External Investigations Guidelines

A practical guide for managing an external investigation

Ombudsman New South Wales

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Foreword

The NSW Ombudsman is an independent integrity agency that pursues fairness for the people of NSW. We strive to ensure that those entrusted with public power and resources fulfil their responsibilities and treat everyone fairly.

One of our key strategic aims is to help improve public administration and community service delivery. One way we do this is by providing guidance, education and training to government agencies and service providers to encourage good administrative practice and build capability.

From time to time, agencies engage external investigators to perform work. While this work can be of a high standard, we have observed that there can be significant issues with the quality of some externally led investigations. In 2016, we released a discussion paper on this topic and a decade later, many of the same pitfalls discussed in our paper continue to cause challenges for agencies.

A common misconception is that, merely by having engaged an external investigator, an agency has thereby discharged all its obligations for ensuring a quality investigation and lawful and fair outcomes. However, agencies have key responsibilities at every stage of an external investigation. These responsibilities must be managed carefully to protect the integrity and credibility of an external investigation.

These guidelines and our associated In Focus paper on *Managing the integrity and quality of an external investigation* provide practical guidance to help agencies maximise outcomes and minimise risks when engaging external investigation services. Further support is provided through our *Quick Reference Guide: External Investigations* . We also recommend agencies refer to the NSW Independent Commission Against Corruption's, *Factfinder: A guide to conducting internal investigations*.

Paul Miller
NSW Ombudsman

Introduction

Government departments, public sector agencies and local councils often need to investigate complaints, reports or allegations about their employees or their business activities, decisions or practices.[1] But it is not always appropriate or possible for an agency to investigate these matters internally. It may be necessary to engage an external person or organisation to investigate on the agency's behalf.

The NSW Ombudsman has developed this resource to support agencies when engaging external investigators.

These guidelines have been designed for senior executives, managers and employees in NSW government departments and agencies, local councils and community service providers.[2] They have been prepared to help your agency:

- build capacity to manage an external investigation
- develop clear and comprehensive policies and procedures to support consistent practice.

In Part A, we offer criteria to help your agency decide whether to hire an external investigator when an investigation is required.

In Part B, we outline how to set an external investigation up for success, including how to:

- select an investigator
- develop a terms of reference
- appoint an agency officer to coordinate the investigation.

Part C highlights the importance of maintaining an 'arm's length' approach while the investigation is underway, while also performing quality assurance. This includes your agency's responsibility to:

- support the investigator
- oversee and monitor progress.

Once the investigation activities have concluded, the external investigator will provide your agency with a report on the investigation.

Part D includes guidance to help your agency:

- assess the quality of the report
- remedy any critical gaps in the investigation or report
- assess how to deal with disputed outcomes.

In Part E, we reinforce the importance of recordkeeping as an essential part of a successful investigation and necessary for accountability and transparency.

At the end of these guidelines, we include a list of additional resources that are relevant to external investigations. Agencies will also need to have regard to relevant legislation and policy that operates in their specific context.

You can use our *Quick Reference Guide: External Investigations* to support an external investigation process, referring back to these guidelines for more detail as needed.

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1 We use the term 'agency' throughout this paper to refer collectively to the range of bodies oversighted by the NSW Ombudsman. This includes state government bodies, community service providers, local councils and universities.

2 The guidelines are necessarily high-level and do not cover all relevant regulatory and legislative frameworks that apply to each context.

Part A: Deciding whether to use an external investigator

After a complaint, report or allegation is made, the head of your agency or their delegate may decide that an investigation is required. Not all matters need to be investigated. Some matters can be resolved informally within your agency.

In some cases, it may be helpful (or required)[3] to undertake a 'preliminary assessment' to identify if there is *prima facie* evidence and/or sufficient justification to proceed with a formal investigation. This may involve interviewing the person who made the complaint, report or allegation and, in some cases, relevant witnesses. A preliminary assessment could be conducted internally or by an external investigator.

