Managing workplace investigations

A practical guide for the Queensland public sector

**September 2018**

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# Overview

The Queensland Government supports employees and managers to maintain a high standard of professionalism, conduct and work performance, and to ensure inappropriate conduct or performance is dealt with effectively, and in a timely manner that is proportionate to the allegations or concerns.

In the majority of instances, timely management action or performance management will be appropriate, and may negate the need for a more formal process, including a workplace investigation. Less formal management enquiries by an agency may be sufficient to determine:

* the relevant facts
* if a complaint or an allegation relating to work performance or conduct is likely to be substantiated or unsubstantiated
* the appropriate action, including whether or not a workplace investigation process should commence.

There will be some matters where a workplace investigation is warranted such as for matters that may proceed to discipline. In these instances, it is critical that the investigation be well managed by the agency, ensuring it is conducted in an appropriate, fair, timely and cost-effective manner.

A workplace investigation, whether internal or external, is not a disciplinary step. It is a separate process to any formal disciplinary process as provided for under chapter 6 of the *Public Service Act 2008*.

## Purpose of the guide

This guide is a practical resource to assist agencies to deal with allegations of inappropriate conduct or poor performance, where consideration is being given to a workplace investigation. The guide is structured chronologically to assist agencies when considering a workplace investigation.

The Public Service Commission (PSC) Conduct and Performance Excellence (CaPE) service[[1]](#footnote-1) offers advice and guidance about work performance or conduct matters. Contact CaPE via email hradvice@psc.qld.gov.au or telephone (07) 3003 2777.

## The legislative framework

Workplace investigations are to be carried out in accordance with the Queensland public sector employment framework which is structured around the:

* *[Public Service Act 2008](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2008-038)*
* *[Public Sector Ethics Act 1994](https://www.legislation.qld.gov.au/view/html/inforce/current/act-1994-067)*
* [*Industrial Relations Act 2016*](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2016-063)
* subordinate legislation, directives and guidelines
* [*Code of Conduct for the Queensland public service*](http://www.psc.qld.gov.au/includes/assets/qps-code-conduct.pdf)*.*

This guide is to be read in conjunction with:

* [*Public Service Act 2008* – Section 25 The management and employment principles](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2008-038#sec.25)
* [*Public Service Act 2008* – Section 26 Work performance and personal conduct principles](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2008-038#sec.26)
* [*Public Service Act 2008* – Chapter 6 Disciplinary action for public service employees and former public service employees](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2008-038#ch.6)
* [Commission Chief Executive Guideline 01/13: Discipline](https://www.forgov.qld.gov.au/documents/guideline/discipline-guideline-0)
* [Commission Chief Executive Directive 02/17: Managing Employee Complaints](https://www.forgov.qld.gov.au/documents/directive/0217/managing-employee-complaints)
* [*Crime and Corruption Act 2001*](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2001-069)
* [Corruption in Focus: *A guide to dealing with corrupt conduct in the Queensland public sector (July 2014)*](http://www.ccc.qld.gov.au/corruption-prevention/corruption-in-focus)
* *[Public Interest Disclosure Act 2010](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2010-038)*

And any equivalent legislation relating to a public sector agency and its employees.

Other reference materials are available at [www.forgov.qld.gov.au](http://www.forgov.qld.gov.au)

* CaPE case categorisation framework
* Conduct and performance matters report guide
* Conduct a structured discussion
* Have courageous conversations
* Identify bullying
* Follow the 5-step performance improvement plan
* Take management or discipline action
* What is management action?
* Types of management action
* Employee suspensions
* Follow the discipline process

# What to do when a work performance or conduct matter arises

There are a number of ways an agency may become aware of a work performance or conduct matter, including through the receipt of a complaint from an employee or a member of the public. Taking into account the particular circumstances of the case and any additional information at hand, an agency’s complaints assessor (who may also be the decision maker for the matter) must first determine whether a referral to the Crime and Corruption Commission (CCC), the Queensland Police Service (QPS), or another external agency is required. The complaints assessor must also consider if the matter meets the subjective and objective tests to be considered a Public Interest Disclosure (PID) as defined in the *Public Interest Disclosure Act 2010*, and take any action in accordance with their agency processes.

## Should the matter be referred?

Complaints about alleged corrupt conduct are referred to the CCC. Complaints can be referred directly, or through an agency’s ethical standards area or CCC liaison officer. Through the course of an investigation, should an investigator form a reasonable suspicion that the conduct could be ‘corrupt conduct’, they should report it immediately to the agency decision maker who authorised their appointment or the agency case manager.

Complaints that may involve an alleged breach of criminal law should be referred to the QPS.

A complaints assessor may also need to consider whether there are other referrals required. For example, Office of the Health Ombudsman, Queensland College of Teachers, or other organisation as it may relate to the professional registration of an individual who is the subject of a matter. Information about whether other referrals are required can be obtained from an agency’s HR or ethical standards area.

