

HARASSMENT, BULLYING WHISTLEBLOWING INVESTIGATIONS

● Themes and Strategies

- 14 June 2023
- Sarah Thomas, Partner
- Richard Yeomans, Partner



SPEAKERS



Richard Yeomans
Partner
Employment and Immigration



Sarah Thomas
Partner
Global Investigations



LATEST HEADLINES

FT FINANCIAL
TIMES

Prudential's chief financial officer resigns after conduct probe

B B C
NEWS

CBI hired 'toxic' staff and failed to sack offenders

METRO

Deputy prime minister Dominic Raab resigns following bullying report claims

THE  **TIMES**

How the toxic Yorkshire racism row ruined lives on all sides

The  **INDEPENDENT**

Ambulance staff afraid to speak out amid a culture of sexism, racism and bullying, report warns

**The
Guardian**

Met police found to be institutionally racist, misogynistic and homophobic

AGENDA – WHISTLEBLOWING - HARASSMENT & BULLYING INVESTIGATIONS

Wider trends



Penalties & Vicarious Liability

Whistleblowing: who and what are protected?



Regulatory overlay

Harassment: heightened awareness/risk



Investigation methodology tips

Personal conduct: regulatory overlay



LATEST TRENDS

01

Whistleblowers' draft Parliamentary Private Members' Bill

- Enhanced protections
- Establishes Office of the Whistleblower
- Creates criminal offences in respect of treatment and handling

02

ESG

- Accounting standard
- Shareholder activism

03

FCA review on supporting whistleblower confidence

- FCA reviewing own performance as receiver of whistleblows
- Majority of survey respondents extremely or somewhat dissatisfied
- Set out a number of areas for improvement by the FCA



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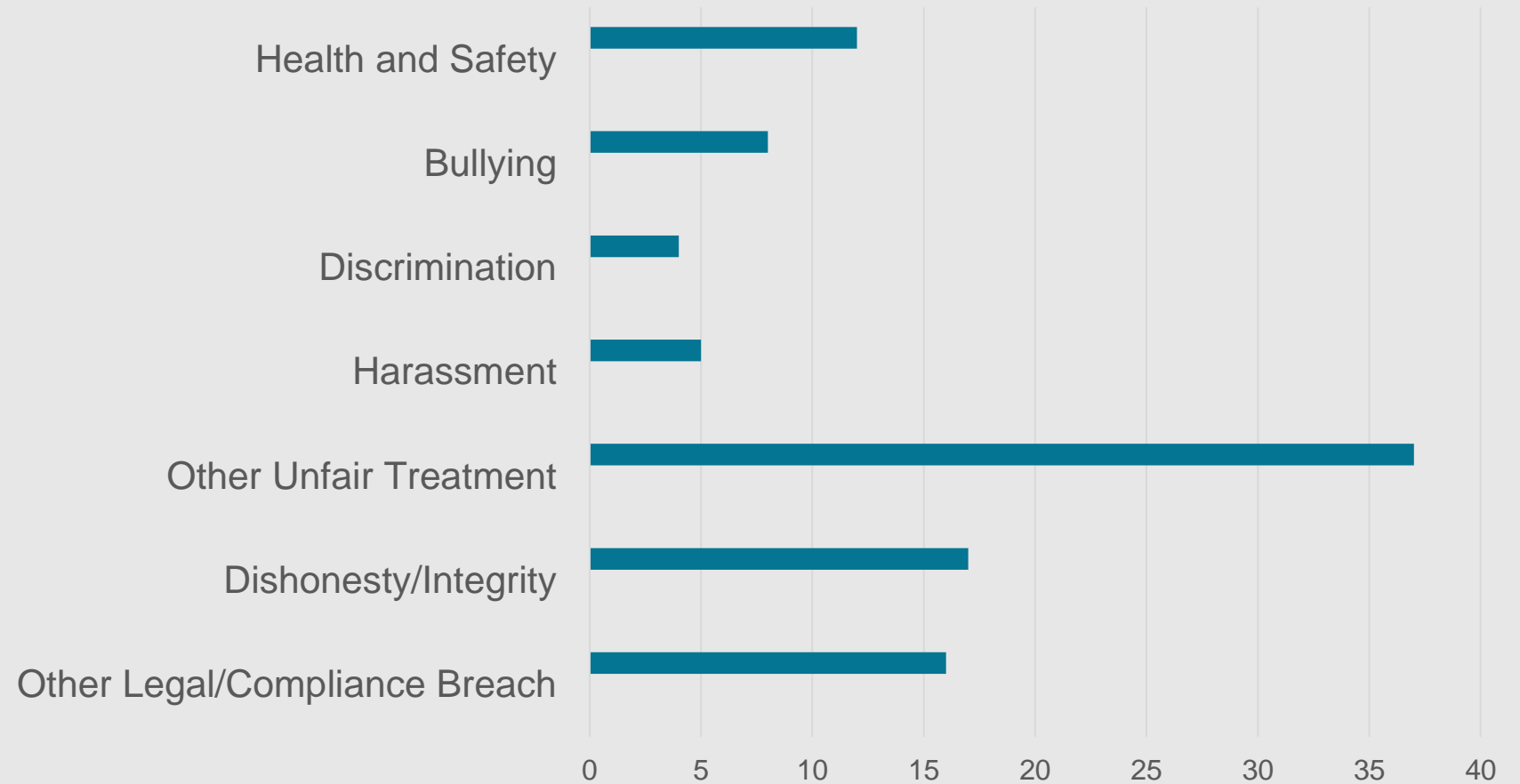
SAFECALL TRENDS REPORT

