

Every investigation should have a 'terms of reference'.

Having adequate terms of reference is very important. If the terms of reference are poor, it is unlikely that the investigation outcomes will be adequate.

The difference between criminal and disciplinary matters

Before you write the terms of reference, you should consider the aim of a disciplinary investigation. Be alert to the fact that, unlike criminal matters in a court, no one party (for example, the source, the organisation, the respondent) has to work to prove or disprove something.

Disciplinary investigations are inquisitorial. The aim is to uncover the facts, not to prove that something did or did not happen. It is not meant to be an adversarial process, and there is no presumption of innocence. This means that the respondent is not 'innocent until proven guilty'.

What are the terms of reference?

The 'terms of reference' set out what the investigator is to investigate. They should be included in the investigator's instrument of appointment.

The terms of reference should:

- include the fully defined allegations [FS11]
- be set out in writing, and
- be approved by the decision maker. [FS10]

The terms of reference are usually determined by the decision maker. The decision maker may consult and work with others to set the terms of reference.

If you are an investigator and you have not been given any terms of reference, you should request some before you start investigating.

Formatting the terms of reference

The terms of reference should set out the key investigation deliverables, which usually includes a report. The report may or may not contain recommendations. [FS21]

A common way of setting out the terms of reference is to use a 'scope' and a 'purpose'. This would be followed by the allegations.

Scope

Generally, the scope will consist of a broad statement about the matter under investigation, and will set a time period or focus event. Taking as an example the alleged misconduct discussed in previous fact sheets, the scope could be:

Scope:

All misconduct alleged to have been committed by John Smith while performing the role of regulator in 2016.

Purpose

The purpose would then explain the matter in more detail. The purpose should also indicate whether the investigator is expected to make findings and recommendations. For example:

The purpose of the investigation is to:

- gather information on and make findings of fact about whether, on the balance of probabilities, John Smith accepted gifts contrary to policy in 2016;*
- gather information on, and make findings of fact on the balance of probabilities about, the relationship between the alleged acceptance of gifts by John Smith and his approval of Company A's expanded operations in 2016;*
- gather information and make recommendations for organisational improvements related to the above alleged misconduct; and*

(d) *produce a report about the above.*

The investigator above has been tasked with making findings of fact about the alleged conduct. This means that it is not the investigator's role to make misconduct findings, or to recommend disciplinary outcomes. The investigator has also been tasked with investigating whether there is potential for organisational improvement.

One of the most important things to state in the terms of reference is whether the investigator is to make factual findings, misconduct findings, or any kind of recommendations.

All investigators should be asked to be alert to systemic or organisational issues. This may be one of the most important outcomes for your organisation. [FS23]

Allegations

After the purpose, the terms of reference would then set out the fully defined allegations. [FS11]

What if more allegations emerge during the investigation?

Be alert to additional allegations of misconduct that may emerge during the investigation. The terms of reference can include instructions on what to do if this happens.

Avoid making the scope and purpose of the terms of reference too specific. For instance, in purpose (a) above, it would be preferable not to mention a specific month.

That way, the purpose would not have to be revised if the investigator uncovered multiple gifts given over 2016. It would also give the investigator some scope to probe the allegations and consider if they were separate factual allegations that needed to be put to the respondent.

If new allegations emerge, the investigator should raise them with the person oversighting

the investigation. They should then be put to the decision maker to determine if they should be incorporated into the terms of reference. [FS11]

If the new allegations are very different to the allegations already under investigation, they may need to be considered separately. For instance, if they were against a different employee it may be more appropriate to deal with them in a separate investigation.

If the decision maker includes the new allegations in the investigation, you should tell the respondent about the additional allegations. As with all the other allegations, the respondent must be given a chance to respond before any findings are made.

A failure to report misconduct may amount to misconduct.

This is a type of alleged misconduct that often arises during investigations.

Counter-allegations

You should be open to counter-allegations of misconduct.

If a respondent accuses someone else of misconduct that casts doubt on the misconduct allegations against the respondent, you should seriously consider revising the terms of reference. Alternatively, you may consider starting a separate investigation.

Failure to incorporate counter-allegations into an investigation has been held to be grossly unfair in certain circumstances. An example of this can be found in the Fair Work Commission case of *Susan Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775. In that case, the respondent had made serious counter-allegations against the complainant, which were corroborated by a witness, but which were ignored during the company's investigation.