If a formal investigation is required, your agency must decide who would be best placed to conduct it. This means assessing whether to hire an external investigator (or to extend their appointment, if they conducted the preliminary assessment), or whether it would be appropriate to conduct an internal investigation.

To make this decision, your agency should consider the nature and circumstances of the complaint, report or allegation. This includes:

- How serious is it?
- Is it an isolated incident?
- How senior are the parties involved?
- What is the impact on the agency, including other employees?
- Could it lead to prosecution or civil action?

Next, assess the practicality of conducting an internal investigation. This includes:

- Has an independent integrity agency suggested or recommended engaging an external investigator?
- Does your agency have the necessary internal expertise, capability and resources?
- Does the subject, complexity or sensitivity of the matter require a person with special expertise or eminence?
- Is there a time constraint or an urgent need to conduct the investigation?
- Could an internal investigation create an actual or perceived conflict of interest?

Lastly, your agency should consider the perception of conducting an internal or external investigation – not just how it could be perceived within your agency, but whether it could affect public confidence in your agency's handling of the matter.

[3] For example, under agency policy or applicable legislation such as Government Sector Employment (General) Rules 2014 (NSW) r 38.

Part B: Setting up an external investigation

In our work, we sometimes see cases where external investigations have gone wrong. Many of the problems that arise involve issues of competence, quality and clarity. This includes when agencies engage investigators without properly understanding the capabilities that are required. Or when agencies are not clear about what each party is responsible for doing and deciding, to ensure that everyone is on the same page.

Many problems can be prevented by a rigorous selection process and being specific about contractual requirements and expectations.

A good practice is to require an external investigator to complete a conflict of interest declaration prior to commencing work.

Selecting an external investigator

It can be challenging to identify a suitable external investigator. While cost is a valid consideration, the priority is finding the right person or people for the job.[4] The needs across sectors and types of investigations are diverse and the task is to ensure investigators are appropriately skilled for the specific context.

The NSW Government Performance and Management Services Scheme (PM&S) includes investigation services and business that have been pre-qualified as potential providers.[5] You may also be able to obtain references from other agencies to help identify someone with an appropriate background and/or a case study from the investigator (provided sensitive and confidential information is protected) which could be verified by a referee. Over time, your agency could compile a list of experienced and knowledgeable investigators from the PM&S with demonstrated expertise across different subject areas, and with an understanding of your specific agency context.[6]

When procuring an external investigator, your agency should consider their:

- knowledge and experience
- skills and attributes
- qualifications.

At a minimum, the investigator should be able to demonstrate knowledge of:

- the NSW public sector operational environment
- administrative law principles (including procedural fairness)
- relevant law and policies affecting the workplace and workplace investigations
- any laws that regulate the subject matter of the investigation.[7]

The investigator should have practical experience planning and conducting administrative investigations. At a minimum, this includes how to:

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4 In some cases, more than one investigator may be required given the scope of the investigation and/or the interview circumstances.

5 NSW Government (2025) *Performance and Management Services Scheme* <https://www.info.buy.nsw.gov.au/schemes/performance-and-management-services-scheme>. Refer to the PMSS rules for procurement requirements and thresholds.

6 You may need to consider whether and in what circumstances the investigator was previously engaged by your agency. When using the same external investigator more than once, your agency should remain alert to manage any conflicts of interest, or the reasonable apprehension of bias. See NSW Independent Commission Against Corruption, Managing conflicts of interest in the NSW public sector, June 2019 <Managing conflicts of interest in the NSW public sector>

7 For example, the *Government Sector Employment Act 2013* (NSW) will be relevant to misconduct investigations, and the *Public Interest Disclosures Act 2022* (NSW) (PID Act) will be relevant where public interest disclosures have been made.

