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2023 Asia Pacific Employers' Forum

The Future World of Work: Mitigating Risks and Responding to Change



2 Workplace investigations – common pitfalls and best practices

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Agenda

A Workplace investigations

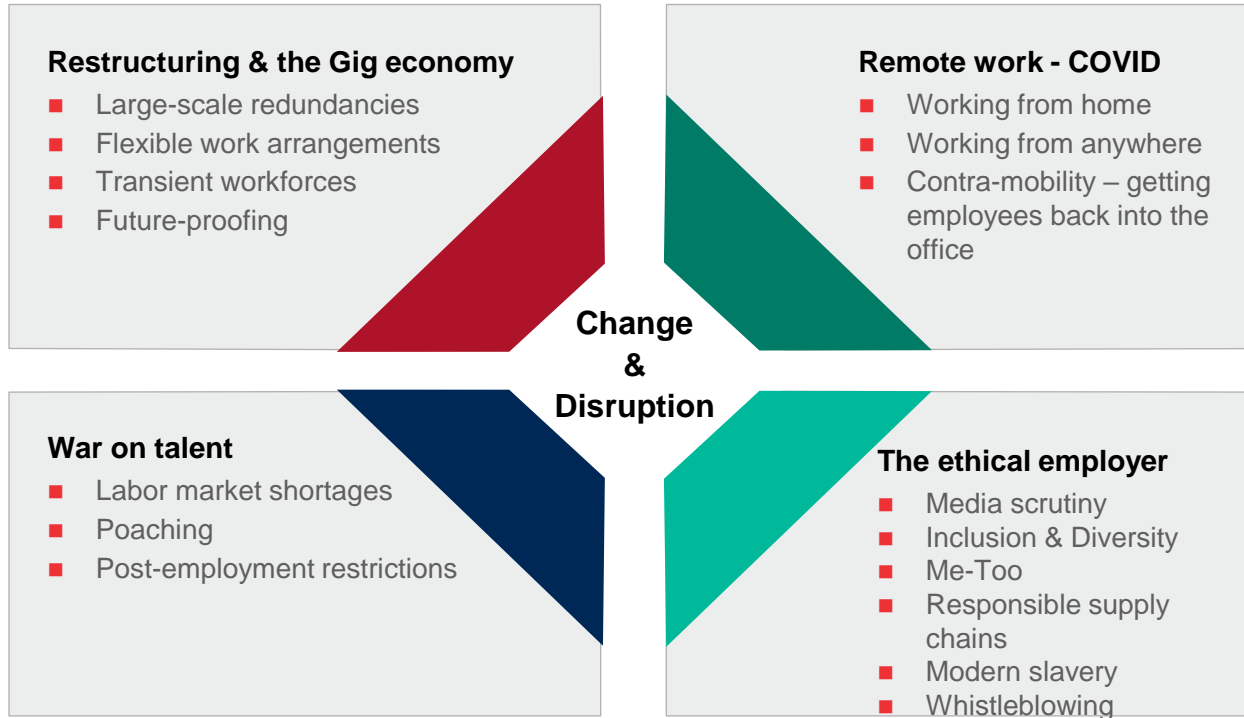
B Inspections & audits by authorities





A Workplace investigations

Important context

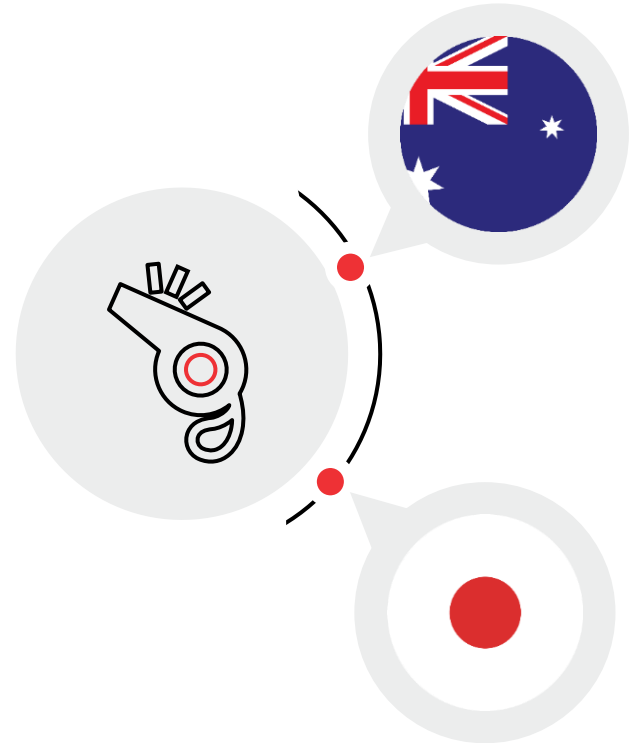


HR whistleblowing complaints

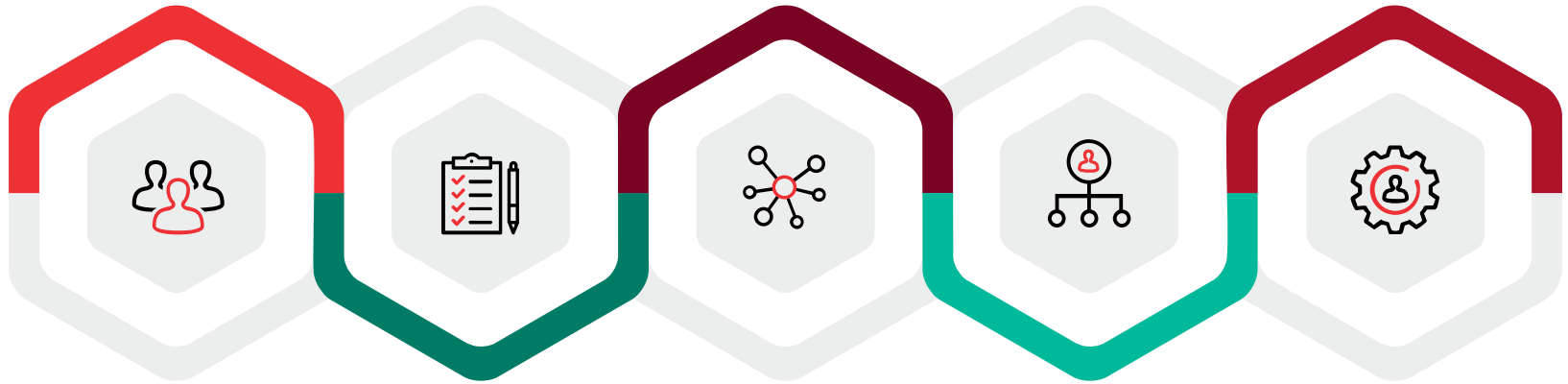
Types of whistleblowing complaints received in the past 3 years

The top whistleblowing complaints among respondents from Japan, Mainland China, Hong Kong, Singapore and Australia are;

72%	Bullying, discrimination and/or harassment
62%	Breaches of internal policies
55%	Workplace health and safety concerns
43%	Anti-competitive behaviour
33%	Breach relating to ESG issues



Trouble with whistleblower complaints



Anonymity

Complaints
lack detail

Multiple
complaints

Escalated to
Board level

Victimization

What is the purpose of the investigation?



Complaint under a grievance procedure or policy



Self-activated complaint to reduce legal risk or as required by law e.g., work health & safety laws



Justify disciplinary or termination



Information required for legal advice

- Protection of reputation ?



