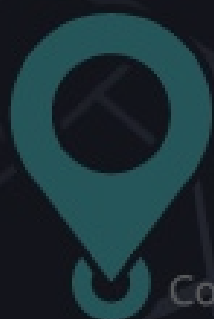


Issue 05 | Autumn 2020

# vault.



Compliance

Culture



HR

## THE ETHICS ISSUE

---

*Navigating **compliance**  
and **culture** issues in a  
(post)-COVID world.*



One of the many(!) things 2020 will be noted for is a growing focus on the intersection between the business functions of Compliance, Legal, and HR - more specifically regarding the direction of a company's culture and whether the company and its employees act with integrity.

This sounds like a statement that should come with a caveat - 'only applies to those in the know' - because it's something only compliance, legal, or HR professionals might talk about. The reality, however, is that this subject has taken its turn dominating the international press even alongside major events such as the global pandemic.

A rising trend of the last few years has seen employees become increasingly vocal about injustices perpetrated by their workplace or employer. Those that have not been able to find a voice through existing channels have grown in confidence and simply created their own. A phenomenon that has significant implications and consequences for business.

**THE TRUTH WILL OUT,**

**SO PREPARE  
FOR IT**



## MIND THE TRUST GAP

Trust in traditional institutions such as media and government was at an all-time low even before the world had heard of COVID-19. According to the 2019 Edelman Trust Barometer<sup>1</sup> - a global study - only one in five people in employment believed the system was working for them. Furthermore, employees in developed nations did not see any light at the end of the tunnel and thought they will probably be worse off in five years' time. Several months after that report was released the pessimists were proved right.

<sup>1</sup> [https://www.edelman.com/sites/g/files/aatuss191/files/2019-02/2019\\_Edelman\\_Trust\\_Barometer\\_Global\\_Report.pdf](https://www.edelman.com/sites/g/files/aatuss191/files/2019-02/2019_Edelman_Trust_Barometer_Global_Report.pdf)

But it's what has happened since that has really captured the world's attention. The sudden gathering of mass and momentum by a social snowball that started rolling years ago.

Inequality is not new. It's been an issue for a very long time and it's very much a business issue just as it's a social issue and a personal issue. Every individual and every organisation has a role to play yet it would seem that public sentiment is shifting more quickly on the matter than the business landscape is, with significant repercussions. Not least of which is the risk that the equality agenda is set back by years or even decades.

During the early months of 2020, the COVID-19 pandemic was accompanied by a rise in race-related discrimination against Asian and Chinese people, darkly echoing sentiments seen during the SARS outbreak in 2003. Then



the George Floyd killing gave momentum to a movement that has been rumbling slowly through the social agenda for a very long time. The systemic racism exposed through the Black Lives Matter movement has once again highlighted the huge problem of inequality for Black people, People of Color, and pretty much all non-white ethnicities. All this happened during the month of June - a month that for the last 50 years has called attention to discrimination against LGBT+ people.





If you look at public sentiment, government and regulator action, and employee activism, it's clear that doing the bare minimum required to comply with the law is no longer enough as companies are pushed by their employees, governments, and customers to step up and adopt a multi-stakeholder approach that serves social purposes as well as investor demands.

National governments are increasingly weighing in. On June 15, 2020, the Supreme Court of the United States ruled that the Civil Rights Act of 1964<sup>2</sup> protects employees

# RAISING THEIR VOICES

from discrimination on the basis of sexual orientation or gender identity. This means that workers across the US cannot be fired for being LGBT. According to the Human Rights Campaign<sup>3</sup>, prior to the ruling, there was no state-level protection for sexual orientation or gender identity in 28 of the 50 US states. These workers could have lost their job, just for being themselves.

As more incidents of injustice make their appearance in the public eye, these same authorities are increasing assurances for reporters, not just to protect the initial actions of those who 'blow the whistle,' but also to safeguard against retaliation.

<sup>2</sup> [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf)

<sup>3</sup> <https://www.catalyst.org/research/lesbian-gay-bisexual-and-transgender-workplace-issues/>



Any company that has more than 50 employees in the European Union will soon have to comply with the EU Whistleblower Protection Directive<sup>4</sup>, and in the US similar progress is being made through initiatives such as the Whistleblower Programs Improvement Act<sup>5</sup> (WPIA) and the Whistleblower Protection Reform Act of 2019<sup>6</sup> (WPRA).

<sup>4</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN>

<sup>5</sup> <https://www.congress.gov/bill/116th-congress/senate-bill/2529/all-info>

<sup>6</sup> <https://www.congress.gov/bill/116th-congress/house-bill/2515>



The intention, on both sides of the Atlantic, is to break down the barriers that disincentivise people from speaking up about wrongdoing they encounter. While this serves a social purpose, it can also only be a good thing for business by way of stimulating companies to improve their own processes and programmes for surfacing risk before it goes public.