## Is it corrupt conduct?

The CCC is a statutory body set up to combat and reduce the incidence of major crime and corruption in the public sector in Queensland. The functions and powers of the agency are set out in the *Crime and Corruption Act 2001*. There are two different types of corrupt conduct defined in section 15 of the Act, as summarised below:

Type A

Type A involves conduct that affects, or could affect, a public officer (an employee of a public sector agency) in the performance of their functions or the exercise of their powers in a way that:

* Is not honest or not impartial
* Knowingly or recklessly breaches public trust
* Involves the misuse of agency-related material or information.

Type B

Type B involves specific types of conduct that impair, or could impair public confidence in public administration. This may include:

* collusive tendering
* fraud relating to an application for a licence, permit or other authority relating to public health or safety; the environment; or the State's natural, cultural, mining or energy resources
* dishonestly obtaining public funds or State assets
* evading a State tax, levy or duty or fraudulently causing a loss of State revenue
* fraudulently obtaining or retaining an appointment.

Both Type A and Type B corrupt conduct must be either a criminal offence or serious enough to warrant dismissal.

Each type of corrupt conduct has three essential elements, which are listed in the tables below. Ask yourself the related questions. To be corrupt conduct, the answer must be Yes to all three questions for either Type A or Type B. If not, it is unlikely that the conduct would amount to corrupt conduct under the Crime and Corruption Act.

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| --- | --- |
| **Key questions for determining corrupt conduct – type A** | **Responses** |
| **1. Effect of the conduct.** Does the conduct adversely affect, or have the potential to adversely affect, how a public agency or public official carries out their duties or exercises their powers? | Y/N |
| **2. Result of the conduct.** Has the conduct resulted, or could result in the performance of duties or exercise of powers in a way that:* is not honest or impartial, or
* involves a breach of the trust placed in a person holding an appointment in a public agency, either knowingly or recklessly, or
* involves a misuse of information or other material related to the performance of powers or exercise of functions of a person holding an appointment in a public agency?
 | Y/N |
| **3. Criminal offence or serious disciplinary breach.** If proved, would the conduct be a criminal offence, or a disciplinary breach providing reasonable grounds for dismissal, if the person is or were the holder of an appointment? | Y/N |

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| --- | --- |
| **Key questions for determining corrupt conduct – type B** | **Responses** |
| **1. Effect of the conduct.** Does the conduct impair, or have the potential to impair, public confidence in public administration? | Y/N |
| **2. Type of conduct.** Has the conduct resulted, or could result in the performance of duties or exercise of powers in a way that could be:* collusive tendering, or
* fraud relating to an application for a licence, permit or other authority for protecting people’s health or safety, protecting the environment, or protecting or managing the use of the State’s natural, cultural, mining or energy resources, or
* dishonestly obtaining or helping to obtain a benefit from the payment or application of public funds or the disposition of State assets, or
* evading a State tax, levy or duty or otherwise fraudulently causing a loss of State revenue, or
* fraudulently obtaining or retaining an appointment?
 | Y/N |
| **3. Criminal offence or serious disciplinary breach.** If proved, would the conduct be a criminal offence, or a disciplinary breach providing reasonable grounds for dismissal, if the person is or were the holder of an appointment in a public agency? | Y/N |

Where the CCC receives a complaint alleging corrupt conduct in the public sector, they assess how it should be handled, taking into account the particular circumstances of the case. The CCC retains and investigates only the most serious allegations of corrupt conduct–including those with a strong public interest element, or where the relevant agency may not be equipped to handle the investigation.

If there is reasonable suspicion of corrupt conduct, the agency should advise their CCC Liaison Officer and follow all CCC requirements and any relevant agency specific policies and procedures. The CCC may issue directions about the way a matter should be managed. Complaints about corrupt conduct that are not considered to be sufficiently serious or systemic to require the CCC’s direct involvement, are referred by the CCC to the appropriate agency to deal with. Taking the CCC’s directions into account, the agency must then determine the resolution strategy.

In some cases, the agency will be required to provide the CCC with a detailed report about the outcome. All matters referred by the CCC to an agency are subject to audit by the CCC.

Investigations into alleged corrupt conduct, whether provided internally or externally, should be conducted in accordance with the CCC guide [*Corruption in focus*](http://www.ccc.qld.gov.au/corruption/information-for-the-public-sector/corruption-in-focus) and any relevant agency specific policies and procedures.

## Is it a criminal offence?

When assessing a matter, if it is identified that a criminal offence may have occurred, the agency should refer the matter to the QPS. In some circumstances, when the matter has been referred to, or is in the hands of the police, the agency may still continue the investigation process to establish if a breach of the employment framework has occurred.

The existence of criminal proceedings (ongoing or finalised) does not always prevent a decision maker starting a workplace investigation process, making a disciplinary finding on the balance of probabilities (the civil standard of proof) or taking disciplinary action. Whether a workplace investigation process should be placed on hold awaiting the outcome of criminal proceedings will be determined on a case-by-case basis in consultation with or at the direction of the QPS.

