

Workplace Investigations

June 2016



People+Culture Strategies

Labour & Employment Law

Contents



Introduction	3
Methodology	4
Part 1: Triggers for investigations	6
Part 2: Resourcing investigations	10
Part 3: The investigation process and outcomes	15
Part 4: Review and legal proceedings	19
Part 5: Best practice in conducting investigations	21
About PCS	23

Introduction

Following on from the success of our inaugural White Paper in 2015, PCS is pleased to provide you with our 2016 White Paper on workplace investigations. The purpose of this White Paper is to provide an insight into what workplace investigation practices are being utilised in organisations across Australia and to identify how those practices might be improved to meet best practice standards.

Legal protections from unacceptable behaviour in the workplace, such as discrimination and harassment, have long been a part of the legal landscape in Australia and have made investigations an integral part of the strategies adopted by employers in managing and preventing unacceptable workplace behaviour.

More recently, there has been increased scrutiny by courts and tribunals of the way in which employers are managing issues that arise in a workplace due to “new” causes of action such as general protections (adverse action) claims and applications for anti-bullying orders.

Workplace issues that become the subject of court proceedings have typically been investigated at an earlier stage for the purposes of taking remedial or disciplinary action or for discovering the factual circumstances behind a complaint or grievance. Having the right processes in place from the outset is an integral part of minimising the risk of litigation.

As a result, an increasing number of employers are recognising the need for robust, defensible, swift and effective workplace investigations in order to manage their risk profiles.

In March 2016 PCS initiated a survey of its client and partner organisations directed at identifying the circumstances in which investigations are undertaken by organisations, what resources are involved in supporting such processes, the manner in which such processes are undertaken, and the circumstances in which they may be subject to review or legal challenge. The White Paper reflects the analysis undertaken by the PCS legal team of the survey responses, together with our industry knowledge and legal expertise in workplace investigations.

I hope you find the report a beneficial resource in helping your organisation and its leadership to reflect on its practices in building a best practice approach to workplace investigations.



Joydeep Hor

FOUNDER AND MANAGING PRINCIPAL

Methodology

The rationale for instigating this research project was to identify trends in the way workplace investigation practices are undertaken in organisations and to assist clients of People + Culture Strategies (“PCS”) to align their approach to workplace investigations with best practice in this area.¹

To this end we designed a survey comprising 23 questions in total, with 2 of those questions being open-ended questions allowing for qualitative responses. The survey period was from March to May 2016. The survey was made available to an extensive cross-section of PCS clients and partner organisations.

The survey questions specifically examined:

- what triggers investigations within the surveyed organisations;
- what these organisations invest in investigations in terms of time and resources;
- how organisations conduct investigations; and
- the extent to which organisations’ investigative practices are exposed to review or legal challenge.

The PCS Legal team has analysed the survey responses and integrated these findings with current legal developments and best practice to produce this White Paper. The paper draws on the PCS legal team’s experience as practitioners in the area of labour and employment law in providing training, conducting, and advising on workplace investigations, as well as dealing with any fall out from investigations in terms of review of outcomes or substantive legal challenges.

This has allowed us in compiling this report to draw on our knowledge of a broad range of different approaches adopted by employers in relation to workplace investigations and our clear understanding of the challenges employers face in this context.

Industries represented

Professional Services	20%
Banking	6%
Not for Profit	13%
Fast Moving Consumer Goods	8%
Hospitality	4%
Manufacturing	11%
Government	11%
Information Technology	2%
Transport/Logistics	5%
Other	20%

Employee in each organisation

0-15	11%
16-100	19%
100-1000	44%
1000+	26%

Annual turnover of each organisation

Percentage of respondents

\$500,000-\$2 Million	16%
\$2 -\$10 Million	11%
\$10 - \$100 Million	43%
\$100 Million+	30%

¹ This White Paper is provided for your information and interest only. It is not intended to be comprehensive, and it does not constitute and must not be relied on as legal advice. You must seek specific advice tailored to your circumstances.



