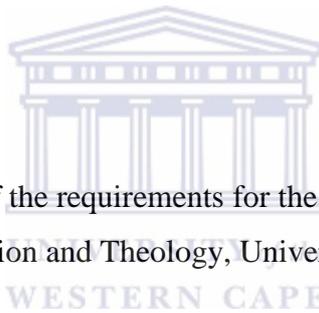


Whistle blowing, ethics and the law:
An ethical evaluation of the Protected Disclosures Act 26 of 2000
using Hans Jonas's theory of responsibility

By

Lydia Joy October



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Supervisor: Professor D. Lawrie

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Abstract

South Africa has progressed towards the realisation of an expressive culture of disclosure. Significant implementation and enforcement of the Protected Disclosures Act (26 of 2000 – hereafter referred to as “the Act” or “the PDA”) of South Africa has assisted to enforce the practices and protections provided in terms of the enabling laws and a societal culture which is receptive to and respectful of whistle blowers. This thesis seeks to make a contribution to the discourse on whistle blowing and the PDA from an ethical perspective, by means of using ethical concepts and analysing and discussing ethical dilemmas to provide a greater understanding of the real cases of whistle blowing that has occurred. Various aspects of whistle blowing are defined and reviewed with reference to Hans Jonas’s theory of an ethics of responsibility. One such aspect is the idea of collective responsibility as understood by Hans Jonas. Hans Jonas describes responsibility; in terms of the future responsibility present individuals have as a collective in order to ensure that the future human being are able to actively engage in the world with the same familiarities as is experienced today. This thesis will investigate, more specifically, the contribution made by Hans Jonas’s theory of responsibility in understanding the PDA in terms of an ethics of responsibility. The research question is posed and attempts to discuss and analyse whether Hans Jonas’s theory of an ethics of responsibility may help to identify, analyse and assess ethical issues embedded in the Protected Disclosures Act 26 of 2000.

Key words

Whistle blowing, whistle blower, morality, values, ethics, responsibility, disclosure, non-disclosure, protected disclosure, good faith, code of ethics, motivation, and organisation

Declaration

I declare that *Whistle Blowing, Ethics and the Law: An Ethical Evaluation of the Protected Disclosures Act 26 of 2000 Using Hans Jonas's Theory of Responsibility* is my own work, and that it has not been submitted before at any other university, and that all the resources I have used or quoted have been indicated and acknowledged by complete references.

Lydia Joy October

December 2015

Signed:UNIVERSITY of the
WESTERN CAPE

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Chapter 1

General Introduction

1.1. Introduction

Whistle blowing in South Africa has drawn particular interest over the past few years, indicating that whistle blowing indeed has a place in South African society. This thesis explores the Protected Disclosures Act 26 of 2000 by means of an ethical evaluation in which complex judgements have been made. The provisions and amendments of the Act are assessed primarily at the hand of Hans Jonas's ethics of responsibility theory.

Whistle blowing is understood in many different ways, depending on one's angle of approach. Some see it as a purely organisational matter, others as a purely legal matter. This thesis attempts to foster an ethical understanding of the role moral responsibility plays in whistle blowing. Chapter 1 sets out to expand the understanding of whistle blowing by providing an appropriate context and relevance as a frame of reference. This frame of reference is informed by the social and political context of South Africa in particular. The nature of whistle blowing is then explained in order to build on the brief frame of reference, that is, on the social and political understanding of the context of whistle blowing in South Africa. The Chapter then provides a demarcation of the topic by saying what has been done and therefore, by default, identifying what has not been done, in an effort to narrow the area of focus and to construct a precise statement of the research problem.

Apart from this, the aims and objectives of the study are made clear in Chapter 1, as well as the significance of the thesis, and possible limitations are clarified. Once all this has been covered, the research procedure and methodology provides a good focus to delineate the research area and provide a basis for the construction of information thus leading into the final section of Chapter 1 which is the overview of the Chapters to follow. The overview extends to spell out what the plan is throughout the thesis and to ensure that the entire basis, as per the research question, as posed in Chapter 1, have been dealt with. Chapter 1 now extends to provide a clear context and relevance for whistle blowing.

1.2. Context and relevance

This thesis will address the problem of whistle blowing through a systematic, disciplined discussion, informed by the relevant literature. Firstly, in order to understand and recognise

that whistle blowing is an ethical issue involving responsibility, one must have both a theoretical background and understanding as well as some practical working knowledge of what whistle blowing is and how it manifests itself within the working world, and also be able to explain why and just how powerfully the field of ethics and the practice of whistle blowing interconnect.

The Protected Disclosures Act 26 of 2000 makes provision for procedures in terms of which employees may disclose information regarding unlawful or irregular conduct by their employers or fellow employees (The Protected Disclosures Act 2000:1). The Act makes provision for the protection for employees who raise concerns internally, and reinforces and protects the right to report concerns externally, provided that there is a valid reason for external disclosure and that the particular disclosure is a reasonable one made in good faith (The Protected Disclosures Act 2000: 1) It barely touches on the responsibility of the various individuals or bodies involved, both the whistle blowers and those who respond to them. As the title suggests, the emphasis falls on the degree of protection afforded to those who have already blown the whistle. It does not deal in any detail with the responsibility of those who are aware of abuses to make disclosures or with that of private or public bodies to foster, in the public interest, a culture of whistle blowing.

Whistle blowing as a practice has not only led to whistle blowing legislation; it has also contributed, in some instances, to organisational systems being developed with the purpose of encouraging proper communication and specifically commitment by management to the whistle blowing process. Anonymous hotlines with respect for confidentiality and various practices to minimise wrongdoing have also been introduced. Organisations such as the Ethics Institute of South Africa, which offer workshops on whistle blowing as ethical risk management, have led to the encouragement of other organisations to develop internal whistle blowing policies and procedures. Often these initiatives go beyond the current legal requirements.

The act of whistle blowing causes a conflict of interest between the personal, organisational and societal spheres. Considerable conflict stems from the context in which whistle blowers are viewed, whether as someone sharing knowledge of misconduct for the benefit of others or as someone who is acting disloyally to their organisation and thus meaning to cause harm (Verschoor 2005: 18). Whistle blowing is a valuable tool in an organisation's corporate governance strategy as it empowers employees to act in accordance with their organisation's

policies and procedures, thus encouraging underlying values such as loyalty, integrity, honesty and respect.

1.3.The social and political context

In 1994 South Africa achieved democratic freedom and became a democratic state. From this rich history stems a strong tradition of passing progressive laws which are aimed at enhancing good governance. Today, however, the widespread nature of misconduct and corruption is of great concern and threatens the gains made. Traditional methods of good governance ought to have an impact on these problems, yet the current legislative system for this seems not to be having the desired effect (Martin 2010: 4).

Political will is a difficult aspect of the environment to control. In the absence of political will, laws by themselves do not achieve much. But the weakness of political will is also reflected in the legislative environment ever more destructive to openness and transparency (Martin 2010: 4). For instance, the Protection of State Information Bill threatens to enforce increased secrecy when it comes to confidential information and, in spite of significant resistance by civil society, looks set to be signed into law (with particular fears for the possible criminal sanctions that may be applied against whistle blowers). The General Intelligence Laws Amendment Bill, while claiming to be consolidating state security issues, appears also to be extending the powers of the Minister of State Security in a manner that undermines transparency (Martin 2010: 4).

An additional angle worth considering as an extension of the social and political context relating to the circumstances under which, from a behavioral perspective, criminal activity might be encouraged. When sensitive information about, say, arms procurement, is protected, those engaged in arms procurement may use it as a cover for corruption, secure in the knowledge that nobody can blow the whistle. Increasingly, South African academia is trying to explore ways to deter corrupt behaviour, but the solutions proposed are still institutional and lean towards an economic-centred understanding of deterrence, and away from a social inclusive paradigm, which is where the ultimate focus should be.

There are other factors apart from the legislative paradigm that demonstrate a socio-political context unreceptive to whistle blowing. Physical and social threats may also leave whistle blowers vulnerable in South Africa. The Public Services Commission noted that one of the

most significant factors negatively affecting government initiatives to contain corruption were that whistle blowers are sometimes intimidated by senior officials and executive authorities when reporting corrupt activities (Martin, 2010: 52). This then leaves them with the decision to not disclose the information for fear of retaliation within the workplace.

According to Holtzhausen (2007: 299), there are a variety of reasons that inhibit whistle blowers from taking action:

1. They are fearful of the possible response from their local community, or even from outside persons; they fear intimidation or even death, should they come forward;
2. They don't know the protections that are available to them should they try to come forward;
3. They are concerned about the social impact of the disclosure. They are worried about being ostracised, or about the risk that people may lose trust in them, and they are concerned about becoming a social outcast. Interestingly, this was linked to the historical impact of the notion of "impimpis", (which is a social term from the Apartheid-era referring to individuals who leaked information to government authorities);
4. Whistle blowers also do not know who to trust with information, or even who they can approach to make a disclosure;
5. Another interesting issue raised was what the group believed to be the "moral challenge" of sometimes being required to act on a disclosure when refraining from action might benefit people they know;
6. Somewhat linked to point (5), there is sometimes a direct monetary incentive for whistle blowers if they do not speak, and lastly;
- 7 The prevalent failures within the South African criminal justice system are also identified as being a discouraging factor (Martin 201: 56).

1.4.The nature of whistle blowing

South Africa's whistle blowing framework has received the highest possible rating of three stars in a report by global law firm DLA Piper for providing express protection to those making legitimate disclosures. This means South African law is superior to that of Germany,

France, Hong Kong and Australia and is on a par with the laws in the United States, the United Kingdom and China (Patel 2014: 3).

In January 2014 DLA Piper issued a research report stating that whistle blowing was attracting high-profile media attention across the world and is proving to be a key concern for multi-national employers, especially in relation to the cultural attitudes, regulations and different levels of protections across the globe. The report showcases the different levels of protection for whistle blowers around the globe, and highlights the extensive protection in South Africa, compared to other jurisdictions around the world. The high profile media attention that whistle blowing is attracting demonstrates the growing recognition that this is an issue that all employers, wherever they are located, and whether domestic or multinational, need to address the importance of implementing policies and procedures that work at all levels (Patel 2014: 2).

The whistle blowing framework in South Africa has developed over time and includes constitutional provisions, the Protected Disclosures Act 2000 (PDA), the Labour Relations Act (LRA), the Companies Act 2008 (CA), and a body of case law. South Africa has specific legislative protection for whistle blowers in the workplace, similar to the legislation in place in The United Kingdom. Patel (2014: 10) noted that protection under the PDA and LRA is limited to employees only, excluding independent contractors and volunteers. It is interesting to note that the Companies Act (CA) extends whistle blowing protection to (amongst others) suppliers of goods or services to the company, which may then include all types of personal services, regardless of whether the service provider can be classified as an employee or independent contractor.

South Africa has emerged from an era of darkness and has joined the international community in promoting openness and accountability. The DLA Piper Report has been quoted in judgments in our South African courts and is thus testimony to the impact this research has had on the South African legal system and the respect in which the information was held. It is of the utmost importance that South African laws are utilised effectively in order to correctly provide legal protection for whistle blowers.

Whistle blowing legislation in South Africa, and especially the PDA, contains a simple idea, namely, that it is in the common interest of both the employer and the employee (the responsible potential whistle blower) to blow the whistle internally, within the organisation,

rather than externally, to, for example, the media. Once a disclosure is made externally the stakes are higher for both the employer and the employee. For the employer it may result in damaging publicity, whether justifiable or not. When it comes to the employee, it is much more likely that the employer will react negatively to the public disclosure, with unfavourable consequences for the employee and his or her future work opportunities (Patel 2014: 4).

While the Act also extends to private sector employers, it is not inflexible, rather appeals to the self-interest of organisations to develop practical measures. South African legislation goes further than both the Australian and American laws to cover both public and private sector employees. However, in drafting the legislation, the Justice Committee was not persuaded to expand the scope of the law beyond the employer-employee relationship. Therefore, a pensioner (who is not an employee) who blows the whistle on a corrupt pension officer or fellow pensioner would not be protected by the law. A decision was taken by the Justice Committee, however, to ask the South African Law Commission to investigate the matter further (Patel 2014).



1.5. Demarcation and statement of research problem

This thesis investigates the contribution made by Jonas's theory of an ethics of responsibility to the understanding of whistle blowing. The question that is addressed here is how the significance of Jonas's position in this regard bears on the strengths and weaknesses of the PDA. On this basis, the research problem investigated in this thesis may be formulated in the following way, *how should the Protected Disclosures Act 26 of 2000 be assessed in terms of Hans Jonas's ethics of responsibility?*

The research problem as stated above assumes the validity of the overview of the literature on whistle blowing that is developed below. The argument is that Hans Jonas's theory of an ethics of responsibility, which is used here in order to identify, analyse and assess ethical issues embedded in the PDA, may help identify the strengths and weaknesses of the Act and may also lead to a better understanding of how to address the possible shortcomings. In this thesis, the ethical discussion is thus developed under two rubrics: (1) Jonas's theory of an ethics of responsibility, and (2) the PDA. This invites a mutually critical discussion between the interaction of the ethics of responsibility theory and the PDA. Although these assessments are preliminary, Chapters 3 and 4 put forward a more distinct response to the research question.

1.6. Aim and objectives

The academic aim of the thesis is to evaluate the Protected Disclosures Act from an ethical perspective, in this case using Jonas's theory of an ethics of responsibility. This involves exploring why whistle blowing is an ethical issue and how this affects organisations and employees alike. This will facilitate a better understanding of the topic of whistle blowing in general, and of the PDA, its merit and shortcomings, in particular, from an ethical (rather than a legal) perspective.

Ethics is a large and important field. In this thesis, Jonas's theory of an ethics of responsibility is used as an example to explore the practical sense of ethical thinking, to illustrate just how important it is to adopt an ethical angle and not just, for instance, a legal angle. This thesis will critically analyse the importance of whistle blowing and how it is related to the ethical theoretical realm.

Another aspect of the aim is to assist future thinking and initiate further research on how whistle blowing applies to individuals. One may research the topic of whistle blowing, but without an understanding of the ethical theories involved, it may be difficult to comprehend what is at stake and what actions and moral stances are appropriate in a given situation. Various contexts are provided to explore just how different the ethics of responsibility theory applies its notions and how certain situations will dictate the way forward in both thinking and action.

In conducting the ethical evaluation of the PDA, a benefit that will emerge upon completion of the thesis is that it may guide strategies for the improvement of the PDA's impact on organisational development, therefore leading to positive outcomes in line with the current amendments that have been suggested. Key questions are asked after carefully reviewing the current debates and discussions around the PDA as it presently stands.

1.7. Significance of the thesis

There has not been any thesis of this nature which relates the PDA to the ethics of responsibility theory. Authors in the field of whistle blowing have only highlighted the social, psychological and mainly the legal aspects of the PDA, but not the ethics of responsibility. If whistle blowing is to be regarded as an ethical action, and not as mere compliance with the

rules of an organisation, one has to ask why and when such ethical action is appropriate and even necessary.

The main aim of this thesis is to analyse the PDA with reference to the ethics of responsibility theory and its prescripts, while identifying gaps and possible ways of improvement. Even though it is important to identify and understand the factors that motivate potential whistle blowers to raise their concerns, the social context of whistle blowing should be analysed too, as the employer and other organisations need to be informed in order to develop and enact organisational policies and procedures and also legislation.

This thesis will add to the existing body of literature on whistle blowing by constructing an original ethical assessment of the PDA using the ethics of responsibility theory as a tool for evaluation. The research will contribute to academic writings by providing a fresh combination of information shaped by Hans Jonas's ethics of responsibility theory.

In addition, I was fortunate enough to have worked specifically within the ethical field and thus gained experience around whistle blowing. This is where the idea, or the rather, theme for this thesis emerged. I worked for Massmart in Johannesburg, an organisation which is a subsidiary of the larger global retail organisation, Walmart. My position was that of Ethics Office Administrator in the Ethics Office for South Africa. While working at Massmart, I had completed the Ethics Officer Certification programme and am now a certified Ethics Officer. This achievement allowed me the opportunity to explore the realm of whistle blowing even further. The one aspect which stood out and which was a central theme throughout the literature and projects regarding whistle blowing was the notion of responsibility, and more specifically, responsibility of the individual, the whistle blower.

My need to know more and to explore further the realm of responsibility led me to Hans Jonas's ethics of responsibility theory. By delimiting my study to his contribution, I was able to bring into focus my search for a deeper understanding of the role of responsibility in the practice of whistle blowing, thus engaging with the ethics of whistle blowing in relation to current legislation and literature alike. It allowed me to give academic form to my intuition that that disclosing information that has the potential to positively affect society and to eliminate abuses is a moral obligation and a social responsibility. It is for these two reasons that this thesis, engaging as it does with both legislation and academic literature, is presented as an attempt to facilitate the process of both thinking and learning about whistle blowing as a form of ethical action.

1.8.Hypothesis

The hypothesis of the thesis is that, whatever its merits from a legal point of view, the Act does not engage sufficiently with the ethics of whistle blowing. This largely accounts for the perceived shortcomings of the Act, which have been pointed out by several critics. This evaluation will, it is hoped, contribute to a higher standard of practice and service for all employees within organisations. Organisations need additional training on the legislation around whistle blowing and therefore need to understand what the South African law states, but also what its ethical underpinnings are, in order to address the problem and improve the functionality of whistle blowing as in general. In this regard, South African legislators should also learn from practices and laws in other countries and find ways of adopting and moulding their positive lessons to best suit the South African context.

1.9.Research procedure

The objectives of the thesis are to provide:

1. Definitions related to the theme of whistle blowing, the PDA, as well as the key terms Jonas uses in his ethics of responsibility theory, as well as an outline of the structures within which whistle blowing manifests itself at an organisation level;
2. An overview of whistle blowing as a concept within an organisational locale, the whistle blowing processes and procedures which influence it, as well as a closer look at whistle blowing within South Africa and the world at large;
3. An overview of the PDA, its definitions, prescripts, and the various discussions around the amendments; and
- 4 An explanation into Hans Jonas's ethics of responsibility theory and its importance in relation to the PDA.

This thesis is a literature-based study, which employs a survey of the literature on whistle blowing, and on the PDA and its provisions for protecting whistle blowers. It uses Hans Jonas's theory of an ethics of responsibility as the main tool for reaching an ethical evaluation of the Act and of whistle blowing in general. The first step required to investigate the research problem is to gain an in depth understanding of the different ways that whistle blowing has been understood. The sources that were employed in this regard include Beukes (2014), Holtzhausen (2012), and Martin (2010), among others. The views of such authors are documented throughout the thesis.

Hans Jonas's *The Imperative of Responsibility* (1984) was used in order to offer a detailed evaluation of the author's views on responsibility. This is documented in Chapter 3 of the thesis along with the provisions and amendments that have been proposed, and the conflicting views in this regard.

This thesis moves away from the legal framework and concentrates more on the ethical perspective and the views suggested by Jonas. Law and ethics should go hand in hand; they cannot be separated completely. Therefore the law (specifically the PDA) will make its appearance in this thesis, but only as a means of illustrating better why a reasoned theory of responsibility is needed to underpin a culture of whistle blowing. It is the moral responsibility that creates the need for a law, not the law that imposes the responsibility.

1.10. Research methodology

The research approach of this thesis is qualitative in nature and will make use of careful analysis, description, and deductive interpretation. A variety of sources have been used in collecting the data for the thesis. The interpretive stance is adopted to these sources to ensure that all angles of approach are covered and that the chosen opinions are properly substantiated and argued.

According to Saunders, Lewis and Thornhill (2009: 106) a research paradigm is a framework that guides how research should be conducted based on an individual's philosophies and assumptions about the world and nature of knowledge. It can also be seen as a way of examining social phenomena from which particular understandings of these phenomena can be gained and explanations attempted.

In this thesis an interpretive paradigm is used, which is linked to the philosophical position referred to as Interpretivism. Interpretivism refers to the way humans attempt to make sense of the world around them. The concern here would be not to achieve a change in the order of things, but rather to understand and explain what the current situation is. The Interpretivist paradigm emphasises that you conduct research among individuals rather than objects. It also indicates that actors play a part in which they interpret in a particular way and act out their part in accordance with this interpretation. The challenge here is to enter the social world of the research subjects and understand their world from their point of view. Therefore, in

Interpretivism, interpretations are socially constructed; there are subjective meanings and the researcher is part of what is being researched.

At a secondary level, interpretations affect people's attitudes and actions. For instance, a new understanding of the PDA (and legislation on whistle blowing in general, enabled by using Jonas's theory of responsibility as a basis for an ethical evaluation, could lead to improved practices regarding whistle blowing. In choosing to use Hans Jonas's theory of responsibility as a means for ethical evaluation, this thesis has embraced a subjective view.

