

Hong Kong's Whistleblowing Laws

The Hong Kong market has in recent years seen a number of listed companies having to go through the painful process of prolonged suspension of trading as a result of failure to publish their financial statements to the public in accordance with the timeframe prescribed in the Listing Rules. A portion of these suspensions arose as a result of whistleblowing or anonymous complaints pertaining to potential irregularities in the listed companies' financial statements, misconduct of senior management or other corporate misfeasance. As a result of such complaints, the affected listed companies may be required to conduct internal investigations to address the issues arising from the complaints and undertake remedial measures before trading of the shares can be resumed.

How one handles whistleblowing or anonymous complaints will potentially have significant implications on the listed companies. While it is debatable whether a prolonged suspension is a proportionate result of whistleblowing which may or may not be substantiated after an internal investigation, it is clear that potential misconduct or irregularities which affect the interests of public shareholders are often uncovered by whistleblowing.

Looking at things from a broader angle, whistleblowing is also one of the key ways for management to find out about potential wrongdoing or misconduct within an organisation, so that appropriate measures can be taken to manage the risks arising before it is too late.

It goes without saying that in order to encourage a whistleblower who intends to make a report of suspected wrongdoing, one may need to give sufficient assurances and protection to a whistleblower (most notably, confidentiality and safeguards against retaliation).

An organisation may have its own whistleblowing policy offering protection to whistleblowers and establishing a process to

handle whistleblowing or anonymous complaints. In addition to such internal policies and procedures, one may also see if a whistleblower is offered any statutory protection, especially when whistleblowing takes place outside a specific organisation.

Compared to other jurisdictions, Hong Kong does not currently have a composite piece of legislation which is designed to provide a comprehensive scheme for whistleblower protection. Instead, the whistleblower protection in Hong Kong is scattered around various ordinances.

It can be foreseen that a reform to introduce a composite piece of legislation for whistleblower protection (whether or not this will happen) will not be an easy task, as any such legislation should balance between protecting whistleblowers from retaliation and blindly offering wide protection such that it invites frivolous and plainly unsubstantiated complaints. In addition to that, the legislation will have to take into account all the other existing protections that are offered to whistleblowers under various legislations.

In this article, we set out some examples that are relevant to Hong Kong's regime on whistleblowing.

A. Companies listed on the Stock Exchange of Hong Kong Limited ("HKEx")

For instance, for companies whose shares are listed on the Main Board of the HKEx, the Corporate Governance Code (the "**Code**") sets out principles of good corporate governance. In this regard, Principle D.2 states that –

The board is responsible for evaluating and determining the nature and extent of the risks it is willing to take in achieving the issuer's strategic objectives, and ensuring that the issuer establishes and maintains appropriate and effective risk management and internal control systems. Such risks would include, amongst others,

material risks relating to ESG (please refer to the ESG Reporting Guide in Appendix 27 to the Exchange Listing Rules for further information). The board should oversee management in the design, implementation and monitoring of the risk management and internal control systems, and management should provide a confirmation to the board on the effectiveness of these systems.

Under Principle D.2, Provision D.2.6 states that

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The issuer should establish a whistleblowing policy and system for employees and those who deal with the issuer (e.g. customers and suppliers) to raise concerns, in confidence and anonymity, with the audit committee (or any designated committee comprising a majority of independent non-executive directors) about possible improprieties in any matter related to the issuer.

Issuers are required to state whether they have complied with provisions in the Code every year. If an issuer does not adopt a provision, such as provision D.2.6 on whistleblowing, they have to "comply or explain", failing which would constitute a breach of the Listing Rules. In other words, the listed issuer has to either explain how they achieved good corporate governance by means other than strict compliance of the provision. This explanation has to provide a clear rationale for the alternative actions and steps taken by the issuer, and their impacts and outcome.

B. Employment Ordinance (Cap 57) ("EO")

Section 72A forbids public officers from disclosing their sources of complaint.

Duty of public officers not to disclose source of complaint, etc.

- (1) *Save with the consent of the person who has made the complaint or as provided in subsection (4), **no public officer shall disclose** to any person,*

*other than another public officer in the course of official duty, **the name or identity of any person who has made a complaint** alleging a contravention of this Ordinance or as a result of which a contravention of this Ordinance has come to his notice or to the notice of any other public officer.*

(2) ...

Any person that contravenes section 72A is guilty of an offence – of strict liability. A contravention of section 72A(1) or (2) would make a public officer liable to a fine at level 3 (HK\$10,000) under section 63D of the EO, while a contravention of section 72A(3) would make a public officer liable to a fine at level 5 (HK\$50,000) under section 63A(4) of the EO.

Separately, section 72B provides that employment cannot be terminated by reason of an employee giving evidence under EO proceedings, or by reason of giving information to a public officer in any inquiry.

Employment not to be terminated, etc. by reason of fact that employee has given evidence in proceedings under Ordinance, etc.

