

Managing the integrity and quality of an external investigation

From time to time, government departments, public sector agencies and local councils will need to investigate the conduct of their staff. An investigation may be required for many reasons. This includes if allegations of misconduct are made against a staff member, or if an incident or event arises that calls into question the agency's¹ decisions or practices, including compliance with its policies or legal obligations.

Some agencies have limited internal expertise, capability and/or resources to complete a thorough internal investigation. Even when agencies do have internal capacity, they may still decide to engage an external investigator. In some cases, this may be obligatory. For example, an integrity agency (like the Ombudsman or the ICAC) may refer a matter to an agency for investigation and recommend that an external investigator be engaged for that purpose.²

Engaging an external investigator may also be necessary if an actual or perceived conflict of interest precludes the investigation from being conducted by staff within an agency. Even where there is no conflict, strictly speaking, an agency may decide that an external investigation would be more appropriate to demonstrate an unbiased, 'arm's length' approach, and enhance confidence and credibility in the investigation process and outcome. Similarly, procuring an external investigator may be necessary because the subject matter under investigation calls for a person with special expertise or eminence.

Anecdotally, there appears to be increased demand for external investigation services from public sector agencies in recent years. In our work, we sometimes see cases where these investigations have gone wrong.

One of the biggest mistakes we see is when agencies appear to assume that, merely by having engaged an external investigator, they have thereby discharged all their obligations for ensuring a quality investigation and lawful and fair outcomes. On the other hand, we also see examples where agencies intervene inappropriately in a way that compromises the investigation's perceived impartiality and credibility, and the findings or outcome are subsequently questioned or not accepted.

It can be challenging for agencies to ensure that they respect and maintain the independence of an external investigation, while at the same time, ensure that the investigation delivers what is expected and required.

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 See *Ombudsman Act 1974 (NSW) s 12A*; *Independent Commission Against Corruption Act 1988 (NSW) ss 53, 54*.



Problems that arise are usually due to underlying issues of competence, quality and clarity, rather than any improper motives. This includes when external investigators are engaged without proper understanding or regard to the capabilities that are required for the particular investigation. It also includes failures to properly articulate at the outset what each party is responsible for doing and deciding, to ensure that both the investigator and agency are on the same page.

A poorly managed investigation can significantly impact the wellbeing, finances and reputation of the individuals and agency involved. It may also require re-investigation,³ which can be particularly challenging given the time and resources spent on the first investigation, the inconvenience and potential trauma for witnesses and other individuals affected, and the risk of prejudice.

Agencies can also find themselves in a difficult position when trying to rectify an error-ridden or insufficiently robust investigation. An agency's decision to reject an investigation report and/or start a new investigation may be entirely justifiable, reasonable and appropriate in the circumstances. But this could be perceived by others as the agency's way of avoiding findings or recommendations that were unfavourable or inconvenient.

Though external investigations may be increasingly more common, they are not generally a routine occurrence for most agencies, and the need tends to arise unexpectedly and infrequently. This means that many agencies will not have a great deal of experience or deep expertise in engaging and managing external investigators.

Despite this, there is little guidance currently available to help agencies when outsourcing investigations.

For these reasons, the NSW Ombudsman has developed this edition of *In Focus* to briefly step through the key responsibilities of agencies at each stage of the external investigation process:

- Stage 1 – Initiating the external investigation
- Stage 2 – Investigating the complaint, report or allegation
- Stage 3 – Reporting on the investigation
- Stage 4 – Determining the investigation outcome.

We are also developing more detailed guidance for agencies on engaging and managing external investigation services. A draft of this guidance is currently circulating for consultation and feedback, and can be accessed via a link at the end of this document.

Stage 1 – Initiating the external investigation

Once an agency receives a complaint, report or allegation, the head of an agency or their delegate will need to make an initial assessment to determine whether an investigation is required. If an agency decides that external investigation services are necessary, it then becomes important to select the right person for the job. This means procuring the services of an investigator who is suitably qualified and has knowledge and practical experience conducting administrative

³ For example, where an investigation is conducted on the referral of the Ombudsman or the ICAC, the agency must report back to the integrity agency. The integrity agency will assess the quality of the investigation process and outcomes to determine whether any further action is required, including potentially conducting its own investigation into the same matter.



investigations within a public sector context. Ideally, this would extend to specific expertise in the subject matter area to be investigated. For example, if a whistleblowing complaint arises, it would be appropriate to engage an external investigator with knowledge and experience following the specific legislative requirements that apply when investigating alleged wrongdoing under the public interest disclosures scheme.

