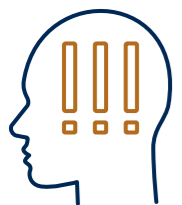


The era of the private sector whistleblower is here

Whistleblowing is becoming increasingly important in the private sector because:

- There is growing recognition that companies in the private sector are just as vulnerable to fraud and corruption as public sector entities. International studies show that over 40% of fraud or corruption in companies is picked up by whistleblowers, mainly employees. Knowing this, companies are realising how important it is to create an enabling environment for whistleblowers to come forward without fear of victimisation or occupational detriment.
- The Department of Justice and Constitutional Development recently published a discussion document on proposed reforms for the whistleblower protection regime. It recognises that, while the Protected Disclosures Act (**PDA**) is well intended, it is deficient in many important respects. For example, it does not provide a clear-cut procedure, does not deal with harm that goes beyond work-related detriments or threats that occur outside of work incidents, or economic impacts of whistleblowing. There are 13 broad amendments proposed including the expansion of occupational detriment and the creation of a fund for whistleblowers who face financial hardship. The proposals relate to amending the PDA, rather than creating a cohesive statutory framework.



There are low levels of awareness of Companies Act whistleblower provisions

Employers need to familiarise themselves with the interplay between the protected disclosure requirements of the Companies Act and the PDA.

The Companies Act whistleblower provisions extend the application of the PDA to disclosures made under the Companies Act, irrespective of whether the PDA would have otherwise applied to that disclosure.

Under the Companies Act, protections are afforded to good-faith disclosures by employees, directors, prescribed officers, registered trade unions, suppliers and suppliers' employees.

It protects disclosures made to a broad group of people and entities, including the Companies and Intellectual Property Commission (**CIPC**), the Companies Tribunal, the Takeover Regulation Panel, directors, prescribed officers, legal advisors and auditors. A notable exception is that disclosures made to journalists are not protected.

Another notable requirement of the Companies Act is the much wider scope of eligible disclosures, which include suspected discrimination or condonation of discrimination, as well as general prejudice.

A key protection provided for in the Companies Act is that whistleblowers can claim for damages if they have suffered harm or there is a real threat of harm as a result of a protected disclosure made in good faith and with reason to believe wrongdoing occurred.



Disclosure policies may be incomplete and out of date

Bowmans' experience is that many employers have whistleblowing policies in place – but these are often out of date or too vague to inspire the confidence of employees thinking about reporting their suspicions.

Often such policies may have been drafted several years ago and are largely unchanged despite the rise in fraud and corruption and the significantly higher risks of reputational damage since then, the amendments to the PDA which came into effect in 2017, and section 159 of the Companies Act.

Some employers also do not regularly check that their reporting channels are fit for purpose, or do not ensure that employees know how to use them.



Creating empowering, enabling and compliant whistleblowing policies and channels

Employers should take the following into account when looking at ways to give employees comfort that the organisation takes whistleblowing seriously:

- Do anonymous hotlines provide prompts to ensure that employees provide sufficient information to ensure the matter can be investigated? A report cannot be investigated without enough information, while reports not acted on for lack of information are a signal to employees that the organisation is not serious about whistleblowing.
- What options do employees have if they want to lodge a report against their direct managers?
- How accessible are reporting channels? Do they allow for reports in various languages? Are calls to hotlines toll-free?
- Confidentiality tends to be a major concern for whistleblowing employees. People tend to mistrust online reporting forms because they can technically be traced back to the sender. Placing physical reporting boxes in areas out of sight of CCTV cameras may produce better results.
- How is the organisation dealing with confidentiality issues (bearing in mind that confidentiality and anonymity are different concepts)?
- How will the company give feedback to whistleblowers on the steps taken to respond to their reports?
- What is the company's stance on situations where an employee facing disciplinary action now lodges a complaint of bullying or victimisation, especially with the recently introduced Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace?



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