- plan and conduct (formal and informal) interviews and take statements
- engage appropriately with legal representatives that may be employed by individuals subject to or otherwise involved in the investigation
- maintain confidentiality and manage privacy, recordkeeping and disclosure requirements
- remain cognisant of the wellbeing of individuals involved which may include experience in working with people who have diverse needs or require additional supports or adjustments, applying a trauma-informed approach – including appropriately responding to people in vulnerable circumstances, and having specific knowledge of cultural considerations
- draft reports
- draft recommendations (if required under the terms of reference).

The investigator should also be able to demonstrate skills and attributes relevant to conducting investigations. These include:

- analytical and critical thinking skills
- oral and written communication skills
- an ability to build rapport
- an ability to work efficiently and follow timeframes
- a commitment to impartiality and ethical practice
- a commitment to act equitably and respectfully towards people with diverse needs and/or backgrounds
- an understanding of cultural safety, vicarious trauma and lateral violence.

Your agency should also consider a potential investigator's qualifications and relevant training[8] and should perform reasonable and appropriate checks to confirm the investigator's background and experience. This may include contacting the investigator's previous clients to enquire about their experiences and perspective on the standard of the investigator's work.

It may be useful to consult people who are directly involved in the investigation within your agency to obtain 'buy in' before engaging a particular investigator. While this may not always be appropriate, it can help to minimise conflict or allegations of bias at a later stage.

Considering whether to engage a lawyer to investigate

Lawyers are generally skilled at identifying, gathering and assessing the strength of relevant evidence. You can also expect that a lawyer will be able to identify and correctly apply legal or regulatory requirements that may be relevant to an investigation. These skills can be valuable for complex investigations or when significant legal issues are involved. When determining whether to engage a lawyer you need to consider the specific training, skills and experience of the practitioner or firm before proceeding with an engagement.

Agencies should be aware that just because an investigation is undertaken by a lawyer or an investigator engaged by a lawyer, this does not mean that legal professional privilege will apply to the investigation report.[9] Whether privilege applies will depend on the circumstances and dominant purpose for the

[8] The Australian Government Investigations Standard identifies the VET accredited qualifications required to coordinate, conduct and supervise investigations for Commonwealth agencies and entities. These include: Certificate IV in Government Investigations; Diploma of Government Investigations; Advanced Diploma of Government Investigations. These standards may be useful to guide your agency, as the NSW Government has not specified the minimum accreditation required to conduct investigations for agencies in NSW. See further: Commonwealth of Australia, Australian Federal Police (2022) *Australian Government Investigations Standard*. <https://www.afp.gov.au/Australian-Government-Investigations-Standard-2022.pdf>.

[9] Legal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services. The privilege exists to encourage full and frank disclosure by clients to their lawyers:

engagement.[10] Agencies should consider discussing with their lawyer what is or may be covered in relation to work when acting as an investigator.

Your agency will also need to check that the lawyer holds appropriate insurance to undertake non-legal work. Also, if legal proceedings arise following the investigation, your agency may need to engage another law firm for these proceedings.

Matters involving voluntary public interest disclosures

Under the *Public Interest Disclosures Act 2022* (NSW) (**PID Act**), your agency can engage an external investigator to deal with voluntary public interest disclosures by investigating relevant serious wrongdoing.[11] In these situations, your agency must:

- notify the NSW Ombudsman of this arrangement
- prominently publish the details of the arrangement on your website and intranet.[12]

Though your agency can outsource the investigation function, your agency will need to retain oversight and/or decision-making responsibility over other obligations under the PID Act.[13] These include risk management, protecting the confidentiality of the maker of the disclosure and keeping them updated on the progress of the matter, extending protections under the PID Act to witnesses,[14] decision-making, and taking corrective action if the investigation finds that serious wrongdoing or other misconduct has occurred.[15]

Additional requirements for local government authorities

Some additional requirements apply to local councils when investigating alleged breaches of their codes of conduct. Councils must follow the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW*.[16]