The approach used is, moreover, the inductive approach. The purpose here is to understand the nature of the topic at hand. And it is the researcher's task to make sense of the information by analysing it. Research using an inductive approach is likely to be particularly concerned with the context in which events take place. Thus the PDA as well as South Africa provides this context. An interpretive theory is developed after analysing the information through a process of interpretation.

The research approach used is qualitative in nature. This means that the thesis will contain qualitative information that can be interpreted and explained. Therefore, the choice of research design combines an interpretive paradigm, using an inductive approach, and a qualitative method: this seems to be the most appropriate combination for the particular research question. This combination allows for maximum value to be obtained from the information and sources used in order to find similarities as well as contrasts throughout the thesis. This allows for the ideas, opinions and views to be expressed freely and openly while still providing good justification for the information used with reference to the research topic at all times.

1.11. Ethical considerations

The thesis is of a descriptive and theoretical nature. There are no ethical considerations, except for the accurate referencing of all sources used throughout. No ethics statement is needed, because only published views of human subjects are used. The thesis focuses on two main published sources, namely, the Protected Disclosures Act of South Africa and Hans Jonas's book, *The Imperative of Responsibility*. All other supporting literature has been referenced accordingly to acknowledge the contribution of the authors to this thesis.

1.12. Overview of chapters

Chapter 1 offers an outline of the context and relevance of the thesis. The historical background and nature of whistle blowing is explained, with particular emphasis on the nature of whistle blowing within an organisational setting. Along with this goes a very brief outline of the motivations of whistle blowing, the processes involved in whistle blowing and the particular understanding of whistle blowing in South Africa. The significance of the thesis in relation to the research question and the relevant literature is explained. The statement of the research problem leads to a demarcation of the areas that the thesis will be focused on, whilst providing an explanation of the research procedure and limitations of the thesis.

Chapter 2 deals mainly with definitions of terms. It provides various definitions of and theoretical views about whistle blowing, how it came into existence, and the motivations behind it and the provisions provided to facilitate it. Since the purpose is to examine the provisions of the PDA from an ethical perspective, some definitions of ethical terms are also given. This chapter then briefly touches on what the process of whistle blowing entails, what procedures are normally followed and what the consequences generally are. This will provide clarity on whistle blowing as a responsible moral act, drawing on existing literature. The position of whistle blowing in other countries is discussed next in order to benchmark the position the South African PDA finds itself in and possible ways to remedy any of its shortcomings. Various examples are used from the South African context in order to provide a greater understanding of the actual cases which occur within our country. Lessons can be learnt from other countries and their legislation and prescripts, but this understanding will only be meaningful and useful if the South African context is understood in its entirety; only then does this ignite the thought process and initiate change.

In Chapter 3 the PDA is delineated and scrutinised. It explains how the Act came into being, what the Act's aims and provisions are, what its current status is, and what the protections and remedies are available to whistle blowers in terms of the PDA. It then discusses in some detail what criticisms have been raised against it and what amendments have been proposed. Although the PDA provides a legal framework for dealing with whistle blowing, it does not explicitly address questions of responsibility. It essentially provides (some) legal protection to those who blow the whistle but it does not deal with the moral dilemmas faced by the potential whistle blower or those who have to respond to such action. In this sense, it does not fully cater for or foster responsible moral action. The recommendations and amendments that

have been suggested often take up precisely these points. Implementation gaps are identified and possible remedies suggested. This chapter lays the foundation for discussion and critical analysis of Hans Jonas's ethics of responsibility theory which is discussed in Chapter 4.

Chapter 4 examines the contribution Jonas's theory of an ethics of responsibility can make to our understanding of the PDA, its strengths and weaknesses. A brief history of Hans Jonas's life is given in order to provide adequate background and understanding of this author. It is further shown how Jonas's theory helps us to assess the role of responsibility in whistle blowing by showing who has what responsibility to whom and how these responsibilities are to be weighed and balanced. It is shown how this theory highlights certain weaknesses in the PDA and points the way to potential improvements of the Act. An important question at this stage is whether moral responsibility can and should be embodied in legislation. If not, how then can an understanding of responsibility at least help us to improve legislation in respect of whistle blowing? This question is posed and examined from within insights provided by Jonas.

Chapter 5 draws together the three main strains in the thesis, namely, the concept and practice of whistle blowing, ethical provisions regarding whistle blowing and an ethics of responsibility in relation to the PDA. The main discussion points throughout the thesis are drawn together to establish a clear and coherent understanding of the points raised and suggestions are made for future research arising from this thesis.

1.13. Conclusion

Chapter 1 has provided an overview of the context and relevance of the thesis by providing the history of the social and political topic of whistle blowing and showing that it is indeed a focus of scholarly attention, though not often from an ethical perspective. It was shown that whistle blowing is understood in a particular way in South Africa because of the history of this country. It was argued that whistle blowing is an ethical issue that should not be left to legislators alone. A demarcation of the thesis's focus was explained in order to say what will be done and what will not. The purpose is to give an ethical evaluation of the PDA using Hans Jonas's ethics of responsibility as a tool for evaluation, as opposed to those who provide a view of PDA based only on legal considerations and expediency. The aims and objectives of the thesis were clearly outlined and explained to avoid any confusion and to frame the area of study that the thesis embarks on. The significance of the thesis was mentioned as well as

possible limitations. The research procedure was clearly outlined as well as the methodology that brings with it a deeper understanding of the significance and importance of whistle blowing in South Africa today. Now that an introduction to the methods and purpose of the thesis have been given, a further and more detailed look into what whistle blowing entails will be given in the next chapter. Various definitions will be given and discussed in order to provide a contextual basis for understanding the rest of the thesis.



Chapter 2

Whistle blowing: An overview

2.1. Introduction

This Chapter sets out to consider what whistle blowing entails, how it came to be, and especially the social and political background that has provided the basis on which it has grown and developed. Various definitions pertaining to ethics are given and explained, as well as key terms related to the field of whistle blowing, with special reference to South Africa and its history.

A further platform for understanding whistle blowing is then given by exploring what the motivations for whistle blowers might be, as well as what the process of whistle blowing entails. Examples from the South African context are then used to further facilitate the understanding of the mind-set and behaviour of whistle blowers in a given situation. Once a good understanding of the South African context has been established, the chapter then draws to a close by providing a brief overview of whistle blowing around the world in order to extend both thinking and understanding and appreciate just how unique South Africa is, where whistle blowing had started, and to what lengths it has developed to reach the point it is at today.

The aims in this chapter are to eliminate confusion regarding concepts related to ethical aspects such as morality, values, and ethics, as well as whistle blowing terminology such as protected disclosures, irregular conduct, what the nature of the employer-employee relationship entails, as well as aspects relating to the decision- making process which leads to blowing the whistle. The literature on whistle blowing is discussed within an organisational setting in order to determine the nature of the decision to disclose information concerning wrongdoing. In Chapter 1, the research question was posed as follows, *how should the Protected Disclosures Act 26 of 2000 be assessed in terms of Hans Jonas's ethics of responsibility?* and a foundation for creating a clear and meaningful interpretation in the context of an organisation was laid. This chapter thus further aims to identify the difficulties which surround the whistle blowing process by providing case studies and discussion around issues which arise from them. Definitions assist in laying the foundation for understanding and are discussed in the following subsections.

2.2 Definitions

2.2.1. Whistle blower

According to Bakman (2003: 3) whistle blowers are defined as employees who make unauthorised disclosures of irregular behaviour or illegal conduct. In addition to this, Mbatha (2005: 7) says that whistle blowing is not about the disclosure of information in the negative sense; it is rather about making use of a key tool in the promotion of individual and organisational responsibility. Individuals blow the whistle as a way of revealing unethical behaviour to those who are able to do something about it.

The earliest definition of whistle blowing found comes from 1994 and states that whistle blowing is generally defined as the disclosure of illegal, unethical or destructive practices in the workplace to parties who might take action (Rothchild and Miethe 1994: 254). This definition is closely related to what Mbatha above explains whistle blowing to be; whistle blowing is based on the hope that someone in a higher, more influential position will act in accordance with the information disclosed. Various dictionary definitions, as discussed by Dehn (2004: 13), indicate that whistle blowing can be understood in the following ways: (a) bringing an activity to a sharp conclusion as if by the blast of a whistle (Oxford English Dictionary; this metaphorical use is the basis for the more restricted use of the term in organisational settings); (b) giving information (usually to the authorities) about illegal or underhand practices (Chambers Dictionary); (c) exposing to the press a malpractice or cover-up in a business or government office (US, Brewer's Dictionary); (d) raising a concern about malpractice within an organisation or through an independent structure associated with it (UK Committee on Standards in Public Life) (Dehn 2004: 13).

According to Kleinhempel, (2011: 1), there are various views to explain how the term whistle blowing came into its current use, one of them being that whistle blowing is a term that comes from England, where policemen, as in many other countries around the world, used to literally "blow the whistle" when they were witness to an illegal activity, calling for attention of both other policemen and those who were passing by.

A further definition of what constitutes whistle blowing in an organisational setting reads as follows, "Whistle blowing is now used to describe the options that are available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance ... Thus whistle blowers

are the opposite of the anonymous informer that authoritarian systems nurture” (Dehn 2004: 28). In addition to this, Mbatha (2005: 15) says that whistle blowers have an increasingly important role to play in the life of an organisation with regards to wrong-doing as whistle blowers play a role in combating wrongdoing of both a criminal and an ethical nature.

From a South African perspective, there has been some confusion and debate over connotation of the term whistle blower, as it has had a bad reputation in previous years. The understanding of whistle blowers during the Apartheid era was negative, where whistle blowers were seen to be disloyal employees or trouble makers. For those with the worst reputation the term “impimpi”, usually used for apartheid informants who betrayed their fellow comrades, was even used (Auriacombe 2004: 215).

The term whistle blowing today is generally used to refer to reports of misconduct in both private and public organisations as defined in the PDA. Kleinhempel (2011: 1) says that whistle blowing carries “the voice of conscience” as whistle blowing is usually defined as the disclosure of information that a current or former organisation member reasonably believes is evidence of illegal, immoral or illegitimate practices carried out by other organisation members to other people and/or organisations that may be able to effect action, while reporting inadequate behaviour, either internally to superiors, compliance officers, senior managers, auditors, etc., or externally, to law enforcement and regulatory bodies, for example, can prove problematic (Kleinhempel 2011: 12).

Whistle blowers may be deemed either heroes or traitors. Some whistle blowers, like Watergate’s Deep Throat, or Cynthia Cooper, who was named “Woman of the Year” by Time magazine after she played a key role at uncovering a massive fraud at WorldCom, the whistle blowers at Enron, and Harry Markopolos, who reported irregularity at the infamous Bernard Madoff’s financial companies for years, have gained fame, but most whistle blowers have a hard time. Their superiors and colleagues, as well as public opinion, view them as traitors who have betrayed their respective organisations. Whistle blowing is a significant, complex issue, largely because, typically, what happens inside organisations remains undisclosed. Organisations are rarely transparent, keeping, often for sound reasons, their organisational activities confidential (Kleinhempel 2011: 2).

Negative views have unfortunately extended the stigmatisation of whistle blowing, and whistle blowers are, as a result, despised rather than encouraged (Mbatha 2005). This has a negative effect on whistle blowers, who have to ask whether they are in a position to disclose

information and what the personal and organisational effect of the disclosure will be. Individuals act and react in relation to their personal beliefs, values, and morals, and only when they are put into a situation of wrongdoing do they actively evaluate what the outcome and consequences of their actions might be.

From the above discussion it can be seen that whistle blowers are seen in many different ways. Some emphasize that they make unauthorised disclosures, while other say that they act from the highest motives. In practice they are sometimes rewarded, but often punished. There is also a tendency to see whistle blowers specifically as employees of an organisation. It seems better to focus on the probable origin of the term: a whistle blower is someone who observes illegal or otherwise undesirable behaviour and tries to put a stop to it by drawing attention to it. Such a person does not have to be an employee.

2.2.2. Ethics and morality

The terms ethics and morality, as well as ethical and moral, are often used interchangeably in ordinary speech. Scholars, however, usually make a distinction between the two, but in two different ways. The first (but more recent) distinction apparently stems from Bernard Williams, who says that ethics is concerned with the question, “How should one live?” (1985: 4ff). Morality, on the other hand, is a “particular development of the ethical”. It is concerned with duties and obligations to do what is *right*. Decisions in ethics may depend on particular circumstances, but decisions in morality are always universal (Williams 1985: 14). Metz (2012: 111) suggests that ethics deals with all aspects of the good life, with “what to pursue for its own sake”, while morality deals “right actions”, primarily in relation to others.

Formerly and often today the line between ethics and morality is drawn in a different way. Morality is seen as “a social system of regulations” (Frankena 1963: 6) that direct the behaviour of people. Although the system is social, individuals are generally socialized to accept moral regulations at an early age, so that they experience them as their own. Ethics refers to the systematic, theoretical reflection on morality. It asks, for instance, about the principles that underlie actual moral regulations and whether the regulations are in line with the principles. Ethics in this sense is also called moral philosophy, the branch of philosophy that seeks to understand morality as a system. Moral philosophy or ethics relates to morality as the philosophy of science relates to the practice of science (Wiggins 2006: 7).

In practice those who speak about ethics and morality often make the two equivalent or apply the two distinctions discussed above in confusing ways. The following examples will indicate the extent of the confusion.

Ethics comes from the Greek word *ethos*, which refers primarily to the inner character of a human being; in virtue ethics it is still often used in this way. In the business world, however, the word ethics refers to rules that direct the behaviour of public sector employees and could also be referred to as moral laws (Andrews 1987: 7). Ethics also specifies the way in which public officials understand ethical behaviour as the right moral action. Merrill, Lee and Friedlander in De Beer (1998: 292) define ethics as the branch of philosophy which deals with what ought to be done with what kinds of actions are “good”. Chandler and Palno, as cited in Mafunisa (2000: 335), define ethics as being a system of moral principles which branch into philosophy dealing with values relating to human conduct. This in turn relates to rightness or wrongness of certain actions and to the goodness or badness of the reasons for and ends of such actions.

Andrews (1988: 34) define ethics as the application of values to individual behaviour and action that provides the moral and legal basis for guiding personal conduct in different situations. Ethics is reflected in laws and regulations; it is the science of character, the science which deals with morals and habits; the character and conduct of man. Different values and norms could lead to ethical dilemmas and therefore result in conflicting situations.

The word ethics can also be described by referring to its teleological and deontological implications. Ethical deontological theories hold that either a power or something else, such as reason, determines which actions are considered ethical or not. In deontological theories, the concept of ethics is closely linked to that of values, which are long-term beliefs that influence the choices we make. Disclosures, especially an external disclosure raise legal and ethical issues of confidentiality and organisational confidentiality and influence. If public officials had accepted the correct ethical values and behaviour, then whistle blowing could be an effective means that government can utilise in its campaign against corruption. According to Mbatha (2005: 213), whistle blowers can be characterised as ordinary people who have a high standard of moral values conveyed in ethical conduct, in essence, people with the ability to differentiate between right and wrong. Employees become aware of irregular or illegal conduct thus makes us of their value-based judgement to decide whether to blow the whistle.

Teleological theories hold that ethical actions are those that achieve the appropriate goal or bring people closer to that goal. What one values matters less than what one strives to attain. Teleological theories would motivate whistle blowers in a different way. Potential whistle blowers may ask whether corruption or other inappropriate behaviour does not undermine the purpose of the organisation. They may also ask whether they can achieve their own goals if they remain silent about wrongdoing.

Morality is defined by Hilliard and Ferreira (2001: 93) as personal conduct and the perception thereof to be good or bad, right or wrong. There are rules of conduct which guide morality and ethics which refer to principles and norms of behaviour. For instance, as parents, there is the responsibility to instil the most upright values in the form of habits for behaviour in children in order that they behave morally correct in all societal interactions. Once this is instilled, the children as they grow into adulthood are better equipped to decide whether certain actions are classified as appropriate behaviour or not. These tools assist in the moral action of all individuals and by extension, also facilitate the idea of caring for others outside of one. For instance, a parent may introduce a pet into the house when their child is of an age where they are able to understand by way of reasoning. The child may have asked for a pet and the parent uses this as a tool to teach the child responsibility, especially responsibility of caring for another being. The child is responsible for feeding the pet, cleaning up its mess, and bathing it. All these duties that the child performs allows the child to become aware of the nature of caring for someone else entails, even though this may be only one aspect, it still allows the child to become accountable and responsible, and when the duties are not performed, certain punishments are enacted. The child is then able to learn what acceptable behaviour is in relation to others and what is expected of them.

Clearly these accounts of ethics and morality raise many questions. It is not the purpose of this thesis to settle disputes about the correct use of terms. It would also be impossible to change ingrained habits of speech. It is customary to speak of “ethics in the business world”, although “morality” may be a better word. Behaviour and standards are called moral or ethical without making any distinction; I may do so as well. But it is important to ask what theory in ethics (or moral philosophy) underpins moral behaviour about whistle blowing. In this thesis “ethical acts” denote not merely acts that seem right to the people who perform them, but acts that are based at least partly on a theoretical framework based on theoretical reflection. It is argued that a theory of responsibility is the best basis for a morality of whistle blowing.

2.2.3. Ethical dilemmas

There are three major kinds of public sector ethics, namely policy ethics, individual ethics and organisational ethics. According to Kernaghan (1996: 3-5) policy ethics refer to the decisions and recommendations that may have ethical implications on organisational policy and procedures. Therefore, policy and organisational ethics interlink in that the one is enabled by the other, policy enables the organisation to function regarding rules and regulations, and these rules and regulations dictate the behaviour within an organisation. Similarly, individual ethics plays a role in both the policy and organisation levels as individual ethics enables the organisation to formulate ethic principles and once these are formed, and then policy ethics is enforced. Individual, organisational and policy ethics all interconnect and are interrelated as they cannot exist on their own within the organisation setting. Individuals make up an organisation, the organisation exists because of the individuals, and these individuals need guidelines in the form of policies and procedures to function in their environment.

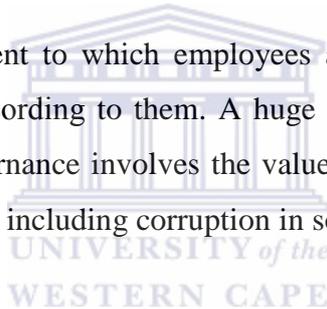
2.2.4. Values

According to Hilliard and Ferreira (2001: 93), values are general standards by which people live, it represents their views about what is acceptable or not. This acceptable or non-acceptable behaviour forms part of a social, political, and personal structure within society. These belief systems are at the forefront in societal interactions and form the foundation for individual and group behaviour and action. For instance, a social structure such as a school or university upholds certain values and belief systems. Once a student becomes a member of an institution such as this they too are expected to uphold the values at all times and their views are given scope to expand and be shaped in order to make informed decisions within the world. This application shows the wealth of knowledge a student adopts and thus creates individuals who are able to think and analyse more critically than if they were not part of an institution. As human beings, our values shape our thinking and the way in which we choose to experience a situation and also what lessons are learnt from experiences. Certain values such as loyalty and honesty are closely linked to ethics and by way of having these values inscribed in us; an ethical action is more likely to occur. Our morality and values thus go hand in hand.

2.3. Why is whistle blowing recognised and protected?

Whistle blowing is central to South Africa's constitutional principles. It is central in the fight against corruption and misconduct and serves to strengthening transparency and accountability within organisations and society as a whole (Martin 2007: 7). Martin (2007: 8) notes that the National Development Plan 2030 for South Africa stresses that corruption is recognised as being a serious threat to the rule of law, and the stability and security of societies. It jeopardises the fair distribution of resources as it undermines fundamental democratic values and institutions and impedes social, economic and political development and the freedom of human rights. South Africa has embarked on an important initiative to promote ethics and the principles of good governance, which places emphasis on openness, transparency, competition, agreements, incentives, procedures and rules (Martin 2007: 8). These suggestions are seen to be of great value when it comes to enacting whistle blowing legislation and ensuring that the law and its prescripts are held to the highest favour possible.

The real success lies in the extent to which employees also identify themselves with the organisation's values and act according to them. A huge part of the human element that is critical for promoting good governance involves the values of the community within which we seek to fight poor governance, including corruption in society (Martin 2007: 9).



2.4. Contextualising whistle blowing and the whistle blower

According to Calland (2004: 2), basic human interaction underlies whistle blowing, and it is mainly focussed on responsibility toward others. Employees who disclose information which relates to irregular or illegal activity within an organisation are known as whistle blowers (Louw 2002: 121). Dehn, as cited in Mbatha (2005: 163), notes that there have been many definitions of whistle blowers, some of which are defined as follows applies within the organisational context, a) raising a concern about malpractice within an organisation or through an independent structure associated with it (UK Committee on Standards in Public Life); b) providing information about illegal or dishonest practices (Chambers Dictionary); and c) exposing to the media a malpractice or conspiracy in an organisation or government office (US, Chambers Dictionary).

