

APPOINTING AND OVERSIGHTING THE INVESTIGATOR

FS14

Stage 2
Investigation

An investigation is only as good as its terms of reference, regardless of the skills of the investigator. All investigators should be given adequate instructions and oversight, and understand the required deliverables.

The results of a poor investigation may be overturned. A poor investigation may also result in complaints and internal issues for your organisation.

How to appoint the investigator: the instrument of appointment

The investigator should be appointed in writing, via an 'instrument of appointment'.

The instrument of appointment should set out:

- the terms of reference, including the fully defined allegations [FS12]
- the authority and powers of the investigator, including any necessary delegations
- any mandatory procedural steps, requirements and milestones
- reporting requirements
- record keeping, security, confidentiality and privacy requirements, and
- deadlines.

The instrument should be signed by a person with appropriate authority under any relevant legislative or industrial instruments. This will often be the decision maker. [FS10]

Setting deadlines for the investigator helps prevent unnecessary delays. Be open to extending deadlines if necessary.

External investigators

The investigator should be clear on what support your organisation can provide. For instance:

- will you facilitate interviews and the collection of documentary evidence?
- will you provide administrative support?
- what should they do if any legal or technical issues come up – will your employees be available to give advice?

Consider incorporating all of this into their contract and/or their instrument of appointment.

You may specify in the contract that the investigator will deliver the investigation report to the required standard. The contract should also allow the investigation to be expanded if new allegations emerge.

Investigator authority and powers

The investigator's power to question people, request information and obtain evidence should be set out in their instrument of appointment. They can then rely on the instrument if their requests are denied or questioned.

The authority and powers of the investigator may influence the outcomes of the investigation. If legally possible for your organisation, you should delegate the investigator with the power to direct employees to answer reasonable questions or supply information. Failure to comply with such a direction would be misconduct.

If it is not possible to delegate the power to issue directions to the investigator, make sure the investigator is aware of the process they can follow if they need an authorised person to issue such a direction. [FS18]

All investigators should make a conflict of interest declaration before starting the investigation. [FS10]

It may also be helpful to give the investigator a written request from the decision maker asking for the full cooperation of employees.

If the investigator thinks that evidence may be destroyed, it may be appropriate to give them written approval to undertake a search in your organisation. It is better that this authorisation is done on a case-by-case basis. It should not be a power given to the investigator in their instrument of appointment.

Oversighting the investigator

General requirements

Whether they are internal or external, a suitably skilled person in your organisation should be assigned to oversight the investigator. This person should:

- monitor compliance with the terms of reference
- monitor compliance with the governance framework
- answer any questions from the investigator
- ensure the investigator is not working toward a preconceived outcome
- monitor compliance with administrative law, and
- monitor timeframes and deadlines.

Some of these tasks will be performed during the investigation. Others will be checks performed when the investigation report is received (before it goes to the decision maker).

The person overseeing the investigation should not be the decision maker.

Internal investigators

The investigator should regularly report to an internal investigation supervisor on the progress of the investigation. The supervisor should be able to act as a mentor.

External investigators

Outsourcing an investigation does not reduce the responsibilities of your organisation. You should still provide adequate oversight to ensure the investigation stays on track. As the client, you need to ensure that you fully understand the requirements and deliverables of the investigation.

You need to have someone in your organisation with the capacity to oversight the external investigator. This person should provide oversight as listed above, as well as facilitate evidence-gathering, for example by supplying documentary evidence on request.

Although oversight is necessary, you should also ensure that the supervisor does not influence the external investigator. They should not direct or participate in the investigation. They should not, for example, tell the investigator what questions they should put to employees. This can result in the investigation outcomes being overturned.