Some recent examples of this happening with disastrous consequences include the former chief executive of McDonald's currently being sued by his former employer over sexual relations with multiple direct reports in breach of company policy. Or the Amazon workers shutting down warehouses with protests over inadequate PPE and safety measures while simultaneously hiring employees by the thousand to meet increased demand from online shoppers. Or a revelation

by Adidas employees about systemic racism and discrimination at the global brand, resulting in the resignation of the company's head of people.

The list goes on and will continue to do so. The Future of Work survey, released by law firm Herbert Smith Freehills<sup>7</sup> at the end of 2019, revealed that 80% of surveyed enterprises globally expect to see a rise in activism among both employees and casual workers in the future. Why? Because the mechanisms for raising concerns internally haven't worked for a long time (if they ever did) and people have found that raising your voice publicly seems to capture people's attention. In acknowledgment of this phenomenon there is an entire industry of tech solutions springing up that either help employees organize and amplify their activism initiatives, or streamline the process for filing suit against their employer.



<sup>7</sup> <https://www.herbertsmithfreehills.com/futureofwork>

# MAKING SPEAK UP WORK FOR YOU

**C**ompanies have had plenty of opportunity to fix their own speak up mechanisms voluntarily. Now they're being told to. There are UK Government initiatives such as the EHRC guidelines on dealing with sexual misconduct at work<sup>8</sup> - guidelines that are due to become legislation.

Meanwhile, in the US the Department of Justice (DoJ) updated its Corporate Compliance Guidance<sup>9</sup> indicating heightened scrutiny over its understanding of how compliance programs should work as well as on the effectiveness of such programs. For companies that come under the DoJ's scrutiny, prosecutors will look at three attributes in investigations:

**Is the corporation's compliance program well designed?**

**Is the program being implemented effectively?**

**Does the compliance program work in practice?**

A soundbite from the document suggests that the hallmark of a well-designed compliance program is "the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct."

This is the crux of the matter. How can you take an accurate measure of your company's ethical health if your people won't talk to you because the barriers to do so are too high?

<sup>8</sup> <https://www.equalityhumanrights.com/en/sexual-harassment-workplace>

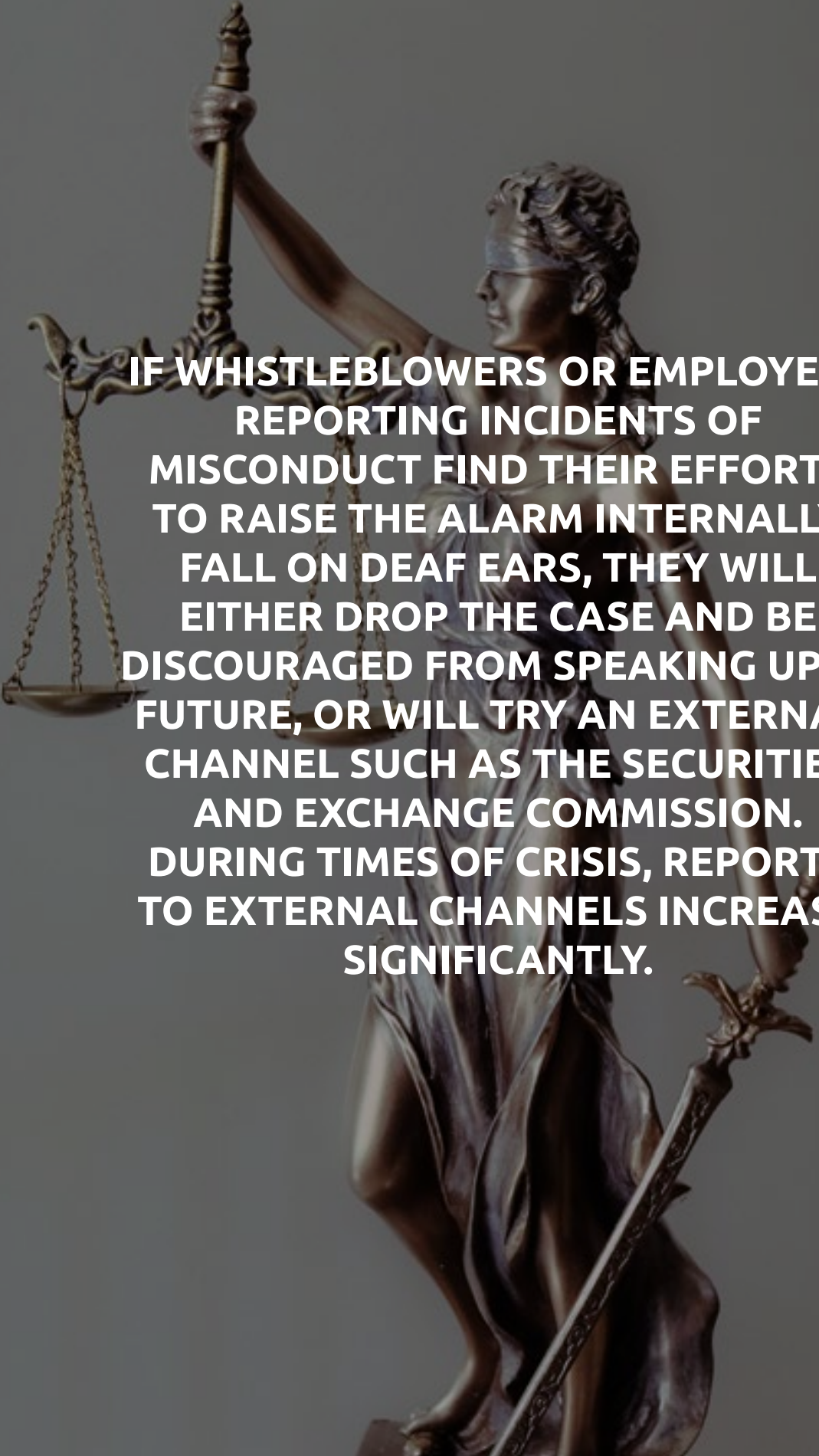
<sup>9</sup> <https://www.justice.gov/criminal-fraud/page/file/937501/download>