Privilege – a global concept

Best practices for maximizing privilege protection in multi-jurisdictional investigations

- Nearly all jurisdictions recognise either "privilege" or professional confidentiality obligations for legal counsel

- In **common law jurisdictions**, "privilege" is normally based on case law / statutes. BUT: not all common law jurisdictions have the same privilege rules

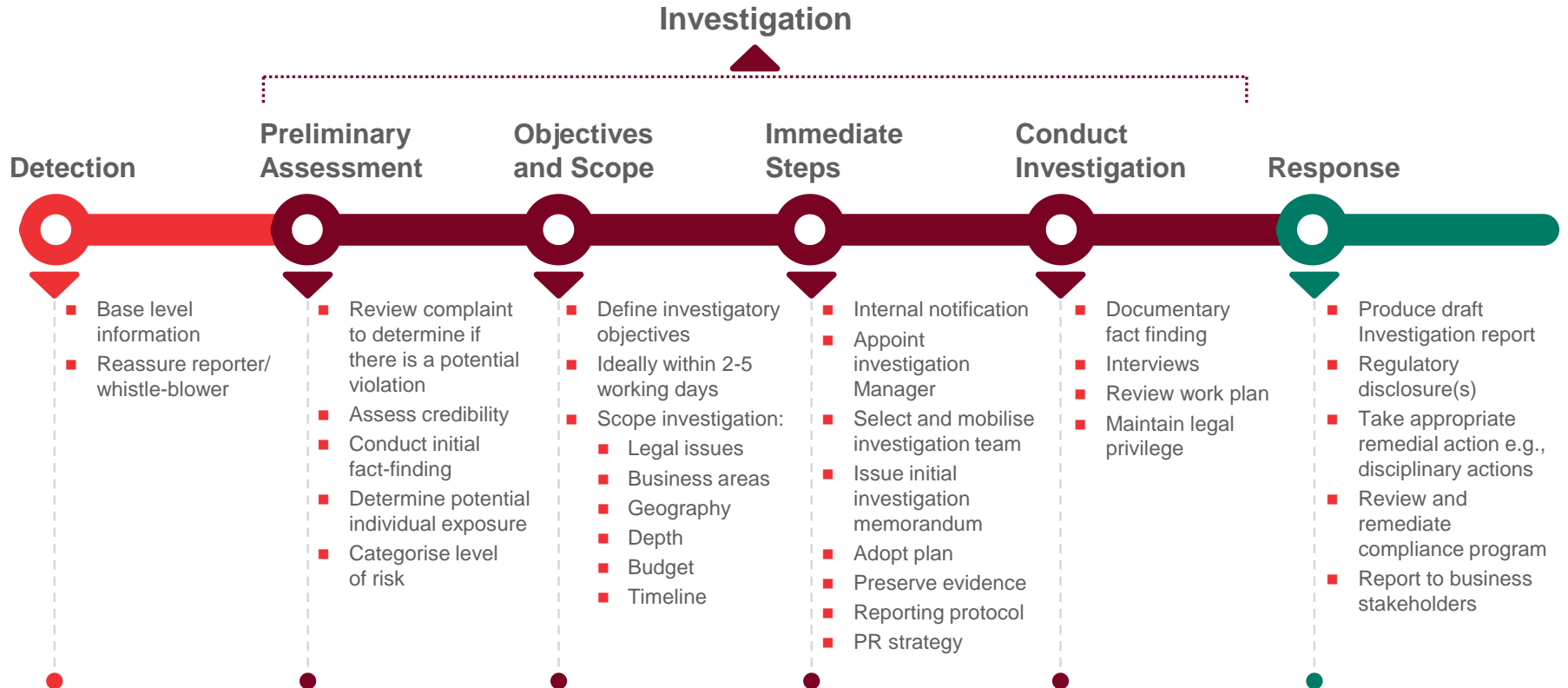
- In **civil law jurisdictions**, no formal concept of "privilege"; general rule is that information given to an attorney is confidential. Professional secrecy.

