SECTION 6

ROUNDTABLE DISCUSSION : THE PROTECTED DISCLOSURES ACT, 2000 (Act No.26 of 2000)

INTRODUCTION

The Protected Disclosures Act (PDA) was passed in 2000. Since the promulgation of the Act, various officials sought to use its protection. Some officials were successful, others not. The South-African Reform Commission has since 2004 called for comment on the proposed revision of the Act, in order to address on what has been perceived as certain weaknesses with respect to both its content and implementation. For this reason a roundtable discussion on the Act was thought to be appropriate for the Summit.

Discussion on the PDA was prefaced by presentations from officials as indicated in the Table A hereunder.

TABLE A: ROUNDTABLE DISCUSSION: PANELLISTS

NAME	ORGANIZATION
Mr Tim Modise (Chairperson)	SABC
Adv Johnny de Lange	Deputy Minister - Justice & Constitutional Development
Prof Stan Sangweni	Public Service Commission
Ms Lorraine Stober	Open democracy Advice Centre
Ms Alison Tilley	Open democracy Advice Centre
Ms Dallene Clark	SA Law Reform Commission
Ms Petronella Branford	Office of the Public Protector
Ms Prakashnee Govender	Congress of South African Trade Unions (Cape Town)
Mr Thami Maseko	Secretariat – NEDLAC

The presentations made by the representatives as indicated in the above-mentioned Table A became the basis for the plenary discussion which followed. Some of the concerns raised in plenary were that some whistleblowers were physically threatened. Also, there is no stipulation in the PDA to indicate that managers are obliged to investigate specific allegations. Moreover, there is a need to translate the PDA into all official languages and each government department should develop a policy on whistleblowing.

18.1 HISTORICAL OVERVIEW OF THE PROTECTED DISCLOSURES ACT, 2000 (ACT NO. 26 OF 2000) BY ADV. JOHNNY DE LANGE[53]

Following recent debate in the newspapers, I have realized that members of the media and the general public do not really understand the issue of whistleblowing. There is a general belief that no matter what one does – how or when it was done – whistleblowers would be covered regardless, simply by virtue of the Protected Disclosures Act (PDA) Perpetrators of crime themselves often blow the whistle on fellow partners in crime as a way of detracting attention from their own wrongdoing. So, I first need to ensure that you understand the PDA clearly. The PDA is not a free for all and there are very clear procedures and jurisdictional facts that one has to comply with to be able to fall within the parameters of the PDA.

The study of whistleblowing legislation in the rest of the world revealed that protection was incredibly narrow. In some countries, it was only for public servants or public employees, and only when certain types of evidence were disclosed. We realized this concept was not adequate for this country and drew up our own ideas. You may like to read Clauses 1 and 2 of the PDA so that you understanding the aims and objectives of the Act. There are really three components to it:

- what is being protected;
- what are the remedies for a person once they have to be protected in law; and
- what are the procedures they have to follow when they make these disclosures.

To put it differently, what are the jurisdictional facts that a person must comply with before he/she falls within the parameters of this Act and what procedures he/she must follow? What one cannot do to a person if he/she falls into the first two categories, and if one does something to a person that is not allowed, what will happen then?

Let's look at the applications that need to be complied with before a whistleblower falls within the parameters of the PDA:

i) only employees receive protection - so we are only dealing here with employment relationships;

ii) this act is applicable to public employees and private employees, so it is applicable to the private sphere. This is most important and South Africa is probably the only

[53] Johnny de Lange is the Deputy Minister of Justice and Constitutional Development.

country in the world that does (because our Constitution allows horizontal and vertical application of rights);

iii) only certain specific types of disclosures are protected, thus not all information in the workplace is eligible. It is only particular types of information that are covered, i.e. mainly information emanating from, or concerning the conduct of, the employer or an employee in the workplace. The types of information include the following:

- any kind of criminal offence (clearly as a society we would want people to disclose criminal offences in the workplace);
- if one has failed to comply with any particular legal obligation (we have created laws and legal obligations and we want them to be complied with);
- if there is a miscarriage of justice or the possibility of a miscarriage of justice (this is very wide and almost anything can be read as a miscarriage of justice);
- if the health or safety of an individual is going to be endangered;
- if one's environment will be damaged through some action of that department or employer;
- if there is an unfair discrimination in terms of the promotion of equality legislation; and
- lastly, if you try and conceal any of the above.

So, it is very specific types of information that can be disclosed and covered by the PDA.

iv) it is important to note that this act works retrospectively. This Act specifically states that a protected disclosure can involve issues that arose before the PDA (prior to 1991). In other words, if someone committed a crime in 1960 it would be possible to make a protected disclose on that information; and

v) no contract of employment is allowed to undermine or exclude any aspect of this legislation. One cannot sign a contract with an employee specifying that the employee will not disclose illegal or incorrect acts or information. If such a contract is signed, the PDA will over-ride this proviso and the contract would be void.