Whistle blowers disclose information as a way of protecting others within an organisation; it can therefore be said that whistle blowers act altruistically for the benefit of others (Miceli and Near 1992: 36; Camerer 1996: 48). This proactive behaviour is noted in Miceli and Near

(1988: 268) as being a form of pro-social behaviour, and is defined as being a positive social behaviour with the intent to benefit others, and in the process, rewards may be reciprocated. Whistle blowers can therefore be seen as acting altruistically as they blow the whistle for the benefit of others in an organisation; they are called to duty, and therefore called upon to act (Greenberg and Baron 2003: 408).

An act of disclosure is characterised by Hunt (1998: 529) as one that is focused on, 1) what information is disclosed; 2) who disclosed the information; and 3) to whom the disclosure is made to. Hunt further says that only when the organisational information is disclosed: only then does it become an ethical and moral action. Once the information relating to criminal or irregular conduct is exposed within the organisation, or when it becomes public knowledge, only then does the situation become a dilemma to the organisation. Not only do certain options and consequences need to be evaluated and assessed in relation to their outcomes; the nature of the way organisations behaves with regards to their organisational policies and procedures are also brought to light. The information is then on display and so are the employees who are involved and the organisation as a whole.

2.5. Individual and psychosocial characteristics that underlie the whistle blowing process

A theory of moral reasoning is posed by Near and Miceli (1985: 12) who suggest that moral reasoning is essential for an individual's ethical inclinations to blow the whistle. Dozier and Miceli (1985: 825) says that in relation to this ethical inclination, whistle blowers are unselfish members of an organisation and have greater moral reasoning capabilities, and are therefore able to resist organisational retaliation.

Near and Miceli (1985: 12) as well as Arnold and Ponemon (1991: 119) are of the opinion that whistle blowing judgment and moral reasoning processes underlie all ethical behaviour and action, and Rest (1986: 77-79) explains their views in the following way:

1. Whistle blowers feel sensitive towards certain situations which involve ethical actions and choices;
2. Whistle blowers reason differently in that they choose the single best option, the most ethical action;
3. Whistle blowers follow through with their initial intentions of blowing the whistle and thus demonstrate perseverance and the ability to follow through when making an ethical decision;

4. Whistle blowers display loyalty and trust in their ethical decision and therefore expect a positive outcome;
5. All of the above outline the nature of the responsibility that the whistle blower feels when all these characteristics connect.

Thompson (1992: 981) endorses the above traits, by referring to literature in the psychological realm which demonstrates that the above components form a realistic tool for incorporating the complicated process of ethical behaviour and action into the individual personality.

An individual who does not possess the traits as mentioned above does not possess ethical sensitivity and therefore would find it problematic to differentiate between ethical and unethical behaviour. Brabeck, cited in Near and Miceli (1985: 59), believes that the most significant trait that whistle blowers can possess is perseverance. Perseverance allows and aids whistle blowers to follow through with their ethical decision and to see it through to the end, no matter how difficult it may get. According to Uys and Senekal (2005: 9), whistle blowers become even more determined and insist even harder when a form of unethical behaviour is brought to light. They lose trust in their organisation because it has allowed such unethical behaviour, and therefore no longer recognise the organisation as an authoritative figure (Davis 1989: 8). There are however some instances where the whistle blower has no choice but to forgo the disclosure and continue as if the unacceptable behaviour did not occur due to some form of pressure within the organisation, and therefore would find it difficult to keep functioning effectively in the organisation (Miliken, Morrison and Hewlin 2003: 1454).

2.6. The whistle blowing process

If members of an organisation are concerned about irregular conduct within their organisation they essentially have the following options, 1) to stay silent; 2) to blow the whistle internally, within the organisation; or 3) to blow the whistle externally, either to the authorities outside of the organisation or to the media or possibly to both (Ponemon 1994: 125). Whistle blowers may also experience an internal dilemma of having loyalty towards their organisation, fear of being victimised for raising the concern, or having conflicting personal moral beliefs which conflict with that of the organisation (Camerer 1996: 2). According to Dehn and Borrie (2001: 2), the potential whistle blower needs to believe that the wrongdoing will be addressed, or it might seem better to remain silent. In addition, Milliken et al. (2003: 1541)

states that the potential whistle blower may opt to remain silent due to fear for those higher up on the ladder of influence within the organisation. Alternatively, if the organisation creates a culture of openness and transparency, a culture of disclosure, then the potential whistle blower may feel more at ease to raise the concern. If the concern is raised internally, this gives the manager an opportunity to deal with the matter internally, avoiding any public damage; this act of disclosure might then be encouraged (Barnett 1992: 950).

An example of effective internal whistle blowing is that of Cynthia Cooper, who was mentioned in Chapter 2 and who was voted as one of Time Magazine's Persons of the Year (Near et al. 2004: 219). She had taken the internal route of raising her concerns about possible fraud within her organisation. She informed the board of director's audit committee and the board reacted by firing the officer concerned and disclosed the concern to the public. Cooper thus reiterated in an interview that the only way to disclose information is to do so within an organisation, that is, to follow the route of internal disclosure (Near et al. 2004: 219).

The other alternative to blowing the whistle internally within the organisation is blowing the whistle externally, e.g. to the media. Most whistle blowers are met with criticism and retaliation when this is done, although not all reactions are equally severe. Dworkin and Baucus (1998: 1286-1287) confirm this view and state that whistle blowers that disclose externally are inclined to experience more severe retaliation than those who opt for the internal resources to blow the whistle. Dworkin and Baucus further explain that external whistle blowers are seen as being disloyal members of an organisation as they choose to disclose information outside of the organisation. It must not be assumed that internal whistle blowers do not face the same or similar negative consequences to that of external whistle blowers; the difference here is merely that it does not happen as often.

Blowing the whistle externally generally causes more damage to the organisation, which is why retaliation is often more severe. It is also often suspected, sometimes perhaps rightly, that those who blow the whistle externally have personal reasons for wishing to harm the organisation. This raises questions about the motives of whistle blowers.

2.7. Motivations for whistle blowing

One perspective on whistle blowers is that they are altruistic. Altruistic concerns point to the virtue of unselfish concern for the wellbeing of others, says Holtzhausen (2012: 14). The

altruistic reason for whistle blowing is the need and desire to correct the wrongdoing which is bringing harm to the interests of the organisation, consumers, colleagues, or the society as a whole (Holtzhausen, 2012: 26). Another perspective is the motivational and psychological viewpoint as discussed briefly in 2.2.7. above. It is difficult to prove that only altruistic motivations lead to whistle blowing as the act of whistle blowing may result in some form of benefit for the whistle blower. The benefit may come in the form of monetary reward of which the whistle blower may or may not have been aware. The PDA makes provision for this unknowing act. Some organisations sometimes offer a reward in exchange for information about wrongdoing in the organisation (Holtzhausen 2012: 27). An individual whistle blower may also receive benefits, either knowingly or unknowingly, from an outside individual or organisation that offers the reward as a form of appreciation for reporting misconduct. On the other hand, the whistle blower may be guided by personal motives and vendettas such as revenge against an individual, a group of individuals, or an organisation.

Organisational commitment and cognitive moral development are two other motivations for whistle blowing put forward by Mathews (1987: 1). An employee builds a relationship which is based on loyalty. This loyalty is closely linked to their personal beliefs and own moral systems. When an employee is placed in a position whereby they have to question their own moral code as well as their organisational commitment, the employee will always choose to adhere to their own beliefs and disengage from any position which negatively impacts their beliefs. Mathews further explains that findings cited in Miceli (2009: 277) indicated that men are more likely to report misconduct than women, and whistle blowing is more likely to occur when the observer of the wrongdoing holds a professional position. Miceli also found that the motivations for whistle blowers depend on the channels for reporting the misconduct, whether they exist or not (as per the PDA), and also what the perceived likelihood of retaliation might be. This paper, through its study, found that there is a theoretical relationship between whistle blowing and the two individual attributes of organisational commitment and cognitive moral development. It is argued here, that both these variables, independent of each other, will have a positive effect on the likelihood that an individual will report misconduct.

Kleinhempel (2011: 2) argued that whistle blowing went against loyalty to an organisation, with sayings like “don’t wash your dirty laundry in public” supporting this notion among the general public. Whistle blowing brought back memories of informers in countries with authoritarian episodes in their past, like Nazi Germany. The line separating unethical

individuals or informants and whistle blowers are thin and often blurry. The main distinction lies in the disclosure and what it entails and also the whistle blower's motivation. The question is whether hiding misconduct is ethically more adequate than its exposure, therefore evaluating the consequences of one's actions. Reporting any wrongdoing, mainly internally, provides an organisation with the possibility to take remedial steps or, at least, to diminish potential negative consequences (Kleinhempel 2011: 2).

Kleinhempel (2011: 2) explains that if the wrongdoing has actually happened and can be proved, and proved substantially, then the matter is relatively simple: the more relevant and truthful the deed, the more warranted the whistle blowing intensions. Duska (as cited in Lal 2013: 3) agrees with Kleinhempel (2011: 3) by saying that the purest motivation for whistle blowing is altruistic: the whistle blower reports a misconduct to remedy a wrongdoing, to avoid or repair the damage done to the organisation, its employees or customers, and, by extension, to society at large. This is selfless motivation, but whistle blowing can sometimes bring significant financial gain for individuals who blow the whistle. In the United States, for example, the False Claims Act provides monetary incentives for whistle blowers, which were expanded by the Dodd-Frank Act in 2011.

Though organisations themselves offer rewards to whistle blowers, not every motivation that is not altruistic is necessarily financial. Revenge or blackmail, the hope of a promotion or any other workplace-related benefit, and even the fear of losing one's job if a wrongdoing is disclosed externally and the organisation falls prey to a scandal, are also strong motivations for whistle blowers. Ultimately, every individual will need to make a careful assessment of the criteria mentioned above to make the right decision and evaluate its possible outcome. Most often, individuals choose to blow the whistle when organisations around them favour a culture of transparency, having and making use of open-door policies and procedures to protect whistle blowers. Research has shown that employees feel more inclined to report wrongdoings when they are pleased with their organisations and believe that management is fully committed to ethical values (Kleinhempel 2011: 3). Attitudes may change as a result of management's behaviour and according to personal standards, and are also shaped by external factors, such as local culture and beliefs. Some individuals require more support than others; some are driven by monetary incentives, as mentioned above, while others are more concerned with justice or decide to blow the whistle if they have a user-friendly, convenient tool to do so. The most common motivation not to report misconduct is a belief that the

organisation will fail to take any corrective measures and that details will not remain confidential, threatening whistle blowers' professional and personal lives.

Whistle blowing does not only entail an ethical dilemma, but also a question as to whether reporting a specific wrongdoing amounts to a betrayal or a benefit for the organisation and society. Blowing the whistle is much bigger than just the individual and the organisation, or even the legislation such as the PDA; it also affects the community at large. On the other hand, organisations are increasingly becoming more consciously aware that transparency and good business practices both provide sound competitive advantages and minimize public risks, and also their associated costs, either from ethical convictions, to gain an edge over competitors or to avert risks, corporate behaviour is changing and legislation such as the PDA is becoming more prominent and valuable. Business organisations are rolling out compliance programs with specific rules to protect whistle blowers from any form of retaliation (Ramofoko 2001: 1).

2.8. Consequences of whistle blowing

Since whistle blowing is frequently seen in a negative light, whistle blowers may experience great distress concerning the manner in which the organisation in which they are employed may react to the disclosure (Rothschild 1999: 110). The social act of whistle blowing involves an action that requires moral courage, says Rothschild. Individuals who take risks to honour their organisations and codes of ethics are the courageous ones. The risks to whistle blowers are endless: they include: humiliation, possible loss of job, disillusionment, isolation, assassination of character, and difficult working conditions all round (Holtzhausen 2012: 51). Blowing the whistle can be life changing. Holtzhausen identifies whistle blowing as an obligatory rather than a chosen act. From this point of view, whistle blowers find themselves in a position to either speak out or remain silent while having to live with what they know. Jonas says from an ethics of responsibility theory point of view, individuals have the responsibility to act in a way that is morally pleasing. This situation can be eased if adequate legal protection for whistle blowers is available. In South Africa the Protected Disclosures Act 26 of 2000 seeks to provide such protection.

2.9. Examples of whistle blowing cases in South Africa

Some of the most well-known South African cases to date are that of Harry Charlton, Mike Tshishonga, and Glen Chase, These cases are explained below.

2.9.1. Harry Charlton

Charlton was the chief financial officer in Parliament and was assigned the duty to inquire about the use of travel voucher by the members of Parliament, since concerns were raised in this regard (Dawes 2005: 1). Charlton's inquiry revealed that travel agents and members of Parliament had been abusing the travel vouchers to an amount estimated at R24 million, which resulted in the National Prosecuting Authority taking action (Dawes 2005: 1). Following this action, the organisation in question reacted by eventually dismissing Charlton on charges of misconduct for bureaucratic and governance indiscretions relating to the procurement of software and consulting services (Binikos 2006: 27). Charlton was then found guilty on 12 of the 15 disciplinary charges against him and was not allowed to appeal the decision but he had the option to engage the Conciliation, Mediation and Arbitration Committee (hereafter referred to as CCMA) (Adams 2006: 2). Charlton then filed a case in the Labour Court on the basis of the PDA. Charlton was of the opinion that he was dismissed unfairly because of the disclosure he had made (Daniels (2007:..5). Parliament had argued that the PDA does not apply to Charlton's matter as the disclosures concerning members of Parliament did not fall within the authority of the PDA. Numerous members of Parliament were fined and the Labour Court has dismissed Parliament's argument that the PDA did not apply to Charlton. Charlton was then able to obtain evidence that he blew the whistle on the travel voucher scam and Parliament was ordered to pay legal costs (SABC News 2007).

2.9.2. Mike Tshishonga

Mike Tshishonga was employed at the Department of Justice for 30 years and was the managing director of the Master's Office Business Unit who raised serious concerns about the former Justice Minister Penuell Maduna (Davids 2007: 1-4). Tshishonga's duty was to address any corruption in the liquidation industry. Tshishonga had alleged that Maduna had a dubious relationship with a private-sector liquidator which had led to advancing his personal interests (Davids 2007: 1-4). It was found that the Minister did not have the power to appoint liquidators. Following this, the Minister then appointed a subordinate of Mr Tshishonga's, without his knowledge, to supervise the appointment of liquidators in Pietermaritzburg. Former Minister Maduna then removed Mike Tshishonga as head of the unit and rejected any form of contact with him. Mike Tshishonga then took the matter to the Office of the Public Protector where nothing was done about the complaint. At this point he took the matter to the Auditor General. Once again, as in the case of the Public Protector, nothing was done.

Eventually, the Public Protector referred the matter of Tshishongas' poor treatment to the Commission of the Public Sector, and only after not being assisted once again, Mike Tshishonga arranged a press conference. After many proceedings in the Labour Court, the former Director General refused to reinstate Mr Tshishonga and as an alternative terminated his employment and offered him a settlement as agreed by both parties (Davids 2007: 1-4). The court eventually established that the disclosure made by Tshishonga to the media was reasonable, as this was his fifth disclosure he had made and that the correct procedures had been followed and all the requirements of the PDA had been complied with (Davids 2007: 1-4). The Department of Justice received negative publicity and was ordered to pay Tshishonga one year's salary as well as the legal costs.

2.9.3. Glen Chase

Diale and Holtzhausen (2005: 16) regard the case of Glen Chase as being one of the most cited ones on whistle blowing in South Africa. There is, however, an irony to this case in that instead of rectifying the injustices reported, the Northern Cape Provincial Government chose to shoot the messenger. Glen Chase had discovered abuse of the state's financial resources for doings unconnected to the tasks of government. Upon this discovery, Chase compiled a file with the information and handed it to the Special Investigative Unit (Scorpions). The allegations of misconduct made its way to the media and the MEC involved resigned, but Chase was suspended. Chase was charged with misconduct and eventually exonerated. In this case, apparently, the accuracy of the disclosure was not in dispute, but action was taken only against the whistle blower.

2.10. Brief overview of whistle blowing legislation around the world

Whistle blowing has become an issue of legislative discussion around the world. This subsection reviews a few representative cases from different countries. The South African Protected Disclosures Act, together with suggested amendments to it, is discussed in the following chapter.

2.10.1. British Law

The United Kingdom (hereafter referred to as UK) enacted its whistle blowing legislation (PIDA) on account of the well-publicised scandals and disasters that occurred in the 1980's and 1990's (Kaplan 2001: 39). The need to act in good faith and with reasonableness is a critical aspect of this legislation. Malan (2010: 58) says that the UK is possibly the country

that has had the most significant influence on the development of the South African legal framework and society. For years, South Africa was a British colony, and even though there are to date eleven official languages, English is the language which governs all business interactions and is especially used in the justice system (Smit and Von Eck 2010: 46).

There are three aspects of the PIDA that require consideration. Firstly, the legislation renders that duty of confidentiality invalid that an employee is deemed to owe an employer according to a specific contract of employment. In other words, an employer against whom a protected disclosure is made may not sue the employee for breach of contract; service contracts cannot be used to muzzle employees. Secondly, the Act protects disclosures of international issues. The PIDA has an international application: it applies also if the concerns raised relate to alleged improprieties committed outside of the UK's jurisdiction. Finally, it establishes an employee's right not to be subject to an occupational detriment for making a protected disclosure. Where detriment is suffered, the Act allows for full civil damages (Feldman 1993: 93). One of the advantages of the UK's legislation is that its provisions encourage employees to create their own procedures to blow the whistle and to respond to allegations of irregular or criminal conduct (Kaplan 2001: 39).

2.10.2. Australian Law

Within Australia the dilemmas regarding whistle blowing are diverse and the legal issues are problematic. Whistle blower protection became an issue around 20 years ago when investigations into corruption scandals became public knowledge and the whistle blowers faced difficulties on account of their activities. At that stage, if employees were to blow the whistle on their employers, under common law, a duty of trust was deemed to exist in the contractual employment relationship, therefore any employees who disclosed workplace information faced the risk of being sued by their employers (Malan 2010: 66). Thus it can be seen here that whistle blower legislation abroad also required strengthening. Since that time, all Australian states adopted some form of whistle blowing legislation or legislation to protect so-called public-interest disclosures (Malan 2010: 66).

2.10.3. American Law

The prevalent attitudes towards whistle blowers in the United States of America (hereafter referred to as the USA/US) are highly negative. Whistle blowers are often viewed as disloyal complainers rather than heroes (Kaplan 2001: 28). Most of the academic literature on whistle

blowing emanating from the US gives evidence that, regardless of Federal and State legislation that ought to offer protection, the whistle blower is left to secluded and unprotected (Feldman 1999: 94). From a theoretical standpoint, the US whistle-blowing laws are in place and provide support to the rest of the legislation within the US. In addition to the WPA, there is the Sarbanes-Oxley Act, which has the goal to correct the wrongdoings as efficiently as possible and to increase disclosure within organisations.

A unique feature of the US whistle blower protection Act (hereafter referred to as the WPA) is that whistle blowers are not required to make disclosures through any specific channel in order to benefit from the Act's protection. This can be compared to the PDA, where the protections which are available according to the Act take effect only if the correct channels, as prescribed in the PDA, are followed, , if not, then the protections do not apply. In the US, the balance between employer and employee protection is disturbed, for employees can make detrimental public disclosures without exploring internal channels. Nevertheless, the US encourages internal whistle blowing unless there is reasonable belief that the internal disclosure will be in vain (Rubinstein 2008: 638).

U.S. law prohibits employers from taking adverse action against employees who engage in whistle blowing activities. Federal law specifically protects those employees who blow the whistle on environmental, workplace safety, and securities laws violations. Federal whistle blower laws also prohibit retaliation against employees who participate in governmental or administrative investigations into potential workplace law violations, even if those employees did not initiate the complaint. The Occupational Health and Safety Act of 1970, for instance, protect workers from retaliation as a result of reporting or investigating health or safety violations in the workplace. Similar laws address specific industries or categories, such as commercial motor vehicle safety and environmental hazards.

The Sarbanes-Oxley Act of 2002 ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 work in conjunction with other laws to protect whistle blowers in all publicly traded companies. Employers at publicly traded companies are prohibited from taking adverse action against any employee in retaliation for that employee's initiating, testifying in, or assisting in any investigation or judicial or administrative action related to the employer's violation of the federal securities law. The SOX and Dodd-Frank whistle blower protections are particularly broad, encompassing adverse action taken even in minor part as a result of protected activity. Thus, even if an employee has committed a

serious offense, if that employee has also engaged in whistle blowing activity, he or she may be protected from adverse employment action.