Key Findings

- The vast majority of employers have written policies regarding workplace investigations.
- Employers are usually alerted to potential problems by complaints made by employees and most initiate an investigation once they become aware of the problem or receive a complaint.
- Workplace bullying and harassment are the most common problems requiring investigation by employers.
- Organisations rely on internal human resources when seeking advice about and in conducting workplace investigations.
- Most respondents indicated that they invest one to five days per person per year to train staff on how to conduct investigations.
- Organisations that only do internal investigations were nearly two and a half times more likely to cite concerns around legal proceedings as a reason preventing them from implementing recommendations. They were also 56% more likely to be uncertain about how to implement any recommendations following an investigation.
- One out of four respondent organisations indicated that they do not draft investigation reports.
- Almost half of the respondents had been asked to review an investigation, with the person who made the complaint being the most likely catalyst for review.
- Close to half of the respondents overall indicated that legal proceedings commenced at least once following an investigation, and over half of those respondents indicated that this followed an internal investigation.
- Unfair dismissal was the most common type of action that employees took following an investigation, followed by bullying claims and general protections claims.

What the survey data shows

Part 1: Triggers for investigations

The nature of matters being investigated

Respondents were asked to indicate the types of matters that most commonly required investigation in their organisation.

The results show that bullying and harassment matters are by far the most common, with just over 57% of respondents indicating that bullying and harassment matters most frequently necessitated an investigation being undertaken by their organisation. Work health and safety matters were the next most common, with roughly 21% of respondents indicating that this type of matter was the most common requiring investigation.

Table 1: The most common matters requiring investigation

Percentage of respondents

Harassment / Bullying	57.4%
Work health and safety	21.3%
Misuse of resources	14.3%
Drug / alcohol issues	5.7%
Discrimination	3.3%
Criminal matters	2.2%

Commentary

The finding that bullying and harassment features prominently in the matters most commonly requiring investigation by respondents is consistent with the growing recognition of the impact of these behaviours in Australian workplaces and the increasing risks for employers in not adequately addressing these matters if and when they arise. This includes whether employers are properly investigating grievances and complaints regarding such behaviours.

A particular risk for employers is that employees who believe that they have been subjected to bullying or harassment in the workplace now have a wider range of external avenues to make a complaint or seek redress, including:

- an application to the Fair Work Commission for an order to stop bullying;
- workers' compensation claims;
- complaints to the relevant work health and safety regulator; and
- other legal proceedings against their employer, including claims under relevant anti-discrimination legislation or breach of contract claims.

For employers, each of these avenues represents a potential challenge to the employer's policies and procedures in managing workplace behaviour, including the findings of any investigation that it undertakes. In addition:

- complaints of bullying and harassment can cause serious reputational damage to an organisation, regardless of whether or not the complaints are substantiated;
- complaints of bullying and harassment are often indicative of broader disharmony or dysfunctionality within the workplace;
- managing complaints of bullying and harassment, including investigating those complaints, can have a disruptive and negative impact on the workplace; and
- the participants in an investigation, in particular the complainant, may be emotionally invested in the claim, and may be seeking specific outcomes, such as an apology, disciplinary action or changes to working arrangements. These factors can make it difficult for an employer in conducting an investigation and in taking action in respect to the findings of that investigation.

In light of these potential risks, employers should develop and implement strategies for investigating bullying and harassment claims that provide for investigations to be conducted promptly and appropriately, and in a manner that protects the integrity of the process and appropriate confidentiality for the employer and for the participants in the investigation. Such strategies may include:

- where appropriate, engaging an external investigator who is regarded as neutral and objective, and who has the necessary experience and legal understanding; and
- ensuring that, to the extent possible, all documents and discussions relating to the investigation, including the investigation report, are subject to legal professional privilege. The benefits of legal professional privilege, and how it is established, are discussed in Part 2.

How organisations are alerted to the problem

Respondents were asked to indicate how their organisations generally become aware of matters requiring investigation, with the option to select more than one response.

Arise out of verbal complaints	94%
Arise out of written complaints	78%
Arose out of observations by leaders	68%
Arose out of observations and hearsay	51%

From these results it can be seen that by far the most common way in which respondents became aware of matters requiring investigation within their organisations was as a result of complaints made by employees, with the majority of respondents indicating that investigations usually arise as a result of either verbal or written employee complaints. However, what senior staff observe and workplace disquiet are also pertinent to how organisations become aware of matters requiring investigation.