Should it be determined that a workplace investigation is to be placed on hold, pending the conduct/outcome of criminal proceedings, consideration will need to be given to suspending an employee from duties. More information about suspensions can be accessed at [www.forgov.qld.gov.au/employee-suspensions](http://www.forgov.qld.gov.au/employee-suspensions).

## Public interest disclosures (PID)

A PID is a disclosure, in the public interest, of information about wrongdoing in the public sector. For an allegation to be considered a PID, it must meet the subjective and objective tests set out in *the Public Interest Disclosure Act 2010*.

PID processes will be detailed in an agency’s policy on this topic. For further information please visit the Queensland Ombudsman website: [www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures](http://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures)

#### Protecting a complainant/discloser and witnesses

The Code of Conduct for the Queensland public service states:

“*We will support employees who report genuine concerns of wrongdoing and manage any reports of wrongdoing in a fair, transparent and consistent manner*”.

As such, staff will have performed their duty by participating in an investigation and must not be treated adversely because of their involvement. Any substantiated allegations of reprisal or victimisation on these grounds may result in disciplinary action being taken.

Remember when interviewing a subject officer and any witnesses, they should be reminded that discipline action may be taken if there is found to be any reprisal action or victimisation as a result of the complaint. It is also fair and reasonable to offer the opportunity for a support person to be present and remind all parties of their obligation to maintain confidentiality.

Duty of care for a complainant/discloser can be demonstrated:

* by giving careful consideration to the appropriateness of allowing individuals involved in, or where there is potential for, workplace conflict to continue working in close proximity, prior to resolution of the matter
* where a decision is made to continue working arrangements ‘as normal’ or to put in place alternate arrangements, documenting the decision to demonstrate appropriate consideration of the risks, including taking into account the views of affected individuals
* by advising the complainant/discloser of the availability of the Employee Assistance Program (if relevant)
* by advising the complainant/discloser or witnesses that if they experience any form of reprisal action, it should be reported immediately.

# Determining the most appropriate response to a work performance or conduct matter

There are a range of possible workplace responses to a work performance or conduct matter. Management enquiries (for example, preliminary or administrative enquiries, desktop reviews) may help to inform decisions about whether a workplace investigation is required. A management enquiry with a review of all available information may also provide all the information required to deal with the matter without the need for an investigation. Consideration should always be given to the nature of the allegation/s. For example, seriousness, quantum of funds involved, the role/seniority of the staff involved etc., as well as the cost implications of a workplace investigation together with the possible outcomes.

The response to a matter must be reasonable and proportionate to the issue or complaint. It may be necessary to manage the expectations of a decision maker, complainant or individual who is the subject of a matter from an early stage when dealing with a workplace performance or conduct matter. Depending on the nature or severity of the complaint, management enquiry may be more appropriate before deciding whether or not to commence a formal investigation.

A **management enquiry** involves a manager (or other assigned person) making enquiries into a matter to inform a decision about how to progress. The enquiries may involve conversations with employees and/or a review of documents, obtaining a version of events - in writing or verbally. Management enquiries do not involve terms of reference, formal ‘investigative interviews’[[2]](#footnote-2) or an external provider conducting or supporting the enquiry.

A **workplace investigation** occurs when it is decided that an investigation should be conducted either internally (e.g. by HR or an ethical standards area) or by an external investigator. An investigation can be defined as the unbiased gathering and evaluation of evidence. A workplace investigation will normally require that terms of reference/formal scope is established, and that an investigation report will be completed for the decision maker to consider in order to determine the next steps.

#### Considering ‘he said/she said’ issues

‘He said/she said’ issues can be complex and damaging for a workplace, however, the quality of evidence alone does not provide grounds to treat the matter less seriously. In some cases, ‘he said/she said’ evidence could be the only evidence available, and may require a decision maker to favour one version of events over another, on the balance of probabilities. Decision makers must take into account the strength and quality of the evidence prior to making a decision. In some cases though a ‘line in the sand’ approach, with clear expectations set for all and with ongoing monitoring and support, may be a better option.

## What management actions could resolve a work performance or conduct matter without an investigation?

Depending upon the circumstances, some of the options available include:

* seeking information directly from the individual who is the subject of the matter and documenting the discussion and response
* supporting an employee for self-resolution of the issue e.g. coaching an employee about how they might attempt to resolve an interpersonal dispute with another colleague
* undertaking management enquiries and gathering information to inform a matter e.g. gathering evidence
* implementing performance improvement strategies, which could include additional training or retraining
* conducting a facilitated discussion aimed at resolving issues between the complainant and individual who is the subject of a matter (ideally by encouraging them to resolve the conflict themselves)
* engaging a mediator (either external or internal) who is appropriately trained
* increasing supervision of (or engagement with) a work team and/or implementing a group facilitation or team building exercise.

## Is a workplace investigation the right response?

Analysis of data reported to the PSC shows the majority of investigations result in outcomes where the same people work together in the same workplace, and without any formal disciplinary action being taken. There are often high costs associated with workplace investigations in terms of time, resources, distraction from work and workplace morale and relationships. Prior to making the decision to proceed with an investigation and without predetermining an outcome, a complaints assessor/decision maker might consider the possible outcomes, if an allegation/s is found to be substantiated, to determine whether a less formal intervention, such as a management enquiry, may deliver the same result.