Once an employee falls within the parameters of this Act and wishes to disclosure certain information, there are then certain procedures to be followed. Our explanatory booklet on the PDA itemizes these procedures under the heading "the door through which you should go" (in order to be eligible for protection). There are five "doors" and each one of them has different requirements to be complied with.

i) As a 'whistleblower' one can seek advice from a legal practitioner or from someone else capable of giving advice (i.e. a shop steward). Choosing this "door" has specific requirements: it doesn't have to be in good faith - as long as one seeks advice and that advice is confidential.

ii) Where one discloses the information to an employer. Obviously one wants to encourage this method so that the employer himself or herself can deal with the issue. This "door" has to be in good faith; and should substantially be in accordance with whatever procedures the employer provides for. However, when there are no procedures, the PDA specifies what should happen then. Again, this second "door" is comparatively easy to go through. To a large extent it is just good faith and following existing procedures.

iii) Disclosure to either a member of Cabinet or Executive Council (i.e. to a political authority within a government department). Here again one needs good faith in making the disclosure. The individual body that one discloses to should fall within the parameters of that department, so that that department can deal with it. So, clearly whatever one complains about needs to fall in the ambit of that particular department.

iv) There are certain regulatory bodies that one could raise the problem with. The Public Protector and the Auditor General are two such bodies (and we have allowed through regulations to expand these regulatory bodies). Here again one needs to ensure good faith; and ensure that one's choice of body falls within the mandate of the Public Protector or the Auditor General or they will have no authority or no legal mandate to deal with it. For the first time, this "door" includes the proviso that one must reasonably believe that the information is substantially true. Thus it can be seen that hurdles are getting higher when these mechanisms are followed.

v) The fifth and last "door" is an approach to the media or similar institutions. There are five hurdles or steps that one has to pass through in order to go through this "door":

   a) good faith;

   b) a reasonable belief that the information one is disclosing is substantially true;

   c) one may not disclose for personal gain (very, very important!). So if there is any reward involved the person concerned would not be eligible for protection under the PDA;

   d) it must be reasonable for one to make the general disclosure under the circumstances; and

   e) one must have met one of four conditions:

- that the impropriety is of an exceptionally serious nature;
- that one is too wary of disclosing to an employer suspecting that no action would be taken within a reasonable period;
- a reasonable belief that the evidence will be concealed and therefore it would be pointless to disclose to the employer; and
- a belief that one would be subjected to occupational detriment.

One or more of these "doors" can be used at any given time as long as the relevant steps within the respective "doors" are complied with. Now one needs to consider:

- have the jurisdictional facts been complied with; and
- have all the procedures been complied with?

If the jurisdictional facts and the relevant procedures have been complied with correctly, there are certain 'occupational detriments' (as they are called in the PDA) that may not be applied to the person disclosing. The whistleblower may not:

- be subject to disciplinary action;
- be dismissed, suspended, demoted, harassed or intimidated;
- be restricted from transfer or promotion;
- have their contract subject to any additional terms or conditions of employment;
- have their retirement brought forward or altered at all; and
- be refused a reference or given an adverse reference.

There are other detriments to which an employee may not be subjected by the employer, but these I have listed will give an idea of protection afforded to a genuine whistleblower who has taken the correct steps before disclosing. However, should any detriment be inflicted by the employer, the employee can take any of the following steps (which are dealt with under "Remedies" in Section 4 of the PDA). The employee may:

- go to any court or use any other process that is provided, i.e. the CCMA;
- resort to the Labour Relations Act (in as far as an unfair dismissal in breach of Section 3, will be deemed an unfair labour practice). One would not have to prove an unfair labour practice, it would be "deemed" as such;
- also resort to the full range of determined 'occupational detriments' (other than a dismissal in breach of Section 3.) and dealt with it in terms of a different chapter

within the Labour Relations Act. So in this Act we have taken the Labour Relations Act and linked it up with the PDA to ensure that one has these protections; and

- ask for a transfer within the department if one feels adversely affected (such a transfer may not be less favourable than one's present position). The employer must comply with this request - if it is reasonable.

Of course there are other more specific regulations and guidelines which I will not go into detail about now and there are still certain aspects of the PDA that need further investigation and have been referred to the SA Law Reform Commission for consideration. A few of these aspects are listed hereunder:

i) Should the PDA go beyond the employment relationship to protect people? For example, where there are contractual relationships or where corruption is witnessed by a member of public; should there be some form of protection?

ii) The Open Democracy Bill provided certain civil and criminal immunities for whistleblowers (we thought this was a terrible suggestion because it undermines the basic civil and criminal law that exists in this regard).

iii) Should a whistleblower be entitled to sue their employer and seek punitive damages?

iv) When an employer actually commits a detrimental act against a whistleblower in his/her employ, should it be deemed an offence? In other words, should it be criminalized?

We have not had time to look at all the possible consequences of the PDA and have requested the Law Commission to look into these.

I have noticed that the Law Commission has also included another issue – whether the identity of the whistleblower could remain a secret? Parliament was absolutely opposed to this concept as it completely undermines the whole concept of whistleblowing, so I look forward to hearing the outcome of the Law Commission's research in this regard.

18.2 ADVOCACY ROLE IN PROMOTING THE PROTECTED DISCLOSURES ACT, 2000 BY PROF STAN SANGWENI[54]

I have three points to share with you.

Firstly, the Public Service Commission is not included in the PDA as one of the regulated bodies to whom disclosures could be made, for the simple reason that this would have created a conflict of interest in terms of the PSC's role as a body of recourse for grievances from the public sector. The PSC has played a very prominent role in promoting this Act:

- After the PDA had been promulgated in 2000, the PSC organized several workshops for officials in the provinces and at national level to publicize the Act and its provisions.
- As part of the PSC's advocacy role we issued an explanatory booklet. We produced this booklet in association with the Institute for Security Studies (ISS) and the Open Democracy Advice Centre (ODAC). It is a very useful, user-friendly booklet which outlines in very simple, straightforward terms how the various parts of the Act apply.
- The PSC has been prominent in the media to publicize the PDA. There have been numerous appearances on television and in the electronic media and interviews in the printed media.

Although the PSC headed a diverse publicity campaign on the PDA, there is still a great deal of ignorance and a clear lack of knowledge and understanding on the part of public officials concerning the provisions of the Act. It is difficult to discern the reasons for lack of awareness on their part. We are inclined to think that it is probably because the regulations and guidelines required under the PDA, have not been sufficiently published, but one would have thought that the kind of advocacy that we have played and our extensive publicity had been adequately covered, to at least inform officials of the basic procedures – but it seems not.