The findings highlight the importance of employers ensuring that they make clear the process by which employees may make a complaint about matters in the workplace that may require investigation. This is to ensure these matters come to light and are acted on appropriately. As reflected in the survey findings, without employees making verbal and/or written complaints, the likelihood of matters requiring investigation coming to the employer's attention significantly diminishes.

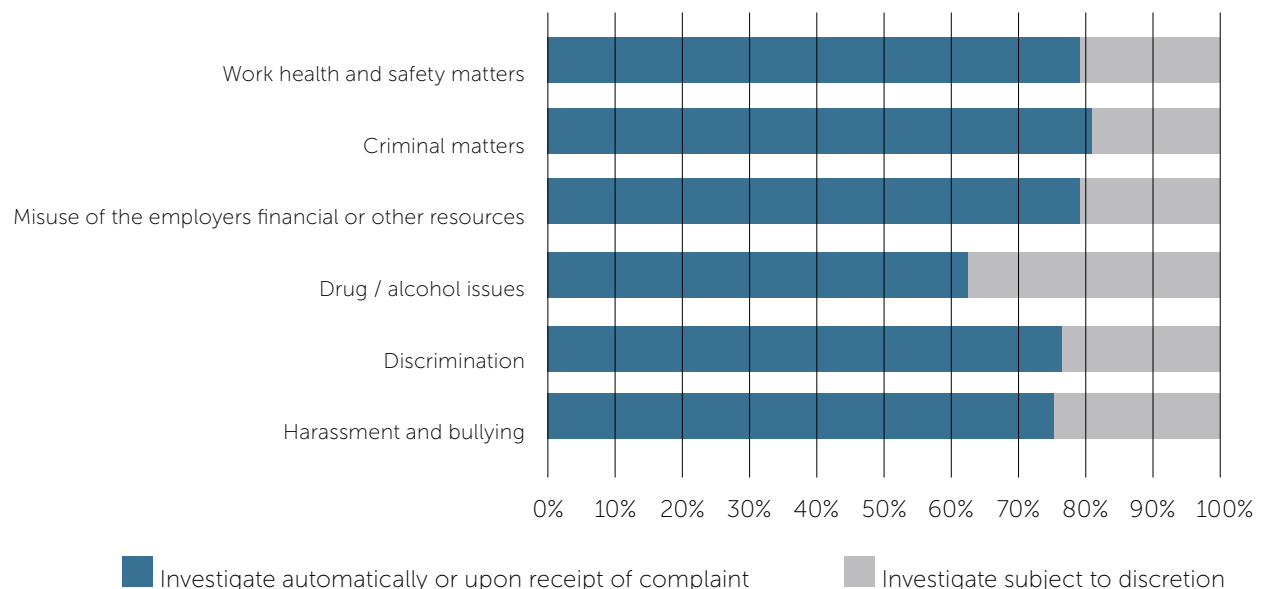
Willingness of employers to investigate

Respondents were asked to indicate their organisation's usual response to investigating particular types of matters that arise in the workplace, with the capacity to indicate whether they automatically investigate all such matters, investigate only if a written complaint is received, or that an investigation occurs subject to discretion.

The results show that employers are generally willing to conduct an investigation once the matter has been brought to their attention, although this willingness differs slightly depending on the nature of the matter. For example, in relation to matters involving misuse of the employer's resources, just over 80% of respondents indicated they would either commence an investigation automatically, or upon receipt of a complaint. However, in relation to matters involving drugs or alcohol, only 62% of respondents indicated they would commence an investigation automatically, or upon receipt of a complaint.

Taking the average across the different types of matters, the results show that 78% of respondents will investigate potential problems either automatically or upon receipt of a complaint.

Table 2: Responses regarding willingness to investigate



Qualitative Responses

The respondents were also asked to provide qualitative responses regarding their organisation's approach to dealing with "off the record" complaints by employees and on whether their organisation had ever initiated an investigation following the termination of employment of an employee.

The results show that most respondents take a "case by case" approach regarding whether to investigate an "off the record" complaint. Many respondents acknowledged that the organisation may have an obligation to conduct an investigation, regardless of the wishes of an employee.