When ‘speak up’ programmes were first implemented, largely driven by regulations such as Sarbanes-Oxley in 2002, the most reasonable method of capturing incident reports from employees was a literal telephone hotline. Since then, not much innovation has been seen as many ethics and compliance leaders had achieved what the regulation stipulated, which was simply to offer a mechanism employees could use to report their concerns about corruption. The Global Business Ethics Survey 2019<sup>10</sup>, revealed that hotlines have fallen far out of fashion, accounting for only 6% of internal reports of misconduct as an intake channel. The most popular reporting channel by far is a mention to a direct supervisor, which introduces its own challenges - escalation being at the supervisor’s personal discretion, possibly reflecting badly on them, and it’s also not uncommon for the problem person to be in the reporting employee’s management tree. This means not only does the ethics and compliance reporting procedure not help, but it’s also part of the problem.

Compliance was largely a check-box exercise resulting in there being more cons than pros for any prospective whistleblower. The conundrum is that a potential whistleblower has to act in line with their own moral compass and likely face retaliation for breaching their employment contract or to ignore their concerns to keep their employer on side.

The extensive research of James Detert, a professor of business administration at the University of Virginia’s Darden School of Business<sup>11</sup>, found that no matter how good the intentions, well-meaning initiatives to encourage openness and transparency fall short for two key reasons: a fear of consequences (embarrassment, isolation, low performance ratings, lost promotions, and even firing) and a sense of futility (the belief that saying something won’t make a difference, so why bother?). All this is further compounded if people are fearing for their jobs during a global crisis.

Meanwhile, there’s a different problem at the top. Research from US academics at different universities published in July looked at historical data and found evidence that biases tend to re-emerge strongly during economic crises. The fallout is that business leaders hunker down with their flawed beliefs, almost for comfort, despite clear evidence that diversity and inclusion have positive impacts.



**IF WHISTLEBLOWERS OR EMPLOYEES REPORTING INCIDENTS OF MISCONDUCT FIND THEIR EFFORTS TO RAISE THE ALARM INTERNALLY FALL ON DEAF EARS, THEY WILL EITHER DROP THE CASE AND BE DISCOURAGED FROM SPEAKING UP IN FUTURE, OR WILL TRY AN EXTERNAL CHANNEL SUCH AS THE SECURITIES AND EXCHANGE COMMISSION. DURING TIMES OF CRISIS, REPORTS TO EXTERNAL CHANNELS INCREASE SIGNIFICANTLY.**

<sup>10</sup> <https://www.ethics.org/wp-content/uploads/Global-Business-Ethics-Survey-2019-Third-Report.pdf>

<sup>11</sup> <https://hbr.org/2016/01/can-your-employees-really-speak-freely>



“IN TIMES OF MARKET VOLATILITY OR DISRUPTION, WE SEE UPWARD TRENDS IN REPORTING - WE SAW THAT IN THE 2008 CRISIS. AND COVID-19 CERTAINLY QUALIFIES AS MARKET DISRUPTION AND VOLATILITY... IT IS USUALLY WHEN THE COMPANY DOES NOT TAKE ACTION THAT PEOPLE REPORT TO THE SEC.”