In most instances where whistleblowers would appear to have been victimized or have run into problems after disclosing, it is invariably because they have failed to follow the correct procedures. There is an unfortunate trend of resorting to the media and ignoring the correct channels. I have actually yet to hear of an instance where somebody ran into problems because they reported the matter through the correct channels. The PSC has made a particular effort to advise public officials that if they do resort to the media, there are five conditions they should first fulfill. The matter:

[54] Prof Stan Sangweni is the Chairperson of the Public Service Commission (PSC).

i) must have been reported to an employer or to the Auditor-General or to the Public Protector – who had then failed to address the matter;

ii) was not reported to any of these prescribed people because of a personal conviction that it would not be adequately attended to;

iii) was not reported to any of the prescribed people because of a fear of victimization;

iv) was not reported to any of the prescribed people because it was of an exceptionally serious nature; and the matter

v) must be of public interest and must not be an issue of personal concern or result in personal gain.

Practically none of these reasons can be applied to cases that have been reported to the media in recent times.

Finally, I would like to say that the PSC interacted with the Minister of Justice & Constitutional Development on the issue of guidelines and a regulatory framework and we are reliably informed that the guidelines are in the process of preparation and therefore should come to hand in the near future.

18.3 RECOMMENDATIONS MADE BY THE SOUTH AFRICAN LAW REFORM COMMISSION - A DUAL PRESENTATION BY MS DALLENE CLARK[55] AND MS PETRONELLA BRANFORD[56]

The SA Law Reform Commission (SALRC) is in the process of compiling a report on the review of the Protected Disclosures Act, 2000 (PDA) and has published two documents thus far: an issue paper in January 2003 and a discussion paper in August 2004. The main focus of the report is the extension of the ambit of the Act. Areas highlighted for discussion during the compilation of the report are:

- the extension of the PDA beyond the employer/employee relationship regarding wrongdoing in the workplace;
- providing immunity from criminal and civil liability;
- providing protection for the identity of whistleblowers;
- providing additional remedies; and
- the creation of offences within the PDA.

[55] Ms Clark is with the South African Law Reform Commission.
[56] Ms Branford is with the Office of the Public Protector.

With regard to the extension of the ambit of the PDA, the SALRC has seen a notable increase in the use of part-time and temporary workers and also the trend of outsourcing. The SALRC therefore recommends that the ambit of the Act be extended to include independent contractors, consultants, agents and other workers.

Relating to the extension of the PDA, the SALRC has also found that a number of statutes allow for persons to blow the whistle but that they are not protected against being victimized on account of their disclosure. Without making recommendations in this regard, the SALRC has posed the question for public debate whether citizens' whistleblowing should be included? The Office of the Public Protector (OPP) agreed with the more inclusive approach defining the term "employer" or "worker". This should indeed be adopted. It accords with the practical experience of the Office of the Public Protector and the express need to expand the scope of the application of the PDA.

Regarding the extension of the PDA to include citizens' whistleblowing – we are of the view that the expansion hereof would entail defining a number of issues such as: detriment against which protection would be applicable, the remedies available, etc. Experience has shown that extending a statute to cover areas not originally intended by the legislature, often result in serious interpretation and implementation difficulties. The view is therefore held that the concept of protecting the citizen 'whistleblower' should not be incorporated into the PDA at this stage.

If the recommendation that the PDA be extended, is accepted, then the SALRC recommends that the definition of "employee" be amended to bring it in line with the proposed extended PDA. It also proposes that the word "employee" be changed throughout the Act to "worker". A worker would then be any person who, in any manner, assists in carrying on or conducting a business of an employer or client including, but not limited to, any independent contractor, consultant, agent or person rendering services to a client, or being employed by a temporary employment service.

The Office of the Public Protector supported this amendment of the definition of "employee" but we would like to make a further recommendation. One of the complaints investigated by our office illustrated the clout of whistleblowers who are former employees. In this case the whistleblower decided to disclose irregularities after he had resigned from the municipality. Although no longer an employee, he shared similar fears to 'whistleblowers' who are protected in terms of the PDA: civil action for defamation, breach of confidentiality, etc. We also noted that Section 3. of the New Zealand Protected Disclosures Act defined an employee to include former employees, and we think former employees should be included in the definition.

As the concept of “client” is included in the new definition of “worker”, it is necessary to insert a matching reference into the definition of employer. The result would be that an employee of an employment service who is rendering services to a client will, in fact, have two employers as far as the PDA is concerned: firstly, an employer in a strict sense (temporary employment service) and an employer who is the hirer of the services or the client.

The SALRC has also questioned whether a new term such as “work-giver” should be created in the PDA to replace “employer”.

The Office of the Public Protector found that it might even be feasible to invent a new term, such as “work provider” to avoid any confusion and to distinguish the meaning of “employer” to that in the labour law.

With regards to occupational detriment, the SALRC is of the view that the definition of “occupational detriment” should be extended to include reprisals such as defamation suits and suits based on alleged breach of confidentially agreement or duty. Such suits are frequently used to intimidate would-be ‘whistleblowers’. The SALRC also proposes to include a detrimentivity experience by contract workers – the loss of contract – or the otherwise inexplicable failure to be given a contract.

It is common cause that employees are generally subject to confidentiality by law, agreement, oath or practice. For instance, the Public Service Regulations imposes a duty on an employee when handling official information and papers not to release these unless they have the necessary authority. In one of the case studies considered by the Office of the Public Protector, Mr X was charged in a disciplinary enquiry inter alia contravening this regulation. The Presiding Officer found that as Mr X went further than disclosing to the designated entities (he released it to the public) that the PDA was no longer applicable. The question whether or not Mr X met the requirements of a general protected disclosure provided for in Section 9 of the PDA, was never considered. Similarly, it seemed that the employer representative argued that when the said regulation had been contravened, it was a secret matter that constituted misconduct. Although it might be argued that it could clearly not have been the intention of the drafters of the said regulation to prohibit disclosures of improper, unlawful or irregular conduct, we felt that it would be in the interest of legal certainty to add the phrase “or disciplinary action” to the proposed sub-paragraph H of the definition.