In addition, many individual states have independent whistle blower statutes protecting employees of private companies. In New York, for example, both public and private employers are prohibited under state law from disciplining or taking vengeful action against any employee who has disclosed or threatened to disclose policies or practices that violate the law or that otherwise threaten public health or safety.

2.10.4. French Law

Under French law, employees cannot be sanctioned, dismissed or be subject to direct or indirect discriminatory measures (especially concerning salary, training, reclassification or appointment) for reporting in good faith suspected wrongdoing by their employer. French companies are not, however, obliged to adopt a written whistle blowing policy. Nevertheless, all whistle blowing procedures in France must comply with the principles set out by the CNIL (i.e., the French Data Protection Authority). These rules are primarily designed to protect employees from invasion of privacy, potential breaches of individual liberties, false denunciations and wrongful data management. Any form of retaliation taken against an employee who has used a whistle blowing mechanism in good faith is deemed to be null and void. By way of exception to this legal principle, an employee may face a disciplinary sanction and even incur criminal liability should he or she report a violation in bad faith or with malicious intent (Patel 2014).

2.10.5. German Law

There is no legislation relating specifically to whistle blower protection in Germany. The rights and duties of employees in this respect are determined by the general rules and obligations applicable to the employer-employee relationship. In short, employees must be loyal to their employer and protect the business. German labour courts have considered the validity of sanctions that employers have applied to employees who have raised concerns with third parties outside of the company (such as police and public authorities), either after raising or without trying to raise the issue with the employer first.

German courts have deemed terminations or sanctions based on whistle blowing actions as invalid in those cases where employees have tried to address illegal behaviour of a colleague or superior internally without success before informing third parties outside the company.

The courts have stated that any sanction violates the principle of protection against victimisation and retaliation, provided that the whistle blowing was justified. In such cases, dismissed employees must be re-employed.

The legislation in the whistle blowing area is still under development in Germany, since there are no clear legal regulations in place. As a result, there is still a lot of uncertainty as to which disclosures are protected (Patel 2014).

2.10.6. Hong Kong Law

In Hong Kong, no legislation specifically offers whistle blowers protection. To gain protection after having blown the whistle, an employee has to rely on other rights found in employment and anti-corruption legislation. For instance, under the Employment Ordinance, an employee who gives evidence in any proceedings regarding the enforcement of labour legislation, an industrial accident, or breach of work safety regulations, is protected from dismissal and discrimination. An employer who dismisses or discriminates against such a whistle blowing employee commits a criminal offence and is liable to pay a fine of HK\$100,000 and or compensation to the employee.

The Stock Exchange of Hong Kong Limited has amended its Corporate Governance Code to state that it is recommended best practice for all Hong Kong-listed companies to establish a whistle blowing policy, under which employees may raise concerns about possible unethical behaviour in confidence. This is not compulsory, but listed companies that fail to comply must explain non-compliance in their annual report (Patel 2014).

2.11. Conclusion

The Chapter 2 started out by providing definitions to ethical terms such as values and morality and then built on this knowledge to incorporate an understanding associated with whistle blowing, such as why it is an ethical issue to begin with. Various motivations have been discussed to place the whistle blower into a context in which they and their actions can be understood and readers can identify with their concerns. It is on the basis of understanding and identification that the whistle blowing process was then explained and further elaborated on by providing examples of whistle blowing within the South African context. South Africa has made great strides in the realm of whistle blowing by firstly building on its own social and political history, and, secondly, as by learning from countries worldwide. As mentioned

in the chapter, South Africa's whistle blowing legislation is mainly based on the United Kingdom's whistle blowing legislation, which has many positive features. As indicated in this chapter, many other debates about whistle blowing around the world has positively influenced the South African understanding, while also providing a means for evaluation and benchmarking. It is always of great importance to stay up to date with what the world at large is experiencing, more so to be able to learn from their possible mistakes, but also to learn from any challenges that may have been overcome. South Africa has made its fair share of mistakes, but it is better to learn from others who have had a longer track record of dealing with whistle blowing, and while South Africa is still considered to be a developing country, it has many more successes to accomplish in the future.



Chapter 3

Understanding the Protected Disclosures Act 26 of 2000

3.1. Introduction

Chapter 3 provides an explanation of The Protected Disclosures Act of South Africa. The PDA is explained in terms of its application within South Africa and the greater importance it has grown to have within the organisational sphere. Key terms such as what constitutes an employer, an employee, and also the nature of an employer-employee relationship is explained, and the way in which the PDA is applied in an organisational setting is discussed from a legal perspective. The PDA has certain amendments which seek to improve the practical application of the Act as well as administer certain remedies to situations and experiences under the Act. Recommendations of improvement and advancement are also discussed along with the protections that are provided under the Act. Because this Chapter can easily become confusing, careful attention has been placed on making the information as clear and as simple as possible.

The Protected Disclosures Act 26 of 2000 was passed in Parliament on 20 June 2000. The Bill was then signed by the president on 1 August 2000 and published in the Government Gazette on 7 August 2000 (Camerer 2000: 3). For ease of understanding and reference the full text of the PDA has been given as Appendix 1 herein.

The Act has not yet come into force and there is reluctance by the Office of the President to enact the legislation while not having the proper guidelines in place (Camerer 2000: 3). The effective implementation and infrastructure does not allow the Act to be efficient in its current form, thus amendments have been suggested to remedy some of the Act's shortcomings.

The PDA currently makes provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers or fellow employees, to provide for the protection of employees who make a disclosure which is protected in terms of the Act, and to provide for matters connected therewith (The Protected Disclosures Act 2000: 1). The South African law on whistle blowing encourages honest employees to raise their concerns and report wrongdoing within the workplace without fear of retaliation. From a corporate governance perspective, this law is used to promote safe, accountable and responsible work environments.

The South African law draws heavily on the United Kingdom's Public Interest Disclosure Act 1998, also known as PIDA. PIDA was introduced following a number of high-profile disasters and scandals in the United Kingdom which claimed hundreds of lives. The public inquiries which were established to expose the facts behind these tragedies repeatedly proved that such incidents could and should have been prevented. Employees who worked at the various organisations in question at the time had known about the dangers prior to any damage, but were too scared to go through with blowing the whistle (Camerer 2001: 4). Reasons for their hesitance were possibly that they had confided in the wrong people and that the concerns they had raised were not taken seriously. A similar situation occurred in South Africa (Lenasia) in 2001, where there was reasonable belief that the health and safety of employees were endangered. The factory deaths in Lenasia demonstrated the importance of reacting when the whistle is blown. Subsequent to the eleven factory workers' deaths, it came to light that the Department of Labour had received notice from concerned employees who had blown the whistle three months before about unsafe working conditions in the factory (Camerer 2000: 2). Employees were being locked up with gas bottles for up to sixteen hours, fire extinguishers were not in working order, and ventilation and an alarm system were lacking, all these constituted intolerable as well as illegal working conditions (Camerer 2000: 2). This is a prime example of an organisation that did not create and encourage a culture of disclosure. Unfortunately, this is fairly typical of organisations at large where workplace concerns are simply not addressed. Failure to address whistle blowing concerns could result in loss of life, as in the Lenasia case, as well as damage to reputation and financial losses. However, all of this could have been avoided had the concerns that were raised with the Department of Labour been taken seriously. This links directly to the amendments that are discussed later in this Chapter, according to which employers are deemed to have a greater responsibility to encourage whistle blowing within their organisation and address concerns that are raised accordingly. In order to facilitate the understanding of the Act, a few definitions have been given below; these, and others can also be found in Appendix 1, pages 1-3.

3.2. Definitions (part 1 in Appendix 1)

3.2.1. Disclosure

In the Act, unless the context otherwise indicates, "disclosure" means any release of information regarding any conduct of an employer, or an employee of that employer, made

by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following;

- (a) That a criminal offence has been committed is being committed or is likely to be committed;
- (b) That a person has failed is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- (c) That a miscarriage of justice has occurred is occurring or is likely to occur;
- (d) That the health or safety of an individual has been is being or is likely to be endangered;
- (e) That the environment has been is being or is likely to be damaged;
- (f) Unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- (g) that any matter referred to in paragraphs (a) to (f) above has been, is being or is likely to be deliberately concealed (The Protected Disclosures Act 2000: 2).

3.2.2. Employee

An employee is regarded 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; or any other person who in any manner assists in conducting the business of an employer (The Protected Disclosures Act 2000: 2).

3.2.3. Employer

An employer is anyone who (a) employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or (b) who permits any other person in any manner to assist in the carrying on or conducting of his or her or its business, including any person acting on behalf of or on the authority of such employer (The Protected Disclosures Act 2000: 2).

3.3. Objectives and application of Act (part 2 in Appendix 1: 3-4)

3.3.1. Objectives of the Act

The objectives of the Act are as follows:

- 1 (a) To protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;

(b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and

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

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

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

(a) Rationale to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or

(b) (i) purports to preclude the employee; or

(ii) Has the effect of discouraging the employee, from making a protected disclosure (The Protected Disclosures Act 2000: 3-4).



3.3.2. Application of the Act

The PDA was passed with a view to create a culture in which employees may disclose information on criminal and other irregular conduct in the workplace in a responsible manner, thus promoting the eradication of crime and misconduct in organs of state and private bodies (The Protected Disclosures Act 2000: 3-4). Each of the provisions was designed to ensure that the disclosure is protected and has certain requirements to be complied with. If a disclosure is made to a legal representative, for example, there are only a few requirements, but the requirements become more comprehensive as one moves up the ladder, with the most comprehensive requirements applying to making a general disclosure.

Camerer (2001: 5) quotes Richard Calland, Executive Chair of the Open Democracy Advice Centre (ODAC), as having said, "At the heart of the Act is the notion that prevention is better than cure. It strongly encourages whistle blowers to disclose first of all to their employer, in order that the employer should have the opportunity to remedy the wrongdoing. Potential whistle blowers need to know that they must first go through this door, where the test is that of good faith, rather than making a broader disclosure which would require higher tests."

When it comes to reporting wrongdoing, the Act does not favour the interest of the employees, but rather those of the employer. The Act is specifically structured in a way that best serves the interests of organisations that choose to be responsible and are held accountable. Only when internal channels have been exhausted or fail, are broader disclosures to external bodies protected, meaning that the disclosure must be made in accordance with the prescribed process as represented in the Act (Camerer 2001: 6).

If employers respond appropriately to the good faith concerns raised by their employees, the Act should be applied infrequently rather than recurrently. Ultimately, the law protects both employers and employees, by informing employees that it is acceptable to blow the whistle and putting procedures in place for them to do so. Employers thus receive early warning signs of potential problems in their organisations and can address them before they become public knowledge. An employee who raises legitimate concerns in an environment of trust to those able to address those concerns cannot be discriminated against for doing so in any way relating to his or her occupation.

The preamble to the Act (The Protected Disclosures Act 2000: 1) echoes its policy objectives and gives recognition to the fact that, 1) 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; 2) section 8 of the Bill of Rights provides application of rights in the Bill of Rights, taking into account the nature of the right and the nature of any duty imposed by the right; 3) 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 (Camerer 2000: 1).

Neither the South African common law nor the South African statutory law makes provision for procedures in terms of which employees may, without fear of retaliations, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector (Camerer 2000: 2). Every employer and employee should have a responsibility to disclose criminal and any other irregular conduct in the workplace and all employers have a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any retaliations as a result of such disclosure (Camerer 2000: 2). The main aim here is 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 retaliation as a result of disclosures (The Protected Disclosures Act 2000: 2).

At its core, the PDA contains a simple idea, that it is in the common interest of both the employer and the employee (responsible, potential whistle blower) to blow the whistle internally, within the organisation, rather than externally, to, for example, the media which could generate irreversible damage. Once a disclosure is made externally the stakes are greater for both the employer and the employee due to the damning nature of the media without concrete evidence. For the employer it may result in damaging publicity, whether reasonable or not. For the employee, it is much more likely that the employer will react negatively to the disclosure, with negative consequences for the employee and his or her future work prospects either within the current organisation or elsewhere.

3.4. Protected Disclosure to Employer (part 6 in Appendix 1)

A protected disclosure to an employer can be defined as follows, 1) any disclosure made in good faith; and (2) substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned.

The Act applies to employers and employees, but does not include the entire corporate family; for instance, directors who are not employees as well cannot claim protection under the Act. The Act defines the concept employer, while the South African labour statutes define the concept employee. According to the Camerer (2001: 3-4), the PDA should be extended beyond the employer/employee relationship in order to achieve the objectives of the Act.

3.5. Legislative shortcomings of The Protected Disclosures Act 26 of 2000

3.5.1. Only four spheres of protection

Martin (2010: 15) identifies four spheres of protection for whistle blowers, namely, (1) the public, (2) employees in the public/state and private sectors, (3) employees and identified other in all companies, and (4) employees in private and state-owned profit companies. The least protection is given to the public as these are not covered by the PDA. Members of the public are therefore discouraged from blowing the whistle. Due to the limited understanding that the legislation prescribes to the public, the lack of communication and understanding

inhibits the effective use of the law to the advantage of the public, and so in this case, the organisations are favoured. If the public were to be included, the public would then constitute the majority grouping as opposed to the employees in the public and private sectors, or the employees in the private and state owned profit companies combined. This inclusion of the public would mean anyone who lives in South Africa.

3.5.2. Does not constitute a single comprehensive legal framework

Another legislative gap of the PDA is that it does not comprise of a single comprehensive legal framework for whistle protection (Martin 2010: 75). The law has a limited understanding of what constitutes an employment relationship and thus the definition excludes consultants, agents, and independent contract workers. Further omissions are that of pensioners, volunteers, prospective employees and organisation pensioners (Martin 2010: 76). These groups of people who are excluded may certainly be aware of some wrongdoing or potential elements of risk within the organisations they deal with. The South African labour market increasingly makes use of contract workers, which are not protected by the PDA, and this undermines one of the objectives of the Act, namely the promotion of eradication of unlawful and irregular conduct within organisations (The Protected Disclosures Act 2000: 4). Only once the amendment for the addition of the word “worker” to be classified in the same category as an employee, only then will the objective be upheld. However, the pensioner and other regular members of the public will still not be covered by the PDA in its current form. The Auditor-General noted in the South African Law Reform Commission Report, as cited in Martin (2010: 15), that a valuable source of information is not the employees of an organisation but rather the independent contractors and the members of the general public who come into contact with the organisation.

3.5.3. Does not force organisations to have implementation mechanisms in place

The scope of the law fails the PDA as it does not require an obligation to include implementation mechanisms such as whistle blowing policies within the organisation or for the individuals employed outside of the employer-employee relationship, thus setting the organisation up for possible risk (Martin 2010: 15). There should be a mechanism in place to have all organisations develop whistle blowing policies (if they do not already have them) and then to implement that annual reports on the reports received be analysed both internally and perhaps externally to ensure transparency and responsible action be taken from the

outcomes of the report. Only if organisations are forced to, by law, implement and acknowledge whistle blowers and whistle blowing processes, only then can organisations be made liable to its actions within the organisation and also account for the image and reputation that is portrayed to the public. The public has a stake in organisations and this implementation will allow for transparency and ensure good governance as a general image and function of organisations.

3.6. Remedial Issues

3.6.1. All forms of remedy are court-based

In its current form, all forms of remedy in terms of the PDA are court-based and this weighs heavily on an already burdened criminal justice system (Martin 2010: 15). This allows for exploitation by organisations with financial influence that are able to delay the process of any concerns that are raised. Martin (2010: 15) suggests a solution for the PDA to require or permit any alternative dispute resolution mechanisms that may be able to relieve the stress on the court system.

3.6.2. Financial repercussions

Financial repercussions are also a concern under the PDA as it is informed by the LRA. The financial compensation is limited to the experience of the occupational detriment and not the full range of financially-related repercussions that may arise from making a disclosure. (Martin 2010: 15). This limitation does not allow for non-patrimonial forms of damage (i.e. things that cannot be related to financial aspects, such as traumatic stress), and the whistle blower thus falls short in this regard.

3.7. Recommendations for the current Protected Disclosures Act 26 of 2000

Martin (2010: 18) discusses the recommendations that have been suggested by The Open Democracy Centre and says that most will require new legislation and that there are factors within the existing law that require direct intervention. The recommendations are as follows:

3.7.1. Definition of employee

The South African Reform Commission has specifically proposed that the definition of what constitutes an employee be amended to include independent contractors and other workers of

this type, and to include all persons with knowledge about irregular conduct within an organisation so that they are able to disclose information should they deem necessary, with all the measures that protect the current component of employee.

3.7.2. Confidentiality of whistle blowers

A positive recommendation that has been suggested is that recipients of disclosures must protect the confidentiality of whistle blowers (Martin 2010: 18). In line with this provision, Martin reiterates the Public Service Commission's view that specific mechanisms such as the national Anti-Corruption Hotline must be improved to ensure that consideration for the potential whistle blower is taken into account, so that all potential whistle blowers can have confidence in the process, and that trust is reinstated to demonstrate that their disclosure will indeed be taken seriously.

3.7.3. Immunity from prosecution and damages

Further amendments include immunity from civil, criminal and administrative prosecution, and must not be limited, by reference, to the LRA. However, it may be necessary for the PDA to establish a dedicated adjudication body, with investigative and enforcement powers to overcome the cost barriers and therefore prevent the current abuse of judicial process by reluctant employers (Martin 2010: 18).

3.7.4. Adoption of whistle blowing policies and procedures in organisations

Martin (2010: 18) also notes that all organisations should have an obligation to adopt whistle blowing policies and procedures and to make these known internally within the organisation and externally to other organisations and entities. This ensures that all those involved have a clear understanding of all methods of interactions and the consequences thereof. Furthermore, this adoption allows for responsibility and accountability of actions to be taken by all parties involved.

3.7.5. Enhancement of monitoring efforts

In an effort to counteract the weakness of political will that exists in the PDA, Martin suggests enhancing the monitoring efforts in relation to the PDA. The PDA should require all organisations to annually submit reports on their policies, procedures, disclosures and the

responses thereto, as well as the statistics regarding the number and nature of any reprisal against whistle blowers (Martin 2010: 18). In addition to this, independent bodies responsible for the receipt of the disclosures are to provide advice to the public to promote awareness, knowledge use and implementation of whistle blowing laws.

3.7.6. Penalties for organisations

A negative provision that Martin (2010: 18) puts forward concern the penalties an organisation would incur should they not proactively encourage whistle blowing by, for example, publicising whistle blowing manuals. This ensures that the structure in which irregular conduct occurs provides enough support to inform the transgressor effectively and also allow for compliance tracking, monitoring, and reporting. A timeline of annual reporting of awareness efforts could also be initiated in relation to the penalties to ensure that this process is on-going and can allow for growth and development on the organisation's part to rethink strategies to combat unethical behaviour and also to deter future wrongdoing within organisations.

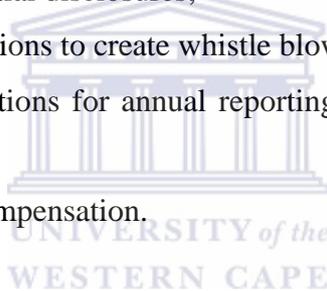
All these recommendations must filter through the dedicated monitoring bodies such as the Public Protector or the Auditor General. If one central place receives and is able to analyse the data for statistical purposes, the methods and modes of reporting would then be aligned and this too could be on an annual basis.

3.7.7. Seven point whistle blowing test

The seven point whistle blowing test that Martin (2010: 23), on behalf of the Open Democracy Centre, has created has been developed to be used to assess the South African whistle blowing environment. The seven steps are as follows:

1. A Code of Good Practice to be established which can provide guidance to private and public bodies on interpretations of the law, implementation of whistle blowing policies, and alternative mechanisms for preventing corruption;
2. A whistle blowing network of civil society organisations to be established to assist with the provision of advice and support; awareness-raising and parliamentary advocacy on whistle blowing issues;

3. Whistle blowers should actively be encouraged through financial incentives, the provision of security, and other alternative mechanisms aimed directly at the needs of the typical whistle blower;
4. The forums that exist for whistle blowers should be implemented effectively, which includes the agencies charged which deal with whistle blowers;
5. All new laws passed should support and encourage whistle blowers, rather than diminish any of their existing rights;
6. Whistle blowers are to be protected from civil, criminal and administrative liability for legitimate public interest disclosures;
7. The PDA is to be amended for maximum benefit by among others;
 - a. Extending protection to independent contractors and former employees;
 - b. Extending the number of agencies to whom a protected disclosure can be made to the maximum possible;
 - c. Allowing for confidential disclosures;
 - d. Create positive obligations to create whistle blowing policies; and
 - e. Create positive obligations for annual reporting on policies and actions taken in terms of policies;
 - f. Lifting the limit on compensation.



