

# Ensure OHS by building whistleblower confidence

By [Kate Collier](#)

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The processes for reporting dangerous workplaces can significantly differ from one organisation to another. Notably, there seems to be a lack of consideration for an anonymous reporting mechanism, leaving individuals raising concerns vulnerable to potential identification by others within the organisation who may take issue with the report.



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There is no apparent contemplation of an anonymous process through which reports of dangerous workplaces can be provided and those raising the alarm are not protected from identification from other personnel who may be aggrieved by the report.

## Protection and safeguards

Section 26 of the OHSA prohibits any victimisation, by an employer, against an employee that discharges a duty or exercises rights under the OHSA. However, this may be of little comfort to employees who are genuinely scared of, or intimidated against, raising concerns about workplace safety or instructions issued by supervisors which may be unsafe.

South Africa's existing Protected Disclosures Act is designed to safeguard whistleblowers from any form of retribution by their employers from an "occupational detriment" which is any negative action taken against a whistleblower, other than dismissal. This includes disciplinary action, suspension, demotion, harassment, or intimidation in the workplace.

Secondly, outside of reporting of immediate possible harm and the use of the right to refuse work, where an element of protection does already exist, employers should consider the potential value of the use of whistleblowing systems and whistleblower protections as part of accident and incident investigations.

Although not free from its own shortcomings, there is scope for employers and employees alike to assess the usefulness and appropriateness of the Protected Disclosures Act in the context of occupational health and safety management.

In addition, when developing systems for employees to exercise their rights under health and safety legislation, or whether employers implement systems in line with best practice in excess of which the legislation requires, the guidelines in ISO 37002: *Whistleblowing management systems – guidelines* (ISO guidelines) can be relied upon. This document "provides guidance for organisations to create a whistleblowing management system based on principles of trust, impartiality and protection".



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## Direction

The ISO guidelines provide direction on establishing, implementing, and maintaining effective whistleblowing management systems. Within the contemplated management system, a structured framework is set out in respect of receiving, assessing, and addressing whistleblower reports as well as concluding cases involving whistleblowing. The policies and procedures that constitute a whistleblowing management system promote early reporting, preventing detrimental treatment of whistleblowers, and foster a culture of safety reporting.

The processes and principles set out in the ISO guidelines would enhance workplace safety through early identification and remedial action in response to harm or risk of harm to safety and safe working practices. The guideline provides a clear process for receiving and assessing reports of wrongdoing including safety-related issues that provides for prompt evaluation and action, increasing an organisation's capacity to intervene in unsafe circumstances before harm occurs.

## Reporting mechanisms

Where an employee is apprehensive about making a report of an unsafe work practice or environment to an immediate supervisor for any reason, it is advantageous to establish additional reporting channels that are visible, accessible, and secure. The ISO guidelines set out practical recommendations as to the types of channels that may be considered for this purpose as well as the factors to consider in maintaining the integrity and confidentiality of any disclosures made through those channels.

Making employees aware of existing reporting channels, be it manually written complaints in a record book or updated channels via an online portal, is crucial to avoid employees claiming impossibility for reporting a complaint or concern. Employers should remain mindful of the multi-language requirements of the workforce and facilitate engagements in a language that the whistleblower is comfortable with.

## Fear of intimidation

Even though employees bear a statutory duty to report actual or perceived unsafe or unhealthy situations, many fail to do so, citing intimidation as the reason for such failure. Facilitating anonymous and confidential disclosures, as well as continued information exchange is advantageous in circumstances where harm has occurred for the purposes of gathering evidence of an incident while mitigating circumstances that lend themselves to employees claiming intimidation as the basis of their failure to report.

In turn, this lays a foundation for robust accident and incident investigations. Such guidance covers the information that should be sought from whistleblowers to ensure that an organisation has information at hand to properly assess the incident itself as well as the likelihood of the whistleblower suffering detrimental conduct as a result of making the disclosure and the severity of the detriment should it occur.



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## Procedure and protocols

Establishing protocols or guidance on how to engage with a whistleblower during and after a disclosure will limit or avoid compromising accident and incident investigations. This enables an organisation to prioritise reports based on risk. Additionally, the type and frequency of feedback that should be provided to the whistleblower during an investigation into a reported issue builds and maintains trust and provides an opportunity for a whistleblower to share additional information.

A fast and reliable method of collecting and securing evidence of an accident or incident empowers an organisation to act swiftly. Assessing appropriate measures in addressing dangerous working places or practices should include considering factors such as whether the incident necessitates additional procedures such as disciplinary proceedings; assessing if the incident involves a criminal offence and warrants referral to the Department of Mineral Resources and the South African Police Service; considering the timing of the incident, its potential to disrupt business activities, immediate threats to health and safety, human rights, or the environment; and addressing the need to preserve evidence.

## Potential risk factors

There are, of course, possible risk areas if this is not managed carefully, particularly where the disclosures are not made in good faith, regulators intervention that may require identification of complainants (including where incidents are subject to statutory investigations or inquiries – particularly as the current legislative regime does not expressly provide for anonymity, although employers may offer this to employees to encourage disclosure) and whether a system designed to protect employees against retaliatory conduct by an employer would work optimally in an environment where the protection may be required from other employees or supervisors, and the employer is already committed to protection of employees who raise health and safety concerns.

The existing legislative frameworks do not provide protection or clear consequence for retaliation beyond the realms of the employment environment and in respect of which employers may have little influence or control.

Anticipated changes to whistleblowing legislation may then be of interest to health and safety managers and employers, particularly if legal reforms introduce stronger penalties and consequences for those who retaliate against whistleblowers, serving as a more effective deterrent, whether legislation will require financial and legal support mechanisms to those who expose wrongdoing coupled with the possibility of rewards and incentives to encourage individuals to step forward.

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