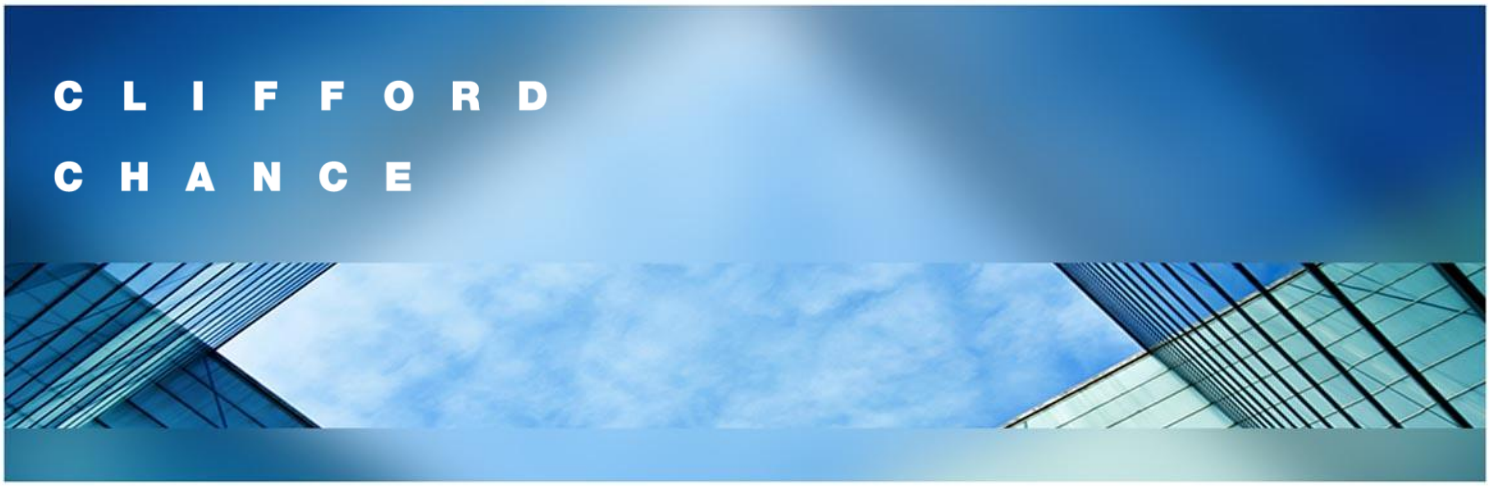

WORKPLACE INVESTIGATIONS – QUARTERLY REVIEW – EDITION 2

Employers are increasingly building a uniform global approach to workplace investigations to demonstrate and support a strong compliant culture.

In this Quarterly Review we identify relevant themes across jurisdictions, consider regulatory guidance and the possible impact of Trump's Executive Order targeting diversity, equity and inclusion ("DE&I") programmes. We examine recent and forward-looking developments and areas to watch that have practical impact on employee-related investigations globally.

EXECUTIVE SUMMARY

Americas

The administration change under President Trump in early 2025 has the potential for an ongoing impact on workplace investigations and reviews, the full impact of which is not yet clear. There is uncertainty over whether there will be support from Federal Government for an enhanced workplace investigations regime; DE&I Executive Orders bring the possibility of civil rights investigations and reviews; and on 27 January 2025 Attorney Generals across 11 States wrote to specific financial institutions seeking responses regarding diversity, equity, and inclusion and environmental, social, and governance commitments.

Europe

In the UK, in Q4 2024, there were key developments from a regulatory perspective. First, we saw the introduction of updated technical guidance from the Equality and Human Rights Commission ("**EHRC**") on sexual harassment in the workplace, including on conducting investigations. Second, the Solicitors Regulatory Authority ("**SRA**") finalised their guidance on conducting internal investigations – which general counsel will want to have regard to. We have identified common themes (and cross-over on practical steps) between the two.

For the financial services sector, in Q4 2024, we saw enhanced efforts by the FCA to improve their commitment and transparency towards investigations in the UK. This included resolving to provide clearer guidance for whistleblowers impacted by non-disclosure agreements and putting forward a (heavily

scrutinised) proposal to give firms a ten-day notice that the FCA will be publicising that they are under investigation. The results of the FCA's survey on non–financial misconduct were published, giving additional insight on the FCA's expectations on how firms should deal with allegations (ahead of the publication of the FCA's policy statement on non-financial misconduct which is expected later in 2025).

For corporate enterprises, 1 January 2025 saw the introduction of the UK Corporate Governance Code 2024, making a significant shift in the relevance of company culture to corporate governance by introducing the requirement to monitor and assess how desired company culture is embedded – we expect proactive workplace culture investigations and or reviews to be one way that is tested.