3.8. Amendments to the Protected Disclosures Act 26 of 2000 as suggested by the South African Law Reform Commission and the Open Democracy Centre

In addition to the recommendations, the following amendments are to be considered:

3.8.1. Addition of the word “worker” and extension of “occupational detriment”

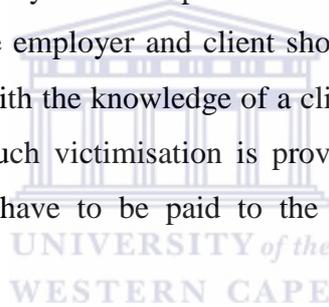
The addition of the word “worker” is to ensure that independent contractors, consultants, agents and persons working for the State, will also be entitled to exercise certain remedies if they are subjected to any occupational detriment as a result of having made protected disclosures. In this regard, an extension to the definition of “occupational detriment” to include an employee or worker being subjected to any civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement stemming from the disclosure of a criminal offence (Pattle and Wilkinson 2014: 1).

3.8.2. Civil and criminal liability

The Bill further proposes that civil and criminal liability be excluded for disclosing information that would expose criminal activity in the hope that this would facilitate and encourage disclosure. However, it must be noted that, in terms of the amendments, should employees knowingly or believing the information not to be true, disclose false information they will be guilty of an offence and on conviction will be liable to a fine or to imprisonment for a period not exceeding two years or both (Pattle and Wilkinson 2014: 1).

3.8.3. Responsibility of employers

The next amendment inserts a duty or obligation on employers to set up appropriate (internal) procedures for dealing with disclosures and to inform all employees and workers of such procedures, as well as conducting investigations should a protected disclosure be made. With regard to victimisation of an employee for the protected disclosure, this amendment aims to impose joint liability on both the employer and client should the employer have acted with express or implied authority or with the knowledge of a client by subjecting the employee or worker to victimisation. Once such victimisation is proved, the amendment provides that compensation or damages will have to be paid to the employee or worker (Pattle and Wilkinson 2014: 1).



3.8.4. Disclosure of information

Perhaps the most important amendment to the PDA is to improve disclosure of information by making it the responsibility (and therefore enacting joint responsibility) of every employee, worker and employer to disclose information without the fear of retaliation, should a disclosure relate to suspected or alleged criminal or other irregular conduct to prevent the irregular or unlawful conduct (Pattle and Wilkinson 2014: 1).

Every employer must authorise appropriate internal procedures for receiving and responding with information about improprieties and take reasonable steps to bring the internal procedures to the attention of every employee and worker.

3.9. Protections under the Protected Disclosures Act 26 of 2000

In its current form, the PDA makes provision for procedures to allow and assist employees in both the public and private sector to raise their concerns about the unlawful or irregular

conduct of employers or co-workers. Various types of information disclosure are noted in the Act, including suspicion of criminal offences, failure to comply with legal obligations and "a reasonable belief that the health or safety of an individual has been, is being or is likely to be, endangered" (The Protected Disclosures Act 2000: 2).

In terms of the Act and its amendments, every employer and employee is now regarded as having a responsibility to address crime and any other irregular or unethical conduct in the workplace. The employer must take all the necessary steps to ensure that employees who disclose such information are protected from retaliations as a result of having made disclosures. Employees making a protected disclosure in terms of the specified procedures are protected from occupational detriment. This might include being subjected to disciplinary action, dismissal, suspension, demotion, harassment, intimidation, being transferred against his or her will, being refused a transfer or promotion, or otherwise poorly affected in respect of his or her employment, profession or office, including employment opportunities and job stability. The Act forbids an employer from subjecting an employee to occupational detriment on account of having made a protected disclosure. Should occupational detriment occur and be found to have been linked to the making of a protected disclosure, the whistle blower would be protected and the employer would not be allowed to dismiss or prejudice the employee for having raised legitimate concerns. This, in summary, is how the law protects whistle blowers (Pattle and Wilkinson 2014: 1).

The Act does not deal with the way unethical behaviour must be remedied or prosecuted. The Act assumes that the whistle blower has not been involved in any unethical behaviour, as it does not provide immunity for him or her against persons other than the employer (Pattle and Wilkinson 2014: 1). The relationship between the whistle blower and a co-employee is not the principal focus of the Act; however, the provisions relating to transfers may provide some protection from the antagonism of a co-employee who has been implicated.

In terms of section 3 (The Protected Disclosures Act 2000: 5) of the PDA, no employee may be subjected to any occupational detriment by his or her employer on account of, or partly on account of, having made a protected disclosure. Therefore, an employee will only be afforded protection in terms of the Act if he or she has made a protected disclosure to either a legal adviser, an employer, a member of cabinet or of the executive council of a province, the Public Protector, the Auditor-General, or a person or body prescribed for the purposes of the

Act. Importantly, the employee will not be protected by the provisions of the Act where he or she is committing an offence by making the disclosure.

The type of information disclosed relates to what is meant by criminal and irregular conduct in terms of disclosing wrongdoing and may be a criminal offence, failure to comply with a legal obligation, miscarriage of justice, endangerment to the health and safety of an individual, damage to the environment, unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (Act 4 of 2000), or the deliberate suppression of any of these matters. The disclosure must be made in good faith and the employee making the disclosure must have a reasonable belief that the information disclosed and any allegation contained in it is substantially true.

Any disclosure made for personal gain (excluding any reward payable in terms of any law) is not protected by the Act. Sections 3 and 4 of the Act (The Protected Disclosures Act 2000: 5-6) set out the protective measures upon which an employee who has made a protected disclosure may depend on. An employee may approach any court or tribunal that has jurisdiction or may pursue any other process allowed or prescribed by law in order to protect him or her from suffering any occupational detriment in contravention of section 3 of the Act.

Any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected as a result of having made that disclosure, may also request to be transferred to another post or position in the same division or to another division (Pattle and Wilkinson 2014: 1). The employer must be guarded in transferring the employee, as the Act specifies that the terms and conditions of employment may not, without the written consent of the employee, be less favourable than the terms and conditions pertinent to him or her directly before his or her transfer. While the Portfolio Committee of Parliament, when drafting the Protected Disclosures Act, considered the creation of new offences to be appropriate, the Act has not provided for penalties either in the case of an employer who does not protect whistle blowers, or in the case of whistle blowers who make a disclosure which is not protected (Pattle and Wilkinson 2014: 1). In this regard, the Committee decided that the matter needed further research and consideration, since such a provision may impact on existing laws, policies and practices regulating the employer-employee relationship.

Amendments may also be added to the existing legislation of penalties where an employer unlawfully subjects an employee to an occupational detriment, or where an employee makes a false disclosure. The Act is restricted to the relationship between employer and employee in

both the public and private spheres; it would not provide protection to an independent contractor or consultant for example.

Those whistle blowers who plan to use the provisions of the Act to disguise their own involvement in criminal activities will not find protection in this legislation (Pattle and Wilkinson 2014: 1). Where a law has been breached, the Act will not protect the employee from criminal prosecution, civil liability to third parties, or prosecution for offences. Any contract between an employer and an employee that implicates to exclude any provisions of the Act will be deemed invalid.

Employers will need to familiarise themselves with the provisions of the Act and ensure that they are fulfilling their responsibilities in creating an environment where irregular activities can be exposed without fear of retaliation against the whistle blower. It is imperative that all organisations set up the necessary internal procedures to empower the employee to make a protected disclosure. The question is whether more should not be done if the Act is to achieve its goal.



3.10. Conclusion

At the beginning of the Chapter the main aim was to provide tools to assist in the understanding of the PDA. Definitions were discussed, as well as the legislative frameworks that underpinned the Act (particularly the Labour relations Act). Remedial issues and the provisions for protection and redress were discussed with reference to the Act and other relevant legislation.

When criticism and proposed amendments were discussed, it became clear that the PDA is not universally supported even within the legal community. Many believe that the PDA will have far more positive consequences should the suggested amendments be accepted. Some shortcomings will be fairly easy to correct. At present the PDA protects whistle blowers only against “professional detriment”, but it can be changed to include other forms of victimisation as well. It should also be relatively simple to establish a special tribunal, so that whistle blowers need not follow the expensive route through the courts when they seek redress.

Other objections to the Act involve ethical issues far more directly. Not only the broader public but even outside contractors and their employees are left with virtually no protection. This creates the impression that blowing the whistle is (under some circumstances) one of the

rights of employees and not the duty of all responsible citizens. The impression is strengthened when it is seen that the PDA tends to favour the interests of organisations over those of employees – not to mention the public. Does the Act effectively serve the public interest?

The PDA provides some protection to whistle blowers and means of redress if they suffer reprisals. These come into play once the whistle has been blown, that is, once an abuse has been exposed. Because no obligation is placed on organisations to be pro-active by drafting internal rules and procedures to deal with disclosures, the impression is again created that the PDA does little to *avoid* abuses or to foster transparency accountability. Workers who are in a position to blow the whistle may well be left in ignorance of what their rights are and may therefore decide to remain silent.

The PDA recognises in its preamble 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.” Afterwards, in the actual stipulations, it does little to promote “good, effective, accountable and transparent governance in organs of state and open and good corporate governance in private bodies” – the positive side of the coin. A collective effort from all legislative bodies, governmental organisations, private entities *and the general public* is needed in order for the full effect of the utopian idea behind the PDA to be realised. The amendments suggested have shown that there has been growth and development in thinking about the matter. This thinking now needs to be enacted. Though this may entail a lengthy process, it will be of great benefit and value to all in the end.

What was called for in the previous paragraph is *responsible* action from everyone, not excluding the general public. As the paragraph also suggests, responsible action looks towards the future effects of current actions. In the context of an increasingly complex and technologically driven society, taking responsibility is not an easy matter. A call for responsible action is also a call for a better understanding of what responsibility entails in our world. Hans Jonas has provided a theory of responsibility that takes into account the conditions of our modern world, therefore the next chapter will examine his contribution.

Chapter 4

Hans Jonas's perspective of responsibility in relation to the PDA

4.1. Introduction

In the previous chapter, the PDA was outlined, explained and discussed. In this chapter, a clear understanding is provided of what Hans Jonas perceives ethical responsibility to be. Jonas begins by first defining responsibility, and all its dimensions, and then relating and linking it to the nature of ethics to provide a clear understanding of what it means to enact one's actions ethically in the world. To build on the PDA's understanding, as discussed in the previous Chapter, Jonas's ethics of responsibility is discussed with cross reference to the PDA. In order to understand the thinking of Hans Jonas, a brief history is given below.

4.2. Hans Jonas: A brief history

Hans Jonas was a German-American philosopher who influenced 20th century philosophy with a specific interest in bioethics and political science religion. Jonas left his birth home of Germany and moved to England and then to Palestine. While in Palestine he met Lore Weiner which he later married in 1943. In 1940, Jonas had returned to Europe in to Europe to join the British Army. He was sent to Italy and moved to Germany during the last phase of the war. After the war had ended, he searched for his mother and found out that she had been sent to the gas chambers in the Auschwitz concentration camp. After Jonas had discovered this he did not want to live in Germany any longer and returned to Palestine and took part in Israel's war of independence in 1948. Jonas then taught and worked at the Hebrew University of Jerusalem and then moved to Canada to teach at the Carleton University. Jonas then set his sights on New York City and moved in 1955. He was educated and influenced by the teachings of Edmund Husserl, Martin Heidegger, and Rudolf Bultmann. From these teachings stemmed a passion for philosophy, and thus Jonas began teaching at the New School for Social Research, New York City, where he taught for many years. Jonas later worked with the Hastings Center in New York where his main area of interest were issues relating to biomedical ethics, especially those of death and dying. One of Jonas's later works, "The Phenomenon of Life: Toward a Philosophical Biology", was the conclusion of his philosophy on life and living beings. In his last public lecture, Jonas put emphasis on responsibility and said that there can be no end to rethinking responsibility, but merely a new construct which is created. Jonas insisted that human beings could only exist if efforts to care to the future were

adopted today (Achtman 2014: 3). Jonas held the visiting Professorship at the University of Munich from 1982 to 1983.

With the death of Jonas on February 5, 1993, three months prior to his ninetieth birthday, the philosophical community lost one of its foremost ethicists. Throughout numerous publications since the 1970's, his mission was to develop new arguments for the notion of a new ethics, and in his prominent book, "The Imperative of Responsibility", Jonas conveyed the teaching that human beings must develop a new sense of collective responsibility for the generations still unborn, and echoes Kant's view which states, "Act in such a way that the effects of your actions remain compatible with the permanence of authentic human life on earth" (Jonas 1984: 10). To state this more simply, this interpretation bears directly on Jonas's view on responsibility and the use people make thereof: Jonas's view on responsibility provides a greater understanding of this core belief that we are bound to act in the interest of the future of humanity and not only from present concerns.

4.3. New dimensions of responsibility

4.3.1. Why responsibility was not central in former ethical theory: a theory of responsibility

According to Jonas, the well-being and existence of human beings can be defined in three concepts, namely, totality, continuity, and future (Jonas 1984: 101). Jonas explains that responsibility is total, it consists of every aspect of life, it is continuous, it is comprehensive in space and time, and it not only touches the present but also the future. For instance, caring for the planet holds responsibilities which lie in the hands of all human beings. The nature of caring includes caring for all living creatures, the air we breathe, the water we drink, and making sure that the sustainability thereof are of the utmost importance for future generations. This is the only planet we have, the only creatures, the only air, land and space; therefore, it is here, at the present time, where conscious effort and awareness is needed to actively conserve on a daily basis in order that all that is today is still in existence in the future. The notion of extinction here can also be explained in terms of the responsibility we as human beings have in our lifetime to build and leave a meaningful legacy behind for those generations to come. History and all its remnants came about as a result of other people wanting to better the lives of those in the future so that they do not face the same circumstances and lead the same lives. Apartheid is an example of this, where people lost their lives fighting for the freedom and equality so that we today are able to have full

enjoyment of all public spaces, where there is no segregation of spaces as was experienced during the Apartheid era. Active conservations and preservation of our laws and legislation is also an aspect that we as human beings need to consider now for the future; what we do and accept now will have an impact on the generations to come. What is accepted now will set precedents for future actions to be taken. The amendments to the PDA were proposed in order to expand its reach to more people in South Africa, so that all the effects and protections of the PDA could be applied to all people, regardless of whether they fall within a specific definition or not. All human beings need to think of themselves as one day being parents to those still to come. All parents want the best for their children and would do anything to protect them and provide the best care that they can offer. Parents also prepare for their children's future by setting up bank accounts for schooling and possibly tertiary education. When this is applied to the PDA, the PDA is our chance as future parents to future generations to lay the foundation and set the correct precedents for our "children" to ultimately thrive and live the best possible lives, knowing that the our society and laws have been altered to assist in the protection of all human beings who want to live and act in accordance with the correct moral values and belief systems to the benefit of all within a community.

Jonas (1984: 100) explains that parental responsibility as well as political responsibility is total. For instance, a child is seen as being a total responsibility. A child has to be looked after in the full sense (fed, clothed, loved, sheltered) from birth, this too includes education relating to character, knowledge, and conduct which have to be motivated and encouraged to guide their development throughout their young life. Jonas (1984: 100) explains that parental care is having a pure being as such and then seeking to provide the best care for the child. In this sense, the child then too embodies what Jonas explains as being totality, continuous, and future. A child is raised by their parents; therefore their parents have a responsibility towards them. This care is continuous throughout the child's life and through the parents rearing and motivating their child, so too is the child then able to learn and understand how to care for their own child one day, thus this is also seen as being future orientated. It is not only concerned with the present, but the future existence as well. The future orientated approach in relation to the child has no limitations.

According to Williams (1985 77), the parental rights that parents have towards their children are their own rights to their own children and it is not the children's duty to give these rights back. This therefore reiterates what Jonas explains above, that the children and parents indeed

do have a non-reciprocal relationship. The parent looks after the child; the child does not look after the parent. If this notion is looked at from a societal point of view and keeping in mind the relations implied by ethical responsibility, there are certain instances within society where parents and their children develop such incredible bonds of love that the children do indeed feel as if they have a responsibility to their parents. This responsibility stems from a moral stance and implants responsibility in the children in a way that they too feel that they are responsible for their parents just as their parents were responsible for them. When the children are of an adult age and are able to give back to their parents in whatever forms this may in their case, this is seen as then being a reciprocal relationship. This type of responsible relationship then assumes the forms of a culture within the society and reinforces the bonds and responsibility within the society. Human beings learn how to be responsible through their schooling and religious affiliations, but most importantly from their parents. It could be argued that this is the reason why children feel responsible towards the first beings who taught them responsibility, their parents. This could also be seen as being the natural order of things. Therefore, in relation to whistle blowing and the PDA, this could be an addition to Jonas's views on a sense of responsibility. The responsibility is taught at home and then flows into the community as well as the workplace.

In addition to this, Jonas says that responsibility is the archetype of all responsibility. This original form of responsibility, as Jonas (1984: 100) explains, means that human beings alone are able to have responsibility in its totality, continuity, and future orientation as explained above, as opposed to other creatures; this therefore implies that humans have responsibility for others, who are also possible vessels of responsibility for the future. The child in the example above is the vessel of responsibility in this instance. Human beings also use the ability to have predictive knowledge, i.e. the ability to foresee and weigh possible outcomes of behaviour within certain situations, and it is: this knowledge which nourishes a human beings power to act, and thus itself assumes ethical importance (Jonas 1984: 8). This power to act needs to be recognised as being important and to ensure that acting does not merely mean acting out behaviour, but that the behaviour has meaning and is portrayed in a good manner.

The opening which exists between the ability to act and the knowledge which precedes it does however create an unusual moral problem. An individual possesses knowledge which informs thinking and decision making; this is what leads an individual to making an informed decision; having all the knowledge at their disposal and then making the decision to act.

Jonas explains that the action performed is much greater than the knowledge which facilitated the individual to act in the first place (Jonas 1984: 101). An individual may have all the knowledge concerning a particular situation, and at times, the decision is not a straightforward good or bad one, and even though the thought process may lead the individual to think it is a bad idea, the individual still follows through with the action. Therefore, the decision is made whether it may be a good or bad choice, and even though it is seen to be a bad one, the action is still carried out. The power to act overwhelms the ethical considerations. That human have the power to act is more important from an ethical point of view than human knowledge by itself.

A teenager for instance, has the power to act. The behaviour that is carried out is not always the correct choice, but nonetheless, the behaviour is still carried out. At this stage of a teenager's life span the ethical importance is almost non-existent and needs to be taught to them by their parents and other potential role models. This ties in with the totality, continuity, and future as explained above. Ethical thinking and the importance thereof is total, which means that the positive and negative of a situation would be evaluated. The continuity means it never ends and is a constant process of evaluation. The future aspect means that the teenager must not only be taught to think of themselves, but also to think of themselves in relation to others and how their actions might affect others.

For instance, a family goes on holiday. Prior to the trip certain foods are bought according to the family's preference, and special foods are bought for those who practice the Muslim faith. Those of the Muslim faith only eat food if it is prepared in a manner where the food is prayed over, thus blessing the food; the food is then known to be halaal and should not come into contact with non-halaal food. On one of the mornings while making breakfast, the food that is halaal is prepared using the same pan that the non-halaal food was prepared in, therefore the food is no longer seen to be halaal, and the food was passed off as if it were prepared according to the family member's specifications. The person preparing the food had the option of informing the family member that certain foods were not halaal, but chose to remain silent. The knowledge and ethics did not govern the action and thus the action was neither ethical nor responsible. The family member had entrusted the preparation of the food in another family member's hands and was unaware of the consequences as an option of making an informed decision about eating the non-halaal food was not given. Thus the power to act was greater than the ethics that should govern an action to be taken. The action of the family member who had prepared the food overpowered the right thing to do. The

consequences were considered and the choice was made not to inform the family member that the food was not halaal. It was the ethical responsibility of the family member to inform the Muslim family member in order for the individual to make an informed, ethically responsible decision.

In addition to this, Jonas (1984: 122) explains that responsibility is a function of power and knowledge. Jonas says that both power and knowledge were previously so limited that most had to be left to chance and the natural order of the way things were, with all the attention focused on doing right. Jonas (1984: 23) says that the right action is best guaranteed by the right being, and likewise, the best constitution is one which is based on virtue, are which promotes virtuous citizens in the process. This will in turn assist in the development of a utopia where individuals trust and respect one another, and will also extend to a space where advice will be sought after, and when in the company of exceptional people of the highest calibre and virtues, others too aspire and become inspired to become better people and therefore better citizens.

In relation to the PDA, the virtuous citizen is not taken into account; only the influence of power with an organisation and the legal point of views are considered. The remedies that are mentioned are superficial in that they do not cater for the public, the citizens, but only for the employee and employer as these are governed by the LRA and other organisational legislation. The first objective of the PDA is as follows, “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” (The Protected Disclosures Act 2000: 3). The PDA only makes accommodation for the “disclosure of information by employees relating to criminal and other irregular conduct in the workplace” according to the Protected Disclosures Act (2000, p.1), and does not cater for the citizens. Therefore, there are no other laws and legislation that could protect or impose any legal statutes on a citizen acting in an unethical or illegal manner. Therefore, this would not be assisting in the creation of virtuous citizens if the citizens do not fall within the ambit of the law, and therefore does not ensure, as stated in the Protected Disclosures Act (2000: 1), that the rights of all people in the Republic are recognised and affirmed.