On the question of whether organisations ever initiate investigations following a termination of employment, the results indicate that it is relatively uncommon for employers to conduct an investigation in these circumstances. According to the respondents, investigations are generally only conducted post-termination in circumstances where the outgoing employee has made bullying allegations during an exit interview or where the employer needs to investigate allegations made by the former employee in legal proceedings, such as an unfair dismissal claim.

What the survey data shows

Part 2: Resourcing investigations

Internal resources

Respondents were asked to indicate which of the following internal resources their organisation had in place to deal with investigations (with the ability to select more than one response, if applicable):

- employee policies (for example, grievance handling or behaviour and culture policies);
- contractual clauses (requiring compliance with an investigation or permitting suspension); and
- HR handbook or guides on how to conduct investigations.

97% of respondents indicated that they have policies and procedures in place to deal with investigations. Less common were contractual clauses (47%) or handbooks/guides on how to conduct investigations (54%).

Commentary

The survey responses with regard to the internal resources that respondents have in place to deal with workplace investigations are significant as they reflect an appreciation on the part of employers of the need to create an internal framework for workplace investigations, which they do predominantly through policies.

An employer's appreciation of the importance of the role that these internal resources play in a risk management context is crucial to ensuring that the frameworks they implement provide for best practice when and if a workplace investigation is required to be undertaken. Recent cases demonstrate that it is not enough simply to have policies, procedures or other guidance in place; the policies, procedures or other guidance must also be enforced. Education and training also play a key role in ensuring compliance.

Policies also have significance as they provide guidance for investigators as to the process to be adopted and can also be used as a 'yard stick' to assess if all relevant steps have been taken. Any short fall identified by way of that assessment would potentially equate to procedural flaw in the process.

The recent decision in *Murugesu v Australian Postal Corporation & Anor [2015] FCCA 2852* demonstrates that it is not enough simply to have policies; they must be enforced. In that case the employer was found to have failed to address properly complaints made by an employee, despite having “exemplary” training systems and policies in place. In the decision Justice Burchardt found that:

“The official position taken by Australia Post is wholly exemplary. The code of conduct and other documents exhibited to the Court show that, on its face, the first respondent is wholly opposed to any form of racial or other unlawful harassment in employment. The difficulty, however, is that it is one thing to have these policies, no doubt sincerely embraced by the management of the first respondent, but it is another to enforce them.”

Where do organisations seek advice when conducting investigation?

When asked how their organisations sought advice regarding workplace investigations, most respondents answered that they relied on their organisations’ internal human resources staff, rather than any other source of advice. This was followed by those relying on a law firm, with only around one fifth of respondents relying on other sources of advice (such as in house lawyer or an employer association).

Internal HR expertise	41.3%
Law firm	38.04%
Employer Association	9.78%
Specialised employment/HR lawyer in house	6.52%
Generalist lawyer in house	4.35%

Training in conducting investigations

This data shows that over two thirds of respondents invest between one to five days per person each year in training staff on how to conduct investigations. Approximately a quarter of respondents did not invest in investigations training at all (which may have been because they always engage an external investigator). Only 5% invested more than five days per person each year to train staff.

Commentary

That a majority of respondents provide training to staff about conducting workplace investigations is a positive indicator that employers are recognising the significance of this aspect of their risk management framework and dedicating resources accordingly.

However, given the legal and factual complexities that can arise in conducting investigations and the need to ensure adherence to any applicable policies, and the potential consequences of not conducting a workplace investigation appropriately, organisations may need to reevaluate the level of investment in staff training in this area.

Conducting investigations: internal or external?

Respondents to the survey were asked to indicate whether it is their regular practice to engage an external investigator to conduct investigations into workplace matters and then asked to rank the principal factors that influenced their decision from a list of factors provided. 94 respondents responded to the question as to whether it is their regular practice to engage an external investigator to conduct workplace investigations, as follows:

- 2% always engaged an external investigator;
- 24% always perform investigations in house; and
- 74% decided to engage an external investigator or investigate internally was dependent on a number of factors.

