

Workplace Investigations

Contributing Editors

Phil Linnard at Slaughter and May
Clare Fletcher at Slaughter and May

09. What additional considerations apply when the investigation involves whistleblowing?

Australia

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A complaint will be a whistleblowing complaint where a complainant has reasonable grounds to suspect that the information they are disclosing about the organisation concerns misconduct or an improper state of affairs or circumstances. The information can be about the organisation or an officer or employee of the organisation engaging in conduct that:

- breaches the Corporations Act 2001 (Cth);
- breaches other financial sector laws;
- breaches any other law punishable by 12 months' imprisonment; or
- represents a danger to the public or the financial system.

Since 2020, all public companies, large proprietary companies and trustees of registrable superannuation entities in Australia are required to have a whistleblower policy. Employers conducting an investigation will need to follow the processes outlined in their policy.

One of the key differences when conducting an investigation that involves whistleblowing is identity protection and the ability of the whistleblower to disclose anonymously and remain anonymous.

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Switzerland

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If an employee complains to his or her superiors about grievances or misconduct in the workplace and is subsequently dismissed, this may constitute an unlawful termination (article 336, Swiss Code of Obligations). However, the prerequisite for this is that the employee behaves in good faith, which is not the case if he or she is (partly) responsible for the grievance.

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23. Should the investigation report be shared in full, or just the findings?



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The investigator should prepare a written report setting out whether the allegations are substantiated, unsubstantiated or cannot be determined due to insufficient evidence. This report should be used for internal purposes only. Accordingly, the report should not be shared with the complainant, respondent or witnesses unless required by law, the employer's policies or another industrial instrument. It is particularly important not to share the investigation report should the employer wish to maintain privilege in respect of the report.

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Switzerland

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In principle, there is no obligation to disclose the final investigation report. Disclosure obligations may arise based on data protection law vis-à-vis the persons concerned (eg, the accused). Likewise, there is no obligation to disclose other documents, such as the records of interviews. The employee should be fully informed of the final investigation report, if necessary, with certain redactions (see question 22). The right of the employee concerned to information is comprehensive (ie, all investigation files must be disclosed to him).^[1] Regarding publication to other bodies outside of criminal proceedings, the employer is bound by its duty of care (article 328, Swiss Code of Obligations) and must protect the employee as far as is possible and reasonable.^[2]

^[1] Nicolas Facincani/Reto Sutter, *Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten*, in: HR Today, to be found on: <Interne Untersuchungen: Rechte und Pflichten von Arbeitgebern und Angestellten | hrtoday.ch> (last visited on 27 June 2022).

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