## Factors to consider before proceeding to a workplace investigation

* How serious is the matter? If all the allegation/s were proved, what would be the most serious penalty?
* Are there counter allegations, and how serious are these?
* How likely is it that the required standard of proof will be obtained? In a ‘he said/she said’ scenario without witnesses, this evidence may be difficult to obtain.
* Is the matter primarily about interpersonal communication issues? If so, are there records that the individual who is the subject of a matter has been given clear expectations about their communication style or placed on a performance improvement plan?
* If it is likely that the outcome of a matter would be a discussion, training, setting expectations, or other management action, an investigation may not be warranted due to the time and costs involved.
* Informal action is not appropriate to address allegations of sexual harassment, corruption, bullying, criminal activity or where the allegations, if proved, would likely result in a serious disciplinary outcome (for example, demotion or dismissal).

### Standard of proof

When making findings, a decision maker must apply the civil standard of proof – the ‘balance of probabilities’ and not the criminal standard of proof, which is ‘beyond reasonable doubt’. This means that for an allegation to be substantiated, the evidence must establish that it is more probable than not that the alleged conduct occurred.

The strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the:

* relevance of the evidence to the allegations.
* seriousness of the allegations.
* inherent likelihood - or improbability - of a particular thing or event occurring.
* gravity of the consequences flowing from a particular finding.

This is known as the “Briginshaw test” (*Briginshaw v Briginshaw* (1938) 60 CLR 336).

# Deciding to investigate

## Roles and responsibilities during an investigation

#### Case manager

The case manager[[3]](#footnote-3) is a Queensland Government employee who has been designated by the decision maker (or in some instances HR) to take responsibility for managing a matter, including coordinating action and ensuring timeframes are met. The case manager should be suitably skilled and of a seniority that is proportionate to the severity the allegations and seniority of the employees involved.

#### Complainant

The complainant may be a Queensland Government employee who has made a complaint, or raises issues either formally or informally. The complainant may also be a member of the public. For example a patient, or a parent of a student.

#### Complaints assessor

The complaints assessor receives a complaint and determines (or recommends to a decision maker) how the matter might be handled. A complaints assessor may also make recommendations as to whether a referral to an external agency is required. The role of the complaints assessor may be performed by the decision maker or case manager.

#### Contact officer

The contact officer3 is a Queensland Government employee (preferably independent of the work unit and the decision making process) that is nominated by the decision maker. The role of the contact officer is to provide the complainant and/or the employee who is subject to the allegations with information about the investigation process, such as the steps involved and the role of a support person, and to act as a point of liaison for any queries to the decision maker/investigator. Ideally, and particularly in relation to bullying or harassment complaints, separate contact officers are to be appointed for both the complainant and the individual who is the subject of a matter.

#### Contract manager

The contract manager is a Queensland Government employee who has been designated by the decision maker to take responsibility for managing the contract with an external investigator, monitoring the contract and organising payment of the fees.

#### Decision maker

The decision maker3 is the chief executive of a public sector agency or delegate of the chief executive responsible for making the decision about a work performance or conduct matter under Chapter 6 of the *Public Service Act 2008.* The decision maker will consider whether/what information is required and how this information will be obtained. For example, management enquiry or investigation.

They must evaluate the evidence and make their own decision in relation to whether an allegation is substantiated and a breach in legislation or policy has occurred. It is not the role of the decision maker to conduct an investigation.

#### Individual who is the subject of a matter

Sometimes referred to as a ‘subject officer’. An individual who is the subject of a matter is an employee, a former employee, or in some cases a volunteer of a Queensland public service agency who is the subject of a work performance or conduct matter or complaint.

#### Investigator

An investigator is appointed by the decision maker to collect evidence and make findings of fact in relation to the allegations. The investigator makes findings as to whether, in their opinion, the evidence is, on the balance of probabilities, capable of substantiating each allegation. The role of the investigator and the role of the decision maker need to be clearly defined.

#### Support person

The support person is someone that an employee can nominate to attend a meeting with them to provide emotional support and reassurance. They are not permitted to advocate on behalf of the employee however they will be able to observe proceedings, assist with clarifying the process and take notes. The support person must respect the confidentiality of the process. A support person could be a work colleague, friend, family member, industrial representative or lawyer, however there are circumstances where it may not be appropriate for a particular person to take on this role. If a support person is an officer of a union to which the employee is a member, the officer also has a role to support their member’s interests, including actively ensuring that natural justice and procedural fairness has been afforded to their member. The support person should not be a witness or otherwise involved (or implicated) in the investigation.