From a regulatory perspective, we will also be seeing the impact of increased ESG reporting requirements (for example, under the Corporate Sustainability Reporting Directive, Directive (EU) 2022/2464 ("**CSRD**")) in the EU (with the potential for non-EU application) – and further developments are expected following the "omnibus regulation".

APAC

We set out a comparative analysis between investigation approaches in Australia with UK's recently introduced positive duty to take reasonable steps to prevent sexual harassment in the workplace.

More generally, we are seeing employers learning lessons from other jurisdictions and seeking to systematise their approach to workplace investigations and reviews across jurisdictions.

We explore these topics further and cover other relevant developments and updates in our Quarterly Review.

FULL REVIEW

Americas

US: Corporate Whistleblower Awards Pilot Programme

As mentioned in our last edition, on 1 August 2024, the U.S. Department of Justice ("**DOJ**") unveiled the details of its much-anticipated Corporate Whistleblower Awards Pilot Programme intended through individual financial incentives to help root out corporate misconduct and to encourage companies to make prompt, voluntary disclosures. Since its announcement, DOJ has reported that it has received more than 200 whistleblower tips. The proliferation of whistleblower bounty programmes designed to financially incentivise individuals to report on company misconduct, and voluntary disclosure programmes designed to incentivise both companies and individuals to timely report their own misconduct, heightens the premium for companies to ensure active and adequate risk management and compliance monitoring and assurance. However, there is uncertainty in 2025 as to whether the President Trump administration will support enhanced workplace investigations regimes.

US: DE&I Executive Order brings the prospect of civil rights investigations

Amongst the first executive orders issued by President Trump are a number focused on DE&I. While the focus of the executive orders is largely on terminating DE&I programs and initiatives within and related to the Federal Government, significantly, there are two developments which squarely impact private companies who may be forced to pivot in their hiring and promotion criteria on threat of a civil rights discrimination investigation.

Based on the argument that DE&I programs are illegal and "violate U.S. civil-rights laws," the Executive Order Ending Illegal Discrimination and Restoring Merit Based Opportunity instructs the U.S. Attorney General to assist the heads of all Federal Government agencies, by 20 May 2025 to deliver a "proposed strategic enforcement plan," that addresses, amongst other things: recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DE&I; identification of key sectors of concern within each agency's jurisdiction; including the "most egregious and discriminatory DE&I practitioners in each sector of concern"; identification of a "plan of specific steps or measures to deter DE&I programs or principles; other strategies to encourage the private sector to end illegal DE&I discrimination and preferences and comply with all Federal civil-rights laws; litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest"; and potential regulatory action and sub-regulatory guidance.

The Executive Order directs each agency to identify "up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations and foundations with assets of 500 million dollars or more, and State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."

It is possible that this Executive Order could face legal challenge.

On 27 January 2025, Texas Attorney General Ken Paxton and 10 other State Attorney Generals wrote to major financial institutions, in a letter, stating that their DE&I, environmental and social governance commitments could lead to enforcement action if these policies and practices were found to violate state or federal laws. It was stated that both the response to the letter and interviews with relevant employees would be used to determine if any enforcement action is required against these key institutions.

Generally, companies are in the position of having to weigh the new expectations under the Trump Administration against the commitments they have made to their workforce and shareholders (as well as their regulatory obligations in respect of other jurisdictions) and consider whether policies and disclosures may need adjustment. Multinational companies that may face potentially conflicting requirements in relation to such matters as board diversity will need to consider how to reconcile these. Companies may wish proactively to examine what programmes they have in place, what they have committed to and announced publicly (and what they have called those programmes) and prepare to demonstrate how their workforce programmes and actions comply with US civil rights laws and regulations. This may also include reviewing the approach to what incidents trigger workplace investigations.

Europe

UK: Regulatory guidance on conducting investigations – practical steps

On 28 November 2024, the SRA updated and finalised its guidance for lawyers on conducting internal investigations (the "**SRA Guidance**"). This guidance is directed towards solicitors (including in-house solicitors) and law firms when they are involved in leading or conducting an internal investigation. It is also useful practical guidance from regulators generally as to the standards expected in workplace investigations. The Equality and Human Rights Commission ("**EHRC**") also previously published Updated Technical Guidance on Sexual Harassment at Work published on 26 September 2024 (the "**EHRC Guidance**") and supplemented this with their checklist and action plan published on 12 November 2024, which reference investigations. There are some overlaps in practical investigation steps coming out of these set of guidance as follows:

1. Choosing the right investigator – preserving independence

Where possible the investigator should be in a different part of the organisation from those involved in the underlying incident and have limited knowledge of the people involved. Respective seniority of individuals should be considered. In certain circumstances, this may mean appointing an external investigator (particularly when individuals at executive or board level are under investigation, given the influence those individuals might have or be seen to have over the investigation).

