

# **The Protected Disclosures Act**

**Whistleblowing  
as a Corporate Governance tool  
to deliver  
Organisational Accountability**

# Whistleblowing -

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

# *Blowing the whistle*

- What?

(Betrayal? Telling-tales? Upsetting the apple cart?  
Breaking ranks? Letting the team down?)

- Who?

(Informer? Disgruntled / disloyal employee?  
Troublemaker?)

- Why?

# Whistleblowing



# *Costs*

- Lives lost & livelihoods destroyed
- Millions in fines, compensation & insurance
- Crisis management
- Jobs lost & reputations ruined
- Loss of confidence - public & investors
- Increased regulation

## *The missed message*

The official inquiries into all these disasters showed that the staff had been aware of the danger before the accident but had either:

- Been too scared to raise the alarm
- Had raised the matter in the wrong way or with the wrong people

## **Department knew about death trap factory**

*(Mail & Guardian, 24 Nov 2000)*

## **Witch-hunt for whistleblowers**

*(Mail & Guardian, 15 Mar 2002)*

## **Minister on warpath after AIDS report leak**

*(Star, 21 Mar 2002)*

## **Arms deal leak: who blew the whistle?**

*(Mail & Guardian, 21 Mar 2002)*

## **Culture of silence keeps sodomy under wraps**

*(IOL, 18 June 2002)*

## **Sex slaves, drugs and video tape**

*(Star, 18 June 2002)*

## **Burn the evidence or your job's on the line**

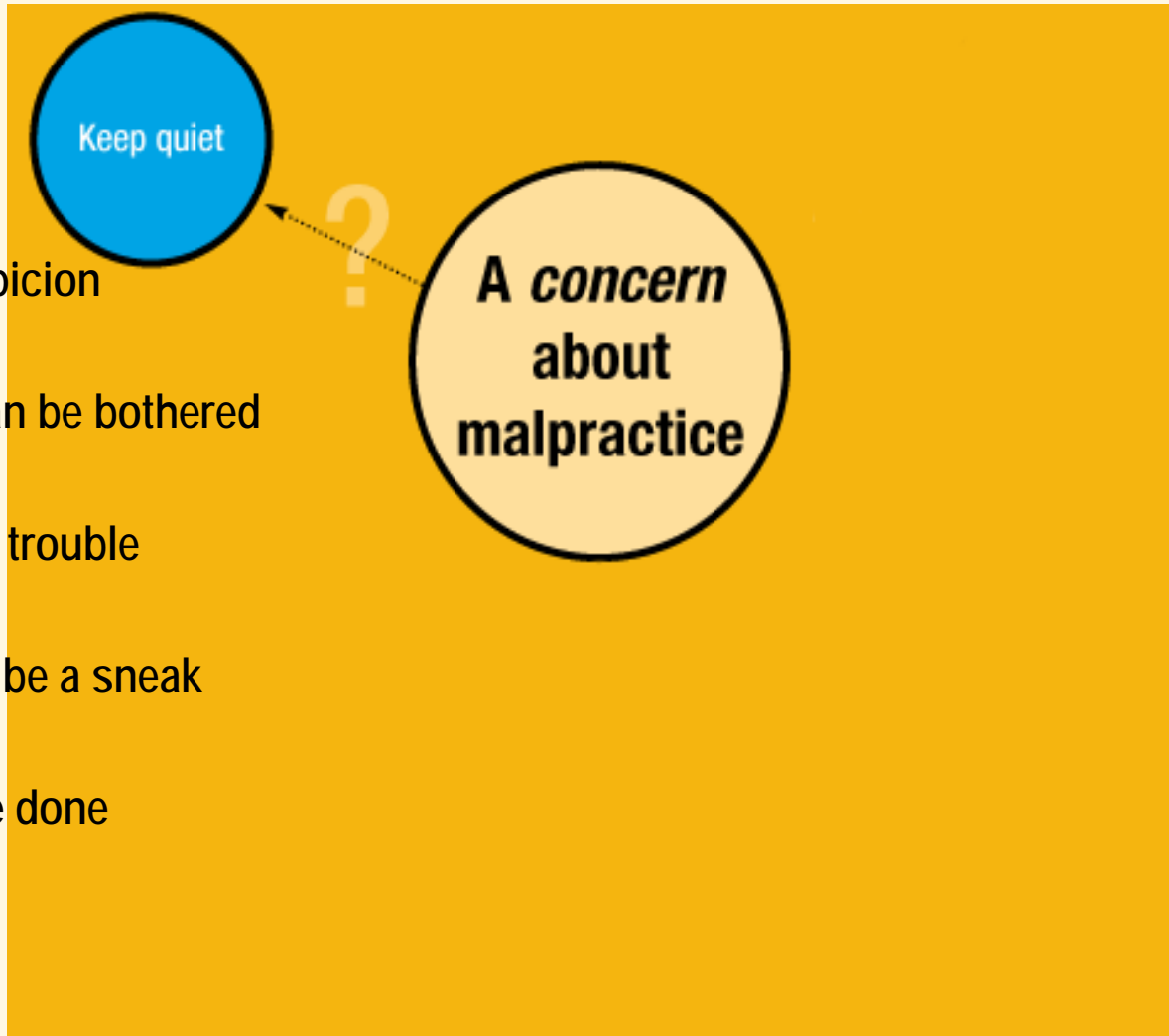
*(Star, 20 June 2002)*

Enron, WorldCom, Tyco  
Phar-Mor, Regal, Barrings, Beige  
Leisurenet, Lenasia, Groetvlei, ZZZZ Best,  
(and all the rest)

The question is, whose next?