**- JANE NORBERG, CHIEF OF THE OFFICE OF THE WHISTLEBLOWER, ENFORCEMENT DIVISION, UNITED STATES SECURITIES AND EXCHANGE COMMISSION, SPEAKING AT THE ECI BEST PRACTICE FORUM, 2020**

**S**o what to do? Business leaders need to listen more. Being vocal in support of minorities is all well and good but a hashtag or a donation won't cut it and businesses run the risk of talking over the voices they need to be listening to most. We all know these issues are on the agenda. An online survey carried out by Vault Platform in October 2019, polling 1,000 HR, legal and compliance professionals found that at least 65% of respondents feel they should address harassment, discrimination, and bullying proactively<sup>12</sup>.

That companies are taking action is undeniable, but it only matters if the action is effective. In order to listen, employees need to be able to speak and these legacy implementations for ethics and compliance speak up aren't working. In a recent article for Harvard Business Review<sup>13</sup>, Rob Chesnut, who was most recently Chief Ethics Officer at Airbnb, warns that it's the end of the line for 'canned codes of ethics' and companies that treat their code as just another legal box to check.

Companies that want a culture of integrity must make the process of reporting all problems, especially violations of the code, easy, straightforward, and clear. Chesnut says you need to create a culture that isn't afraid to have people raise ethical questions, that welcomes bad news, and that celebrates employees who speak out about problems.

To this end, the function of Compliance has a powerful platform within the organisation that reaches every employee and can become a powerful strategic driver if leveraged the right way. But it's a platform that isn't and shouldn't be owned by a singular function. E&C professionals may be savvy to the need and the mechanisms for reporting unethical behavior but the same isn't necessarily true of the rest of the employee population.

The culture of a company is ultimately looked after by multiple stakeholders and the two main ones are Compliance and HR. Both have a role in ensuring that individual employees and the company as its own entity behave ethically and that the people feel encouraged, confident and secure enough to say when they think something is wrong.

Part of achieving this is down to codes, policies and tools. But how people behave when there is no code and no one watching, really comes down to culture. You need buy-in from the top, with leaders not just setting examples of appropriate behavior, but championing the use of tools for people to speak up when something is wrong. Employee engagement needs to be driven from the bottom up too - by taking the same approach with the various employee relations groups.

<sup>12</sup> <https://vaultplatform.com/sexual-harassment-is-leading-concern-for-2020/>

<sup>13</sup> <https://hbr.org/2020/07/how-to-build-a-company-that-actually-values-integrity?ab=hero-subleft-2&registration=success>



Encouragement, accountability, and transparency are key ingredients of trust between employer and employee but tools do play an important role. In an October, 2020 newspaper article about German car manufacturer Volkswagen, which this year completed a multi-year monitorship following the diesel emissions scandal, a “culture of tolerance” for rule-breaking internally had been identified by Hans Dieter Pötsch, chairman of the Supervisory Board of Volkswagen.

Part of the monitorship improvement process focused on improving channels for reporting such violations. The Board found that the historical whistleblower program wasn’t very

employee-friendly, as it only accommodated two main languages—German and English—and employees often had to wait 20 minutes to leave a tip. Furthermore, “people did not feel that such technical issues or violations of the regulatory framework was an issue that the whistleblower hotline would deal with,” the Board said.

This speaks to the collaboration between Ethics and HR in normalizing the act of speaking up when something is wrong, whether that is a regulatory issue or mistreatment of one employee by another. The joint responsibility for culture has never been more important to get right given that increased pressure on the business makes it

tempting for companies to cut corners. Meanwhile, employees facing increased pressure are more likely to turn a blind eye to misconduct, or even take the approach that it’s even tolerated and engage in it themselves. This can be a time bomb for a business and quickly makes things worse.

We’ve recently spoken to a number of Ethics and HR leaders that have been using their speak up program to enable employees

to discreetly and anonymously inquire if there are resources for mental health support, or domestic violence, or even to raise concerns about their work environment in light of COVID.

As Emily Hawkins, the Group People Director for advertising giant M&C Saatchi explained, new technologies, such as an app, are far more accessible and feel less daunting than putting a request in to HR. Just making an app on your phone available to

raise concerns or ask questions meant that the process felt like “less of a big deal” than using a hotline or sending an email to HR or the ethics team.

According to Hawkins, the key is to normalize speaking up at work (or home) as this gives employees “the feeling that we are willing to listen and act and that’s really at the heart of what we are doing in terms of accountability.”

#speakup

**vault.**

@vaultplatform  
vaultplatform.com