2. Setting the scope/ terms of reference of the investigation

Investigators should identify at the outset facts they should establish and the questions they should ask. The investigator should consider what information will be shared with which parties and when (taking into account how personal data, privacy concerns, confidentiality and legal privilege will be handled) and determining at the outset what the output of the investigation will be and who will be entitled to see this (and to comment on it before it is published). In some cases, where the police or law enforcement agencies are involved, additional considerations will apply.

3. Conducting the investigation – support for the investigation teams

Consider training or briefing the investigator to ask appropriate questions (in terms of style and content – particularly where trauma is involved), support them in developing a way to manage and record evidence (including to ensure that the underlying data and documents are not lost) and make sure they have established an appropriate approach to interview notes.

4. Supporting the complainant and accused – including preventing retaliation

Where possible, set target timescales and communicate them to the complainant so they feel their allegation is being sufficiently investigated and taken seriously (and where appropriate, give updates on progress). Additional support may be required to whistleblowers to ensure the individual's anonymity and to protect them from the risk of victimisation. It may be appropriate to suspend the accused on full pay or take other measures such as temporarily removing line management responsibilities or requiring them to work from home.

5. Post investigation steps

After an investigation has been concluded an employer can nominate an employee to reintegrate those affected by the allegations and investigations into the workplace (including by providing support and any counselling, arranging mediation and making offers of redeployment). Firms should also consider appropriate remediation steps and what they can do to stop incidents taking place again.

The EHRC guidance also cross-references the UK's ACAS guidance, which, while not legally binding, can influence tribunal outcomes and is a useful further source of practical steps.

UK: Changes to whistleblower protection

Amendments being introduced through the Employment Rights Bill ("**ERB**") will extend whistleblower protections in the UK to expressly cover those who report sexual harassment (whether it has already occurred or is likely to occur). In light of this, current whistleblowing and grievance policies should be audited to assess the current interaction and/or overlap between grievance, harassment reporting and whistleblowing procedures, if any, to ensure those alleging sexual harassment are afforded equivalent internal protection. Employers should be mindful however that, depending on the factual matrix, an employee that reports sexual harassment may already be covered by the whistleblowing protection regime. The timescale for implementing the change is unknown, but it is unlikely to be before 2026. Protection for whistleblowers remains a matter on the Government's agenda, in October 2024 in a parliamentary debate Baroness Jones of Whitchurch noted that the Government are continuing to look at the whistleblowing regulations, are committed to ensuring that whistleblowers are not subject to detriment and are exploring the option of introducing an Office for the Whistleblower.

In the financial services sector, the FCA have said in a letter, of 29 November 2024, responding to the "Sexism in the City" inquiry that it will be providing clearer guidance in 2025 for whistleblowers who are impacted by a non-disclosure agreement, but who wish to report to the FCA.

Corporate enterprises: The UK Corporate Governance Code 2024 (the "Code")

The Code, published by the Financial Reporting Council, came into force on 1 January 2025. It provides that the Board of directors should assess and monitor culture but also consider how the desired culture has been embedded into the organisation. The Board must also seek assurance that management has taken corrective actions when it is not satisfied that policy, practices or behaviour throughout the business are aligned with the company's purpose, values and strategy.

The Financial Reporting Council (FRC) Guidance to the Code states that Boards will need to be alert to signs of possible cultural problems and suggests that signs of a possible culture problem include: fear of speaking up, sub–cultures and lack of openness to challenge. In this context, one of the questions it suggests Boards ask themselves is: "How is 'speaking up', beyond whistleblowing policies – including ideas and innovation, encouraged across the organisation?"

The FRC Guidance has potential implications for workplace investigations; when defining the scope of an investigation consideration should be given to whether wider cultural issues should be included alongside the substantive focus. Alternatively post-investigation assessments or deep-dives to address

cultural issues are a possibility. In all cases, it is important that the cultural considerations arising in the context of any investigation are not dealt with in silos, that a joined-up approach is adopted with inputs from various functions across the organisation, and that there is a consolidated flow of MI to the Board. We have prepared a separate briefing in respect of wider considerations under the Code.