As with any procurement activity, an agency is also responsible for formalising the contractual aspects of the engagement. This includes providing guidance for the external investigator in the form of a 'terms of reference'. The intention is to set the external investigation up for success and minimise the risk of questions or confusion arising while the investigation is underway.

A robust terms of reference clearly outlines the scope and parameters of the investigation, including the key questions to be answered or issues to resolve. It identifies any law, regulation, code, policy, procedure or standard that is relevant to the matter under investigation. It also stipulates any conditions that must be complied with around procedural fairness, privacy and confidentiality, communication protocol,⁴ recordkeeping, and preservation of documents and evidence. It states the timeframes and format for deliverables (for example, an investigation plan and report containing findings and recommendations). It also names the key personnel involved in the investigation and delineates roles and responsibilities.

Agencies should appoint a staff member to act as the primary contact for the external investigator, and to coordinate, support and monitor the investigation. Ideally, this agency officer should themselves be familiar with good investigative practice and principles of administrative law.

Stage 2 – Investigating the complaint, report or allegation

The external investigator's primary role is to gather, review and assess any information that is relevant to the matter under investigation. They are responsible for conducting interviews where required, and demonstrating procedural fairness to individuals who are the subject of allegations or any potential adverse findings. Depending on the subject matter of the investigation, they may also need to comply with additional legal or regulatory requirements.

Effective recordkeeping is essential to a successful investigation and necessary for accountability and transparency. An external investigator must therefore make records documenting the investigation process, and any evidence gathered (such as records of interviews) must be preserved and secured from unauthorised access.

To maintain the independence of the investigation, an agency's direct involvement during the investigation stage should be limited (unless an agreement has been entered into to share investigation tasks between internal staff and the external investigator). It is appropriate that an agency assists an external investigator by bringing any relevant evidence or information to their attention, and facilitating access to employees and other support as required.

However, it is important that agencies do not become so involved in the process that their conduct compromises the impartiality of the investigation. We advise agencies to exercise caution; even the

⁴ This includes, for example, requirements to notify individuals that they are under investigation: NSW Independent Commission Against Corruption (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>>.



appearance of undue influence can be detrimental, affecting confidence in the investigation process and outcome.

While an investigation is in progress, an agency's primary role is to undertake quality assurance by overseeing and monitoring the investigation's progress. This includes ensuring that the external investigator adheres to the terms of reference, complies with administrative law principles and procedural fairness requirements, and meets the necessary timeframes.

Stage 3 – Reporting on the investigation

Once the investigation activities have concluded, the external investigator is to provide a draft investigation report for the agency's review and feedback. For example, this report could document the external investigator's methodology, their assessment of the credibility and reliability of evidence, the facts established by the investigation, and the rationale supporting their findings and recommendations.

During the review, agencies should assess the report's quality and comprehensiveness, and whether the external investigator's findings are sufficiently supported by the evidence presented and meet the relevant standard of proof. This quality assurance process is particularly important as an agency may need to rely on the report to justify action taken in response to the investigation.

Maintaining the independence of the investigation continues to be important during the reporting stage. We advise agencies to avoid extensive involvement in finalising the investigation report, as this can compromise the report's integrity. We recommend that agencies keep copies of all drafts documenting any comments, clarifications and amendments to the investigation report. This is not only good recordkeeping practice but will also prove essential if the report comes under scrutiny in the future.

Stage 4 – Determining the investigation outcome

It is important to remember that even when an investigation is outsourced to an external investigator, the agency retains decision-making responsibility over the investigation outcome. We advise agencies not to automatically 'rubber stamp' the recommendations made by an external investigator. After receiving the final investigation report, the head of the agency or their delegate must determine what action should follow.

Where appropriate, relevant parts of the investigation report may need to be shared with individuals involved in the investigation, particularly when a disciplinary response is to be taken. Depending on the nature of the investigation and the outcome, an agency may also need to refer the matter to an external body, such as an independent integrity agency or NSW Police.

For transparency, accountability, and good recordkeeping purposes, an agency should document their response to the investigation report and the outcome of the investigation. Where relevant, this should include any reasons why the agency has chosen not to implement any findings or recommendations contained in the investigation report.

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Maintaining the integrity of an investigation is paramount. For this reason, we are developing more detailed guidance for agencies to help maximise outcomes and minimise risks when engaging



external investigation services. The draft guidance can be found here: [Draft External Investigations Guidelines](#) – we welcome agency comments and feedback.