Types of report

Trends in different industries



TYPE OF REPORT

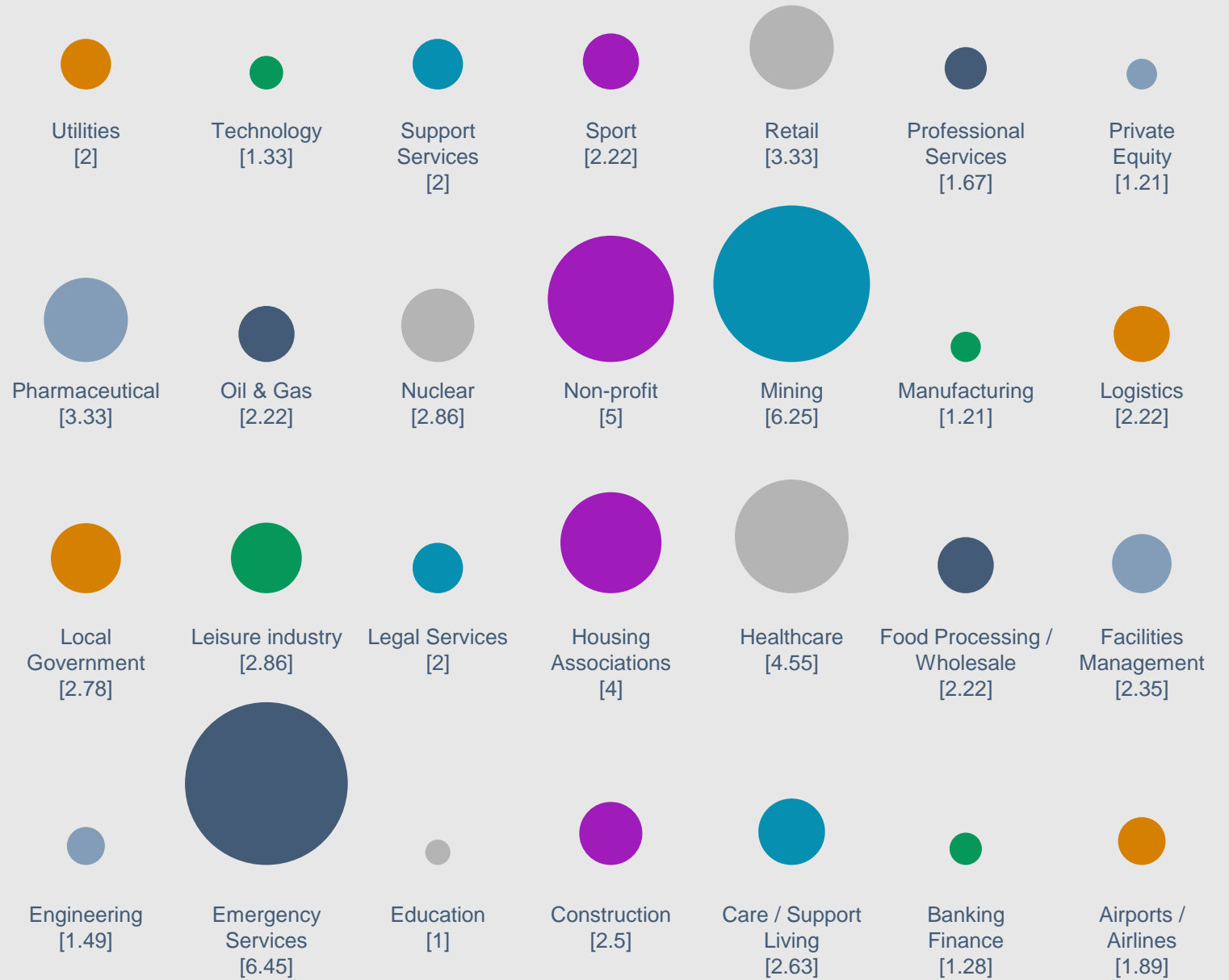


Source: Safecall Benchmarking Report 2023

INDUSTRY SECTOR BREAKDOWN: AVERAGE NUMBER OF REPORTS/ EMPLOYEE 2022

Source: Safecall Benchmarking Report 2023

Average number per 1,000 employees



WHISTLEBLOWING: THE CURRENT POSITION IN EMPLOYMENT LAW

Workers

Constituent elements:

- Is there a **qualifying** disclosure?
- Is it also a **protected** disclosure?
- Was the dismissal or detriment **caused** by the making of the protected disclosure?



STEP 1 - IS THERE A “QUALIFYING DISCLOSURE”?



Disclosure of information:

- More than a general allegation
- See: *Norbrook Laboratories (GB) Ltd v Shaw (EAT)*



Relevant failure:

Reasonable belief that the information tends to show that a relevant failure is occurring or is likely to occur (e.g. criminal offence; breach of legal obligation)



Public interest:

- Reasonable belief that the disclosure is made in the public interest
- What is “in the public interest”?



Case law on the public interest test:

Chesterton Global Ltd v Nurmohamed (CA):

- Numbers not material
- Key is belief

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WHISTLEBLOWING: BULLYING & HARASSMENT

01 Bullying

Offensive, intimidating, malicious or insulting behaviour involving misuse of power that can make someone feel vulnerable, upset, humiliated, undermined or threatened

02 Harassment

Unwanted conduct related to a PC which has the purpose or effect of violating dignity or creating intimidating, hostile, degrading, humiliating or offensive environment

03 Often a “public interest”

04 Growing trend to report

05 Increased publicity



STEP 2 - IS THERE ALSO A “PROTECTED” DISCLOSURE?

RECIPIENT OF THE DISCLOSURE?

Qualifying disclosure only “protected” if:

- Disclosure made to the right person/entity - usually internal disclosure to the employer
- External disclosures in some circumstances but more stringent tests
- See: *Barton v Royal Borough of Greenwich* (EAT)

WAS THE DISCLOSURE MADE IN GOOD FAITH?