- Need to consider what jurisdictions are affected by the investigation and which privilege laws may apply

- In multi-jurisdictional investigations, consider which jurisdiction presents the greatest risk if privilege is lost

- Even if jurisdiction in which investigation is conducted does not recognize privilege, it still may be important (e.g., US FCPA investigations)

The investigatory process



Investigations – key principles

Prompt and timely

Targeted (and not a fishing expedition)

Complies with workplace policies

Accused is given advance notice

Accused is given proper opportunity to respond

All reasonable inquiries are made

Internal communications are managed

Gossip is minimised

The investigation is free from bias

Findings of fact are made and recorded

Disciplinary action is dealt with separately

Retaliation is avoided

First contact



Get the detail – when, where, what was said exactly, who was there and ask for any supporting materials (e.g., emails)



Do not promise confidentiality – but be discrete



Ask the employee **what they are seeking** by raising the complaint



Explain the **options** to resolve the issue

- Investigation
- Meeting with the other person and HR
- Mediation
- Counselling
- Other

First contact

DO NOT



- **Commit to a process** but explain next steps and the likely timing of your next meeting
- **Take a side** or **buy into** the employee's complaint
- **Cast judgment** on the on the conduct
- **Give legal advice**
- **Disclose other complaints** and how they were dealt with
- **Send off any emails** which suggest you have cast judgment

DO



- **Acknowledge feelings**
- **Engage EAP if necessary**

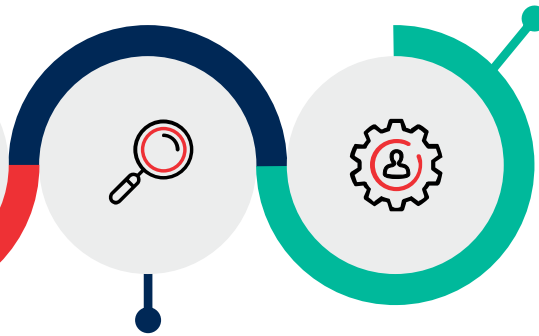
Define the complaint

Practical tips to stop the matter from snowballing

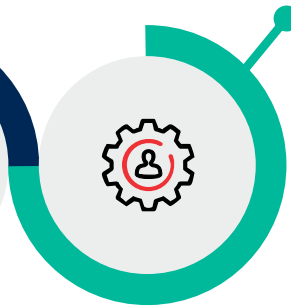
Lay out exactly the facts in dispute which you are investigating



Draw a circle around the complaint



Check this scope with the complainant





Plan the investigation: triage

- Are the issues serious? Do you need to notify the regulator ?
- Should you get legal advice?
- Who should the investigator be :
 - Internal or external? – Ability to resist management influence
 - Independent? Cost?
 - Any special skills required?
- What is in dispute?
- What documents may assist the investigation?
- Stop orders on deletion of documents?
- What policies are relevant?
- Which witnesses?
- Order of interviews?
- Availability to avoid delay?
- Support person for complainants
- Risk assessment – victimisation and gossip



Involving outside parties

Involving individuals who have left the company or third parties

Risk of leak to
media /
reputational
issues

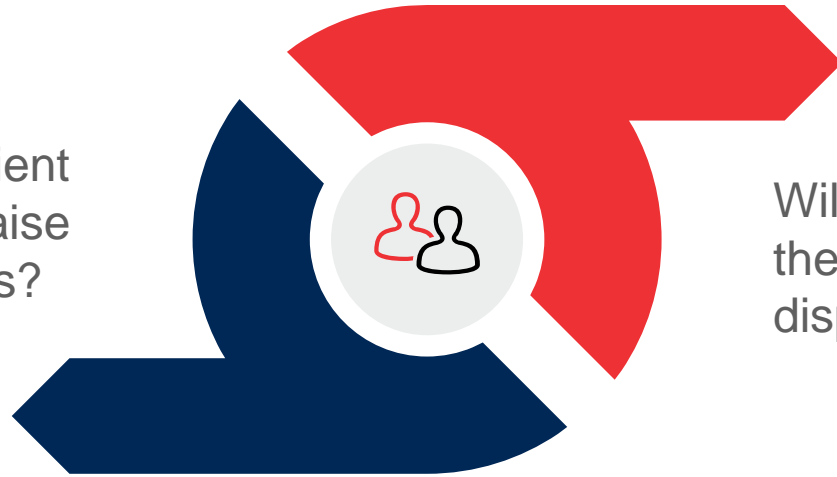
Weigh
significance of
their potential
input

Consider
confidentiality
obligations



Do you go directly to the respondent?