## Guiding principles for conducting workplace investigations

1. Absence of conflict of interest/bias - a conflict of interest occurs when a person has a private interest that could influence the performance of his/her professional duties and responsibilities. It can be actual, perceived or potential. A decision maker who has a conflict of interest, whether real or perceived, should remove themselves from the decision making process, and a new decision maker then appointed.
2. Clarity, ethics and transparency - workplace investigations are based on clearly articulated terms of reference and are conducted in an ethical manner that ensures transparency. Parties to an investigation are treated fairly and with respect at all times.
3. Procedural fairness/natural justice - procedural fairness and natural justice (terms can be used interchangeably) comprise three principles:
4. The right to be heard. A person must be given sufficient information to know the case against them and be given the opportunity to present their case.
5. The right to an unbiased decision maker.
6. The right to have a decision based on evidence and with reasons for decision.

Procedural fairness requires that a fair and proper procedure be applied when making a decision. It is necessary for the findings of the investigation to be defensible and legally sound.

1. Confidentiality - without guaranteeing anonymity or complete confidentiality, steps must be taken to safeguard the confidentiality of the investigation in the interests of the persons involved and for the integrity of the investigation.
2. Lawful - provisions, directives, policies, guidelines and procedures required by law are observed throughout the process.
3. Timely and proportionate - investigations should be conducted in a manner that is timely and proportionate to the allegations. They should conclude as quickly as possible, and endeavour to meet the benchmarks (for timeliness) specified in the CaPE [Case Categorisation Framework](https://www.forgov.qld.gov.au/report-conduct-and-performance-data-your-agency). External investigations should provide value for money.
4. Logical and justifiable - findings and recommendations are supported by evidence. Reports are logical and provide a sound basis for decisions to be made on the merits of the case and on the balance of probabilities.
5. Separation of the roles of investigator and decision maker - the decision maker must come to an independent conclusion, based on the evidence presented by the investigator, in relation to whether there has been a breach of legislation or policy. It is the role of the investigator to present evidence in relation to the allegations. It is not the role of the investigator to make conclusions about:
* whether there has been a breach of legislation or policy
* whether a discipline ground exists
* what the appropriate next steps may be after the investigation.
1. Regular and transparent communication – a case manager and/or contact officer should maintain regular communication with the complainant/s and the individual subject/s of a matter to ensure transparency of process, including by:
* outlining the proposed process, estimated timeframes and obligations
* providing regular updates throughout the process
* keeping a record of any communication on file to demonstrate key parties have been kept informed about the process
* advising all parties to the process of the availability of the Employee Assistance Program
* applying duty of care for all involved.

## Drafting the terms of reference for the investigation

The terms of reference determine the scope of the investigation. They specify what subject matter will and will not be considered in an investigation — that is, what is within scope and what is outside of scope. Terms of reference provide clear instructions, set realistic timeframes and milestones, and specify reporting requirements (including any interim report required).

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.

The allegations contained in the terms of reference should detail the actions, that if proved may amount to breaches of legislation or policy and provide the grounds for discipline. Any change to the terms of reference, for example if the allegations are refined or fresh allegations emerge during an investigation, should be made by agreement between the agency and the investigator, and then documented.

The terms of reference for an investigation should:

* detail the allegations the investigator is being asked to investigate
* define the investigator’s role to present evidence in relation to these allegations in order to make findings of fact
* clearly articulate the deliverables (reporting requirements) and specify timeframes
* clarify what support will be provided to the investigator e.g. administrative support, legal advice etc.

*See Appendix 1: Template Terms of Reference*

## Internal or external investigator?

An internal investigator is a suitably skilled Queensland Government employee who is appointed by the decision maker to conduct a workplace investigation.

An external investigator is a person or service provider that is engaged through a contract arrangement to conduct a workplace investigation. Suitably qualified external investigators may be sourced through the Professional Services Standing Offer Arrangement (SOA), unless the required expertise is not available under the SOA.

Some considerations for engaging an external investigator might include:

* the requirement for specialist skills — do the nature of the allegations require specific expertise not available within the agency?
* conflict of interest — is there a real or perceived conflict of interest or bias? Does the matter require an investigation by someone external to the work area or agency?
* risk to public confidence – is there a risk to public trust and confidence?
* funding— is the cost of the proposed external investigation proportionate to the seriousness of the matter? Would it be more resource effective to engage a suitably skilled internal person (within the agency or a representative from another agency) to conduct enquiries or undertake an investigation?
* capability and capacity — does the agency have the capability required to conduct an investigation and the capacity to do so in a timely manner? Does the matter provide an opportunity for capability development by partnering with a more experienced leader/manager from within the agency or another agency?

## Engaging an external investigator

Before engaging an external investigator, determine their suitability by:

* 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 the Professional Services SOA
* identifying and managing any actual or potential conflicts of interest.

### Professional Services Standing Offer Arrangement

A panel of external workplace investigators is available to agencies through the [SOA for Professional Services](http://qcd.govnet.qld.gov.au/Pages/Details.aspx?RecID=1244) (QGCPO878-13 Workplace Investigations subcategory). Under the SOA, providers are evaluated against the following criteria: organisation structure, organisational support, corporate experience, value for money, and staff and training.

Agencies are advised to follow their own procurement guidelines when selecting and engaging external providers. All panel providers have signed an SOA contract with specific terms and conditions and are subjected to referee checks.