The SALRC also proposes that a list of forms of occupational detriment be left open-ended to allow the recognition of further types of victimization, on the understanding that

any form of victimization suffered by a 'whistleblower' would have to be shown to be causally linked, or at least partly, to an act of whistleblowing.

With regards to extending the list of persons to whom disclosures are made, it is already possible to disclose to the Public Protector and the Auditor-General. The SALRC finds that there is no good reason to limit the list to just these two bodies. The Constitution lists a number of other state institutions supporting constitutional democracy to whom it would be equally appropriate to make disclosures.

We suggested that the following additional institutions be added to Sub-Section 1:

- the South African Revenue Service (SARS) – in relation to tax irregularities;
- the Financial Intelligence Centre (FIC)– regarding money-laundering activities;
- the Pension Funds Adjudicator;
- the Independent Complaints Directorate – regarding misconduct by members of the SAPS:
- the Judicial Inspectorate of Prisons – if related to treatment of prisoners and conditions and practices in prisons: and
- the Public Service Commission (PSC).

With regard to the proposed inclusion of the term "ombudsman" in the discussion paper, it should be mentioned that some institutions use this term ombudsman even though they are not independent or recognized oversight agencies. It is suggested therefore that this term be more closely defined, for instance "recognized industry ombudsman".

Regarding immunity from criminal and civil liability, the SALRC has found that potential 'whistleblowers' who have themselves been involved in wrongdoing, might easily be inhibited from disclosing due to fear of criminal prosecution and some may be deterred by threats of defamation suits and/or official secrets suits.

Immunity from criminal and civil liability is provided for in New Zealand and such immunity is widely regarded as a most valuable protection given to whistleblowers. The SALRC is of the opinion that if granted immunity from criminal and civil liability, whistleblowers may be more willing to reveal their identities and this would, in turn, defeat the problem of anonymous, frivolous or malicious disclosures. On this point the SALRC has not made a recommendation and has invited comment on whether immunity should be granted.

There appears to be a significant body of opinion suggesting that it would make no sense to shield whistleblowers against victimization and occupational detriment by not affording them the indemnity from possible criminal and civil liability arising out of a protected disclosure. The Deputy Minister made mention of whistleblowers being found with their hands in the cookie jar, in situations where the whistleblower was involved in the illegal activity, can be problematic. The opinion is that to hand out immunity in this regard could lead to serious abuse of the PDA, we felt that the Queensland Whistleblowers Protection Act managed to strike a balance between adequate protection of the whistleblowers and possible abuse of the whistleblowing regime and therefore we suggested that we introduce a similar provision in the PDA.

With regard to the identity of the whistleblowers the SALRC felt that a provision expressly creating a duty to protect the identity of a whistleblower would provide a positive incentive to whistleblowers.

Consultation with whistleblowers revealed that confidentiality and the protection of identity are their primary concerns. It is, however, anticipated that recipients of disclosures could be in a precarious position if they are faced with an application for access to information in terms of the Promotion of Access of Information Act, 2000. Accordingly, a recipient of a disclosure may be requested to provide access of information relating to a disclosure which might include the identity of the 'whistleblower'. In view of the need to protect the identity of 'whistleblowers' it is recommended that grounds for refusal of access to records be expanded.

From the side of the Office of the Public Protector there is thought of a possible amendment to the PDA to add the phrase: "…or person who made a protected disclosure in terms of the Protected Disclosures Act".

A number of new remedies are addressed in the discussion paper. One of them relates to the claims for damages with no ceiling. The SALRC found that there may be a need to provide expressly for claims for damages without a ceiling and requested comment on whether the Act should create a more explicit link between the amount of compensation awarded and the actual loss or damage suffered by the worker concerned.

As the PDA is not specific in dealing with remedies to prevent or cure harm caused by or threatened to a whistleblower, the Commission recommends that specific remedies such as interdicts, including mandatory interdicts, should be available to a broader category of workers. The proposed amendments to clarify and extend the remedies at

the disposal of the 'whistleblower' are concurred with by the OPP. It is also noteworthy in this sense that some foreign laws place a duty on the public sector entities to protect the officers from reprisals, for example, Section 44 of the Queensland Whistleblower Protection Act. You all know that Section 41 (b) of the PDA currently provides for an employee who may pursue any other process allowed or prescribed by law. It is noted that the proposed amendments to Section 4 focuses primarily on legal remedies. From the Public Protector's side, we however interpreted this section to include the lodging of a complaint and the investigation thereof by the OPP. Accordingly, the Public Protector could, in appropriate circumstances, provide a suitable remedy at no cost to whistleblowers. These remarks could also apply to other ombudsmen or oversight institutions. However, if a matter is to be adjudicated in the Labour Law or the High Court, it might have considerable financial implications for workers. The suggestion that the Legal Aid Board is requested to make provision for such cases was informally discussed with a member of the board who indicated a willingness to consider the matter. It was, however, indicated that additional funds would be required. This possibility might be explored further.

With regards to punitive damages, all the respondents to our issue paper are opposed to the concept of punitive damages. The SALRC has found that as it is foreign to South African law, it should not be introduced into the PDA.