Is there sufficient evidence to raise the allegations?



Will it narrow the facts in dispute

Employee instructions not to investigate

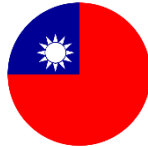
What if the complainant does not want the company to investigate the complaint?

Swan v Monash Law Book Co-operative [2013] VSC 326

- Retail sales assistant subjected to sarcasm, hostility, rudeness, violent behaviour and threat of termination by manager.
- Employee informally raised issues with senior management but claimed she could cope with the behaviour and instructed employer to just "sit on it at this stage and take the comments on notice".
- Failure by employer to properly investigate – delay in any formal response to complaints.
- Ordered to pay almost AUD 300,000 for psychological injuries later suffered by employee.

Work arrangements during investigations

- Risk of **interference**
- Risk of **adverse interactions**
- Suspension
- With or without pay ?
- Availability
- Shutting system access
- Contractual rights
- Reputation / EAP





Data privacy

Top tips for handling personal data in investigations

- Clear policy that company may undertake searches
- Careful scoping of search to ensure that only relevant data is reviewed (date ranges, search terms)
- Consider which jurisdictions data may be transferred to in the course of the investigation (and any potential third-party access to data)
 - Separate but related issue – consider state secrecy laws in certain jurisdictions and impact on cross-border transfers of information





Interview records

DO



- Have at least two people attend on behalf of the employer
- Make sure notes contain direct quotes
- Keep your comments, opinions, notes and legal advice separate from these records

DO NOT

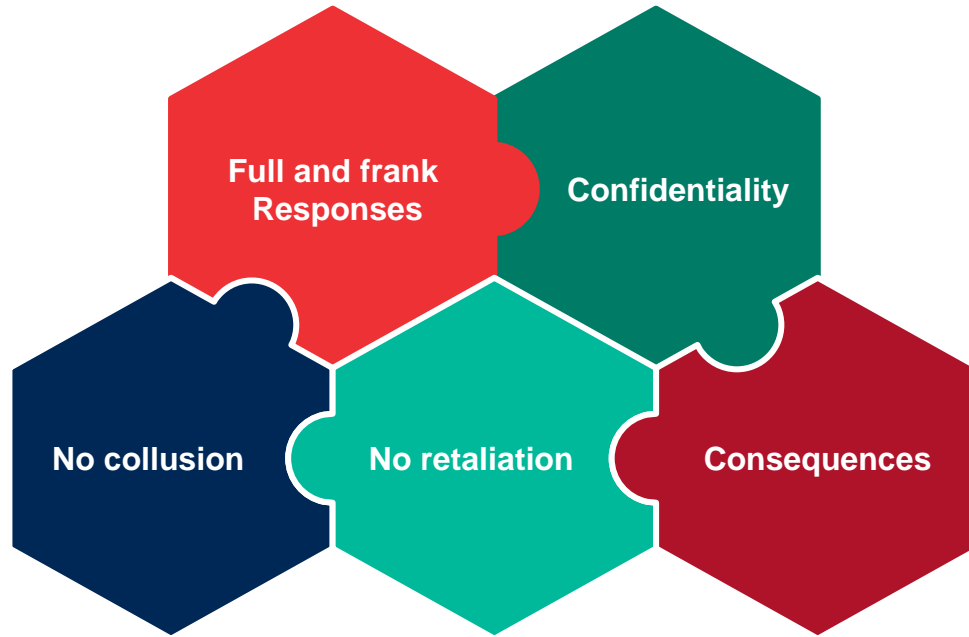


- Have multiple note takers (may create inconsistencies)
- Make threats or accusations to the employee

■ Should interviewee sign interview summary?