# *The dilemma*



It's only a suspicion

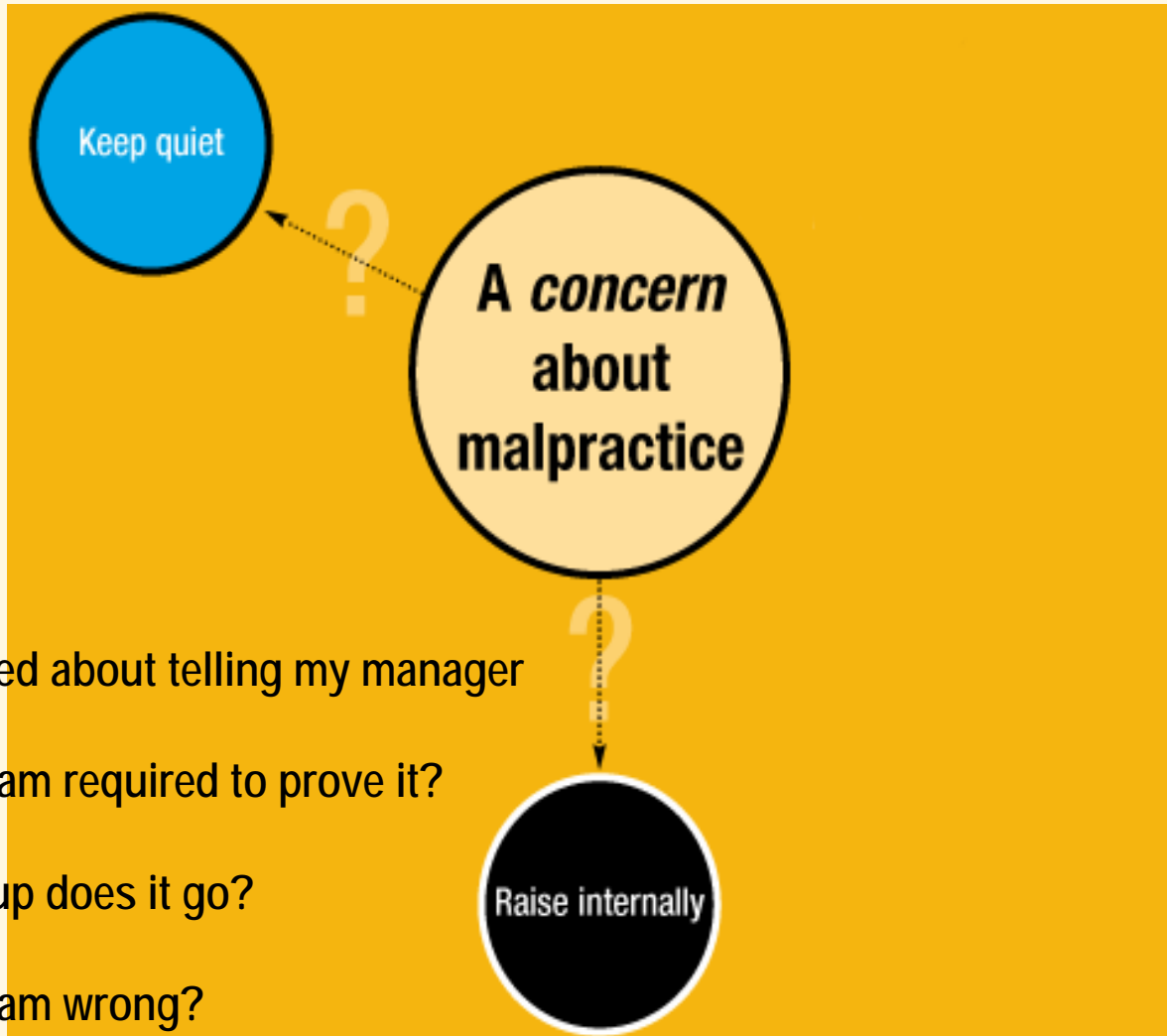
No-one else can be bothered

It'll only cause trouble

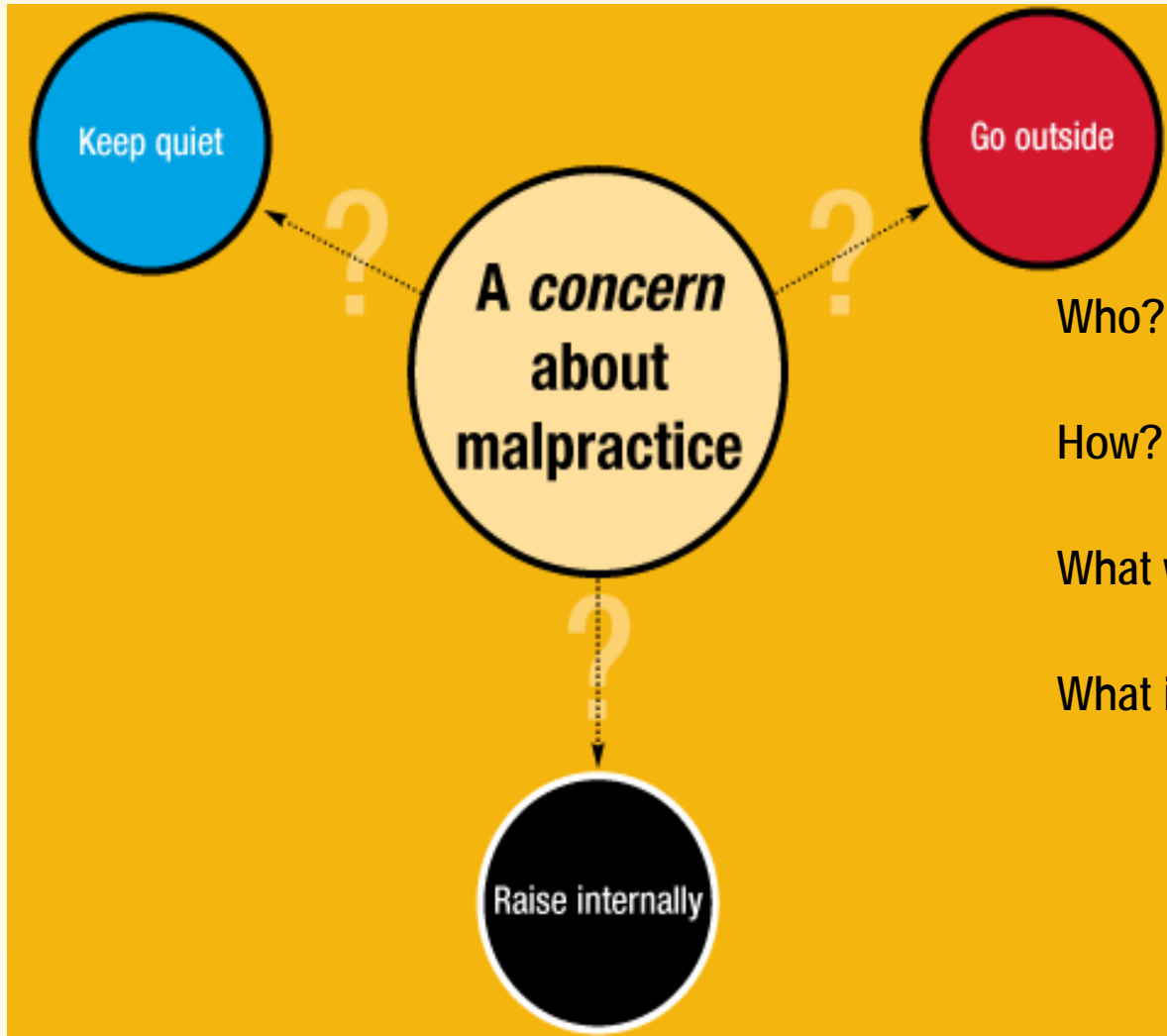
I don't want to be a sneak

Nothing will be done

# *The dilemma*



# *The dilemma*



# The Protected Disclosures Act 2000

## *The South African experience*

Transition to democratic rule characterised by

- High levels of crime - including widespread corruption
- Whistleblowers viewed as 'impimpis' or informants

Leading to initiatives to promote transparency and fight corruption including the Promotion of Access to Information Act 2000 and the Protected Disclosures Act 2000

# *Protected Disclosures Act 2000*

The new law aims to provide a statutory framework which

- Reassures workers with genuine concerns that there is a safe alternative to silence
- Promotes better accountability
- Makes risk management an issue for all staff and managers
- Helps everyone separate the message from the messenger

## *Protected Disclosures Act 2000*

- Applies to every employer and protects every employee
- Wide definition of wrongdoing
- Detriment or dismissal automatically unfair
- Provides for financial (and other) compensation
- Covers malpractice or “impropriety” which occurs outside the Republic of South Africa
- Allows disclosures of impropriety to person other than employer

## *Protected Disclosures Act 2000*

The Objectives of the PDA are to

- Protect an employee from being subjected to an "*occupational detriment*" on account of having made a "*protected disclosure*"
- Provide procedures for the disclosure of information regarding possible malpractice
- Prevent 'gagging' of employees concerned about malpractice
- Create a workplace culture which facilitates the disclosure of information about malpractice



# *Protected Disclosures Act 2000*

## *Occupational detriment*

- Any disciplinary action - including dismissal, suspension, demotion, harassment or intimidation
- A transfer against the employee's will
- Alteration of terms / conditions of employment to employee's disadvantage...