CSRD and the Corporate Sustainability Due Diligence Directive ("CSDDD") – increased need for workplace–based reviews

CSRD introduces mandatory European Sustainability Reporting Standards ("**ESRS**"), many of which contain HR and people provisions that will require proactive investigation or review by companies. This will be relevant to governance frameworks for investigations (for example, requirements to report on channels for their own workforce to raise concern) as well as the results of those (such as managing risks to employees, which might include, for example, sexual harassment). The first tranche of companies are required to report in 2025 in relation to the 2024 financial year. As we explain in our separate briefing, non-EU parent reporting per CSRD will become mandatory in 2028, with first reports coming due in FY2029.

Firms caught by CSDDD will also be required to comply with proactive diligence provisions from 2027 (once transposed into member state law). Although there are divergent global views in relation to ESG approaches, navigation of underlying regulatory requirements will require engagement. Companies are now anticipating the additional proactive (and reactive) investigations that might be triggered by associated diligence and disclosure. This will allow companies and their boards to ensure the appropriate level of management information, cultural risk evaluation, associated remediation and other outcomes. The European Commission is considering further consolidation between the content of the two directives, with "omnibus legislation" expected to be published at the end of February 2025. The extent to which the regimes may be streamlined or consolidated – and the impact on workplace investigations and reviews – can then be further assessed.

Sector focus – Financial Services (UK developments)

FCA and Non-Financial Misconduct ("NFM") Results from survey

On 25 October 2024, the FCA released the results from their NFM survey, which covered incidents of NFM over a three-year period and surveyed over 1,000 investment banks, brokers and wholesale insurance firms. Of note, incidents had increased in the three years under review and the most reported concerns were bullying and harassment (26%) and discrimination (23%). There was also an extremely large "other" category (41%) indicating a difficulty in categorising issues of personal misconduct.

The FCA found that firms identified concerns through a variety of mechanisms, some were using their internal systems to identify potential issues, although formal processes, e.g. grievances (50%) and whistleblowing procedures, were the most prevalent methods of detection. Disciplinary or other actions were taken in 43% of cases. The remaining cases had varied outcomes, including ongoing investigations or no action taken.

The FCA has stated that the findings are being shared to enable firms to benchmark their own reporting against this peer analysis and consider if their processes for reporting and investigating possible non-financial misconduct remain appropriate. Trade associations and other stakeholders are

encouraged to use the findings to drive industry-wide improvements in workplace culture.

The FCA sets out in the findings expectations for firms relevant to non-financial misconduct investigations, including the need to: ensure accessible, trusted and effective reporting mechanisms; review and strengthen policies and procedures related to non–financial misconduct; have effective systems in place to investigate promptly; provide a flow of relevant management information to the board and board committees; and hold senior management accountable for fostering a positive workplace culture and ensuring that misconduct is addressed. It was noted that a senior manager's failure to take steps to address non-financial misconduct could lead to the FCA determining that they "are not fit and proper".

In its letter (29 November 2024) responding to the "Sexism in the City" inquiry, the FCA has said that it plans to publish its final (eagerly awaited) policy statement on financial misconduct in early in 2025. The FCA's chief operating officer, Emily Shepperd, outlined in a speech on 4 February 2025 that the FCA have been updating their rules and guidance on non-financial misconduct and that they expect to set out further detail on their proposed next steps in due course.

FCA's consultation on its policy on publishing information about investigations

As we reported in our last edition, last year the FCA consulted on a change to its policy on publishing information about investigations. It proposed to publish information when an investigation was opened, including the subject of the investigation and a summary of the suspected breach, misconduct or failing being investigated.

In November 2024, after scrutiny from the House of Lords Financial Services Regulation Committee, the FCA stated that it planned to reshape these proposals and on 11 December 2024 the FCA published a consultation paper FCA Consultation Paper CP24/2, on revised proposals including a staged approach to announcing an investigation and the level of detail that would be made public. The proposal is currently to provide firms with a draft announcement and give them ten business days to respond, with an additional two days' notice before publication if the FCA decides to proceed, replacing the original proposal which controversially only gave firms a day to respond.

The consultation paper also reiterates that the FCA will not generally announce when it has opened an investigation into a named individual and that it proposes to maintain this approach given the "specific legal considerations". However, it does not articulate what these "legal considerations" are. As such there appears to be scope in some circumstances for individuals to be named, including the possibility that individuals involved in non-financial misconduct (including sexual misconduct) investigations could be named. The consultation closes on 17 February 2025. The FCA Board plans to decide on the proposals in the first quarter of 2025. But there will be further engagement with stakeholders before finalising the approach.