Since 25 June 2013: not required to acquire protected status BUT absence may impact remedy



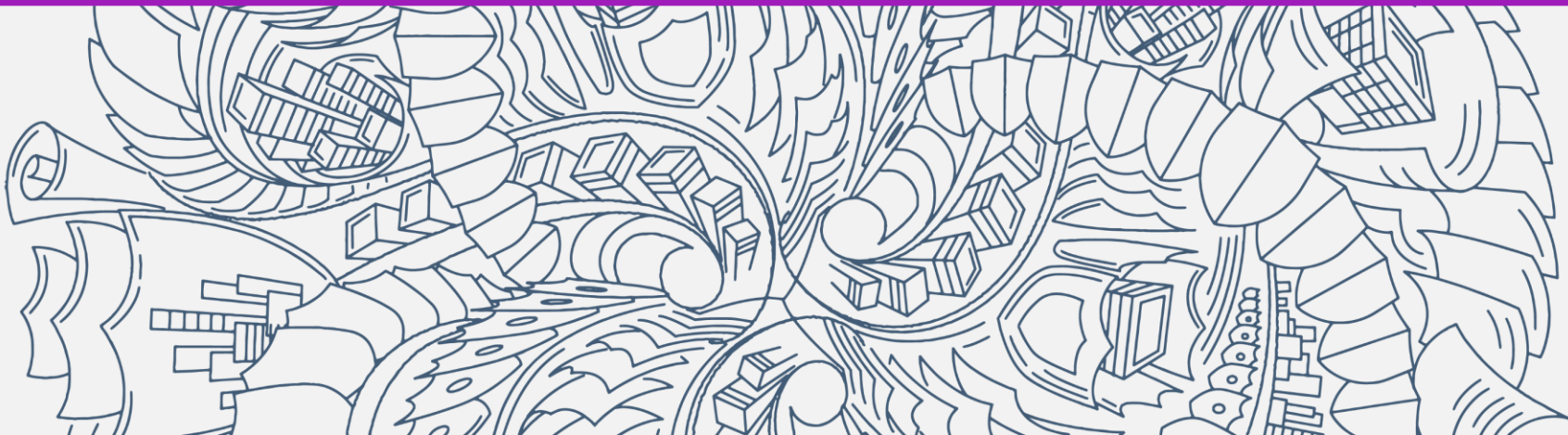
STEP 3 - WAS THE DISMISSAL, VICTIMISATION OR DETRIMENT CAUSED BY THE PROTECTED DISCLOSURE?

Different tests:

- Detriment: disclosure “materially influences”
- Dismissal: disclosure is the “reason or principal reason”

Be clear that the dismissal/action is **not** connected:

- Distinguish the disclosure from associated misconduct / the manner of disclosure
- See: *Panayioutou v Kernaghan (EAT)*,
Jesudason v Alder Hey NHS (CA)



PENALTIES AND LIABILITIES



EMPLOYMENT

Penalties

- Automatic unfair dismissal, declaration, compensation, injured feelings

Liability

- Employer & Manager



REGULATORY

- Breaches of SYSC 18/PRA rules
- Compliance with obligations of the Whistleblowers' Champion
- Fitness and propriety assessments, regulatory notifications, regulatory reference