In relation to whistle blowing, Jonas believed that the main impulse which drives whistle blowers is their sense of responsibility (Jonas 1984: 13-14). Jonas understands responsibility to be not only an emotional aspect but also that human beings feel responsibility because of

this emotion and therefore believe it to be necessary for morality. This interaction of human beings in relation to morality is also related to goals, but it cannot be related to your own goals alone but rather to those of the other. Jonas further says that emotions are crucial for morality, but that reason and the ability to make an informed decision have a far more important role to play (Jonas 1984: 15). Reason aids in the understanding of whether a situation is perceived to be either good or bad, whereas emotions are psychologically important as it moves the will into the direction of a duty and an action. Emotions weigh the action to be important, whereas the ethical importance of an action is important for Jonas. The reasoning behind the action, the questions such as who, what, when, where, and how, are of great importance and so is the evaluation thereof- whether it is good or bad, right or wrong.

Duty assumes that individuals are moral beings because our will can effect action apart from our own vital interests, but rather to acting in the interests of others if a sense of moral responsibility, as Jonas defines it above, is felt. Jonas suggests that this holds true for whistle blowers; for the reason that whistle blowers hear a call from some being that is in distress that surpasses the indifferent freedom characteristic of human reason (Jonas 1984: 16). What matters for whistle blowers is not their own will but rather the will of others, and it is not law and duty that encourage fear in whistle blowers, but rather the situation and the feeling that they might not be able to protect another individual as they feel they should. Whistle blowers thus understand such situations in a way that law does not and it could be argued that they have developed a very specific kind of responsibility; what Jonas calls a moral sense of responsibility.

If the amendments to the PDA, as discussed in Chapter 3 are accepted, society at large will be included and would be afforded the same rights as an employee should any member of the public make a protected disclosure. This is one factor which was overlooked in the initial drafting of the Act: the communities where organisations operate have a view, as well as active citizens in the world, and therefore need to be included, treated fairly, and included in decision making. This growth and development of understanding is focused on the consideration of other people (the other) and those who blow the whistle often feel that other people are in some form of danger, and act in a way which is seen to provide protection, in some form, to those involved.

The Lenasia case, as discussed in Chapter 3, is a good example where employees felt a responsibility to their fellow employees and had written to the Department of Labour regarding the extreme work conditions their fellow employees were enduring. From this example it can be seen that this sense of responsibility that Jonas highlights is something that is not there for the individual alone but is in essence shared, and thus he argues for the need of having a collective sense of responsibility, also known as joint responsibility. This joint responsibility is a key feature in the amendments to the PDA where the employer is called to take on more responsibility, not only for the employee but also for the internal whistle blowing policies and procedures and the compliance thereof.

In addition to this, Jonas explains that power and rules are needed to make this collective sense of responsibility effective in the world, and that everything in the world has only one purpose, it wants to be there (Jonas 1984: 90). The rule aspect that is spoken of takes the form of laws and policies in organisations and the communities alike, and the power are the directors, managers, supervisors, community leaders, and any individual or body that has significant power over another within the workplace or society. Therefore, buy-in is needed from all persons in senior positions in order for rules to be implemented effectively within society as a whole. For Jonas, rules are not entirely bad if they serve to broaden our sense of moral responsibility (Jonas 1984: 13). This moral responsibility can only be enacted if the terms relating to these are understood. Jonas makes reference to key terms which relate to responsibility, these are discussed in the following sections.

4.3.2. Key terms relating to responsibility

Causal power is the first key term that Jonas makes reference to. Jonas states that, 1) action makes an impact on the world; 2) that such action is under the agent's control; and lastly, 3) that the agent is able to foresee the consequences to some extent (Jonas 1984: 90). Along with this first key term, there are two insights on responsibility, namely, 1) responsibility in being accountable for one's actions, and 2) responsibility for particular objects that commits an agent to the particular actions concerning them; meaning that a) the agent is responsible for what happened, and that b) someone in a responsible position honours his or her responsibilities. The call to be accountable for one's actions is all good and well but if certain persons are excluded then they are then not able to and not called to be accountable for their actions; they are, in principle, exempt. This relates to possibly the most important amendment to the PDA regarding disclosure where it is made clear that in order to improve disclosure of

information responsibility is placed on every employee, worker and employer to disclose information without the fear of retaliation (Pattle and Wilkinson 2014: 1). This therefore holds all parties accountable and therefore authorises joint responsibility for all persons involved

Jonas emphasizes the element that potential responsibility is never formal but always utilitarian. "I feel responsible, not in the first place for my conduct and its consequences but for the matter that has a claim on my acting" (Jonas 1984: 92). For example "the well-being, the interest, the fate of others has, by circumstance or by agreement, come to my care, which means that my control over it involves at the same time my obligation for it" (Jonas 1984: 93). While the PDA does recognise that good, effective, accountable and transparent governance is of the utmost importance (The Protected Disclosures Act 2000: 1), the reverse thereof could compromise the economic stability of South Africa and cause social damage.

For example, Al-Khalil (2013) discusses the FIFA World Cup 2010 hosted by South Africa, where many issues of inequality and social damaging information had been concealed during this world display of South Africa and therefore people could not make informed decisions. The nation spent billions on building a new stadium, but no money was spent on the necessities of the country, as many of South Africa's citizens living in cities and townships do not have electricity, clean water and decent housing. The government spent R33 billion on the World Cup and this is evidence of there being no concern for the national welfare among its decision makers. The money spent and strategies used during the South African World Cup were even more awful, given the country's brutal history of forced removals during the Apartheid years, including evicting the poor and gathering the homeless and then dumping them into temporary relocation areas in order to create an image that would be pleasing enough for all the world to see. During the period of the World Cup, the inhabitants of "Blikkiesdorp" (Tin Can Town) had been forcibly removed as this area of land was not appealing to any foreign visitors during this time. Hundreds of jobs were created by employing people to work on the construction of the stadium but this work was only of a temporary nature, and thus the illusion of creating more taxpayers who would contribute to the revenue was short lived as it did not improve the national economic status in any way. The public did not have a voice as no law provides for it, mainly due to a lack of transparency from government. The government in this instance had not acted in a transparent nor accountable manner and this led to protests which had a counter effect on the proper image which was to be created during the 2010 World Cup. The well-being of South Africa's

citizens did not come about, instead the event highlighted the inequalities of our country. The stadium cost billions to construct and is currently costing millions per year as it is not able to pay its own weight and yet building a stadium to attract foreigners to our country for such a short period of time was seen as being of greater importance. Responsibility directly impacts on others; Jonas (1984: 93) says that all actions should be done with the other in mind; how the consequences of our actions will affect other people should be taken into account before initiating any action. Responsibility requires future planning, and as can be seen in the example above, future planning had not been the primary focus at the time when bidding to host the World Cup had taken place. The facilities used during the time of the event are not open for public use and only cater to certain soccer events or when being transformed into a concert arena for performing artists, other than this, the stadium is a vacant structure which costs more to make use of and will continue to cost money.

In relation to the PDA, Jonas explains that the well-being and interest of others means there is an unspoken obligation to the wider public as they, in essence, do not have a voice or are able to provide their opinions. Acting in the interest of others should include all others, not just the select few as the PDA currently instructs. If Jonas's words in the lines above are read again with the larger public in mind, then the ethics of care and obligation is invalidated as the public is excluded and therefore does not have to act according to the law. Consequently, this law leaves room for discrepancies and the values of human equality, dignity, and freedom as stated in the preamble of the PDA (The Protected Disclosures Act 2000: 1) are not recognised.

4.3.3. Formal responsibility: the causal attribution of deeds done

Regarding this, Jonas explains that the agent who wills the action is responsible for its consequences and therefore can be made liable for them (Jonas 1984: 90), and this view places more weight on law than morality. Jonas explains that the damage caused must be made good even if the consequences were not foreseen or intended (Jonas 1984: 90). Making amends for your actions, even though the action was unintentional, is of great importance to Jonas; it is more the deed than the consequences that is punished in the case of a crime; the consequences, as in the PDA, are a lawful inevitability and therefore the deed itself must be investigated in order that the root cause of the problem is addressed to avoid another similar action of this illegal or unethical behaviour (Jonas 1984: 91).

For instance, an intoxicated individual gets behind a wheel and does not intend to do any harm with his car to other people on the road. The driver then is involved in an accident where public property is damaged. The driver did not intend to cause any damage, but the law dictates that driving under the influence of alcohol is illegal and so is the damaging of public property. The law then takes over as the consequences for driving under the influence and damaging of public property may end up being a fine and community service. The community service may be in the same public area which was damaged and so the damage caused is made good, and even though the punishment is enacted by law, the deeds done are still being made right by following through with the community service and therefore taking responsibility for the actions committed. Responsibility lies within the law to enact the consequences for the actions taken and responsibility is also placed upon the individual to commit to the consequences to acknowledge them and by carrying them out and becoming an active member of society once again. The law forces human beings to become aware of the behaviour that is acceptable and that which is not. It is the categorical imperative that all deeds are done in a manner which is ethically responsible and if not, then the act or behaviour has no place in the world. Human reasoning and good will are necessary for consistent moral behaviour and in order to act consistently there needs to be a greater understanding of the collective responsibility, joint responsibility. By better understanding what joint responsibility is, individuals will then be aware of what is acceptable, what is not, and also the need to act in accordance with others and not impose on their rights or create negative consequences for them in any way.

4.3.4. Joint responsibility

In order to fully understand joint responsibility, Jonas deliberates very specifically about what the foundation for morality might be. Jonas says being irresponsible is to do nothing and simply let things happen and therefore “only he who has responsibilities can act irresponsibly” Jonas (1984: 91). For example, a reckless driver is careless for himself, but acts irresponsibly when he also endangers his passengers if the driver does not intend to take responsibility for their well-being (Jonas 1984: 93). In this case there is a non-reciprocal relation of responsibility. The driver has responsibility for his passengers and therefore has an obligation to them and by defying this responsibility acts irresponsibly. Similarly the PDA, in its current form, it does not make provision for those who do not qualify, by definition, as an employee. Anyone, especially the wider public, is at liberty to do as they please as the PDA

does not include the public among those who have responsibilities. Therefore, as in the driver's case above, the driver has responsibility to his passengers by allowing them in the car, the employer in an organisational setting has responsibility for all employees within the organisation, however, in the PDA, the responsibility does not cover all people within the organisational setting at this time.

Another example that bears on responsibility, as cited by Martin (2010) the Open Democracy Centre (2013), is that of Imraahn Mukaddam, a shop keeper who raised a complaint with the Competition Commission after detecting that the bread suppliers to his shop were colluding concerning their prices by increasing them at the same time and by the same amount. This case led to the Competition Tribunal fining Premier Foods, Tiger Brands and Pioneer Foods for an amount totalling R99m. The price fixing collusion by these big food companies stole from the majority of poor and vulnerable households in South Africa on a daily basis. After raising his concern with the Competition Commission Mukaddam's small business had closed down. Prior to blowing the whistle, Mukaddam distributed between four thousand five hundred and five thousand loaves of bread daily. After disputing the matter at the Competition Tribunal, his bread distribution figures dropped to an estimated figure of one thousand four hundred loaves and many suppliers stopped doing business with him.

From the above example, it can therefore be said that it is the situation which constructs the responsibility; and so law and duty do not inspire fear in the whistle blower, but the situation relating to responsibilities. Mukaddam had lost his business due to the complex situation he was in and the lines of responsibility were clearly obscured. Mukaddam felt he was acting responsibly by alerting the Competition Commission to the discrepancies as he felt a sense of responsibility to himself and his customers due to his position as shop keeper. Jonas explains that individuals are more inclined to blow the whistle when they view it as a duty that is part of their role in an organisation, or in this case, their role in society, but there are also personal dynamics at stake as Mukaddam had discovered when he lost his business and livelihood. Whistle blowing is not always seen as being a reasonable act and yet at the same time it is not entirely unreasonable either. The only way to understand whistle blowers is to understand their moral urges and the way in which they come into being and action. Jonas leads us to believe that this sense of responsibility should then apply even to distant others and that certain social structures such as legislation, organisational policies and procedures are necessary to facilitate this.

Jonas's key insights explain that what we do on an individual level affects other people, therefore the ethical significance of our actions are far more reach than one would think. Mukaddam perhaps did not think that by raising his concern with the Competition Commission he would affect so many lives. He raised a concern which affected his livelihood, his suppliers and his customers alike and did not anticipate the consequences of his actions. Jonas says that if we cannot anticipate the consequences of our actions, we should essentially not act, unless we can foresee the effects our actions will have in the world; significance is placed on an inclusive and deductive sense of responsibility, and this is what sets Jonas apart (Vandekerckhove 2010: 216). Makaddam did not foresee the consequences of his actions, but if he had not blown the whistle South African citizens would possibly still be paying an exaggerated amount of money for bread. Therefore, in this case, it was good that Makaddam had blown the whistle, but this did not come without its own personal sacrifices.

Jonas believes that human beings have exceptional powers and this is what requires a new sense of responsibility; a new sense of responsibility that is future orientated constant and consistent. The responsibility that human beings should have for one another should not be taken for granted, and Jonas insists on individuals being more responsible for those who are close to them and those with whom they come into contact on a daily basis. If each persona took responsibility for the handful of people they come into contact with on a daily basis then surely the world the world would be on a journey to becoming a better place.

In some cases whistle blowers, when interacting with others, are viewed as being heroes, and in other cases as being traitors. Whistle blowers often blow the whistle despite enormous costs to themselves, and at times the public does not see the immediate benefit of whistle blowers' disclosures. Mukaddam experienced the bad side of whistle blowing, he blew the whistle and suffered personal loss of his business, while the public, unaware of the collusion, was saved from any further exploitation from the competing food companies. The law did however come into effect and the organisations in question did not get away with what they had done.

The relation between responsibility and the law, Jonas stresses, involves three criteria that are essential for whistle blowing as a legally enforceable positive duty, namely that we need to be able to, (1) specify who should know what, (2) minimise the risk to the whistle blower, and (3) adequately deal with mistaken concerns being raised (Vandekerckhove 2010: 2). The

PDA amendments have included these criteria and thus aim to incorporate the inclusive view that Jonas refers to people like Makaddam will therefore be better protected in the future.

Perhaps the most important statement in Jonas's book *The Imperative of Responsibility* are the sentences which reads as follows, "Act so that the effects of your action are not destructive of the future possibility of such life; or simply, do not comprise the conditions for the continuation of humanity on earth"; or again turned positive, "in your present choice, include the future wholeness of Man among the objects of your will (Jonas 1984: 11). One cannot simply appeal to the realness or the emotional aspect; Jonas says we should have the future of humanity in mind and should attempt to answer the question, "Why should we?" with the answer being that human beings collectively have a responsibility for the future of humanity. This is our dominant and absolute imperative of responsibility. Makaddam acted with the future and ethical nature in mind. If he had not blown the whistle he would have ended up losing his customers and while both he and the customers were paying too much for the bread, both would have lost out, the public on their daily sustenance and Makaddam on his business, his livelihood.

Jonas discusses the view that the concept of ethics has always been related to responsibility and that one cannot speak about ethics if it is not presumed that all individuals are to be held responsible for their actions. In order to understand what this responsibility means, Jonas provides three necessary conditions that need to be met, namely, 1) acting in a manner which has a positive impact on the world; 2) that such acting is under the agent's control; and 3) that the agent can foresee the consequences to some extent (Jonas 1984: 90). But given these conditions, there are two widely different senses of responsibility; the first is formal responsibility that is, being accountable for your own actions, and this relates to being accountable for all actions. In opposition to this, substantive responsibility makes provision for an agent to be responsible for particular objects that commits an agent to particular deeds concerning them (Jonas 1984: 90). It thus might be easier to call this substantive responsibility object responsibility that Jonas has in mind when he speaks of responsibility for the future (Jonas 1984: 125). For instance, an individual who consumes alcohol is not acting in an unethical manner; if the individual gets into a vehicle, aware that he has consumed alcohol, and drives intoxicated then this is illegal. Once the individual gets behind the wheel then the law takes effect as the driver could endanger his own life and other drivers and pedestrians as well. This is not acting in a manner which has a positive impact on the

world, nor is the individual in control if he is intoxicated, and therefore is not able to foresee the consequences of his actions, this type of behaviour is unethical.

It is for this reason, as Jonas explains above, getting into the car with the intention to drive is unethical; the individual is intoxicated and so the lines of thought and reason become blurred. The outcome of this is that should the driver get behind a wheel knowingly being intoxicated, it then becomes an unethical as well as an illegal matter. The ethics of responsibility lies in the hands of the individual whether to act irresponsibly and thus endanger the lives of others and not have their best interests in mind. For instance, in the mining sector joint responsibility plays a huge role in both ethics and responsibility and the law. The employers and their employees have a reciprocal relationship, as well as co-miners to each other. There are instances where workers neglect the safety regulations in order to make the work easier, even though they are aware of the consequences of such actions. For instance, the pillars inside a mining site need to be of certain dimensions in order to hold the weight of the roof and structure. The pillars are made of coal and sometimes miners chip away at the centre part of the pillars in order to reach their quota of coal collection for the day. The inspectors measure these pillars on top and at the bottom as these have to meet the accepted diameters, but are not required to inspect the centre of the pillars. The joint responsibility which comes in here is that the inspectors could have seen that the centre of the pillars were being caved in and should have blown the whistle as the safety of the miners were at stake as well as any other people, such as the inspectors, who were entering the mining site. The inspector's job description dictated that measurements should be taken at the top and bottom of the pillar (only), discretion could and should have been used to see and report that the centres of the pillars were a safety hazard, and that perhaps the entire pillar, top, bottom, and the centre should be measured accordingly as this is one of the important structures in a mine.

Jonas notes that in the past, human beings and power had been so limited that little concern had been given to anything related to the future. But in order for an ethics of responsibility to have effect, the concern should be that the conditions as they are in the present moment might not be the same in the future. As in the mining example, the present conditions are putting the safety of all mine workers at risk and therefore should change. If it does not, accidents will occur and miners will not be able to go down into the mine shafts to do their jobs, and this too will then in turn affect their livelihood, their employers as an organisation and the rest of society which depend on mines, especially coal mining, to make a living.

People change, situations and circumstances change, however, it is important to note here that the way the situation is in a given moment in all likelihood will not be the same at any other point in time, and this is why an ethics of responsibility is important; it recognises the need for preservation. Preservation in any shape or form, such as looking after wildlife so that they may be in existence for future generations to see, or by contributing to legislation in order to ensure that there is growth and positive shifts towards improvement of others' lives and the betterment thereof, such as the PDA who's consequences and set precedents and pave the way for the way situations will be handled in the future.

An ethics of responsibility merely caters for the fact that even though change occurs there needs to be consistent regulations for circumstances and situations in order to always arrive at the best possible solution for a given problem. The PDA is an example of how the wording and guidelines should guide any situation to the best possible outcome for all parties concerned and therefore keep the consistency factor in mind at all times. A sufficient ethics of responsibility must enforce an objective good which can exercise a force on our will to action and can positively compel us; it must also deal with the question of motivation. It must consider the issue of whether there is an opinion or emotion that allows us to fulfil our objective responsibility. One of Jonas's most intriguing and important views is that there is a feeling of responsibility that feels natural, such as contractual responsibility, whereby conditions are in terms of the relationship actually entered in to (Jonas 1984: 95). This relates to the employer-employee relationship in accordance with the PDA. The employer has a contractual agreement whereby both parties, employer and employee, are aware of what their working relationship entails. A contract is signed and the nature of interaction is based on the agreement. The employer (the object) stakes a claim over the employee (the agent). In this situation the employee should do everything in its power to protect the employee from any harm (such as possible occupational detriment).

The employer-employee relationship is shared and therefore the protection from the employer to the employee deserves some form of mutual understanding, this is usually in the form of being a good employee, for instance, doing your job to the best of your ability and abiding by the organisation's policies and procedures. If the employer is called to have more responsibility, as per one of the amendments discussed in Chapter 3, then the relationship, understanding, and agreement between the employer and employee should also include responsibility and make clear where the responsibility lies and also includes the implications thereof. The responsibility and who it applies to then would become more visible and

transparent as those involved are accounted for and formally documented. Once this agreement with reference to the PDA has been added to the contract, both parties will have the same understanding of what the contract requires and so will be expected to act accordingly. Thus, once again according to Jonas (1984: 91) only he who has responsibilities can act responsibly. Another view to this mutualistic relationship is that of the political and parental notion of responsibility as explained below.