■ Should interviews be video/tape recorded?

Blunt cautions

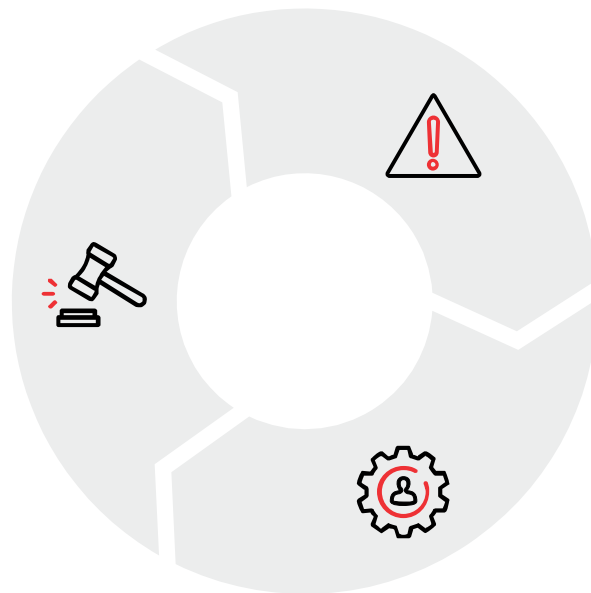




Standard of evidence

"On the balance of probabilities"

Seriousness of
allegation



Is it more likely than
not that alleged
conduct did occur?

Gravity of the
consequences flowing
from the finding



"He said she said" – balance of probabilities

You can prefer the evidence of one over the other but give reasons why:

- X had a more detailed recollection than Y
- X's evidence was collaborated by another witness
- Y's evidence contained inconsistencies
- X's version of events was more probable
- Y kept on changing their answers and did not seem confident in their responses

Keep the parties informed

Consult with both the complainant and respondent



Scope of the investigation



Witnesses



Timing



Process



Changes in Scope



New evidence

Dealing with employee's refusal to co-operate/absences

What should the employer do?



Understand the basis for the refusal



Employee's implied duty to obey reasonable orders



Policies: Failure to follow a reasonable instruction given by the company would be a disciplinary offence



Sickness absence:

- Support person
- Offsite meeting or video
- Responses in writing
- Delay
- Press medical certification

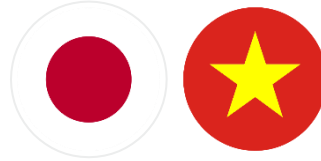


Investigation report

- Deal with each fact separately
- Include conclusions based on objective facts
- Allegations may be substantiated or unsubstantiated due to lack of evidence
- Disciplinary action should be dealt with separately
- Recommendations for action can be made BUT CONSIDER WHETHER FLEXIBILITY IS preferable as other considerations come into play

Allegation	Response from accused	Witness account / other evidence	Substantiated?
Incident Allegation 1	Denied	Email references the incident occurring	Yes
Incident Allegation 2	May have raised voice slightly but did not yell	None other than complainant	No

Possible outcomes



Substantiated allegations may result in:

- Counselling/training employees
- Conciliation/mediation between employees
- Inviting employee(s) to apologise
- Disciplinary action (including for false allegations, victimisation and/or untruthful responses during investigation)
- Ongoing monitoring of workgroup
- Separating employees or changing reporting lines – jurisdictional requirements vary
- Reviewing workplace procedures