- (1) *No employer shall terminate, or threaten to terminate, the employment of, or in any way discriminate against, any of his employees by reason of the fact that the employee has —*
 - (a) *given evidence, or agreed to give evidence, in any proceeding for the enforcement of this Ordinance;*
 - (b) *given information to a public officer in any inquiry made by such officer for the purposes of or in connection with the enforcement of this Ordinance;*
 - (c) *given evidence, or agreed to give evidence, in any proceeding relating to an accident to an employee arising out of and in the course of his employment or for the breach of a*

statutory duty in relation to the safety of persons at work; or

(d) given information to a public officer in any inquiry made by such officer for the purposes of or in connection with an accident to an employee arising out of and in the course of his employment or for the breach of a statutory duty in relation to the safety of persons at work.

(2) Where an employer is convicted of an offence under section 63A(5) in respect of an action prohibited by this section, the court or magistrate before which the conviction is obtained may, in addition to any fine that may be imposed, order the employer to pay as compensation to the employee who was the victim of the offence, such amount as the court or magistrate considers appropriate having regard to the circumstances of the case.

This section is designed to protect employees who give evidence or information against an employer in respect of any enforcement under the Employment Ordinance, or in respect of accidents or other breaches of statutory duty. A contravention of this section is a strict liability offence which could cause liability for a level 6 fine (HK\$100,000).

C. Ordinances on discrimination

Legislation in Hong Kong relating to discrimination generally contain provisions stating that it is unlawful for a person (the alleged discriminator) to discriminate against the victim on grounds that they have brought proceedings against the discriminator or given evidence or information in connection with proceedings brought against the discriminator.

For example, section 6 of the Race Discrimination Ordinance states :

Discrimination by way of victimization

- (1) A person (the discriminator) discriminates against another person (the person victimized) in any circumstances relevant for the purposes of any provision of this Ordinance **if the discriminator treats the person victimized less favourably than in those circumstances the discriminator treats or would treat other persons, and does so—**
- (a) by reason that the person victimized or any other person (the third person) has—
- (i) brought proceedings against the discriminator or any other person under this Ordinance;
 - (ii) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Ordinance;
 - (iii) otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person; or
 - (iv) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance; or
- (b) by reason that the discriminator—
- (i) knows the person victimized or the third person, as the case may be, intends to do any of those things; or
 - (ii) suspects the person victimized or the third person, as the case may be, has done, or intends to do, any of them.
- (2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by that person if the allegation was false and not made in good faith.

Section 9 of the Sex Discrimination Ordinance (Cap 480), section 7 of the Disability Discrimination Ordinance (Cap 487), and section 6 of the Family Status Discrimination Ordinance (Cap 527) all have similar provisions.

D. Securities and Futures Ordinance (Cap 571)

Under section 381 of the Securities and Futures Commission Ordinance, auditors are granted

immunity for reporting fraud or irregularity in companies. This overrides their duty of confidentiality and provides them with immunity from civil liability. The scope of immunity is wide as to cover liability arising from contract, tort, defamation, equity or otherwise.

E. Prevention of Bribery Ordinance (Cap 201) ("PBO")

Section 30A of the PBO provides for the protection and secrecy of the identities of informers of suspected bribery to the ICAC :

30A. Protection of informers

- (1) *Save as provided in subsection (2)—*
- (a) *no information for an offence under this Ordinance shall be admitted in evidence in any civil or criminal proceeding; and*
 - (b) *no witness in any civil or criminal proceeding shall be obliged—*
 - (v) *to disclose the name or address of any informer who has given information to the Commissioner with respect to an offence under this Ordinance or of any person who has assisted the Commissioner in any way with respect to such an offence; or*
 - (vi) *to answer any question if the answer thereto would lead, or would tend to lead, to discovery of the name or address of such informer or person, (Amended L.N. 162 of 1993)*

if, in either case, such informer or person is not himself a witness in such proceeding, and, if any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain an entry in which any such informer or person is named or described or which might lead to his discovery, the court shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary to protect the informer or such person from discovery.

ICAC informers are also eligible for witness protection under the Witness Protection Ordinance (Cap 564), which includes different measures to protect their safety or well-being.

F. Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) ("DTRPO"), Organized and Serious Crimes Ordinance and the United Nations (Anti-Terrorism Measures) Ordinance

Section 25A of the DTRPO provides that where a person knows or suspects that any property is used or is intended to be used in connection with drug trafficking, he should make a disclosure to an authorised officer. Once he makes such disclosure, he is exempted from the offence of dealing with drug trafficking proceeds, and is immune from breaches of contract and damages which arise from the disclosure.

Section 26 of the DTRPO provides that in civil or criminal proceedings, no witnesses will be obliged to reveal the identities of people who have made a disclosure.

The Organized and Serious Crimes Ordinance (Cap 455) and the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575) also have similar provisions to protect a person who has made such a disclosure

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