

CONSIDERATIONS FOR EXTERNAL INVESTIGATIONS:

What is the purpose of an investigation?

The purpose of an investigation is to examine and evaluate all relevant facts, and to determine whether, on the balance of probabilities, the alleged behaviour took place. An investigation uncovers material related to an incident; it does not result in a sanction or other outcome being imposed on an individual. Rather, the investigation provides the information that can assist the delegate in determining the appropriate sanction, if applicable, to apply at the conclusion of the investigation.

Who should investigate?

2. Assess what type of investigation is warranted

After determining whether the allegations are serious enough to warrant an investigation – need to determine what sort of investigation is needed. When considering whether to appoint an external investigator you need to consider the following:

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[Redacted text]
- [Redacted text]
- [Redacted text]

All the above factors will determine whether you choose to engage an external workplace investigation provider or whether you conduct the investigation internally.

Engaging an external investigator

Terms of Reference

Terms of Reference: determine the scope of the investigation (what subject matter will be in vs out of scope in an investigation); provide clear instructions, set realistic timeframes and milestones, and specify reporting requirements (including any interim report required).

The terms of reference for an investigation should:

- *Background*: Provide relevant background about the complaint or issue to be investigated (eg: who it was received from and when).
- *Allegations*: detail the allegations the investigator is being asked to investigate, including:
 - the nature and seriousness of the alleged misconduct;
 - whether it has occurred in the past or is still occurring; and
 - whether there are any known witnesses, documents and/or physical evidence to support the allegations.
- *Investigator's Role*: define the investigator's role to obtain and present evidence in relation to these allegations in order to make findings of fact.
- *Deliverables / Reports*: clearly articulate the deliverables (reporting requirements), who the report should be provided to, and specify timeframes / milestones. This could include an overview of what the report should contain.
- *Support*: outline any support that will be provided to the investigator e.g. administrative support, facilitating site visits, legal advice etc.
- *Communications*: clarify communications & reporting channels
- *Integrity and Confidentiality*: Clarify any guidance on the integrity of the process, including by conducting the investigation in an impartial and objective manner; ensure procedural fairness is applied throughout the process; and by maintaining appropriate confidentiality.
- *Contacts*: identify key contacts.

[See example TOR at Appendix 1. B of [Managing workplace investigations](#) publication).

For external investigations, it is recommended the terms of reference require the investigator/s to prepare an investigation plan articulating their approach, timeframes, and their terms of business e.g. hourly rates, estimate of hours required, other costs. The investigation plan should provide an overall expected cost of the investigation, and be accepted by the decision maker prior to the investigator being engaged.

Investigator Suitability

Factors to consider when determining the suitability of an investigator:

- identifying the skills required from a prospective investigator prior to engagement
- conducting a preliminary interview to determine skills and capabilities, ascertain relevant expertise and verify qualifications
- undertaking referee checks, if required
- ensuring they have relevant insurances and licences if the external investigator is not listed under a panel or other arrangement.
- identifying and managing any actual or potential conflicts of interest.

When engaging an external investigator, it is recommended that the contract manager:

- identifies the decision maker, determines the authority for the investigation, governance of the investigation and the authorisation channels.

- briefs the investigator and provides them with a copy of the APS Values and *Code of Conduct* and any legislation, policies, procedures and/or guidelines relevant to the matter being investigated
- advises the investigator of any internal agency supports to be afforded to parties such as access to a support person and provision of a copy of the electronic recording or transcript of their interview
- maintains regular communication with the investigator and manages their performance throughout the period of the contract
- determines and agrees upon the process regarding the retention of records and documentation with the investigator in accordance with agency record keeping requirements and legislation
- creates a plan to provide agreed regular updates on the progress of the investigation¹ to both the decision maker and participants.

The investigation plan

- The first step for an investigator after reviewing the terms of reference and information sent as part of the investigation referral is to formulate an investigative plan.
 - An investigation plan is as critical as the terms of reference and allows an investigator to determine that they are on the correct path.
 - As part of planning for an investigation, the order of the investigation should be considered. Whilst there may be occasions where the order changes to accommodate extenuating circumstances, the order in which an ideal investigation is conducted is as follows:
 1. Obtain a detailed complainant statement.
 2. Undertake a site inspection where relevant.
 3. Review all documentary evidence.
 4. Obtain witness statements (interviews).
 5. Interview the respondent.
 6. Review and analyse all material/evidence obtained during the investigation (this may include documentary and physical evidence, or require visits to relevant locations).
 7. Conduct further investigation as required.
 8. Prepare a report, including findings of fact, for the delegate.
 - Whichever way an investigator conducts an investigation, it is important that the investigator obtains sufficient evidence and facts in order to make a finding on the balance of probabilities.
 - Investigators should only take into account relevant information, and any conclusions reached should be logically formulated. To this end, investigators need to ensure that the employee and all key witnesses provide all relevant information. The decision to follow up witnesses or consider additional material put forward by an employee is to be made by
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the investigator in the context of the requirement to ascertain, as far as possible, the truth of the allegations.

The investigation report

The investigation report should be succinct and clear. It should:

- outline the authorisation, scope and purpose of the investigation
- detail the complaint and set out the allegation/s
- set out the evidence that supports or does not support substantiation of the allegation/s
- outline if on the balance of probabilities each allegation is capable or not of substantiation
- include relevant attachments.

[Refer to Appendix 2: Investigation Report suggested headings]

REFERENCES:

- [Managing workplace investigations: A practical guide for the Queensland public sector \(QLD\)](#)
- [A guide to engaging and providing workplace investigation services \(QLD\)](#).
- [ACTPS Guide to Managing Workplace Behaviour \(ACT\)](#).
- <https://www.ibac.vic.gov.au/publications-and-resources/article/investigations-guide> (VIC).
- <https://www.ashurst.com/en/news-and-insights/insights/guidance-on-conducting-investigations-remotely>

Appendix 2: Investigation report suggested headings

Executive Summary
Terms of Reference
Background
Investigation Summary/Methodology Decision on who to interview, the list of interviews conducted, documents examined.
Allegations For each of the allegations, include the following headings: <ul style="list-style-type: none">• Summary of evidence• Analysis of evidence• Findings and reasons
Summary of Findings
Recommendations (if relevant):
Attachments: Attachments, including all documents relied on by you and any relevant policies and procedures, should be indexed and numbered in the order they are referred to in the investigation report (e.g. "Attachment 1"), and attached.