4.3.5. Political and parental responsibility

Parental responsibility is natural, it is not contractual, it is not reciprocal, and there is not contract between the two parties. Parental responsibility is seen to be rather effortless in that it wants to interact on a caring and responsible level and does not expect anything in return. This type of relationship does not ask for anything to be reciprocated and acts out of the nature to protect and serve others. Political responsibility is more contractual in nature, in that it expects certain actions to be reciprocated in return. For instance, a political campaign is the obvious example whereby a politician will say anything to get the votes of the citizens in order to win an election; the politician ultimately makes certain promises and appeals to the needs of the citizens and then expects a vote next to their name during the election. This type of responsibility has a sell by date in that as soon as the election is over so too does the relationship then cease to exist. Parental responsibility on the other hand, has no sell by date; it is continuous and ever changing to accommodate those who feel they have responsibility towards others. The responsibility in question here is consistent and though adaptive, will always be there to cater to the needs of others. Similarly to an actual parent's love, attention, and affection, so too does parental responsibility has a place in society today. If more care and acknowledgement of the other was apparent and aimed at being consistent in its teachings, so too then would those who ascribe to acting politically responsible (only when it suits me) be affected in seeing the benefits of acting in acknowledgement and forethought of others, with the protection factor in mind.

Jonas says that although there are differences between political and parental responsibility, their common traits nonetheless join into the one most important and classic interpretation of the phenomenon of responsibility (Jonas 1984: 98). According to Jonas there are three common traits, namely, totality, continuity, and future (as explained in 4.3.1. herein), which make reference to the existence and well-being of human beings (Jonas 1984: 98). Within the real world neither parental nor governmental care can allow itself a vacation or pause, for life

continues without a break, with recurring and constant demands (Jonas 1984: 105). The PDA too can be compared here as there is no break from the law and responsibilities. parental responsibility has no point of exclusion set by the nature of the object or persons prescribed in the Act, theoretically, parental responsibility is infinite (Jonas 1984: 117) and so too is the PDA and the depictions which extend from it, as well as the contractual employer-employee relationship, which should include the public as well as they too have a stake in organisations success. The political responsibility as per the PDA is contractual in nature of the employer-employee relationship, but requires certain elements from the nature of what parental responsibility dictates in order to function successfully in society. Even though laws are contractual, the parental aspect will bring to light the need to consider the other more protectively with care and consideration. This is what Jonas builds on when he speaks of new dimensions of responsibility.

According to Jonas, new dimensions of responsibility emerged because nature became a subject of human responsibility, as human beings are the only beings capable of responsibility (Jonas 1984: 10). This is emphasised by the increasing character of human being's impact on the living world. Knowledge, under these circumstances, is a prime duty of man, and must be equal with the causal scale of human action. Man should seek "not only the human good but also the good of things extra human, that is, to extend the recognition of 'ends in them' beyond the sphere of man and make the human good include the care of them" (Jonas 1984: 7-8). For Jonas an imperative that is responding to the new type of human action might read like this, "Act so that the effects of your action are compatible with the permanence of genuine human life", or expressed otherwise, "Act so that the effects of your action are not destructive to the future possibility of such life" (Jonas 1984: 11).

Since future human beings do not have rights, our duties to future generations are independent of any idea of right or reciprocity. Human responsibility is basically a non-reciprocal duty to guarding beings (Jonas 1984: 38-39). For instance, human beings have a responsibility to care for their pets, to see that they are fed, clean up after them, have a warm place to sleep, as well as grooming them; pets do not have any responsibility towards their owners, and therefore is seen as being a non-reciprocal purposeful duty. Similarly, the future generations which the country's laws set precedent for, do not have any responsibilities. Jonas expresses having purpose as follows, "We can regard the mere capacity to have any purposes at all as a good-in-itself, of which we grasp with the intuitive certainty that it is infinitely superior to any purposelessness of being" (Jonas 1984: 79-80). Purpose has its own

recognition within being. There is a fundamental self-affirmation of being, which suggests it categorically as the better as opposed to a non-being. This insistent purposefulness can also be found in the conflict between legal and moral responsibility. The PDA does not make any provision for the moral element of an individual to emerge. With the addition of the proposed amendments, the moral element is inserted in the form of responsibility that pertains to an employer (all organisations in the private and public sectors), the employee, and the public. Responsibilities are present not only pertaining to the contractual relationship, but are present also in being accountable for the awareness component of whistle blowing and the efforts to raise awareness in this regard. The annual reporting of whistle blowing statistics and reporting information within the respective organisations ensures this responsibility while also making sure that all the information that is reported is public knowledge on organisational websites, for example, to ensure the governance aspect of being held accountable and acting responsibly. The interaction of this legal and moral responsibility is further discussed below.

4.3.6. Legal and moral responsibility

Jonas (1984: 90) reflects on the difference between the legal and moral responsibility and says that the difference between civil and criminal law involves the concepts of compensation for injury (out of legal liability, if compelled to do so) and punishment (for guilt). The shared aims here refer to actions done and becomes real when the agent is made responsible for their actions and the consequences which follow, whether in the form of legalities or guilt. The repenting for wrongful actions can be done by inwardly accepting responsibility and showing remorse. Responsibility is therefore the formal burden on the causal action that the agent should account for by displaying readiness to accept the consequences and as a result having more moral quality. In order to simply explain legal responsibility it can be explained by saying that this form of responsibility only deals with the rules, laws, and regulations which govern an organisation (and therefore all its employees) and society at large. There are various legislations which govern different persons by their respective definitions, but within an organisation, the laws take the form of policies and procedures and apply to all the employees and clients alike. Rules in this sense are static and are organisation or perhaps industry specific.

Moral responsibility is not static and thus allows a space for interpretation and discussion based on the individuals involved and the specific nature of a situation. Having moral

responsibility compels human beings to act according to their values and beliefs and if they contradict with organisational behaviours (as they usually do), then this brings the organisational and personal belief system into conflict. Moral responsibility is about doing the right thing, the honest, honourable, and most ethical action. In relation to legal responsibility, there is no place for morals and belief systems, the law is black and white, whereas moral responsibility allows for more a grey area where the outcomes are best suited to achieve the best, most ethical answer and outcome for all involved.

4.3.7. Substantive responsibility

This view of responsibility is related to the deeds that are still to be done; it is not concerned with the consequences and conduct but for the matter that motivates the agent to act (Jonas, 1984: 92). The substantive responsibility is more goal committed by asking what is meant by an irresponsible action, which is defined as lacking the capacity for responsibility, not being accountable at all (Jonas 1984: 91). Again, it must be stressed that only those who are aware of their responsibilities can act responsibly. The guidelines for the employer-employee responsibilities are set out accordingly in the PDA, but the difficulty here is when one is not sure of what the responsibilities are should you not fall into these two categories. Moreover, reiterated at this time is the need for definitions and relations to be clearly defined in order to act accordingly.

4.3.8. Natural and contractual responsibility

In addition to the types of responsibility already discussed in the previous sections, Jonas also differentiates between natural responsibility and contractual responsibility. "It is the distinction between natural responsibility, where the immanent 'ought to be' of the object claims its agent a priority and quite unilaterally, and contracted or appointed responsibility, which is conditional a posterior upon the fact and the realms of the relationship actually entered into" (Jonas 1984: 95). In previous generations it could not really be said that human beings had a responsibility to nature as they did not have the knowledge to know what the effects of their deeds would have. For instance, global warming is a result of not knowing that a growing population and therefore growing production would put significant strain on the earth's resources. Therefore, to say that previous generations were responsible would not pass the Jonas test in the awareness in knowing what their responsibilities were in order to then act responsibly by, for example, by conserving resources. Previous generations had the power to act responsibly by conserving resources, but did not have the knowledge and

support to act accordingly. The support today takes the form of government and organisations; this includes the public and private sectors. These support structures are looked at and called on for advice and guidance, similarly to that of a parent-child relationship.

The parent and the statesman are explained as being ideal types of natural responsibility and contractual responsibility, respectively. Concerning their responsibility, there is a great deal which is common in the roles of the parent and the statesman (the employer or government and employee respectively). These common features are totality, continuity, and future-orientation. The responsibilities included here are the total being of their object; the elements are fully fixed with future-orientation. The pure being as such, and then the best being of the child, is what parental care is about (Jonas 1984: 102-107). The government's responsibility is the future, whether it is individual or communal, and is concerned beyond its immediate present tense. An agent's concrete moral responsibility at the time of action extends further than to its neighbouring effects (Jonas 1984: 102-107). Jonas thus summarises the imperative of responsibility as follows, 1) the concept of responsibility implies that an individual has the power to act, and 2) then how the other responds to this action (Jonas 1984: 130-134). This simply means that an individual first needs to understand what the nature and definition of their responsibility is, the understanding of whether the individual knows whether they have responsibilities, what they are e responsibility extends. Then, the individual knows whether there is responsibility to the other, being responsible for other people, and the power in taking action to protect others.

The imperative knows that an individual has responsibilities to the other and doing something about it because of the acknowledgement of the other. Is important here that individuals first become aware that the other is to be protected a view that previous generations perhaps had and felt but did not have the support structure to act accordingly in a conserving manner. it Jonas introduces the notion of a new ethics at this juncture by explaining that daily human interaction is overshadowed by the growing collective action where the doer, the action and the effect do not hold values such as justice, charity and honesty, and therefore requires a new dimension of responsibility; a new ethics (Jonas 1984: 6). This new ethics is more concerned with the obligation towards the distant future and a principle of decision in present action (Jonas 1984: 10). Moreover, Jonas makes reference to Kant's categorical imperative which states the following, "Act so that you can will that the maxim of your action be made the principle of a universal law" (Jonas 1984: 10). Here, the issue of consistency and reason are significant given the existence of human acting agents, or as Jonas describes, acting rational

beings. The action of any rational acting being must be so that it is able to be imagined, without self-inconsistency, as general practice in a community (Jonas 1984: 11).

The PDA in its entirety should be able to clearly guide the agent in order to make informed decisions. These actions along with their decisions need to be consistent for all persons so that whatever the thought is, the action, and possible outcome should be the same; this is the way to ensure consistency. The PDA in its current form does not allow for consistency to be reached as there are too many gaps in interpretation and implementation. A clear direction needs to be added by way of the amendments to ensure that the entire basis is covered and that all effectual and imagined actions are included and consequences added to these actions accordingly. Only once this is done can the full value of the PDA be reached; these too are steps towards the new ethics that Jonas envisions. In keeping the vision of a new ethics in mind, and with the inclusion of the amendments to the PDA, Jonas says it is important to have a few simple statements in mind to create the ultimate vision, these are as follows, “Act so that the effects of your action are compatible with the permanence of genuine human life”, or expressed in another way, “Act so that the effects of your action are not destructive of the future possibility of such life”, or simply, “Do not compromise the condition for an indefinite continuation of humanity on earth”, or, “In your present choices, include the future wholeness of Man among objects of your will.” This new imperative dictates that human beings may risk their own life but not that of humanity at large (Jonas 1984: 11). If the PDA along with the proposed amendments adheres to these statements then the goal would have been reached. We as human beings have a duty to account for our actions and to uphold the standards of all people in our acting so as not to sacrifice any aspect of our humanity and future endeavours in the process.

In an effort to explain the contractual idea further, Williams (1985: 75), in relation to moral wrongness says that an act is wrong if its performance under the circumstances would not be allowed by any system of rules for the general regulation of behaviour which no one can reasonably reject. This directly ties in to what moral thought is about and what the possible motivations could be. The motivations that Williams (1985: 75) explains is the basic moral motive which is the desire to be able to justify one’s actions to others on the grounds that they could not reasonably reject; this is quite close to Kant’s views on morality in that he too believed that actions and duty’s need to be justified. Williams (1985: 75) takes it further by saying that it is a question of what rules would be acceptable to people who are presumed to

already be interested in an agreement. Similarly, in the PDA, employers and employees already have a vested interest in the PDA as the prescripts includes them by definition, therefore, it is now, as per the amendments, the rules which are acceptable by the employers and employees now also need to be extended to include the public as a stakeholder as well in order to reach some form of agreement.

Contractual relationships are further explained as being those relationships to which one has to justify actions to (Williams 1985: 76). This extends to being concern for others which is also echoed by Jonas as being the nature of a contractual relationship. The natural aspect is the human being part of interaction as this is what naturally occurs between human beings. In order to function within a society however, there needs to be some form of contract, a promise, something which binds the words and actions of those involved in the relationship. For instance, when two individuals decide to get married it is because of their natural human interaction. The commitment would be in the form of a marriage and along with this there are symbols such as the ceremony where vows (promises) and rings are exchanged as a token or symbol of their commitment to one another. Along with this the newly wedded couple both sign a contractual agreement of marriage which is their marriage license. This license is a binding legal document of their commitment to one another. The couple then also signs another legal document where it states how they choose to handle their assets accumulated throughout their marriage should any separation or divorce occur in the future. This document also becomes important when buying property; if for example, the couple decides to get married in community of property which means that all assets belong to the couple equally. So too in the context of the PDA is the employment contract a legal and binding document of the employment relationship. This contract is needed to set rules, guidelines and regulations on how the relationship should be conducted and what the right and wrong acts with the relationship are. When the employer and employee sign this legal document they sign as an indication that they understand all the contents of the contract and will abide by them. The negative consequences of breaking any of the rules of the relationship are also outlines in the contract. This is why the natural and contractual relations are so closely related, and in essence the one type of relationship cannot live without the other within society.

Within the PDA this is especially important to have. Even though social interaction is guided by our natural inclinations as human beings, we do need some form of governable document

to guide our relations. The amendments to the PDA are a good example of how first draft of a document might only cover certain individual at the time, but within the South African context where social inclusion and equality are two major aspects of what constitutes our daily interactions, all people in our society should have a voice and so too should be accounted for and included in legislation. This is especially true for the area which this thesis covers, the delicate area of whistle blowing. If certain persons do not feel that they have a voice then this generally erupts into something that could have been avoided if the necessary steps had been taken in the beginning of drafting a document. It is thus important that the amendments are enacted to cover all the gaps and loopholes that currently exist under the PDA.

5. Conclusion

This chapter set out to describe a clear understanding of what Hans Jonas perceives ethical responsibility to be. This analysis included an examination of Jonas's ethics of responsibility by first defining responsibility, and all its dimensions, and then relating and linking it to the nature of ethics to provide a clear understanding of what it means to enact one's actions ethically in the world. It also focused on the PDA's understanding, as discussed in the Chapter 3, by providing Jonas's ethics of responsibility with cross reference to the PDA.

The discussions around what Hans Jonas understands responsibility to be and how it can be related to the PDA is discussed by using simple examples to show what can sometimes be overwhelming text that Jonas writes, in more simple terms. Each definition that Jonas gives is contrasted by using the PDA as reference for discussion. Chapter 3 provided an understanding of the PDA and its amendments and Chapter 4 has built on this by providing examples to relates the amendments to examples that occur within society and to show that the ethical element of the PDA is almost non-existent as there is no room for discretion but rather to pass the law when the irregular conduct presents itself.

Jonas has indeed challenged thinking and reasoning a new light. One must not only have the ability to reason, analyse and make deductions; these behaviours should be used, polished, and put to good use. Responsibility has proven itself to be a far greater word than could have been imagined, and surely has grown on weight and importance since the onset of this thesis. The most significant nature of responsibility is that it compels those involved to act, but also

to act accordingly, therefore Jonas has provided the tools for thought action and not just doable action.

Chapter 5 hereafter pulls together all the strands of the thesis to provide a conclusion which leaves nothing unturned, and reiterates the main points throughout the thesis.



Chapter 5

Concluding remarks

5.1 The legal and the ethical

From the chapters above, the urgent need to promote the awareness of the Act, its objectives and its shortcomings can be seen. From a practical point of view, employers and employees should make use of the time before the Act comes into force to familiarise themselves with the procedures and ways to encourage and facilitate a culture of disclosure within their respective organisations. In this way, organisations will be better able to respond to concerns that are raised and also ensure that the concern being raised is of a legitimate nature before any harmful consequences ensue. The Protected Disclosures Act 26 of 2000 has the potential to create the context needed for responsible and ethical growth towards an open culture of disclosure. This is the legal side of the matter.

Because the PDA was written from a legal perspective, it focuses on legal protection of the interests of both employers and employees. Employers have the right to have certain information protected against random disclosure. Such information may be “trade secrets” or information that can be misinterpreted when it is taken out of context. Employers also have the right to be protected against false and slanderous accusations that could harm both the employers and their employees. Employers have the right to be protected against reprisals when they disclose information that points to illegal, dangerous or detrimental practices.

The PDA builds on previous legislation and tries to fill gaps left by previous legislation. For instance, it takes existing definitions of employer and employee as its point of departure. It legislates against possible abuses by employers who are guilty of malpractices or employees who make malicious or false disclosures. When such abuses occur, it prescribes purely legal forms of redress.

This thesis, however, approached the discussion from an ethical point of view. This view on legislation is often neglected, because there are many lawyers who are of the opinion that laws have nothing to do with ethics, and that laws exist to regulate life. But what is law without morality? There is a constant tendency of law and morality to drift away from one another. Part of the aim of legislation should be not only to regulate but also to raise consciousness. South Africa has a very idealistic Constitution that suggests that laws should not only be organising principles of standing orders, but should also uphold the rights as

enshrined in the Bill of Rights. Fostering good citizenship is of great importance if the country is to achieve its objectives and goals in a comprehensive way. The foreseeing of a desired state as an ideal should constitute a part of the function of legislation.

Even in ethics, not all people hold this view. Is ethics there merely to guard against abuses? This is certainly the position of some exponents of Kantian philosophy: ethics stops people from doing what shouldn't be done. The categorical imperative is always "do not", that is, do not do what is wrong. Because the consequences of actions should not be considered when one obeys the call of duty, one must not ask what responsibilities one has towards the future and how one should act in order to ensure a specific state in the future.

The other view, one which is more associated with virtue ethics, says that categorical imperatives impel people towards reaching some form of aim or goal. Therefore moral imperatives, according to this view, are always implicitly, if not explicitly, not "do not" but "do"; do what should positively be done. In his focus on a sustainable future, Jonas leans towards the virtue ethics position in as far as this approach seeks to enhance human life. Here one may compare Jonas's categorical imperative, paraphrased from Kant, with Kant's formulation.

One may also compare Jonas's position with that of utilitarian's, since both require moral agents to consider the consequences of their actions. Jonas does indeed say that that one has to take responsibility for the effects of one's actions on other people. He differs from classic utilitarians in that he does not restrict consequences to the immediate future. "In your present choice, include the future wholeness of Man among the objects of your will" (Jonas 1984: 11). Although this seems a small point, it has consequences for whistle blowing. A utilitarian could argue that one should not blow the whistle on a mining company that pollutes waterways, because the company employs many workers who will suffer if the company has to shut down. Jonas may counter that polluting scare sources of water endangers the future of humanity. Even if the effect is not big now, it could become very significant if the pollution is not checked in time.

In speaking of "authentic human life", Jonas also stands closer to Kant than to some utilitarians. He is clearly thinking of a human life that is marked by more than simply happiness, the absence of pain, and so on. The authentically human life is a life of shared and mutual responsibility. If pleasure is maximized but people are made less responsible, his goal is not reached. It is typical of Jonas that he believes that the new world of technology, which

can be seen as taking away human responsibility, actually places a greater responsibility on people, because it increases their power to act.

I have argued that Jonas's ethics of responsibility theory offers a better basis for understanding whistle blowing than a purely legal theory or a Kantian or utilitarian ethical theory. The legal perspective establishes legal rights, the right to protect information and the right to disclose information. It hardly establishes a *responsibility* to blow the whistle in order to ensure that no harm is done to a sustainable human future, although the preamble does recognise the common law responsibility to disclose information about criminal acts. The Kantian approach also focuses more on the negative, on what should be avoided. Unless foreseeable consequences are considered, it cannot always be shown that one has a *duty* to blow the whistle. Utilitarians do look at consequences, but the focus is one-sidedly on "the greatest good for the greatest number" – without regard for the future. They also lack a vision of an authentic human existence which includes the human potential to take responsibility for others.

Jonas goes beyond these theories when he speaks of a joint responsibility that is comprehensive and continuous and that includes the future. He explains how our greater knowledge extends our ability to act in both positive and negative ways. Therefore he includes ecological concerns in his theory. This is relevant to whistle blowing, because at least some abuses are harmful to the planet, although they do not harm people in the short term. In his theory, one has the responsibility to disclose such abuses.

Another important feature of Jonas's theory is that it places responsibility on all people as citizens. Responsibility is not limited to the position that one holds as employer or employee. One cannot avoid responsibility by saying that "this is not my business". If one has information about abuses and does not disclose it, one has acted in a particular way and one has responsibility for the consequences. Responsibility is not only contractual; it includes all areas in which one has the ability to act in certain ways. The responsibility of parents for children is a model of this. By assuming responsibility one aims at a positive good – to ensure a truly human future for others.