When engaging an external investigator, it is recommended that the case/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 *Code of Conduct for the Queensland public service* 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 investigation[[4]](#footnote-4) to both the decision maker and participants.

### Duty of care owed to the individual who is the subject of a matter

Employers owe a duty of care to provide adequate support to employees who are the subject of workplace investigations. Employers can demonstrate their duty of care to the subject officer by:

* providing the individual who is the subject of a matter with details of the employee assistance program and a contact officer who is different to the complainant’s contact officer.
* giving careful consideration for the wellbeing of an employee who is being advised of any matter that could reasonably be expected to cause distress and, in addition to advising of the services provided through an employee assistance program, provide practical support as appropriate, including for example, arranging transport home.
* giving careful consideration to the appropriateness of allowing individuals involved in (or where there is potential for) workplace conflict to continue working in close proximity, prior to resolution of the matter.
* documenting the decision to demonstrate appropriate consideration of the risks, including taking into account the views of affected individuals where a decision is made to continue working arrangements ‘as normal’ or to put in place alternate arrangements
* keeping in contact with the individual who is the subject of a matter, especially if the investigation is lengthy, and providing updates on the investigation process remembering that in most instances the employment relationships will continue after the resolution of the matter.
* not unreasonably refusing leave requests especially if the investigation process is expected to be lengthy.
* reviewing the wellbeing of all involved until the matter is resolved.

# Conducting the workplace investigation

Once the decision has been made to investigate, an investigation should be conducted in accordance with the CCC’s *Corruption in Focus* and any relevant agency specific policies and procedures.

## 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*

# Managing the outcomes of an investigation

At the conclusion of the investigation the decision maker:

* reviews the investigation report and all evidence at hand and determines if they will accept the findings of the investigation, either fully, partially or not at all, and then determines what, if any, action is required.
* determines what information is going to be released to the complainant/s (for example, actions taken, complaint decision, reasons for decision, any remedy and review options) and/or individual subject/s of a matter (for example, the terms of reference, final investigation report, or parts of the report). Note that the investigation report or parts of it, transcripts of interviews, statements or other material may be required to be disclosed to an individual who is the subject of a matter to afford that person natural justice during a disciplinary process. This material may also be discoverable in any legal proceeding and may be obtainable under Right to Information legislation.
* corresponds with the individual who is the subject of a matter, which may be a first show cause on liability for disciplinary action letter setting out the allegations, or a letter informing them that the allegations are not (or are unable to be) substantiated and no further action will be taken. The PSC Commission Chief Executive Guideline 01/17: Discipline contains guidance and templates for conducting a discipline process.
* writes to the complainant to inform them that the investigation process has concluded and the necessary action has been taken, or the allegation was not substantiated and no further action has been taken.
* considers whether others, e.g. witnesses, should be informed that the investigation process has concluded - generally the decision maker does not write to witnesses who were interviewed to inform them of the outcomes of the investigation, and this should be advised at their interview.
* determines what records and documentation need to be retained in accordance with legislative requirements and agency record-keeping procedures and ensure that all evidence e.g. recordings, statements, documents are secured and able to be provided to any external agency, for example, the CCC should it be required.

# Glossary

#### Balance of probabilities

A legal standard of proof that requires a decision maker to determine that it is more probable - likely - than not that the facts are true. Depending on the nature of the allegation the strength of evidence required to meet the standard of proof may change. The more serious the allegation the greater the strength of evidence must be to satisfy a decision maker that a particular allegation is proven. This is called the ‘Briginshaw Principle’.

#### Code of Conduct for the Queensland public service

The Code of Conduct is based on the public sector ethics principles as outlined in the Public Sector Ethics Act 1994. The code applies to employees - as defined in the Code - of Queensland public sector agencies.

#### Corrupt conduct

Corrupt conduct is conduct defined in Section 15 of the *Crime and Corruption Act 2001*.

#### Investigation

An investigation can be defined as the unbiased gathering and evaluation of evidence. A workplace investigation requires a formal scope - terms of reference - and a written report for the decision maker to consider.

#### Work performance matter

A work performance matter is defined in section 88H of the *Public Service Act 2008* as a matter involving a public service employee’s work performance or personal conduct, including, for example, an allegation against the employee that constitutes or would, if proved, constitute grounds for disciplinary action.

# **Appendices**

* Appendix 1: Template Terms of Reference
* Appendix 2: Investigation report suggested headings
* Appendix 3: Letter to individual who is the subject of a matter advising of investigation
* Appendix 4: Letter to witness inviting them to an interview

## Appendix 1: Template Terms of Reference

##### PRIVATE AND CONFIDENTIAL

*Date*

TERMS OF REFERENCE

Allegations of misconduct (and if relevant corrupt conduct)

Issued to:

*Name of Investigator*

#### Background

Provide background information about the complaint or issue (for example, “A complaint was received from name on date”).

The following allegations have been identified:

Provide detail (allegation 1)

Provide detail (allegation 2) etc.