Despite the FCA amending their proposal to garner support, the proposal remains under scrutiny with the House of Lords Financial Services Regulation Committee reporting (in a report that Clifford Chance contributed to) that the FCA should not proceed until it is able "to find an acceptable balance" and an

approach that would "help prevent consumer harm" and also mitigate the risk posed to those under investigation and to market stability.

APAC

Comparative analysis – UK and Australia: Impact of legislative regimes on investigations into sexual harassment

From 26 October 2024, employers in the UK have been under a positive obligation to take reasonable steps to prevent sexual harassment of their employees in the course of their employment. A breach of the legislation is relevant to the level of compensation available to an employee (there can be an uplift to compensation of up to 25% in all discrimination claims if an Employment Tribunal upholds a sexual harassment) and in addition the EHRC can take enforcement action, undertake investigations and impose fines.

This new statutory obligation has led to employers strengthening policies and procedures, extending and updating training programmes and ensuring staff are made aware of what constitutes sexual harassment and how to report and address it. Employers are also reconsidering the approach taken to investigating and recording allegations of sexual harassment and the need to undertake risk assessments (see section on Regulatory Guidance on Investigations above).

Learnings from Australia

The UK regime follows that in Australia which in December 2022 introduced a positive duty on employers to prevent workplace sexual harassment. The positive duty in Australia requires organisations and businesses to take "reasonable and proportionate measures" to eliminate the following behaviour as far as possible:

- discrimination on the ground of sex in a work context;
- sexual harassment in connection with work;
- sex-based harassment in connection with work;
- conduct creating a workplace environment that is hostile on the ground of sex;
- related acts of victimisation.

Whilst Australia's positive duty to prevent harassment includes a wider range of unlawful conduct compared to the UK's requirements, both frameworks are fundamentally similar in that they require employers to take proactive steps to prevent sexual harassment rather than merely responding after incidents occur.

In practice, this positive duty in Australia has led employers to view sexual harassment as a health and safety issue and proactive employers have adopted a multidisciplinary approach to risk assessments, engaging stakeholders from legal, HR, safety, operations, and leadership to identify potential risks of sexual harassment across various business areas.

In the context of workplace investigations specifically, the Australian Human Rights Commission ("**AHRC"**) has published guidance on compliance with the positive duty in Australia and highlighted the importance of employers fostering a culture that encourages workers to report sexual harassment. The

guidance suggests that practically this can be achieved by establishing a well-developed and known complaint channel, along with ensuring investigations will be conducted fairly and impartially, and that decision-makers will act reasonably on the findings. The AHRC also stresses the importance of collecting data and using it to assess and improve the work culture. This is particularly relevant to workplace investigations, which can produce valuable information about behaviours and culture within an organisation, provided it is done in an appropriate and confidential way at the conclusion of an investigation.

The expectations in Australia around how internal investigations should be conducted are similar to the UK, although the concept of 'procedural fairness' is codified in the national workplace legislation (the Fair Work Act 2009).

Practically, this means that investigations in Australia tend to be more formalised and structured, with a high reliance on external investigators even within smaller organisations. However, both jurisdictions emphasise thorough investigations, unbiased investigators, providing employees with a fair opportunity to respond to allegations, the right to accompaniment, timeliness, proper documentation, confidentiality and the prevention of victimisation. Beyond Australia and the UK, these are useful governance benchmarks across jurisdictions.

Further developments

The ERB which was introduced to the UK Parliament in October 2024 included an amendment to the statutory obligation to take reasonable steps to prevent sexual harassment to make it an obligation to take "all reasonable steps". The Government's view is that an employer will have taken all reasonable steps if there are no further steps that they could reasonably have been expected to take. The new obligation further heightens the importance of a thorough, robust and independent investigation into any allegation of sexual harassment in the workplace and considering pro-active culture reviews as a preventative step (potentially including engagement with staff to understand from them what they would consider to be additional appropriate steps). Such investigations may show up behavioural failings in the workplace by individuals but also systemic approaches that can be improved. It is unknown when this enhanced statutory obligation will come into effect, but it is unlikely to be before 2026.

CONCLUSION

As organisations look to develop systematic governance of workplace investigations they will need to consider the regulatory framework that influences the approach in each jurisdiction. Specific drivers (e.g. the obligation to take reasonable steps to prevent sexual harassment in employment, ESG regulation and Executive Orders from the Trump administration) may lead to employers having an increased focus on pro-active culture reviews and risk assessments. Global organisations will need to develop a strategy for reconciling divergent approaches – as well as maintaining best practice approaches to more routine incident-specific investigations in light of regulatory guidance.

Clifford Chance's Workplace Investigations and Culture Reviews hub can be visited here.

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