# *Protected Disclosures Act 2000*

## *Occupational detriment...*

- Refusal of transfer or promotion
- Refusal to provide reference or providing adverse reference
- Refusal of employment or appointment to office
- Threatening the employee with any of the above

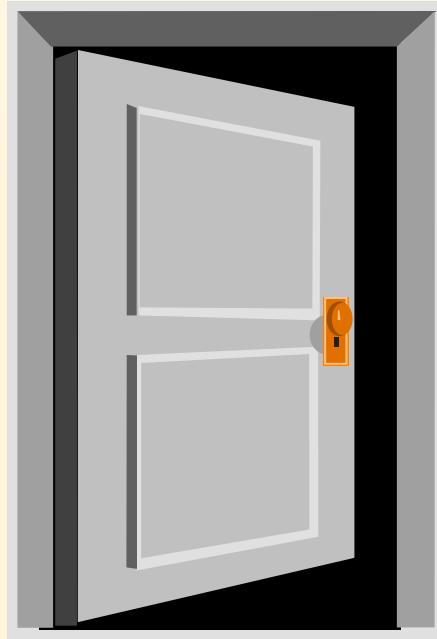
# *Protected Disclosures Act 2000*

A disclosure may be protected if it is about

- A criminal offence or miscarriage of justice
- A failure to comply with any legal obligation
- A danger to health & safety or damage to the environment
- Unfair discrimination
- The likelihood that any of the above is, has or may occur
- Deliberately concealing any of the above

# *Protected Disclosures Act 2000*

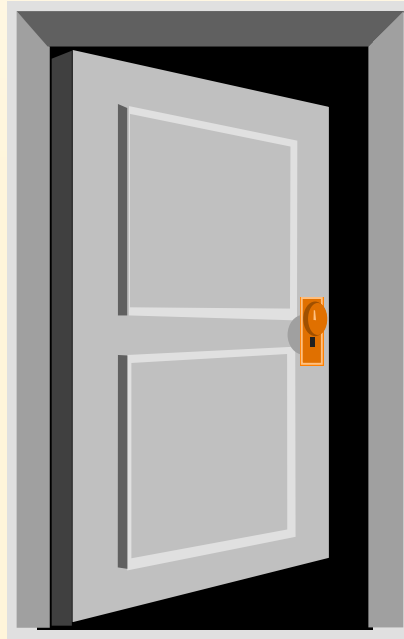
## The Four Doors to Legal Protection: Door 1



To a legal adviser for the purpose of, or in the course of, obtaining legal advice

# *Protected Disclosures Act 2000*

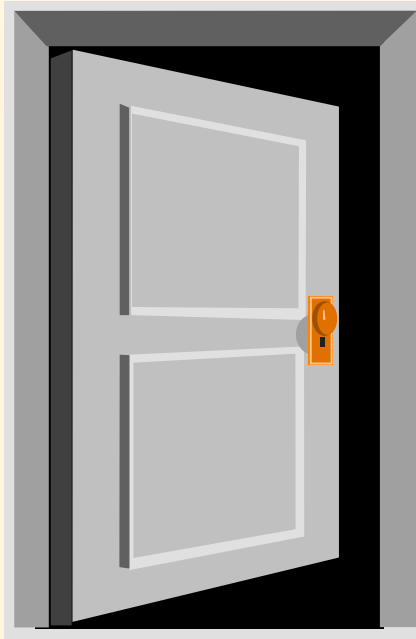
## The Four Doors to Legal Protection: Door 2



In good faith, to the employer - and / or using a procedure authorised by the employer

# *Protected Disclosures Act 2000*

## The Four Doors to Legal Protection: Door 3



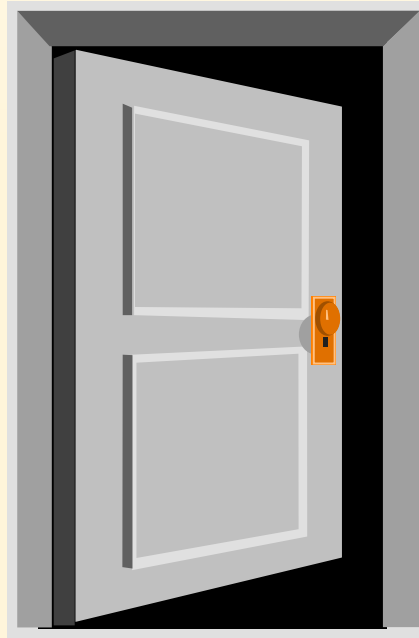
In good faith, to a specified regulatory body (includes Public Protector and Auditor General)

# *Protected Disclosures Act 2000*

## The Four Doors to Legal Protection: Door 4

Fear of occupational detriment?

