

Investigation of complaints

What is an investigation?

An investigation is a fact finding process – a search for, gathering and examination of information in order to establish facts. An investigation is one step in a decision-making process which starts with an issue and ends with a decision. The purpose of an investigation of a complaint is to establish and document relevant facts, reach appropriate conclusions based on the available evidence, and determine a suitable response. The nature and scope of the investigation required in response to a complaint will depend on the circumstances of each case and any relevant statutory requirements or language that may apply.

pursue all lines of inquiry in a way that will meet all legal and procedural requirements, particularly where there is a possibility of criminal or disciplinary action, or a finding of wrong conduct against an individual which could significantly affect that person's reputation, interests, etc. On the other hand, outcome-focused inquiries are primarily directed at quickly identifying and remedying problems. They therefore only seek to obtain sufficient information for a fair and informed judgement to be made about the issues in question, particularly where those issues relate to policies, procedures and/or practices. An outcome focused investigation may require no more than consideration of the terms of the complaint and a study of any relevant documents.

The steps in an investigation

Assessing the complaint

The **first step** is to determine what action is required, which may include options other than a formal investigation. Assessment can involve consideration of a range of factors including:

- whether the complaint primarily involves a communication problem or misunderstanding that can be resolved through explanation or discussion
- whether an alternative and satisfactory means of redress or a more appropriate mechanism for dealing with the issue is available
- whether the complaint can or must be referred or notified to a relevant government agency
- the time that has elapsed since the alleged events occurred, and
- the significance of the issue for the complainant and/or the organisation (including whether the allegation indicates the existence of a systemic problem).

Selecting the appropriate investigative approach

The **second step** is to determine the most appropriate investigative approach. Investigations can take many forms depending on such factors as:

- **Statutory requirements:** Any statutory powers or obligations that apply to the investigation may specify particular procedural requirements.
- **The nature of the issue:** Whether the issue relates to policies, procedures and/or practices, or to the conduct of individuals or organisations. This has an important bearing on matters such as the powers necessary and available for the investigation, the resources that will be needed, the authorisations necessary to undertake the investigation and the nature of the possible outcomes of the investigation.
- **The likely outcome of the investigation:** It is useful to characterise an investigation as either evidence-focused or outcome-focused. Evidence-focused inquiries seek to

Planning the investigation

The **third step** is to define the subject matter of investigation (eg. the conduct and issues to be investigated) and to develop an investigation plan (the complexity of which will depend on the nature of the issues to be investigated). It is necessary to identify what questions need to be answered, what information is required to answer those questions and the best way to obtain that information. For any investigation into complex or sensitive issues to be effective it must be structured, eg. follow a logical sequence in the pursuit of pre-determined objectives.

Ensuring proper powers and authority

The **fourth step** is to assess whether the investigation has the necessary powers to obtain evidence from relevant witnesses and to access relevant records (particularly in relation to evidence based investigations). In this context, it is important to distinguish between the right to ask and the power to demand. Everyone can ask questions, therefore an investigator has the right to request persons to answer questions and to provide relevant documents. However, legal powers (whether statutory or common law) are necessary for an investigator to be able to require witnesses to give evidence or to produce documents. It is also necessary at this point to ensure that the investigator has the authority to conduct the investigation and, particularly for any major or sensitive investigation, approved terms of reference and adequate resources to conduct the investigation.

Obtaining evidence

The **fifth step** is to carry out the investigation, eg. to gather sufficient reliable information to enable the issue to be properly addressed by proving or disproving matters relevant to the issues being investigated. The main evidentiary sources available are oral evidence from the parties or witnesses (recollections of direct experiences), documentary evidence (records), expert evidence (technical advice), and site inspections or examination of physical evidence. The main ways that can be used by an

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investigator to obtain relevant evidence are by seeking written answers to questions, viewing or obtaining originals or copies of documents, and interviewing the complainant, any person the subject of the allegations, witnesses, experts, etc.

Reporting

The **final step** is to prepare a document setting out the complaint or terms of reference, how the investigation was conducted, relevant facts, conclusions, findings and recommendations. It is preferable, wherever possible, to separate the investigation and decision-making functions. Any report should therefore be considered by a person, other than the investigator, who has the authority to make any necessary decisions arising out of the investigation.

Procedural and evidentiary requirements

Impartiality

Investigators must be clear about their role. They should adopt an inquisitorial approach, eg. where the investigator impartially attempts to ascertain the truth and to uncover all relevant facts. They should not adopt an adversarial approach, eg. where the investigator effectively acts either as prosecutor on a complainant's behalf or a defender on the agency's behalf. The quality of an investigation does not depend on whether a fact at issue is proved or disproved. The success of an investigation should only be judged on the quality of the information collected and the assessment of that information, and whether that information enables a sound and valid decision to be made.

Procedural fairness

Procedural fairness is an important issue in investigations which could result in an outcome that affects the rights, interests or reputation of an individual. Any decision affecting an individual that has been made without affording procedural fairness is liable to be challenged and set aside. Procedural fairness may require an investigator to:

- inform people of the substance of any allegations against them or grounds for proposed adverse comment in respect of them
- provide a reasonable opportunity for relevant people to put their case, whether in writing, at a hearing or otherwise
- make reasonable inquiries and consider any submissions before making a decision

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

Level 24, 580 George Street
Sydney NSW 2000

Email nswombo@ombo.nsw.gov.au
Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000
Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524
Tel. typewriter (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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- act fairly and without bias, including not investigating a case in which they have a direct interest, and
- conduct the investigation without undue delay.

Confidentiality

Confidentiality can be a very important issue in an investigation, particularly an evidence-focused investigation into the alleged conduct of an individual. Depending on the circumstances of each case and the particular requirements of procedural fairness that may apply, where this is practical and appropriate there may be a need for confidentiality in relation to some or all of the following:

- the fact that a complaint or disclosure has been made
- the nature of the allegations
- the identity of the complainant (particularly a whistleblower)
- the identity of any persons the subject of investigation
- the identity of any witnesses, and
- any evidence gathered by the investigator.

Communication

It is important to keep both the complainant and persons or bodies the subject of investigation informed as to the progress of the investigation, other than in those limited circumstances where this may detrimentally impact on the conduct of the investigation.

Standard of proof

In administrative investigations (including disciplinary investigations), the civil standard of proof applies. This is a lower standard than that required in criminal matters, where allegations must be proved beyond reasonable doubt. This means that allegations must be proved according to the balance of probabilities, eg. it must be more probable than not that the allegations are made out. The High Court case of *Briginshaw v Briginshaw* is the authority for the proposition that the strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the seriousness of the issues involved.

Rules of evidence

The rules of evidence will not apply to the majority of administrative or disciplinary investigations. Nevertheless, an understanding of the basic rules of evidence is useful for an investigator to ensure that the evidence obtained is the best available and will be admissible should there be a likelihood of subsequent legal proceedings.