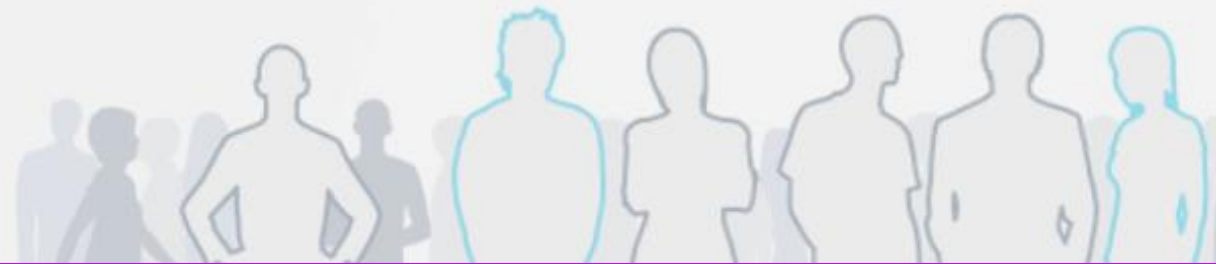


VICARIOUS LIABILITY

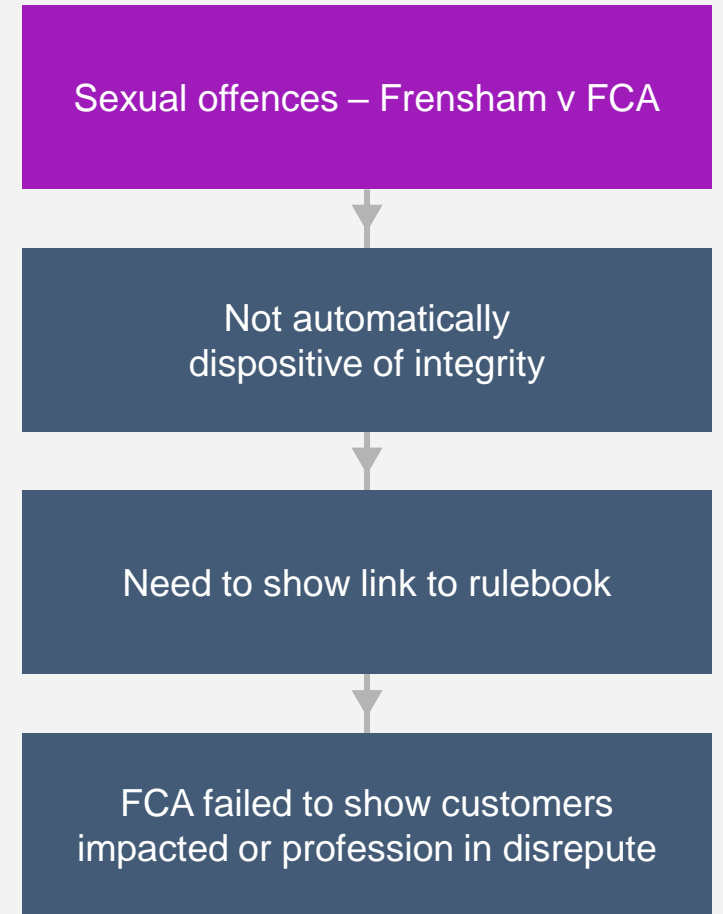
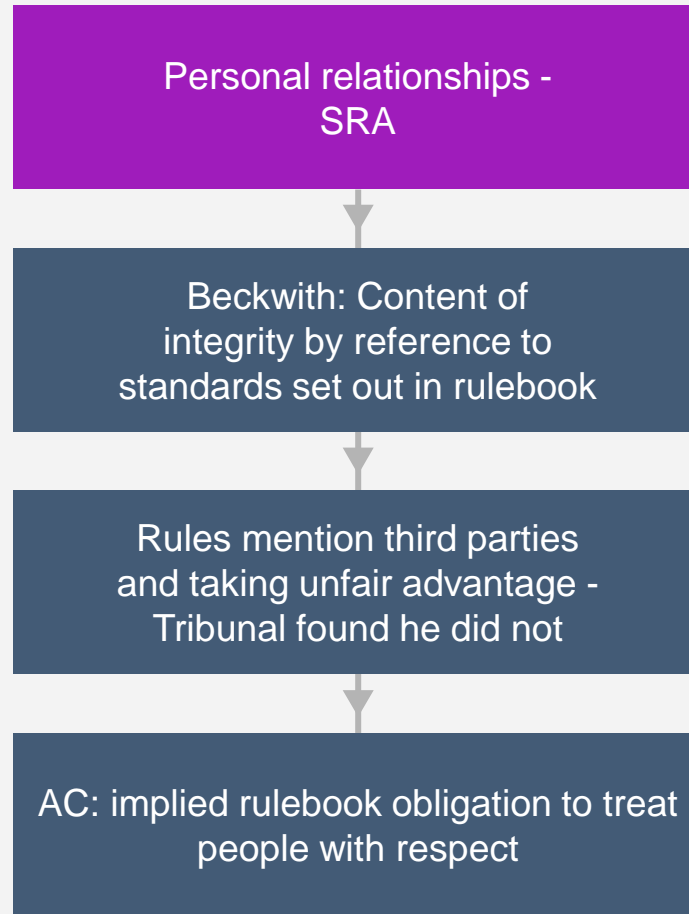
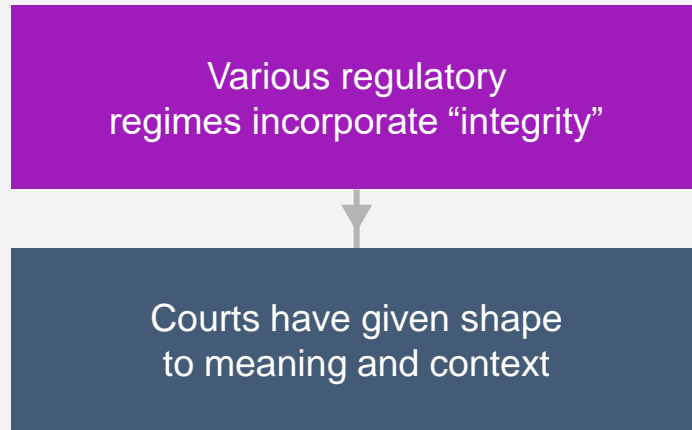
- Protection from retaliation by colleagues (and agents)
-
- “Reasonable steps” defence:
 - Whistleblowing policy
 - Training managers and supervisors
 - Dealing effectively with complaints / taking appropriate disciplinary action
-