The factors identified as having influence on the decision to engage an external investigator, in order from the most important factor to least important factor, were as follows:



Commentary

The survey results show that one third of respondents ranked the type of matter as the principal factor influencing whether their organisation engages an external investigator. The type of matter being investigated is an important consideration – for example, an organisation may wish to consider engaging an external investigator where the type of matter and its seriousness means that the investigation could result in a termination of employment. This is particularly so in light of the fact that the most common type of claim faced by respondents following an investigation is an unfair dismissal application, in which the Fair Work Commission will consider, amongst other things, the fairness of any process (such as an investigation) engaged in prior to the dismissal, and whether the opportunity has been given to a party to respond to any allegation made against them.

Respondents ranked the appearance of bias and integrity of the process, and confidence in skill and capabilities of investigators, respectively, as the second and third most influential factors in determining whether to investigate internally or externally. This suggests that

respondents are aware of the significant ramifications that can result from bias, or the appearance of bias arising from an investigation that is undertaken by personnel without the necessary skills and experience to conduct it. Interestingly, respondents remained concerned about the capabilities of personnel conducting investigations despite almost 69% of respondents investing in at least one day's training for such personnel.

The potential consequences of utilising an inexperienced internal resource to conduct a workplace investigation were made clear in *Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775:

"Ms Green had never conducted a disciplinary investigation into allegations of physical assault at the workplace. Her inexperience and lack of forensic skills as to the assessment of witness evidence, was a major contributory factor to the weaknesses exposed in the respondent's evidentiary case. This should not be seen as a criticism, per se of Ms Green, but rather it demonstrates a failure of senior management to recognise the seriousness of the issues and their causes and a failure to independently assess the investigator's findings and recommendations. Ms Green should not be blamed for these failures."

The employee's dismissal was overturned due to the flaws in the investigation that led to it.

Commentary

Respondents indicated that time constraints were relatively unimportant in deciding whether or not to engage an external investigator. This data needs to be examined in light of the fact that in response to an earlier survey question at least 50% of respondents indicated that they automatically conduct investigations in response to a wide array of possible investigation triggers, and that they tended to rely on internal human resources advice in the investigations process. The extent of investigations undertaken and the reliance on human resources personnel can operate as a significant drain on internal resources.

The issue of costs associated with investigations proved quite divisive. While, on average, costs were one of the less pressing considerations taken into account by organisations when determining whether to investigate internally or externally, over 10 % of respondents ranked costs as the principal factor influencing their decision. Of those who ranked costs as their primary concern, interestingly, most fell into the \$10 million to \$100 million turnover bracket, indicating that costs concerns apply to businesses of all sizes.

In the ranking of factors legal professional privilege did not feature highly. Over 44% of respondents ranked legal professional privilege as the least or second least important consideration taken into account when determining whether to engage an external investigator. This could indicate a lack of awareness that by having an external legal practitioner investigate a complaint the employer may have the opportunity to rely on legal professional privilege should the matter subsequently be litigated. It is possible that this is a consequence of organisations not fully appreciating the benefits that can follow from legal professional privilege with respect to the communications and documentation relating to the investigation process.

What is legal professional privilege?

Legal professional privilege arises from the disclosure of confidential legal communications, and confidential documents prepared for the dominant purpose of providing legal advice or services relating to legislation (actual or contemplated). This facilitates a free exchange of information between legal practitioner and the client, so that the client can be properly advised, without fear of potentially prejudicial information being disclosed at a later date.

Legal professional privilege is established where:

- a professional relationship between a lawyer and a client exists;
- the relevant communications or documents are confidential; and
- the relevant communications or documents are created for the dominant purpose of the provision of legal advice or legal services relating to litigation.

The benefits of legal professional privilege

While legal professional privilege will not automatically attach to an investigation report prepared by a legal practitioner, it can be of significant benefit to an organisation if it can be established. The obvious benefit of legal professional privilege is that communications and documents attracting privilege retain their confidentiality and need not be disclosed, unless privilege is waived. This is particularly important in circumstances where documents contain information about matters that could bring the organisation into disrepute or, if information is of a highly sensitive nature such as pertaining to sexual harassment investigations.

What the survey data shows

Part 3: The investigation process and outcomes

The following table represents what organisations' investigation processes typically involve.