Among other requirements, councils must establish a panel of conduct reviewers who serve a term of up to four years. When it is alleged that a councillor or general manager has breached their council's code of conduct, a conduct reviewer will need to be selected from the panel to conduct the investigation. The procedure specifies the expertise required to qualify as a conduct reviewer. For example, this includes knowledge and experience of law, public sector ethics and alternative dispute resolution.[17]

The Office of Local Government's *Councillor Conduct Framework* is under review at the time of publishing these guidelines, and this may impact how misconduct investigations are managed and

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Esso Australia resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49. Claims of legal professional privilege cannot be used to avoid statutory reporting/disclosure obligations under the *Ombudsman Act 1974* (NSW), PID Act, or *Independent Commission Against Corruption Act 1988* (NSW).

10 *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47; *Powercor Australia Ltd v Perry* [2011] VSCA 239; 33 VR 548; *Medibank Private Limited v McClure* [2026] FCAFC 38

11 PID Act s 81(3).

12 PID Act s 81(4).

13 We have developed specific guidance to support agencies in handling public interest disclosures. See 'Additional resources' at the end of this document.

14 A disclosure will be a 'witness PID' if a person discloses information during an investigation into serious wrongdoing, following a request or requirement of an investigator or the agency involved: PID Act s 22. The PID Act extends many of the protections that apply to voluntary PID-makers (whistleblowers) to witnesses in a PID investigation, so that they come forward willingly, and provide information openly and without fear of detrimental action.

15 If an agency investigating a voluntary PID finds that serious wrongdoing or other misconduct occurred, the agency must take corrective action that appropriately responds to the wrongdoing or misconduct: PID Act s 66(1).

16 Under law, each local council in NSW must adopt a code of conduct that incorporates the standards outlined in the *Model Code of Conduct for Local Councils in NSW*. Both the *Model Code of Conduct for Local Councils in NSW* and the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* are prescribed under the *Local Government Act 1993* (NSW) and the Local Government (General) Regulation 2021 (NSW).

17 Office of Local Government (2020) *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW*, p 11 <https://www.olg.nsw.gov.au/Procedures-for-the-Administration-of-the-Model-Code-of-Conduct-2020.pdf>.

conducted in the future.[18]

Developing the terms of reference

Like any procurement activity, your agency will need to formalise the contract of engagement with the external investigator. You will also need to develop a 'terms of reference' to set expectations and guide the investigation process.

A clear and comprehensive terms of reference will reduce the risk of problems arising during the investigation. For example, confusion around roles and responsibilities or the format of deliverables, or delays caused by having underestimated the resources required.

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

- the key question/s to answer or issue/s to investigate (which may extend in some cases to the root causes and mitigation strategies)
- the identity of known parties to the investigation[19]
- any law, regulation, code, policy, procedure or standard that is relied on to initiate the investigation, or is otherwise relevant to the investigation
- any powers or authority that your agency may have delegated to the investigator (discussed further below)
- the key personnel involved and their roles and responsibilities, including the:
  - investigator(s)
  - agency officer tasked with overseeing the investigation (discussed further below)
  - decision-maker within the agency who will determine the investigation outcome
- the protocol for communicating with parties to the investigation[20]
- confidentiality requirements[21]
- procedural fairness requirements
- the requirement to document the investigation process and methodology in full
- the requirement to conduct the investigation in a way that minimises workplace disruption
- how interviews should occur and whether written statements are acceptable
- requirements around recordkeeping and preservation of documents and evidence (for example, how personal or sensitive information is to be accounted for, secured, and retained[22])
- timeframes including key milestones, completion dates and how extensions of time can be requested
- key deliverables (for example, an investigation plan[23] with a clear methodology and a report with findings)

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18 NSW Government, Office of Local Government (2025) *Councillor Conduct Framework* <https://www.olg.nsw.gov.au/councils/misconduct-and-intervention/councillor-conduct-framework/>.