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REGULATORY OVERLAY



PRACTICAL STRATEGY FOR HANDLING A WHISTLEBLOW

01

Investigation structure

02

Investigation output

03

Anonymity

04

Confidentiality

05

Trauma informed interviewing

06

Privilege



STRUCTURING THE INVESTIGATION(S) AND OUTPUT

Purpose

- May be a grievance and a whistleblower
- Remain separate and try to distinguish subject matter
- HR workstream should liaise with Investigation workstream
- Refuse requests of whistleblower to merge
- Consider regulatory dimension
- Criminal aspects

Team

- Internal – conflicts of interest, challenge, consistency
- External – independent or objective?
- Privilege

Documentation

- Terms of Reference
- Communication Protocol
- Investigation plan
- Output
 - Summary for sharing
 - Detailed privileged report
 - Feedback to whistleblower?

ANONYMITY AND CONFIDENTIALITY



ANONYMITY

- Impact on investigation - sometimes too imprecise
- How to investigate without raising speculation on identity – it is a prompt for work not a legal complaint response
- Promoting confidence in policies to encourage move away from anonymous reporting
- Avoid speculation
- Use anonymous communication tool



CONFIDENTIALITY

- Maintain confidentiality where possible but no guarantees
- Decision about whether to inform subject of whistleblower
- Obfuscate to help preserve - e.g. collecting data
- Responding to refusal of confidentiality
- Beware NDAs - Weinstein NDA included doctor



TRAUMA INFORMED INTERVIEWING

Trauma-informed approach aims to re-empower the person and take care that any response does not disempower or re-traumatise them further

01

Consider location and room layout

02

Let witness choose how to start

03

Ways to offer support

04

Understand responses to trauma - fight/flight/freeze/fawn

05

Frame questions carefully

06

Offer follow up

07

Call out normal impacts

08

Manage expectations

SETTING AND MAINTAINING PRIVILEGE

Open or privileged?

- Third party reports not privileged if not lawyers – unless litigation privilege applies
- Even if open, legal advice privileged
- Identify client group/team
- Circulate information within group
- Tell client team not to forward your advice on as likely to lose privileged status
- Inform relevant employees not to create documents on the matters under investigation
- If international link, get advice on how privilege operates in relevant jurisdictions

Witness interviews

- Who is leading the investigation?
- What are the litigation/regulatory risks?
- Might interviews need to be shared with a regulator?

Output

- Make board/governance challenge records separate?
- Limited copies of reports should be made
- Mark documents “confidential and privileged”
- Consider common interest privilege, limited

QUESTIONS?



MORE IMAGINATION MORE IMPACT

addleshawgoddard.com