5.2 The shape of the argument

In Chapter 1, the research question was posed as follows, *how should the Protected Disclosures Act 26 of 2000 be assessed in terms of Hans Jonas's ethics of responsibility?* It

was shown that the question of whistle blowing has become a heated topic of debate. Across the world, in the public and the private sector, people discuss the matter, often emphasising only the protection that whistle blowers should be afforded. Some, however, also ask about the ethical issues involved. The matter is relevant to the South African situation, because the PDA has been signed into law by the President, but has not yet become operative. Possible amendments are still being discussed.

In Chapter 2, this research question was unpacked by first defining terms related to ethics and providing a brief overview of what whistle blowing entails as well as exploring why whistle blowing is an ethical issue and how this affects organisations and employees alike. It was shown that whistle blowers are not always motivated by ethical considerations. Some blow the whistle because of financial or other personal gain or because they hold a grudge against certain employers or organisations. The question is not only when blowing the whistle is justified, but also when it is a moral act and even a responsibility.

It was shown how recent laws in other countries try to deal with the matter. The PDA is not necessarily worse than similar laws in other countries, but the political will to enforce protection is often lacking here. This was illustrated by means of some examples of whistle blowing in this country, where the whistle blowers were not efficiently protected. Because corruption is so widespread, this is disturbing. This chapter prepared the way for an understanding of whistle blowing as a responsible moral act.

Chapter 3 dealt with the PDA and shows how it tries to balance the interests of employers and employees. It encourages employees to blow the whistle internally rather than externally, but recognises that public disclosures are sometimes necessary. It also looks at various criticisms of the Act and proposed amendments. Some of the amendments try to ensure better implementation, for instance, the proposal that redress should not be limited to the expensive legal route. Two criticisms, however, are important from an ethical point of view. In its current form the PDA limits protection to certain categories of people. Others who may have information about abuses are not afforded protection. This undermines the notion that whistle blowing is an expression of joint responsibility which applies to all citizens.

Secondly, though the Act protects whistle blowers in certain circumstances, it does little to encourage a culture of transparency. The ideals embedded in the Constitution and particularly in the Bill of Rights are not openly promoted. Organisations are not required to educate

employees about their rights and duties. In this sense it does not foster a more responsible society for the future.

Hans Jonas's theory, which is a reference point in the thesis, was unpacked in Chapter 4. The chapter provided background on the theory and showed the significance of Jonas's theory in relation to the PDA, what it prescribes as it currently stands, and what is envisaged in the proposed amendments and additions. Jonas's theory provided a means to ethically unpack each amendment. The ethical analysis provided a way to assess the legal view of the PDA and to evaluate the criticisms of it. If responsibility, as Jonas understands it, is the point of reference, it is easier to understand what the strengths and weaknesses of the PDA are. In a way the ethical approach made it plain what exactly the PDA says and does not say.

Jonas's theory is by no means an easy grasp, but when the literature is taken step by step and unpacked in its detail, it opens a different angle of approach and understanding to legal documents. It provides the reader with the ability to actively engage with the legal text and to ensure that what is being said is actually understood. The way in which legal documents are framed often obscure the moral thrust of certain stipulations.

For instance, one of the amendments places an additional responsibility on employers by inserting an obligation to set up internal procedures for handling disclosures with regards to awareness, investigation and possible victimisation. This can be seen as a technical requirement concerning implementation, but Jonas has provided a better understanding of what responsibility is. He has not only defined responsibility in a broad sense, but has also elaborated on different kinds of responsibility. This makes it possible to locate, define and understand responsibility within an organisational ethical setting, as opposed to a legal and more general understanding. By setting up internal procedures and making everyone aware of them, organisations will be working towards the goal of ensuring a sustainable future for all, not only employers and employees. This responsibility is part of the broader responsibility we all share as citizens.

In this and other ways, Jonas's theory was used to assist in identifying why the PDA amendments were proposed in the first place and to identify the strengths and weaknesses of the PDA. This identification allowed for a critical discussion between legislation and ethical theory. If laws are there only to order practices, they do not significantly assist us to build a better society. At most they can protect us against the worst abuses.

5.3 Results

The primary aim of the thesis was to assess the PDA from an ethical perspective. Since the Act is still being debated and may be modified before it is made effective, it is important to understand what the law currently says and also how and particularly *why* it may need amendments. It is not sufficient to say that it compares well with similar legislation in other countries. One has to understand in what way whistle blowing is a moral action and therefore has to be positively encouraged. If the goal is kept in mind, the amendments will make sense. Although it was shown that whistle blowers do not always act from altruistic motives in practice, it was argued that whistle blowing is *essentially* a moral act. The term comes from the practice of policemen to blow their whistles to alert others that an illegal (or otherwise detrimental) act is taking place *in order to put a stop to it*. It was argued that whistle blowing as a moral practice is best understood as a manifestation of joint responsibility. This responsibility bears on all citizens and should not be restricted to specified categories of people. It was shown that Hans Jonas makes a strong case for seeing responsibility in this way.

An additional aim of the thesis was to assist future thinking and initiate further research on how whistle blowing applies and affects all people. The conclusions that have emerged from this discussion of the PDA from an ethical perspective may guide strategies for the improvement of the PDA's impact on organisational development. But the theory of responsibility does not restrict responsibility to legislators. Organisations may of their own accord seek ways of promoting responsible actions among employers, employees and all others affected by their operations. Such others may be clients or, for instance, communities affected by ecologically detrimental practices. If a culture of openness takes root, whistle blowers will no longer be seen as trouble makers, but as public benefactors.

No previous research has explicitly related the PDA to the ethics of responsibility theory. Authors in the field of whistle blowing have usually highlighted the social, psychological and mainly legal aspects of the PDA, but not the ethics of responsibility as Jonas has. The legal view, when it takes ethics into consideration at all, usually speaks of the *rights* of the parties involved. This is a valid approach up to a point, but it does not explain why the people involved should be granted these specific rights. Jonas's theory suggests that the rights are there to ensure that people can act responsibly without fear of reprisals. It also suggests that

responsible whistle blowing is not only a right, but also a duty. One *has to* act so as to ensure a sustainable human future.

The most significant view found in the literature focuses on the internal conflict whistle blowers experience when deciding whether or not to blow the whistle. The societal, organisational and personal aspects cause a conflict of interest. Whistle blowers are not always viewed in a positive light, thanked and praised for exposing the unethical conduct, but rather are seen as being disloyal members of an organisation. It must however be noted that while whistle blowers may be viewed as being traitors, they are also assisting the organisation by providing tools for corporate governance strategies which will enact organisational policies and procedures by bringing to light an unethical behaviour and raising awareness.

In Chapter 2, where whistle blowing was explained and discussed in its entirety, specific attention was paid to whistle blowing around the world and the whistle blowing process, but case studies from the South African context were also discussed and examined. These case studies made the context and nature of whistle blowing easier to understand, but also served to illustrate the difficulties faced by whistle blowers in practice. Though whistle blowing in South Africa is real and prevalent, South African whistle blowers are particularly badly treated. People in South Africa do not expect such issues to be so close to home. For this reason the proposed amendments to the PDA as discussed in Chapter 3 are very important. Since the culture of transparency is apparently not well developed in this country, there is a need to further develop legislation and policies and procedures within both the private and public sectors, but also to raise consciousness among the general public. Whistle blowing either directly or indirectly affects everyone.

The example of the shop keeper Mukaddam illustrates the point very well. If he had not blown the whistle, then the increase in the bread price would have been swept under the carpet and we would possibly still be paying too much for a basic food such as bread. This would have affected poor people in particular. Yet Mukaddam suffered the consequences of his act. It is not even clear the PDA in its present form would have offered him any redress. Though the case affected many people, not many people know about it.

This objective in Chapter 3 was to explain the PDA in the simplest form possible. This was done by explaining how the PDA came to be, what its objectives are, and how it integrates itself onto the life or an organisation's roles and functions. Definitions were explained as

identified by the PDA and also discussions around the amendments, the remedies, and the way forward. The very fact that the Act has been widely criticised, that many amendments have been proposed and that, after considerable time, it is still not in force, reinforces the view that it does not sufficiently address all the relevant issues.

The main point that emerged in Chapter 2 and that is also taken up in this chapter is that the PDA does not see the public as a body that can also blow the whistle concerning unethical behaviour and irregular conduct, and still be afforded the same protections as employees. This major gap in the PDA leaves room for a greater, much deeper analysis of the whole Act in its entirety to see where the gaps are and what can be done to fill them. In so doing, the remedies that are afforded to people like Mr Mukaddam can also be strengthened.

In Chapter 4, which is central to the thesis, the material discussed in Chapter 3 was viewed from a new perspective. While Chapter 3 set out to explain the PDA, the terms used in the legislation, the application, the remedies and the proposed amendments, Chapter 4 assessed the PDA on the assumption that whistle blowing is a responsible act. Thus the ethics of responsibility theory was used to inform a critical analysis of ideas and concepts that bear, sometimes indirectly, on whistle blowing, but also to identify the gaps and shortfalls of the PDA, and how they can be remedied. Jonas's theoretical explanations allowed the PDA to be understood not only from a legal point of view but also from an ethical point of view. It sought to provide an ethical-theoretical basis for whistle blowing.

But this was not intended to be simply an exercise in theorising. Seeing whistle blowing as a responsible act also makes the PDA more real, more tangible, by creating a sense that it is something that individuals can relate to in their daily lives. It is not simply a piece of legislation with which we have to comply; it is one specific part of the responsibility we all have to others, now and in the future, simply because we are human beings.

One of the things that struck me most when I read through the PDA as a piece of legislature is that it appears to be a purely legal document, which in most respects it is. What it lacks is the means to be able to identify with and adopt what is prescribed in the text; it lacks the tools for understanding. It is difficult to adopt for yourself something if there is no space in it which allows for the acceptance by members of the public, and when it is seen to be a two way street of mainly employers and employees. If one does not identify with what is being read, then no personal accountability or responsibility will be taken. An individual is only able to accept something if it can be identified with; if not, then the goal of implementation

would have failed because there is simply no existential understanding. I may not be in a position to blow the whistle today, but unless I understand how whistle blowing affect me and those around me, I will not know how to act if I should get to a situation where whistle blowing is *my* responsibility.

Legislation is written in order to direct acting and doing, in prescribing courses of action, it does not explicitly mention goals. Jonas, on the other hand, compels us to think while acting and doing, to think about *why* we are acting and doing in the way that we are, and also about *who* we are acting and doing for. When these questions and thought processes occur, they allow for reflection and identification (with specific views and people). This leads us to accountability and responsibility in that it asks for thought and analyses, and from these emanate ideas, views, and, because we are human beings, also emotions and feelings. We become personally involved and work with others towards a shared goal.

Surely legislation cannot be criticised for adhering to the structure that guides it. Its purpose is to prescribe. But human beings are not merely robots who act without thinking, but are rather creates that think before acting and reason before doing. Their lives are meaningful to the extent that they strive towards certain goals and search for better means to reach these goals.

Jonas virtually coerces us to think and reason through his theory. This is what most human beings seem somehow forgotten to have how to do; we particularly seldom ask why we do certain things and how these things affect us and others, including coming generations. When one reads the PDA, the challenge is to take the bare legal text and add human character and typical human behaviour to it in order to bring it to life. Not all laws need to be publicly understood and thought through, because some regulate isolated practices in sectors that do not affect the lives of ordinary people. The PDA, although it seems to regulate forms of behaviour between employers and employees, actually forces us to think what it means to share responsibility for our society and the one our children will inherit.

Throughout Jonas's text he explains that individuals can only have responsibilities if they are *called* to have responsibilities. Certain responsibilities do not fall on all people; others apply to us as human beings. The PDA implicitly deals with a responsibility that we all have as citizens and human beings to be there to protect, assist, help grow and develop one another. Simply as citizens we should bear responsibility to build a South Africa known for justice and community, not for corruption and self-interest. South Africa as a nation is by no means

fully grown, and it is for this very reason that South Africans should be made aware of the responsibilities that we have to our nation and the people in it.

The PDA is a stepping stone to enable us to say that we all stand together as one. It calls for a united voice saying, “No tolerance for unethical or illegal actions; if these actions are committed, then there are punishments which await you.” But public awareness is lacking. For instance, a child only knows that they are doing wrong if they are taught by their parents what the difference between right and wrong is; only then once the teachings have created the necessary awareness can they be held accountable for their actions. Similarly, South African citizens need to be made aware of the consequences of their actions, good and bad, right and wrong, so that they are better able to make informed decisions, with all the information required, in order to act accordingly. Only then can citizens be held accountable.

The PDA is should be seen as a starting point, a small token of better intentions for South Africa. As it is, it can be improved significantly. One could start small by including all people in the legislation and by adding positive guidelines for ethically responsible whistle blowing. It will then be a means towards the creating virtuous citizens that Hans Jonas had in mind.

The only way in which human beings are able to engage constructively with the literature and legislation is by being aware and alert, by knowing what exactly it is we have to read, analyse, or discuss. Where is a law leading us? Is it pointing in the right direction? That legislation can be challenged or questioned is a scary thought, but it we need to do exactly this if there is to be any growth or development. We can only grow as a nation if we are given the platform to disagree, to agree, to form and communicate our own opinions, and to ultimately arrive at a conclusion that will be good for those of this generation and generations to come. With this future orientated thought process and its implementation in mind, we may be able to make the right choices, those that promise greater benefits for all, both now and in the future as well.

APPENDIX 1

PROTECTED DISCLOSURES ACT 26 OF 2000

[ASSENTED TO 1 AUGUST 2000]

[DATE OF COMMENCEMENT: 16 FEBRUARY 2001]

(English text signed by the President)

ACT

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

Preamble

Recognising that-

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

And bearing in mind that-

- Neither the South African common law nor statutory law makes provision for mechanisms or procedures in terms of which employees may, without fear of reprisals, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers, whether in the private or the public sector;
- Every employer and employee has a responsibility to disclose criminal and any other irregular conduct in the workplace;

- Every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure;

And in order to-

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

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

PROTECTED DISCLOSURES ACT 26 OF 2000 Page 1 of 7

1. Definitions

In *this Act*, unless the context otherwise indicates-

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

- a) That a criminal offence has been committed is being committed or is likely to be committed;
- b) That a person has failed is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- c) That a miscarriage of justice has occurred is occurring or is likely to occur;
- d) That the health or safety of an individual has been is being or is likely to be endangered;
- e) That the environment has been is being or is likely to be damaged;
- f) Unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- g) That any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

'employee' means-

- a) Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;
- b) any other person who in any manner assists in carrying on or conducting the business of an employer;

'employer' means any person-

- a) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or
- b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer;

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

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

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

'occupational detriment', in relation to the working environment of an *employee*, means-

- a) being subjected to any disciplinary action;
- b) being dismissed, suspended, demoted, harassed or intimidated;

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- a) Being transferred against his or her will;
- b) Being refused transfer or promotion;
- c) Being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- d) Being refused a reference, or being provided with an adverse reference, from his or her *employer*;
- e) Being denied appointment to any employment, profession or office;
- f) Being threatened with any of the actions referred to paragraphs (a) to (g) above; or
 - a. being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

'organ of state' means-

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

'prescribed' means prescribed by regulation in terms of section 10; **'protected disclosure'** means a *disclosure* made to-

- a) A legal adviser in accordance with section 5;
- b) An *employer* in accordance with section 6;
- c) A member of Cabinet or of the Executive Council of a province in accordance with section 7;
- d) a person or body in accordance with section 8; or
- e) any other person or body in accordance with section 9, but does not include a *disclosure* -
 - (i) In respect of which the *employee* commits an offence by making that *disclosure*; or
 - (ii) Made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5; **'this Act'** includes any regulation made in terms of section 10.

2. Objects and application of Act

(1) The objects of *this Act* are-

- a) To protect an *employee*, whether in the private or the public sector, from being subjected to an *occupational detriment* on account of having made a *protected disclosure*;

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

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

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

(a) Purports to exclude any provision of *this Act* , including an agreement to refrain from instituting or continuing any proceedings under *this Act* or any proceedings for breach of contract; or

(b) (i) Purports to preclude the *employee*; or

(ii) Has the effect of discouraging the *employee*, from making a *protected disclosure*.

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

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*.

4. Remedies

(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 (Act 66 of 1995), for appropriate relief; or

b) Pursue any other process allowed or prescribed by any law.

(2) For the purposes of the Labour Relations Act, 1995, including the consideration of any matter emanating from this Act by the Labour Court-

a) any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act, and the 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 Part B of Schedule 7 to that Act, and the 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.

(3) Any *employee* who has made a *protected disclosure* and who reasonably believes that he or she may be adversely affected on account of having made that *disclosure*, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the *disclosure* to another post or position in the same division or another division of his or her *employer* or, where the

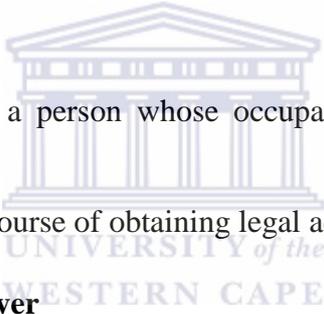
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person making the *disclosure* is employed by an *organ of state*, to another *organ of state*.

(4) The terms and conditions of employment of a person transferred in terms of subsection (5) may not, without his or her written consent, be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.

5. Protected disclosure to legal adviser

Any *disclosure* made-

- 
- a) To a legal practitioner or to a person whose occupation involves the giving of legal advice; and
 - b) With the object of and in the course of obtaining legal advice, is a *protected disclosure*.

6. Protected disclosure to employer

(1) Any *disclosure* made in good faith-

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

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

7. Protected disclosure to member of Cabinet or Executive Council

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

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

8. Protected disclosure to certain persons or bodies

(1) Any *disclosure* made in good faith to-

- a) The Public Protector;
- b) The Auditor-General; or
- c) A person or body *prescribed* for purposes of this section; and in respect of which the *employee* concerned reasonably believes that-

(i) The relevant *impropriety* falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and

(ii) The information disclosed, and any allegation contained in it, are

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substantially true, is a *protected disclosure*.

(2) A person or body referred to in, or *prescribed* in terms of, subsection (1) who is of the opinion that the matter would be more appropriately dealt with by another person or body referred to in, or *prescribed* in terms of, that subsection, must render such assistance to the *employee* as is necessary to enable that *employee* to comply with this section.

9. General protected disclosure

(1) Any *disclosure* made in good faith by an *employee*-

- a) Who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
- b) Who does not make the *disclosure* for purposes of personal gain, excluding any reward payable in terms of any law; is a *protected disclosure* if-

(i) One or more of the conditions referred to in subsection (2) apply; and

(ii) In all the circumstances of the case, it is reasonable to make the *disclosure*.

(2) The conditions referred to in subsection (1) (i) are-

- a) that at the time the *employee* who makes the *disclosure* has reason to believe that he or she will be subjected to an *occupational detriment* if he or she makes a *disclosure* to his or her *employer* in accordance with section 6;
- b) that, in a case where no person or body is *prescribed* for the purposes of section 8 in relation to the relevant *impropriety*, the *employee* making the *disclosure* has reason to believe that it is likely that evidence relating to the *impropriety* will be concealed or destroyed if he or she makes the *disclosure* to his or her *employer*;
- c) that the *employee* making the *disclosure* has previously made a *disclosure* of substantially the same information to-

(i) His or her *employer*; or

(ii) A person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the *disclosure*; or

d) That the *impropriety* is of an exceptionally serious nature.

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

- a) The identity of the person to whom the *disclosure* is made;
- b) The seriousness of the *impropriety*;
- c) Whether the *impropriety* is continuing or is likely to occur in the future;
- d) Whether the *disclosure* is made in breach of a duty of confidentiality of the *employer* towards any other person;

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- e) In a case falling within subsection (2) (c), any action which the *employer* or the person or body to whom the *disclosure* was made, has taken, or might reasonably be expected to have taken, as a result of the previous *disclosure*;
- f) In a case falling within subsection (2) (c) (i), whether in making the *disclosure* to the *employer* the *employee* complied with any procedure which was authorised by the *employer*; and
- g) The public interest.

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

10. Regulations

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

a) For the purposes of section 8 (1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to the Public Protector or the Auditor-

General, as the case may be;

b) Any administrative or procedural matter necessary to give effect to the provisions of *this Act*; and

c) Any other matter which is required or permitted by *this Act* to be prescribed.

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

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

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

(b) The guidelines referred to in paragraph (a) must be approved by Parliament before publication in the *Gazette*.

(c) All organs of state must give to every *employee* a copy of the guidelines referred to in paragraph (a) or must take reasonable steps to bring the relevant notice to the attention of every *employee*.

11. Short title and commencement

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

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