19 For example, the person who made the complaint and the person whose conduct is to be investigated.

20 This includes, for example, requirements to notify individuals that they are under investigation: NSW Independent Commission Against Corruption (ICAC) (2022) *Factfinder: A guide to conducting internal investigations*, p 22 <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/factfinder>.

21 This is particularly relevant to PID matters. Generally, it should be clear to the investigator what information they can and cannot share to maintain confidentiality.

22 To reflect the requirements of the *State Records Act 1998 (NSW), Privacy and Personal Information Protection Act 1998 (NSW)* and the *Health Records and Information Privacy Act 2002 (NSW)*.

23 See further: ICAC (2022) Factfinder: A guide to conducting internal investigations, Appendix 1 <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/factfinder>.

- any documentation created by the external investigator that is to be provided to your agency once the investigation has concluded (for example, case notes, running sheets, interview notes)
- anticipated resources required (for example, travel and other expenses, or the need for a second interviewer to assist with major interviews)
- the process for addressing matters that arise during the investigation process that are outside scope of the investigation such as discovery of possible wrongdoing and/or conduct that must be reported under a legislative scheme[24]
- whether or to what extent the report of the investigation will be published and/or expectations of confidentiality
- any matters out of scope for the investigation
- the process for amending the terms of reference if required.

Any activity you authorise an investigator to do must be in line with legislation and applicable government policies, procedures and guidelines. Some activities and responsibilities cannot be delegated to an external investigator as they can only be exercised by public officials. For example, your agency generally cannot authorise an external investigator to:

- make findings under legislation or decide on any disciplinary action to be taken
- exercise coercive powers to obtain information or evidence
- issue an employment direction to employees .[25]

While setting up an investigation and during the investigation process more generally, your agency should avoid taking or inferring a position or an opinion on the merits of the case. This means that your agency should avoid sharing any observations about the credibility or reliability of a party to the investigation with the external investigator. This may be seen as undue or inappropriate influence and can affect the impartiality of the investigation.

Case study – the importance of a clear and thorough terms of reference

An agency engaged an external investigator after receiving a number of related PIDs. Dissatisfied with the findings made in the first external investigation, the agency engaged external legal services to conduct a review. It then decided to engage a new investigator to have the matter externally investigated for a second time.

Our office observed that the process may have been more efficient and effective if the initial investigation scope drafted by the agency had been clearer and more comprehensive. The process was costly and burdensome for parties to the investigation, including the subject of the allegations.

We also noted that despite an external review and two external investigations, some allegations raised by the PID-maker(s) were not investigated and no explanation was provided as to why these allegations were overlooked.[26]

Ultimately, our office suggested that the agency investigate the remaining allegations itself, which it did so more than 12 months after the allegations were first made.

[24] As an example, the duty to report suspected corrupt conduct under s 11 of the *Independent Commission Against Corruption Act 1988*.

[25] It is, however, reasonable to expect your agency's employees to cooperate with management directions, which means cooperating with an external investigator that has been appointed by management. See further: NSW Ombudsman (2017) *Good conduct and administrative practice – Guidelines for state and local government*, pp 2, 45 <https://www.ombo.nsw.gov.au/guidance-for-organisations/improving-public-administration/good-conduct-and-administrative-guidance>.

[26] See further: ICAC (2022) Factfinder: A guide to conducting internal investigations, pp 20–21 <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/factfinder>.

Appointing an agency officer

Under NSW Government procurement guidelines, your agency is responsible for making sure the external investigator meets their contractual obligations and delivers what is required under the terms of reference.[27]

Your agency should appoint a staff member to manage the contractual arrangements, and coordinate, support and monitor the investigation. This is the person the investigator will report to over the course of the investigation. This person will also be responsible for maintaining a complete record of all communications between the external investigator and the agency throughout the investigation.

