



## Protecting the 'eyes and ears of our society': Jersey's new whistleblowing regime

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### **The importance of whistleblowers cannot be understated for ensuring the highest standards are maintained in financial services businesses.**

Outside the realm of financial services, the #MeToo movement has renewed the focus on providing adequate protection for whistleblowers to such an extent that the UK legal regulator has issued a warning to lawyers confirming that confidentiality obligations cannot be relied on to prevent a person from 'blowing the whistle' on a current or former employer.

In light of this doubling down on protection for whistleblowers, it is notable that Jersey's legislative framework is currently silent on any kind of whistleblowing measures, putting it roughly 25 years behind England and Wales. All this is soon set to change, however, with the States of Jersey aiming to bring forward draft whistleblowing legislation before the end of this year.

Given that so much of Jersey's employment law is modelled on the UK, our expectation is that Jersey's new whistleblowing regime will largely mirror that of England and Wales. This article will, therefore, set out the current UK whistleblowing framework, before considering any potential challenges that having a similar type of regime would pose in Jersey.

#### **Current whistleblowing regime in England and Wales**

The current whistleblowing regime in England and Wales is primarily set out in the Employment Rights Act 1996 as amended by the Public Interest Disclosure Act 1998. Under the legislative framework, 'workers' are able to disclose certain information about their current or former employer and gain protection in relation to that disclosure. Whilst the legislative provisions are relatively broad (for example, the concept of 'worker' is much wider than the usual legal definition, extending to agency workers and seconded workers), it is not the case that a worker can simply make any complaint against a current or former employer and gain protection as a whistleblower. To qualify for protection, a complaint must constitute a 'protected disclosure' – a test which is subject to the following conditions:

1. There must be a disclosure of information.
2. The worker must reasonably believe that the disclosure is made in the public interest.
3. The worker must reasonably believe that the disclosure concerns one of the six qualifying disclosures (these include, for example, that a current or former employer is in breach of a legal

obligation, or that their conduct amounts to a criminal offence).

Note that under UK employment law, there is a distinction between worker and employee. However, as there is no concept of worker in Jersey, it's likely that all employees will be covered by the proposed legislative framework.

A fundamental aspect of the whistleblowing regime in England and Wales is that workers are protected from being dismissed or suffering some other detrimental treatment as a result of making a protected disclosure. Detrimental treatment includes actions such as demotion, suspension or the refusal of a promotion. Further, if an employee is dismissed for whistleblowing, the dismissal will be automatically unfair if the reason for it is because the worker in question has made a protected disclosure. The employee does not need to have a certain length of service to qualify for this protection and, significantly, there's no cap on the compensation which can be awarded.

Jersey employers should also be aware that under the UK regime, it is not possible to agree with individuals that they will not make a protected disclosure – any term of an agreement between an employee and employer preventing the employee from whistleblowing will be deemed to be automatically void.

### **Potential challenges with the regime**

Walkers hosted a round table with clients within the financial services industry as part of the consultation process in Jersey. The unanimous feedback from the attendees was that there is widespread support for a similar UK style protected disclosure regime to be introduced and that it is important for Jersey that it has effective protection for whistleblowers in place.

However, England and Wales' whistleblowing framework is not without its challenges. If adopted in Jersey, employers should be aware that the following aspects of the regime need to be approached with caution:

- the term 'disclosure' is not actually defined in the legislation. In turn, this could lead to it being applied in a wide range of contexts;
- the test for what constitutes 'in the public interest' is hard to pin down and will likely be considered on a case-by-case basis. This issue has been complicated further by recent UK case law confirming that a disclosure in the private interests of a worker may also be in the public interest if it relates to, and would serve, the private interests of other workers. Having such a wide test may not translate as well in a smaller sized jurisdiction like Jersey; and
- the penalty which employers could incur is uncapped. This could pose significant costs to businesses who are found to have subjected employees to detrimental treatment as a result of making a disclosure.

### **Practical implications**

In terms of the practical implications, it may be the case that many Jersey-based companies already have whistleblowing policies in place or operate hotlines as a matter of good practice. Financial services firms in particular, who are subject to greater scrutiny under the UK regime, should ensure that they have a written whistleblowing policy in place containing details of whistleblowing channels where complaints

about wrongdoing can be reported. New whistleblowing policies may also have some interaction and overlap with existing company policies (such as grievance and disciplinary procedures) and so the new legislation could be an opportunity for employers to not only introduce new policies, but strengthen existing ones.

Please contact the authors below or your usual Walkers contact if you wish to discuss this further.