With regard to the creation of offences within the PDA, the PDA does not make it an offence for an employer to subject an employee to an occupational detriment and it is not an offence for an employee to knowingly make a false disclosure. The 'whistleblower' merely forfeits the protection of the Act and it may be a crime in common law (criminal defamation or crimen injuria). The SALRC has provisionally found that employees or workers actions should not be criminalized where he or she makes a false disclosure. The SALRC also does not recommend that it should be an offence to subject an employee or worker to an occupational detriment, this would just add unnecessary tension to employment relationships and jeopardize good labour relations.

Furthermore, the SALRC recommends that protected disclosures to legal advisors should be made in good faith, or alternatively recommend that disclosures made to a trade union representative should be protected in the same way as disclosures to legal advisors.

The contention that these actions should not be criminalized is supported by the OPP. We are of the view that the good faith requirement when making a disclosure to a legal representative is unnecessary when disclosures are made to legal practitioners, in fact,

this provision appears to be based on the concept of legal professional privilege. Accordingly, even if a whistleblower has other motives, a legal practitioner to whom a disclosure is made when providing legal advice, may not disclose such information. It is important to note, however, that the aforesaid principle does not apply to trade union representatives and the proposed addition thereof is not supported by our office.

With regard to conducive workplace environments, there is a wide acceptance of a duty on employers to provide an open and transparent work environment that facilitates the implementation of the PDA. The SALRC has invited comment on whether a specific duty should be placed on employers to inform workers of their rights and obligations under the PDA.

Whistleblowers are particularly vulnerable if they do not know the requirements for making a protected disclosure. They should also be aware of the employer's internal procedures. The proposal that a duty be placed on employers to put in place and implement internal procedures for making disclosures is supported by the OPP. It should be mentioned here that the Public Service Commission published a guide for public sector management together with a draft whistleblowing policy and the view is therefore held that the PDA should require all work providers to take similar steps.

18.4 CONCERNS ARISING OUT OF THE IMPLEMENTATION OF THE PUBLIC DISCLOSURES ACT, 2000 BY MS LORRAINE STOBER[57]

The Open Democracy Advice Centre (ODAC) came into being in 2001 to assist with the implementation of the Protected Disclosures Act and the Promotion of Access to Information Act. In terms of the PDA – ODAC offers:

- a tollfree help line giving legal advice (that is Door 1 that the Deputy Minister spoke about);
- assistance to whistleblowers if they want to know how to blow the whistle – and on what they can blow the whistle;
- assistance to employers who phone ODAC on the PDA; and
- and also assistance to employers in the private and public sector with implementing whistleblowing policies (these polices are very important so that employees know how to blow the whistle and to whom – often employees don't know whom to go to when they see wrongdoing in their workplace).

[57] Ms Lorraine Stober is with the Open Democracy Advice Centre (ODAC).

ODAC's main aim is to promote a culture that is supportive of whistleblowing so that it can become a safe alternative to silence. ODAC also published a book on whistleblowing around the world, by looking at what is happening in other countries and thereby contributing towards the promotion of a culture of whistleblowing.
Some of the problems noted on the helpline are that the messenger gets prosecuted and the message gets lost. The whistleblower often becomes so embroiled in fighting his disciplinary hearing in a court case and when one asks what actually happened to the wrongdoing, nothing has actually happened! This is a most unfortunate situation. In that respect the following cases serve as examples:

- Andre du Toit at Beige Holdings who blew the whistle and subsequently became embroiled in a lengthy battle to save his job (he was eventually dismissed).
- There was also a whistleblower with a big insurance firm who wanted to blow the whistle on equity policies that were not instituted. In fact his firm had reneged completely on the equity policies. He became embroiled in an expensive lengthy legal battle at the Labour Court. (This is why it is so important to get the Legal Aid Board to assist people in terms of the PDA).

Some successes in whistleblowing include the following :

- The Mpumalanga Education Department is not prosecuting the whistleblower who blew the whistle on the exams scam at the end of last year.
- Two whistleblowers blew the whistle on a large national transport carrier which perpetuated very unsafe practices. In the beginning, the employer also hauled the whistleblowers before a disciplinary hearing, but they eventually settled and fortunately they eventually got their jobs back. That was also quite successful.
- There was also Mr Tatolo Setlai who has been re-employed, but not without a long drawn-out court case, unfortunately.

Quite a few speakers raised the issue of confidentiality and anonymity. At ODAC we like to distinguish between the two. ODAC is not in favour of anonymous whistleblowing; ODAC calls that a cloak for the malevolent! Anybody can raise anything if they are anonymous. What we like is confidential whistleblowing and we would like to see the Act actually have that as a protection: that one's identity is protected and that the 'whistleblower' himself has to give written approval for his identify to be revealed. There is a sad case I heard of not so long ago where Employee A blew the whistle on Employee B and the senior manager actually told B who the employee was. B is now suing that employee for defamation of character.

Also, whistleblowing is not about accusing anybody. It is about raising a suspected wrongdoing with one's employer for investigation. The employer will do his/her own investigation into the matter and decide what to do when an employee is found guilty. So, ODAC does not support anonymous whistleblowing but it does support confidential whistleblowing.

There is also a senior versus junior type of employee problem. I did some training in one of the smaller provinces and the attendees were all from the various legal departments of the provincial government. All of them said that the raising of wrongdoing by people who were very senior was very difficult. One often finds junior people not able to expose the wrongdoing of senior personnel. A case in point was the very sad case in Britain where Dr Shipman killed lots of elderly patients. One person who suspected Dr Shipman's crimes, was the taxi driver who drove a lot of the patients to him. He said: "who would listen to me – I'm a mere taxi driver"? That perception is also prevalent in South Africa.

Something that the Deputy Minister also mentioned was the need for the PDA to be extended to non-employees. When the PDA was passed by Parliament the Justice Portfolio Committee was concerned about the types of occupational detriment suffered by 'whistleblowers' who were not employees. The SA Law Reform Commission is looking into this situation and will come up with recommendations I'm sure.