Given their monitoring role, ideally, this agency officer should be familiar with good investigative practice and principles of administrative law.

To support the integrity of the progress, the agency officer appointed to manage and monitor the external investigation should be different to the decision-maker within your agency who will ultimately determine the investigation outcome/s. The agency officer should not have any conflicts of interest in their involvement in the matter.

[27] Monitoring performance and ensuring compliance with the NSW Government's PM&S is the responsibility of the contracting agency. Performance management and reporting requirements are set out under the PM&S Rules: NSW Government (2025) *Performance and Management Services Scheme* <https://www.info.buy.nsw.gov.au/schemes/performance-and-management-services-scheme>.

Part C: Overseeing the investigation

After the terms of reference have been agreed on, the general principle is that the investigation process belongs to the investigator. They determine what to do and when and how to do it, without direction from your agency. This includes the latitude to go wherever the evidence takes them, within reason.

It is important that your agency maintains an 'arm's length' approach to protect the impartiality of the investigation.[28] The credibility of the investigation can be compromised even if it simply *appears* that your agency has tried to influence or control the investigator's process and findings.

Set expectations early with the investigator about frequency and mode of communication between all parties throughout the investigation process.

Supporting the investigator

The external investigator's role is to gather, review and assess evidence. This includes all the information your agency holds that the investigator can justify as relevant to the investigation, and that is not subject to any legal constraints. It also includes evidence created during the investigation, such as information gleaned from interviews.

Your agency should be a facilitator, not a gatekeeper. You can support the external investigator by bringing relevant evidence or information to their attention,[29] helping them access employees to interview, and providing supporting resources as required. The investigator may also require contextual or operational input from an appropriate agency nominee (usually a senior officer).

In general, your agency should avoid limiting an investigator's ability to interview relevant employees or from accessing any agency record relevant to the investigation. However, there may be situations where it is appropriate to ask the investigator from refraining from contacting a witness, for example, if they are on personal leave or litigation is underway.

Information about the investigation should be confined to those with a legitimate need to know. This will help maintain the privacy of any relevant witnesses, and/or protect them from retaliation if their participation in the investigation became known to other people in your agency.

Overseeing and monitoring progress

While the investigation is underway, your agency's primary role is to oversee and monitor progress. This means making sure the external investigator:

- complies with administrative law principles and relevant agency policy
- manages procedural fairness requirements[30]
- maintains records of the investigation process (for example, file notes and records of interviews)
- protects information from unauthorised access and maintains privacy
- meets agreed timeframes
- stays within budget

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28 See further: ICAC (2022) *Factfinder: A guide to conducting internal investigations* <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/factfinder>.

29 This may include evidence that corroborates or refutes what witnesses have told the external investigator, and thereby speaks to issues of credibility.

30 The investigator is responsible for complying with procedural fairness obligations towards any party who is the subject of allegations or any potential adverse findings.

- delivers what is required under the terms of reference.

Sometimes the scope of an investigation needs to be expanded while the investigation is underway. For example, an investigator may indicate that additional time or budget is required to conduct further investigative activity. This may be particularly relevant when systemic issues become apparent to the investigator as the investigation progresses.

In these situations, your agency will need to decide on the action to take. Managing these situations will involve a delicate balance. On the one hand, it is appropriate for your agency to carefully assess any proposal that involves additional expenses. However, you also need to be careful about exerting or appearing to control the investigative process, or making decisions that unreasonably constrict how the investigator does their job.

For example, the investigator may suggest the need to travel to conduct an interview. This could be justifiable if it is crucial to the issue under investigation, and conducting the interview in person would be the most appropriate way of gathering the information needed. On the other hand, there may be situations where the information required can be obtained through alternative means, and without additional time or expense.

The role of the agency is to maintain a balance between priorities such as risk, timeframes and budget and the requirements of a sound investigative process.

What is most important is to document all decisions made during the investigation, including your agency's rationale for agreeing or disagreeing with the investigator's approach.

