommendation that the design and periodic review of whistleblowing laws involve multiple key stakeholders, including trade unions, business associations and civil society by bringing their collective weight to bear on decision-makers to move the recommendations made by the SALRC to the next level of the law making process.

An advocacy and support network is not only a pragmatic, but also a legally required process for protecting employees. As discussed under the previous heading, improved implementation requires complimentary and synergised support for employers and whistleblowers as well as capacity building and awareness-raising. Article 8 of the Council of Europe’s Resolution 1729 “recognises the important role of non-governmental organisations in contributing to the positive evolution of the general attitude towards ‘whistleblowing’ and in providing counselling to employers wishing to set up internal ‘whistleblowing’ procedures, to potential ‘whistleblowers’ and to victims of retaliation.” This envisaged support and improved knowledge must take place in all sectors, amongst civil society, the private sector and trade unions and must be premised on common messages that are able to advance an appropriate culture of disclosure.

In addition, a Code of Good Practice ought to be developed through a consultative process which draws in all the affected role-players, including those represented at NEDLAC.

In summary, both law reform and improved implementation depend on effective co-ordinated advocacy. This requires that stakeholders work in a network structure. There is a need for strong leadership as many networks and co-ordinating structures that do exist, such as the NACF, are not up to the task.
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