It has been a problem that there have been no guidelines or regulations and I was pleased to hear from Prof Sangweni that these will be coming out shortly.

The remedies offered in terms of the PDA. As the Deputy Minister said: "Whistleblowing follows a labour relations route and therefore, a dismissal pertaining to whistleblowing is automatically regarded as an unfair dismissal." In terms of the Labour Relations Act, the cap on an automatically unfair dismissal is 24 months salary. That is very little if one has blown the whistle and been dismissed as a result. Also, what I have mentioned are the litigation costs which are high. At ODAC we would like to see the Legal Aid Board being able to take on PDA cases in order to assist legitimate candidates.

18.5 A COSATU PERSPECTIVE OF THE PROTECTED DISCLOSURES ACT, 2000 BY MS PRAKASHNEE GOVENDER[58]

INTRODUCTION

Labour made a detailed submission to NEDLAC on the draft version of the Discussion Paper on Protected Disclosures on 24 April 2004. After considering public comments, the SALRC published a redrafted discussion paper. It is the purpose of this memo to respond to this redrafted version. Accordingly, this constitutes the Labour Constituency's formal response. However, this must be read together with our April submission for additional details and context.

Comments on specific recommendations in the discussion paper

i) Extending ambit beyond employment relationship

Paragraph 4.17 reflects that the SALRC has provisionally decided to recommend extending the application of the Protected Disclosures Act (PDA) beyond the employment relationship. We strongly support this.

We note that there is a minority view that is opposed to widening its application on the grounds that whistleblowers are "trouble makers". This reflects a profound lack of understanding of the role and nature of this type of legislation, which is to provide protection for individuals from reprisals for assisting in rooting out corruption. Further, it is illogical to assume that this is relevant only to the employment context. In addition, detractors must provide compelling reasons to show why South Africa should go against international precedent favouring a wider application.

ii) Replacement of definition of "employee" with "worker"

The Draft Discussion Paper proposed that the definition of "employee" be replaced with that of "worker", in the process significantly widening its scope to include amongst others, independent contractors. We strongly supported this proposal as it would address serious concerns where employers prevent employees from exercising their labour rights by classifying them as independent contractors. This is to be distinguished from cases where a person is a genuine independent contractor.[59]

[58] Ms Prakashnee Govender is a member of the Labour Task Team of Cosatu.

[59] However, note that we said that we would revert to our earlier position calling for the incorporation of the presumption in the Labour Relations Act (LRA) against independent contracting in the event that the SALRC chose not to adopt the proposed definition of a "worker".

- **Independent contractors**

  Not surprisingly the Business Constituency at NEDLAC has opposed the proposed widening of the definition and specifically the inclusion of independent contractors. The SALRC has called for further comment on this question. Labour questions the logic of the arguments offered by Business against the proposed definition. Firstly, Business argues that "all other employment legislation specifically excludes independent contractors". We do not believe that the PDA can be classified as "employment legislation", merely on the basis that it is currently limited to employment relationships. In fact it has always been the intention to investigate the widening of the PDA beyond the employment relationships in the long-term. Relevant to this is the fact that the line function department responsible for the legislation is the Justice Department and not the Labour Department.

  Secondly, Business argues that "all other employment legislation specifically excludes independent contractors". The intention of employment legislation (which we disagree that the PDA forms part of) to exclude genuine independent contractors is based on the lack of relevance that labour law sometimes has to them. For example it would be illogical for a person contracted by a client to install computer cabling in a once-off commercial contract to be able to claim maternity or annual leave from that client. However, the same contractor may have observed serious health and safety violations at the client's premises. There is no rational reason to deny such a contractor protection for making a disclosure. In fact, failure to provide protection will discourage disclosure for fear of losing the contract or even further business from the client.

  Business alleges that widening the definition is likely to cause confusion, but has offered spurious grounds in support of this. The question that must be asked is what is at risk for not providing independent contractors with protection for making disclosures, especially where this affects compelling broader social or national interests?

- **Inclusion of "work-seeker" and unemployed person"**

  In our April submission we proposed that the definition of "worker" should also include a "work-seeker" or "unemployed person", which is the approach adopted by the Skills Development Act 97 1998 in relation to the definition of a "worker". However, the SALRC has neither incorporated this suggestion nor has it responded to our proposals in this regard. Accordingly, on this question a response from the SALRC is required.

There are compelling reasons to include work-seekers and unemployed persons. For example, a work-seeker may be subject to a lengthy recruitment and assessment procedure in the course affording her/him the opportunity to observe violations by a potential employer or in the workplace. The work-seeker, however, is unlikely to make a disclosure if this is at the risk of not being appointed. The proposed reform directed at providing compensation for damages in such case would make inclusion of this category more viable.

iii) Definition of "employer"

The SALRC is proposing to extend the definition of "employer" to include temporary employment services, which we strongly support. In noting that affected employees here effectively have two employers, we also argued that a further amendment was required explicitly making both employers jointly and severally liable for compliance with the PDA. We also pointed out that a similar approach has been adopted in section 82(3) of the Basic Conditions of Employment Act (BCEA), which states: "The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client, does not comply with this Act…."