Case study – a poorly conducted external investigation

A PID was made about the conduct of an employee and administrative failures by their agency. The employee who was the subject of the allegations was said to have taken reprisal action against the PID-maker, including harassment and intimidation that had caused psychological injury. The agency hired an external investigator to handle the matter.

Our office subsequently conducted an audit of the agency and scrutinised the handling of the PID. We found that there were significant failings in how the investigation was conducted and reported. This was exacerbated by the way the investigation contract was managed and the apparent lack of oversight by the agency.

We found that the external investigator:

- failed to identify and report on each of the allegations
- misread or misinterpreted the requirements of the PID Act
- had not detailed the methodology used during the investigation in their final report
- dealt with matters outside the terms of reference that were not reported on or referred back to the agency for further advice or action
- had not followed up on evidence allegedly implicating other senior officers. Though this was outside the terms of reference, it may have provided context to the allegations. Such evidence should have been brought to the agency's attention so it could have considered any necessary further action.

Part D: Investigation outcomes

Investigation report

Once the investigation process has concluded, the external investigator may provide your agency with an investigation report. The report could outline:

- the external investigator's methodology
- their assessment of the credibility and reliability of evidence
- their analysis of the evidence
- their findings of fact
- their conclusions about whether each allegation has been substantiated, partially substantiated or not substantiated
- their recommendations (if required under the terms of reference)
- any procedural issues that may have arisen during the investigation and how they were addressed.[31]

Your agency is responsible for quality assuring the investigation report. This process is important as your agency may need to rely on the report to justify the action/s you take in response to the investigation.

Though not exhaustive, the following criteria will help your agency consider whether the investigation has been reasonably thorough and objective:

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

Remedying any gaps

Your agency will need to instruct the investigator to remedy any critical gaps in the investigation or investigation report. For example, request the investigator to:

- interview people who should have been interviewed
- ask questions that should have been asked
- specifically deal with evidence that may not support their findings.

In rare cases where there are critical gaps in the investigation that cannot (or should not) be rectified by the investigator, your agency may need to appoint a new investigator.

[31] See further: ICAC (2022) Factfinder: A guide to conducting internal investigations, Appendix 3 <https://www.icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/factfinder>.

In general, maintaining the independence of the investigation continues to be important during the reporting stage. Your agency needs to maintain the balance between ensuring the investigation report is robust, while not compromising the investigation's integrity by exerting too much influence.

Your agency should keep copies of any comments and clarifications sought on the investigation report. This is not only good recordkeeping practice but will also be necessary if the report comes under scrutiny in the future.

Acting on investigation outcomes

After receiving the final investigation report, the head of your agency or their delegate will need to decide on any action to take in response to the investigation outcomes. All decisions must be clearly and thoroughly documented.

In some cases, agencies may need to take disciplinary action against an employee. Depending on the nature of the investigation and the outcomes, your agency may also need to refer the matter to an external body, such as an independent integrity agency or NSW Police.

It may be appropriate to share the report or a redacted copy or extracts of the report with a limited number of people. Agencies must protect information that cannot be shared such as the names of witnesses or complainants and other sensitive information. The key is to be clear and consistent. Your agency should have a documented position on what information will be provided, to whom, and when.

Dealing with disputed outcomes

There may be times when a party to the investigation disputes the investigation outcomes. For example, an employee subject to adverse findings may claim that they were not offered procedural fairness, or that the investigator failed to consider specific evidence.

These issues are less likely to arise if your agency has effectively monitored the investigation and addressed any quality control issues when reviewing the report.

When assessing disputed outcomes consider:

- **Relevance**: How is this person connected to, or affected by the investigation?
- **Impact**: How does the investigation outcome impact them directly or indirectly?
- **Materiality**: Are they raising a material issue that could change the investigation findings?
- **Nature of the concern**: Are they disputing the investigation *process* (fairness, accuracy, evidence etc) or the investigation *outcome* (findings or conclusions)?

