Ombudsman New South Wales

Quick reference guide: Managing external investigations

An agency has key responsibilities at every stage of an external investigation which must be managed carefully to protect the integrity and credibility of the investigation. This quick reference guide complements detailed guidance in the *External Investigations guidelines: A practical guide for managing an external investigation.*

1. Should I use an external investigator?

Once you decide that a matter requires an investigation, consider the nature of the complaint and your agency to determine if an internal or external investigation is most appropriate. Consider any recommendation or guidance from an independent integrity agency about engaging an investigator.

The more of the following features that are present, the stronger the case will be for engaging an external investigator:

- Serious allegations
- Potential prosecution / civil action
- Not an isolated incident
- Lack of internal expertise, capability or resources
- Senior parties involved
- Complexity or sensitivity requiring special expertise or status
- Agency impact, including on other employees
- Time constraints / urgency

2. How do I choose an investigator?

Choose an investigator with the right skills for your specific matter. You should consider their qualifications and conduct appropriate background checks. Before they start, you should also have them complete a conflict-of-interest declaration.

Use the following as a guide for what to look for in an investigator:

KNOWLEDGE	
• NSW public sector operational environment	• Administrative law principles and procedural fairness
• Relevant law and policies affecting the workplace and workplace investigations	• Any laws regulating the subject matter of the investigation

SKILLS AND ATTRIBUTES	
• Analytical and critical thinking	• Oral and written communication
• Builds rapport	• Efficient / follows timeframes
• Committed to impartiality and ethical practice and maintains confidentiality	• Acts equitably and respectfully towards people with diverse needs and backgrounds
• Understands cultural safety, vicarious trauma and lateral violence	

EXPERIENCE	
• Formal and informal interviews, taking statements	• Supporting the wellbeing of individuals involved
• Privacy, recordkeeping and disclosure requirements	• Report preparation (including recommendations) • Engaging with legal representatives

3. How do I set up the investigation?

Help prevent problems occurring by creating a clear and comprehensive contract of engagement and terms of reference. Appoint an agency contact to manage the contract details, as well as coordinate, support and monitor the investigation. This person should not be involved in the matter being investigated.

At a minimum, the terms of reference and the contract of engagement should clearly identify:

SCOPE	
• Key question(s) or issue(s) to investigate (which may extend to root causes and mitigation) and matters out of scope	• Known parties to the investigation (e.g. the complainant and any person whose conduct is being investigated)
• The process for addressing matters that arise outside the scope of the investigation (e.g. wrongdoing or conduct that must be reported, such as corrupt conduct)	• The process for amending the scope if required.

EXPECTATIONS	
• Deliverables such as an investigation plan and report - specify what is required in the report (e.g. outline of investigation methodology and process, findings, recommendations etc)	• Budget and timeframes including key milestones and completion dates
• Anticipated resources required (e.g. travel and other expenses, a second interviewer)	• The requirement to conduct the investigation in a way that minimises workplace disruption
• The requirement to document the investigation methodology and process in full, maintain records and protect information from unauthorised access	• Any documentation to be provided once the investigation has concluded (e.g. case notes, interview notes)

RELEVANT POLICIES, PROCEDURES, LAWS, PRINCIPLES

• Any law, regulation, code, policy, procedure or standard relied on to initiate the investigation or otherwise relevant	• Requirements around privacy, recordkeeping and preservation of documents and evidence
• Confidentiality requirements (e.g. what the investigator can and cannot share)	• Administrative law principles and procedural fairness requirements
• Any powers or authority that your agency has delegated to the investigator (noting some activities and responsibilities cannot be delegated to an external investigator as they can only be exercised by public officials)	• Whether and to what extent the investigation report will be published and/or expectations of confidentiality

METHODOLOGY

• Key personnel involved and their roles and responsibilities, including the:
  ○ investigator(s)
  ○ appointed agency contact
  ○ agency decision-maker
	• Communication including:
	  ○ frequency and mode of communication between the investigator and agency contact
	  ○ protocol for communicating with parties to the investigation

• How interviews should occur and whether written statements are acceptable	• How extensions of time, additional resources or changes to the terms of reference can be requested

4. How do I support the investigation?

The agency must monitor and oversee the investigations progress and ensure the investigator follows the contract and terms of reference. However, keep your distance to ensure the investigation stays impartial.

DO	DON'T
✓ Provide the investigator with access to information and evidence held by the agency ✓ Bring relevant information to the investigator's attention ✓ Assist with access to employees or others for interviews ✓ Keep information about the investigation limited to those that have a legitimate need to know ✓ Keep records of all communication with the investigator and record all decisions made during the investigation	× Take a side or offer opinions on the case × Share observations about the credibility or reliability of a party to the investigation with the investigator × Take any action that may be seen as undue or inappropriate influence and can affect the impartiality of the investigation.

5. Completing the investigation

Reviewing the report

Review the investigator's final report carefully. This process is important as your agency may need to rely on its findings to justify any decisions or actions taken by the agency.

Check these points against the terms of reference to ensure the investigation was reasonably thorough and objective:

1. Have all questions or issues been reasonably addressed? If not, has a reasonable explanation been provided?
2. Was all relevant evidence identified, gathered and reviewed?
3. Were all potential witnesses identified and interviewed (where appropriate)? If not, was the investigator's decision not to interview them reasonable?
4. Were interviews that were undertaken:
5. Reasonably thorough, meaning that all relevant issues were canvassed and the interviewee was given ample opportunity to give their side of the story?
6. Reasonably objective, meaning that the investigator conducted the interview with an open mind?
7. Is there sufficient, relevant, reliable evidence to support the investigator's findings?
8. Has the investigator explained why they preferred certain evidence over other evidence?

Your agency will need to ask the investigator to fix any critical gaps in the investigation or the report. They should keep copies of any comments and clarifications sought on the investigation report. Document all decisions, including your agency's reasons for agreeing or disagreeing with the investigator's approach.

Keep the investigation independent during the reporting stage. Your agency needs to maintain the balance between ensuring the investigation report is solid, while not having an influence the outcome.

Deciding and acting on the findings

The head of your agency or their representative will need to decide on any action to take in response to the investigation outcomes.

Clearly and thoroughly document your response to the report and the outcomes of the investigation. Where relevant, this should include any reasons why your agency does or does not agree with any findings or recommendations in the report.

It may be appropriate to share the report, an edited copy or extracts of the report with a limited number of people.