Likely cover-up?



Exceptionally serious?

Wider disclosures (e.g. to police, media), made in good faith and not for personal gain - must be reasonable

# *Protected Disclosures Act 2000*

## The Four Doors to Legal Protection: Door 4 - wider disclosures

Reasonableness will depend on:

- Identity of person to whom it is made
- Seriousness of concern and /or whether risk continuing
- Duty of confidence owed by employer to third party
- Whether raised first with employer or prescribed regulator
- Use of whistleblowing policy



The Protected Disclosures Act was passed to provide for legal protection for employees who raise concerns about malpractice in the workplace.

The recent King report on Corporate Governance has recommended compliance with this legislation and also the “establishment of easily accessible safe reporting (e.g. ‘whistleblowing’) channels.”

The King report speaks strongly of the need to change organisational cultures to comply with good corporate governance

## *The Nine Point Plan*

- 1 Make it clear, through consultation, that it is both safe and acceptable for staff to raise concerns about wrongdoing
- 2 Draft and consult on procedures and rules for reporting concerns
- 3 Provide feedback within agreed time frames

## *The Nine Point Plan*

- 4 Check confidentiality clauses in contracts of employment
- 5 Decide on a senior person within the organisation with whom concerns can be raised
- 6 Publicise your success stories

## *The Nine Point Plan*

- 7 Ensure managers understand how to act if a concern is raised - and that they understand that staff have the right to blow the whistle
- 8 Consider whether to make use of ODAC's assistance in understanding and using this legislation
- 9 Introduce and promote a whistleblowing policy

## *Introducing a whistleblowing policy*

- Obtain commitment from the very top
- Assess the organisational culture through consultation with staff
- Meet with key personnel to outline the aims and objectives of introducing a policy

## *Introducing a whistleblowing policy*

- Check that staff and management have a clear understanding of the reason for the policy
- Obtain co-operation and commitment of labour organisations
- Make it clear that staff are encouraged and expected to raise concerns
- Review relationship with any prescribed regulators

## *Key elements of a whistleblowing policy*

- A clear statement that malpractice will not be tolerated within the organisation
- Examples of what counts as malpractice
- Respect for confidentiality (not anonymity) of staff who raise concerns

## *Key elements of a whistleblowing policy*

- Offer staff an alternative to line-management through which to raise concerns
- Indicate the proper way concerns could be raised outside the organisation, if necessary
- Allow access to some other external body - e.g. a professional body or independent advice centre



## *Key elements of a whistleblowing policy*

- Give staff of key sub-contractors access to your whistleblowing procedure
- Provide feedback to the whistleblower
- Leave staff in no doubt about the avenues open to them under the whistleblowing arrangements
- Deter abuse of the scheme

ODAC

Open Democracy Advice Centre

The purpose of ODAC is to:

- Promote open and transparent democracy
- Foster a culture of corporate and government accountability
- Assist people to realise their human rights

through supporting the effective implementation of laws that enable access to and disclosure of information

# ODAC's Activities & Services

- Public policy analysis and advocacy
- Public information and awareness campaigns
- Training and consultancy services

# Training and Consultancy Services

- Customised training and consultancy services including:
  - how to put a best practice whistleblowing policy in place
  - how to handle employees' concerns

# ODAC's approach

- To ensure that concerns about wrongdoing are properly raised and addressed in the workplace
- To promote the whistleblower as witness and not as complainant
- To put the principle of accountability into place
- To promote individual responsibility and corporate accountability
- To promote common interests between employers and employees