(If relevant: The CCC has assessed (the complaint) in accordance with the *Crime and Corruption Act 2001.*

The CCC has determined to *(insert as appropriate: e.g. take no further action / merit and compliance review / public interest review etc. Consideration should be given to any other referrals and outcomes for example QPS, QCOT or AHPRA)*

I, (name and position title), am the delegated decision maker for this matter.

I have determined that this matter should be the subject of an investigation by (Investigator) in accordance with the following Terms of Reference.

#### Terms of reference

(Investigator) is appointed to investigate the allegations listed above and to gather all relevant information for the purpose of determining whether or not, in their view, there is sufficient evidence to substantiate the allegations, on the balance of probabilities.

The investigator/s should consider the allegations in the context of relevant legislation and associated policies and procedures including the *Code of Conduct for the Queensland public service*.

Should any further allegation/s be discovered during the course of this investigation, the investigators must refer this matter back to me to determine the relevance of the allegation/s to this investigation and if necessary, to amend the Terms of Reference.

#### Investigation methodology

The investigation is to be conducted in accordance with the Crime and Corruption Commission (CCC) publication ‘Corruption in Focus: a guide to dealing with corrupt conduct in the Queensland Public Sector’, the Public Service Commission document ‘Managing workplace investigations: a practical guide for the Queensland public sector’ and any other relevant agency policy. All relevant documents are attached.

The investigator/s are hereby delegated authority to undertake any reasonable activity associated with the gathering of all evidence relevant to this investigation. These activities could include, but are not to be restricted to, the use of the following:

* Access, obtain, retrieve and copy all agency records considered relevant to these allegations.
* Attend and inspect all relevant agency facilities and/or premises.
* Make reasonable attempts to access any other evidence (i.e. not held by the agency) which is considered relevant to these allegations.
* Give appropriate lawful directions which may be required during the course of this investigation. For example, a lawful direction may be provided to an employee to maintain confidentiality, to attend an interview, or to provide copies of relevant documents.
* Conduct interviews with persons who can contribute information relevant to the investigation. Arrangements for interviews should, where possible, be made in advance through the relevant line manager, investigator or human resources.
* Seek to conduct interviews with relevant persons who are not employees of (name of agency)*.*
* Conduct interviews with the individual subject/s of a matter in relation to their alleged involvement in this matter and record their responses to the allegation/s.

The principles of procedural fairness (natural justice) must be applied at all times throughout the course of the investigation and the authorised investigators are to exercise, or use any degree of caution considered necessary, to maintain the integrity of the investigation process.

#### Investigation report

On completion of the investigation, the investigator/s are to prepare a written investigation report for my consideration. This report should include the following elements:

* An analysis of the evidence gathered in relation to each allegation.
* A note as to whether there is sufficient evidence to substantiate each allegation, on the balance of probabilities.
* A description of any systemic or management issues/system deficiencies revealed during the course of the investigation, that the investigator/s considers may have contributed to the complaint or incident and make recommendations for systems improvement and/or misconduct prevention.

All interviews, documentation and other evidence gathered as part of this investigation that is referred to or relied upon in the investigation report, is to be made available to me for consideration.

#### Investigator’s obligations

The investigator/s should undertake this investigation in an impartial and objective manner. During the course of inquiries, should the investigator/s discover a potential, actual or perceived conflict of interest has arisen, they should immediately cease the investigation and report the matter to me for consideration about whether they should continue.

The investigators are reminded of the relevant statutory requirements surrounding confidentiality and also those contained in the *Code of Conduct for the Queensland public service*. For an external investigation, observance of confidentiality and information privacy is expected.

#### Timeframe

The proposed timeframe for completion of a draft report is (e.g. eight weeks*)* from commencement of the appointment. A final report is requested (e.g. four weeks) following the receipt of the draft report.

The investigator should advise in a timely manner of anything likely to cause delay.

#### Investigation Plan

The investigator/s is to prepare an Investigation Plan as soon as possible, articulating their approach, timeframes, and their terms of business (hourly rates, estimate of hour’s required, other costs etc.). The Investigation Plan should provide an overall expected cost of the investigation.

#### Commencement Date

The appointment is valid from the date of acceptance of the Investigation Plan (referred to above).

*(Name and title of delegate)*

Date: \_\_/\_\_/\_\_

## 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:* 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.  |

## Appendix 3: Template letter for internal investigator – inviting an individual who is the subject of a matter of an investigation to an interview

AGENCY LETTERHEAD

Reference/Case Number

**PRIVATE AND CONFIDENTIAL**

Subject Officer Title First name Surname

Position

Subject Officer Full Address

Email:

Dear Subject Officer First name

**RE: INTERVIEW ARRANGEMENTS**

I have been authorised by (name and position title of delegate) to conduct an investigation into allegations concerning your conduct which may represent a breach of the Code of Conduct for the Queensland public service that if proven would provide grounds for disciplinary action as described under section 187 of the *Public Service Act 2008*.

I invite you to attend an interview about the matters I have been appointed to investigate and report on.

Option 1: Without limiting the matters to be discussed at your interview, I anticipate that the key issues to be addressed with you are:

[List matters to be discussed providing as much detail as possible].