Under paragraph 4.21 the SALRC, in response to our suggestion, is asking for comment on how temporary service employees should be treated. We believe that joint and several liability would promote better enforcement of the PDA in this respect. Accordingly, we are calling on the SALRC to insert a provision replicating the BCEA provision above.

iv) Including disclosures relevant to the Employment Equity Act

Ironically, while the PDA is limited to employment relationships, it currently only provides protection for disclosures on unfair discrimination if this relates to the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). No mention is made of the Employment Equity Act (EEA). We retain our support, as stated in our previous submission, for the SALRC's proposal to extend application of the PDA to the EEA. However, we disagree with the suggestion under paragraph 4.23 that this should be limited to Chapter II of the EEA. It should rather incorporate application of the Act as a whole. Chapter III of the EEA deals with employment equity and affirmative action, and entails many very specific obligations (for e.g. consultation with workers on employment equity plans and reports) that also require the protection of the PDA from violations.

v) Extending the definition of occupational detriment

Again we wish to register support for the SALRC's proposal to extend the definition of "occupational detriment" to include defamation suits and suits based on the alleged breach of confidentiality as well as the loss of or failure to be given a contract. These are classic mechanisms employed to discourage legitimate disclosures. We are also calling for the list of occupational detriments to be made open-ended as the approach in the PDA is currently close-ended.

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

We again register our support for the SALRC's proposal to extend the above list to include amongst others the South African Human Rights Commission, the Commission on Gender Equality, the Independent Authority to Regulate Broadcasting, ombudsmen etc. We are also grateful that the SALRC has taken our proposal on board regarding the inclusion of the labour inspectorate as well.

vii) Citizens' whistleblowing

The SALRC is inviting comments on extending the PDA to cover what is often termed as "citizens' whistleblowing". As indicated in our earlier submission this broader category of disclosure is highly desirable. Below are Labour's responses to the questions posed by the SALRC on this issue:

- Who should be able to disclose?

  "Who" should be defined as widely as possible, with the emphasis on any limitation rather being on the disclosure being bona fide. Further, while references to citizens have been used for the sake of convenience, we would disagree with this being limited to citizens since permanent or temporary residents should also qualify. For example, an asylum seeker may witness irregularities or corruption by Home Affairs Department Officials, but may be reluctant to make a disclosure if this would mean risking not being granted refugee status.

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

  The range of issues in respect of which a disclosure may be made is currently quite broadly defined in the PDA. We believe that this is directly applicable to citizens whistleblowing.

- To which bodies or persons should disclosures be made?

  This would naturally be determined by the content or subject matter of the disclosure as well as the location/environment of the violation. In order to cover a wider range of contexts, it may be necessary to insert a general provision requiring the initial disclosure to be made to a person who has authority over or is in control of an area that is the subject of the disclosure. Further, the proposed extended list of persons to whom disclosures may be made is even more relevant in this context. The retention of the current limitation to the Public Protector and Auditor-General would make implementing a citizens' whistleblowing mechanism, unviable.

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

  The PDA should not be heavily prescriptive in order for protection to be invoked as this would be counterproductive. The emphasis should remain on bona fide disclosures and on disclosing to appropriate persons or bodies.

- How should detrimental action be defined?

  Again, because of the wide ranging potential contexts there may be a need to provide for a generally worded provision, which would focus on harm, detriment, prejudice, discrimination and hardship that the whistleblower would not have suffered in the absence of making the disclosure. The facts of each particular incident will have to be examined on a case-by-case basis.

- What remedies should be provided for?

  Remedies could include interdicts, awards of compensation for damages, provisions allowing courts the authority to reinstate or restore the position that the whistleblower was in prior to the disclosure etc.

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

  Yes, as a mechanism of deterrence, but for obvious reasons this should more correctly be applied to the public official who is responsible. However, we question why this should be limited to public bodies. There have been numerous high profile corporate scandals (more recently involving Enron and Parmalat), which illustrate the extensive social and economic devastation that is possible as a result of corruption at the hands of private entities.

- From a drafting point of view, and given certain differences such as the nature of the detriments likely to be suffered, is it feasible to combine citizens' whistleblowing with 'workplace' whistleblowing? Would it be better to divide the two into separate parts or chapters of the PDA?

We would support the separation of these two mechanisms into separate chapters or parts. The employment context has specific mechanisms and remedies that are not generally applicable. To combine these may create interpretational problems, which should be avoided.

viii) Immunity from criminal and civil liability

As reflected in our April submission, we continue to support the SALRC's proposal to introduce immunity from civil and criminal liability for making a protected disclosure. After all, a bona fide disclosure can hardly be regarded as protected if it opens up a person to prosecution or civil law suits and would therefore discourage disclosures. There is adequate protection in the PDA currently from abuse since any disclosure that is not bona fide, will be subject to criminal prosecution or civil liability.

The poor enforcement and low level of reliance on the PDA is an indication of the need for additional protection to encourage whistleblowing. Accordingly, we support the proposed amendment of clause 9A by the SALRC under paragraph 4.51, which explicitly excludes workers from civil, criminal or disciplinary proceedings as well as the exemption from liability for breach of contract, oath, confidentiality etc.

ix) Protection of identity of whistleblower

As indicated in our earlier submission, we support the SALRC's proposal to provide for the protection of the identity of the worker making the disclosure, unless the worker's written consent is obtained or the disclosure of the identity is necessary. We are also grateful that the SALRC has taken on board our proposal that any disclosure of identity should only be to necessary parties. Accordingly, we support the proposed amendment by the SALRC under paragraph 4.52. Again, the need for additional protective mechanisms is relevant to encourage reliance on the PDA.

x) Damages for compensation

As reflected in our earlier submission we support the SALRC's proposal to remove the two-year salary ceiling currently applicable to unfair dismissals in breach of the PDA. We also appreciate that the SALRC has recognised Labour's concerns about problems facing workers who are subject to unfair labour practices (i.e. that stop short of dismissal) and the discretionary awards of compensation that are applicable. Comments are now being asked regarding our proposals to address this by linking compensation to actual loss or damage suffered by the worker. In support of this proposal, we believe that it is important to take into account the impact of an unfair labour practice on a worker's life and consequently its potential

to discourage disclosure. Loss in income is not limited to dismissals since, a demotion for e.g. could also have major economic consequences and which would be more acute for more vulnerable workers.

xi) Interdicts

As reflected in our earlier submission we support the proposed introduction of interdicts. The emphasis would be on preventing the imposition of a threatened occupational detriment.

xii) Offences

- Workers who knowingly make false disclosures

  As reflected in our earlier submission, we support the SALRC's view that an employee or worker should not be criminalised for knowingly making a false disclosure. This would discourage reliance on the Act to the point that even bona fide whistleblowers would choose not to disclose because of the risks. On the other hand the PDA only provides protection for bona fide disclosures. Therefore someone who knowingly makes a false disclosure is open to a range of civil actions including defamation, breach of contract etc.