These considerations will give your agency a good starting point to assess any disputes on their merits and respond accordingly. Sometimes, a reasonable and comprehensive explanation of the investigation process and how the outcomes were reached will be sufficient.

Part E: Recordkeeping

Effective recordkeeping is essential to a successful investigation and necessary for accountability and transparency.

As outlined above, your agency should keep records of all communication with the external investigator and all decisions made during the investigation and finalisation of the investigation report.

Similarly, your agency should document its response to the investigation 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 contained in the external investigator's report.

The external investigator should also provide your agency with records and documents they have created during the investigation process. For example, detailed case notes, running sheets, interview notes, and audio recordings of interviews. All evidence gathered should be clearly labelled and identify its originating source, including the time and date of interviews.

As a lot of this information will be sensitive, your agency will need to secure these documents and records from unauthorised access.[32] All investigation-related documentation should be stored and retained by your agency in line with the requirements of the *State Records Act 1998* (NSW). Similarly, personal or health information must be treated in line with the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW).

Additional recordkeeping requirements may apply depending on the subject matter of the investigation, or the nature of the information.[33] You should also be aware that some documentation, including the investigation report, may be the subject of an access application under the *Government Information (Public Access) Act 2009*.

[32] Relevant agencies can use the NSW Government Information Classification, Labelling and Handling Guidelines to identify and label sensitive information. See further: Data.NSW (2021) *NSW Government Information Classification, Labelling and Handling Guidelines* <NSW Government Information Classification, Labelling and Handling Guidelines | Data.NSW>.

[33] For example, an agency must keep a written record of the proceedings and any action taken in response to an allegation of misconduct against an employee: Government Sector Employment (General) Rules 2014 (NSW) r 41.

Additional resources

NSW integrity agency resources

NSW Ombudsman, *Dealing with voluntary PIDs*, September 2023 <NSW Ombudsman | Dealing with voluntary PIDs>

NSW Ombudsman, *Updating the makers of voluntary PIDs and providing supports,* August 2023 <NSW Ombudsman | Updating the makers of voluntary PIDs and providing supports>

NSW Independent Commission Against Corruption, *Factfinder: A guide to conducting internal investigations,* April 2022 <Factfinder: a guide to conducting internal investigations - Independent Commission Against Corruption>

NSW Independent Commission Against Corruption, *Obtaining independent advice: Dos and don'ts*, December 2021 <Obtaining independent advice: dos and don'ts - Independent Commission Against Corruption>

NSW Independent Commission Against Corruption, *Managing conflicts of interest in the NSW public sector,* June 2019 <Managing conflicts of interest in the NSW public sector>

Other resources

Canadian Human Rights Commission, *Human rights-based approach to workplace investigation – Guidance and good practices*, 2023 <https://www.chrc-ccdp.gc.ca/sites/default/files/2024-04/human-rights-based-approach-to-workplace-investigations_1.pdf>

Commonwealth of Australia, Australian Federal Police (2022) *Australian Government Investigations Standard* <https://www.afp.gov.au/Australian-Government-Investigations-Standard-2022.pdf>

Integrity Commission Tasmania, *Guide to managing misconduct in the Tasmanian public sector*, September 2023 <https://www.integrity.tas.gov.au/__data/assets/pdf_file/0004/398866/guide-to-managing-misconduct-in-the-tasmanian-public-sector-september-2023.pdf>

Queensland Public Sector Commission, *Managing workplace investigations: A practical guide for the Queensland public sector*, April 2024 <Managing workplace investigations - A practical guide for the Queensland public sector>

South Australian Office of the Commissioner for Public Sector Employment, *Guideline: Management of Misconduct – For South Australian public sector managers and human resource* professionals, March 2023 <2023-03-31-CPSE-Guideline-on-Management-of-Misconduct.pdf>