OR

Option 2: The Terms of Reference for the investigation require me to investigate the following allegations:

[List allegations]

OR

Option 3: The broad allegations I have been asked to investigate are:

(Note: You should consider whether providing specific allegation details to the individual who is the subject of a matter at this stage could prejudice the collection of evidence.)

Prior to the delegate making any decision on this matter you will be provided with a detailed letter of allegation, including the relevant particulars, which you will be asked to respond to.

Option 1: I wish to negotiate a convenient time to conduct an interview with you. Please contact me within three (3) days of receipt of this letter to make arrangements for this interview.

OR

Option 2: This letter confirms that the interview will be conducted at TIME on DAY/DATE at LOCATION. It is expected that you set aside TIME hours for this interview.

You are welcome to have a **support person** attend during the interview. The support person will not be permitted to advocate for you during the interview, however they will be able to observe proceedings, assist with clarifying the process and take notes. The support person must respect the confidentiality of the process. The support person must not be a witness or person involved in this investigation.

The interview will be electronically recorded and a copy of the recording will be made available to you upon request. I may also take handwritten notes during the interview.

Please be aware that matters which are the subject of the investigation are to remain confidential. This will safeguard the integrity of the process. Consequently, you are directed to not discuss this matter with others, including your work colleagues or any person likely to have information relevant to the allegations, other than your union, legal representative or support person. This direction includes that you do not make comment in relation to this matter on any social media sites. You are reminded that your obligations under the Code of Conduct continue to apply throughout and following the conclusion of this process and failure to meet your obligations with regard to confidentiality may result in disciplinary action being taken against you.

I understand that this may be a difficult time for you and wish to advise you that free, short-term confidential, face to face or telephone counselling is available to all departmental employees. This service, provided by an external Employee Assistance provider, Optum, can be contacted on telephone 1800 604 640.

If you have further enquiries about this notice, I can be contacted via email (insert email address) or telephone (insert phone number).

Yours sincerely

NAME

POSITION

DATE

## Appendix 4: Template letter - inviting a witness to an interview

AGENCY LETTERHEAD

Reference/Case Number

**PRIVATE AND CONFIDENTIAL**

Witness Title First name Surname

Position

Witness Full Address

Email:

Dear Witness First Name

RE: INTERVIEW ARRANGEMENTS

I invite you to attend an interview about the matters I have been appointed to investigate and report on.

Without limiting the matters to be discussed at your interview, I anticipate that the key issues to be addressed with you are:

[List matters to be discussed].

Option 1: I wish to negotiate a convenient time to conduct an interview with you. Please contact me within three (3) days of receipt of this letter to make arrangements for this interview.

OR

Option 2: This letter confirms that the interview will be conducted at TIME on DAY/DATE at LOCATION. It is expected that you set aside TIME hours for this interview.

You are welcome to have a **support person** attend during the interview. The support person will not be permitted to advocate for you during the interview, however they will be able to observe proceedings, assist with clarifying the process and take notes. The support person must respect the confidentiality of the process. The support person must not be a witness or person involved in this investigation.

The interview will be electronically recorded and a copy of the recording will be made available to you upon request. I may also take handwritten notes during the interview.

Please be aware that matters which are the subject of the investigation are to remain confidential. This will safeguard the integrity of the process. Consequently, you are directed to not discuss this matter with others, including your work colleagues or any person likely to have information relevant to the allegations, other than your union, legal representative or support person. This direction includes that you do not make comment in relation to this matter on any social media sites. You are reminded that your obligations under the Code of Conduct continue to apply throughout and following the conclusion of this process and failure to meet your obligations with regard to confidentiality may result in disciplinary action being taken against you.

I understand that this may be a difficult time for you and wish to advise you that free, short-term confidential, face to face or telephone counselling is available to all departmental employees. This service, provided by an external Employee Assistance provider, Optum, can be contacted on telephone 1800 604 640.

If you have further enquiries about this notice, I can be contacted via email (insert email address) or telephone (insert phone number).

Yours sincerely

NAME

POSITION

DATE

**Public Service Commission**

Level 27, 1 William Street

Brisbane Qld 4000

Tel: (07) 3003 2800

Email: commission.psc@psc.qld.gov.au

[**www.psc.qld.gov.au**](http://www.psc.qld.gov.au/)

1. The CaPE service collects conduct and performance management data from agencies about work performance matters to identify developing issues, supporting best practice, and opportunities to improve capability across the public service.

To assist public sector agencies, a framework has been developed for categorisation of conduct and performance matters from least serious to most serious, each with their own benchmarks for timely management. Each agency is responsible for determining the category of a work performance matter and the appropriate action to be taken to address the issue. [↑](#footnote-ref-1)
2. Interviews that are recorded, transcribed and included as an appendix to an investigation report [↑](#footnote-ref-2)
3. Note: in some agencies all or some of these roles may be performed by the same person. [↑](#footnote-ref-3)
4. Against milestones specified in the terms of reference, not investigation findings. [↑](#footnote-ref-4)