- Should it be a criminal offence for an employer to subject a worker to an occupational detriment?

  We are not in agreement with the SALRC's view that it should not be a criminal offence for an employer to subject a worker to an occupational detriment, especially since there is little deterrent value in the current setup.

xiii) Disclosures to Trade Union Representatives

Under paragraph 4.98 the SALRC has acknowledged our concerns regarding the need to provide disclosures to trade union representatives with the same level of protection as those made to legal advisers and has asked for comments in this respect. On this issue it needs to be pointed out that workers who can afford access to a legal adviser are a bare minority in this country. A further advantage of protecting such disclosures relates to the trade union representative's proximity to the workplace and general role in mitigating highly uneven power imbalances in employment relationships. Ideally, a trade union representative should then be allowed to accompany and assist a worker in making a disclosure to an employer/superior, which would thereby significantly reduce the possibility of the worker being subject to victimization or intimidation.

xiv) Creation of a conducive workplace environment

We appreciate that the SALRC has recognised our concerns on this issue and has invited public comment in this respect. We reiterate that employers should play a role in creating an environment that would facilitate the implementation of the PDA. As with labour legislation like the BCEA and LRA, this should include posting summaries and guidelines on the PDA at strategic points in a workplace.

18.6 COMMENTS/CONCERNS AND PANEL DISCUSSION ON THE PRESENTATIONS MADE REGARDING THE PROTECTED DISCLOSURE ACT, 2000.

Comments/concerns on the presentations were raised on the Protected Disclosure Act, 2000 (PDA) by the delegates who attended the Roundtable discussion. Some of these included the following:

- There are good intentions and clear objectives behind the PDA and it is supposed to serve the interests of broader South Africa. However, the PDA cannot be a cure for all corruption! Inevitably, there would be a problem for an illiterate person to understand their rights or be able to follow the five correct procedures as outlined by the presenters.
- Looking at a typical scenario of petty corruption; the offender does not threaten firing, he/she says – "I will kill you!" How can a whistleblower be protected against physical reprisal? Demotion at work is the least of his worries when his life is at risk.
- Concern was expressed regarding a lack of input to the SALRC's proposals regarding the PDA. More relevant bodies should have been approached or invited to participate. A representative from the SA Law Reform Commission confirmed that a discussion paper is open for public comment. The discussion paper has been published in newspapers, and has been circulated to various role players around the country. Comment is welcome from all. The paper may be viewed on the SALRC's website.
- Public hearings should be organized when introducing new legislation. It is important to get input from the general public at large before a new piece of legislation becomes law.
- One of the downfalls of the PDA is that there is no duty to investigate. It was pointed out that this omission worried several whistleblowers who were interviewed in this regard.

- There should be no provision for whistleblowers to submit their information confidentially. The PDA is a mechanism of protection – a shield – not a sword.
- Offending employers can be extremely innovative. They may get rid of people in many ways without ever being able to prove that they have broken the parameters of the PDA.
- It is vital to translate the PDA into all languages. Deputy Minister de Lange undertook to liaise with Prof Sangweni to determine if there are ways that such translation could be fast tracked. It was noted that there is no word for “corruption” in several of the official languages.
- Many people claim to be whistleblowers for their own hidden agendas. Care must be taken not to frustrate legitimate business - whether in the private sector or in Government. If everybody blows a whistle around something which may turn out to be legitimate, the beneficiary of services won’t receive it timeously as it may take time to investigate and resolve a particular matter.
- A forensic auditor mentioned that he came across prospective whistleblowers who expected a high degree of protection before disclosing. In this regard, many whistleblowers believe that they will be afforded protection along the lines of a ‘witness protection’ scenario. Clarity ought to be given to such whistleblowers between the message they are getting (partial whistleblower protection for super-specific circumstances) and the witness protection context which relates to crimes. A normal employee does not understand such difference. Getting the message across to people is where the challenge lies. In the finalized Act it must be ensured that it is as close as possible to the scenario that the whistleblower expects.
- Ultimately what one would like to see in South Africa is that each Government department has a particular policy encouraging whistleblowing within a department, together with a firm policy to act on information given.
- There should be no negative consequences attached to whistleblowing. Thus, it must be possible for a whistleblower to make wild claims and defamations without suffering any ill consequences. By simply blowing the whistle, the whistleblower should have civil and criminal immunity.
- Whistleblowing need to be strengthened for what it is - a shield. That shield should be inculcated in the way organizations are managed. Citizens should have certainty into what will happen if they come forward with damaging information. That is why it is necessary that the whistle should be blown at a high level for example, at the Auditor-General and the Public Protector. The information should be given to people with authority who can take follow-up action.

- Legitimate whistleblowing can become a David-versus-Goliath situation. Few whistleblowers would be able to afford adequate legal defence if they are financially victimized by a wealthy organization. In this regard it is necessary that the Legal Aid Board should provide services to legitimate whistleblowers. In an additional comment it was mentioned that whistleblowing cases could prove to be very expensive and that the Legal Aid Board's current mandate is very narrow and that it is severely overworked. In the future, it may be possible to expand legal aid through clinics but presently there is certainly no indication that the Legal Aid Board will ever be able to cope with whistleblowing aid.