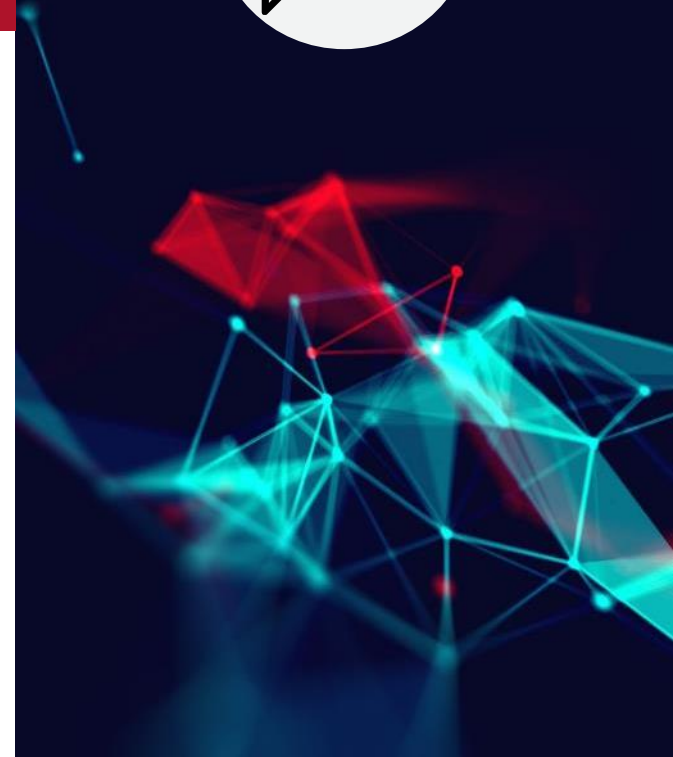
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Immediate response

Key considerations:

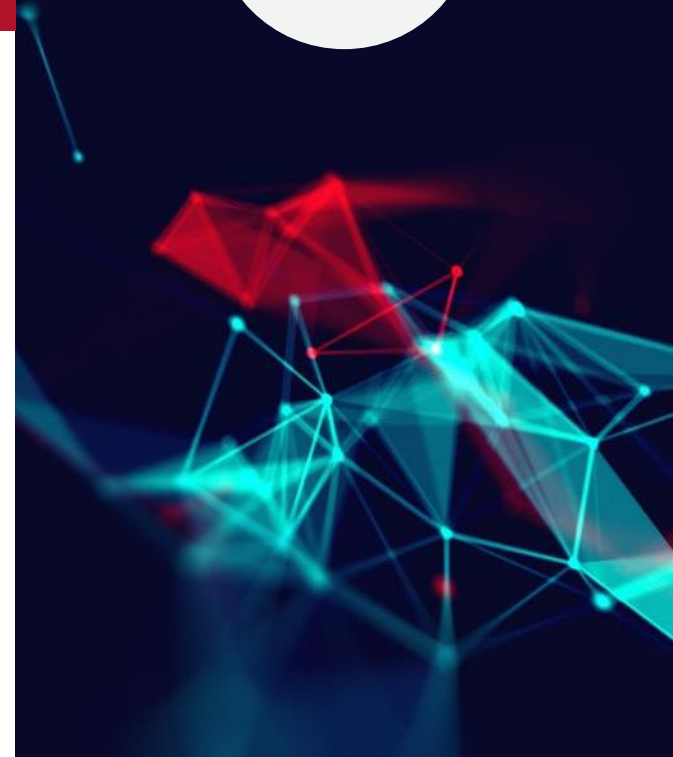
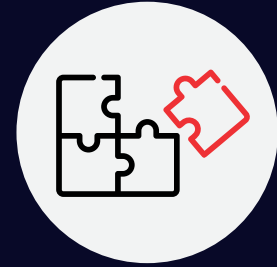
- Mode of inspection and audit (e.g. written, “Dawn” raids)
- Jurisdiction and powers of the relevant authorities
 - Obligations and duties to produce and respond
- Investigation and response team
- Sources of evidence - Preservation, collection and review
- Assessment and response
 - Risk of prosecution or penalties/sanctions
 - Disciplinary
 - Corrective and remediation actions
 - Process improvements and control mitigation / training



Non-cooperation

Potential consequences

- Non-cooperation may in itself be a criminal offence, regardless of underlying subject matter
 - Failure to provide accurate or correct information
- Penalties
 - Fine
 - Imprisonment
- Personal and officer liabilities



Importance of internal auditing



HR Compliance HealthCheck





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