Outsource entire process	17%
Enquire with witnesses	81%
Enquire with complainant	85%
Enquire with respondent	83%
Face-to-face interviews	90%
Telephone interviews	49%
Recording of meeting	26%
Written statements	70%
Investigation report	75%
Other	8%

Common practices

The figure above shows the wide range of processes used by organisations during their investigations. These responses provide an insight into common practices and while many organisations demonstrate a robust approach to the types of tools utilised when conducting workplace investigations, we note the following data that emerged from our survey:

- a quarter of respondents stated that they do not draft an investigation report as part of their organisation's investigation process;
- one out of five respondents indicated that their investigation process does not involve enquiries being made with the respondent; and
- almost half of respondents who specified "other" means of investigating issues in the workplace cited some form of electronic surveillance.

Commentary

Some of these practices raise concerns about the procedural fairness of the process where the allegations are not put to a party who is the subject of the investigation. Similarly, the absence of an investigation report setting out the findings of the investigation and the basis upon which they were made may call into question those findings and can affect the ability of the decision maker to be properly informed of the outcome of the investigation. These types of practices can seriously impact on an employer's ability to rely on the investigation findings in disciplinary proceedings. The absence of an investigation report may also be indicative of a lack of delineation between the roles of investigator and decision maker.

The survey results show that organisations may use various types of electronic surveillance in their investigations. While this information can be extremely useful, it is equally important that employers have proper surveillance policies in place that comply with the relevant legislation (with differing regimes operating across states and territories). Without such policies employers not only risk a breach of the legislation, but also place decision makers in a difficult position where, for example, they have strong evidence that could justify termination of employment, but the method of obtaining the information is unsound.

Confidentiality

Overall the percentage of organisations that strictly enforce confidentiality in relation to an investigation is not insignificant (75%). However, when examined further, the data provides that those employers that engage external investigators were almost 30% more likely to require all participants in an investigation to comply with such obligations, compared to those that always conduct investigations internally. This marked difference may reflect a broader cultural differentiation between workplace investigations conducted internally as opposed to those undertaken externally.

Enforcing confidentiality

Depends on the nature of the alleged conduct	19.05%
All investigation participants are required to comply	75%
Some investigation participants are required to comply	1.19%
Never needed to consider the issue	4.76%

Interestingly, nearly 20% of respondents said that they determine their level of enforcement of confidentiality around an investigation based on the nature of the alleged conduct. Once an investigation has been initiated, it is recommended that employers enforce the need for confidentiality at all times. In some circumstances, and especially if there is a formal policy on grievance procedures, failure to enforce confidentiality can complicate and disrupt the investigation process, as well as potentially compromise any subsequent disciplinary action.

Supporting documentation

The responses in relation to documentation relating to investigations reflect the fact that the majority of respondents appreciate the need to have quality notes taken during and immediately after interviews. However, one in five respondents reported that contemporaneous file notes were not taken during the interview. In our experience contemporaneous file notes regarding the management of the process and correspondence from the investigation participants recording the investigation process (including letters to a respondent) reinforce the fairness of the processes undertaken.

- Over 20% of respondents do not take file notes after interviews conducted for the purpose of an investigation.
- More than one out of three respondents do not issue formal letters from the employer during any investigation.

Recommendations from an investigation report

The value of detailed and well founded recommendations for a decision maker to consider should not be underestimated. Such recommendations following an impartial investigation can provide insights into solutions that the decision maker may not have contemplated, such as mediation, training or mentoring. This in turn can enable an organisation to respond to inappropriate conduct in the workplace in a constructive and beneficial manner. Similarly, a recommendation of termination based on a thorough investigation can be extremely useful in defending unfair dismissal claims.

The data suggests that organisations that engage external investigators for some investigations are almost twice as likely to receive a recommendation of mediation following an investigation than those who always investigate internally.

Table: What kinds of recommendations are being made following an investigation?

	Always investigate internally	Engage external investigators at least some of the time
Termination	26%	39%
Mediation	22%	42%
Training and Mentoring	30%	44%
Internal reorganisation	17%	25%

Following through on recommendations

- 48% of all respondents stated that internal difficulties in implementing the recommendations following an investigation were a factor that prevented the organisation from following through on recommended actions.
- Respondents that always investigate internally were almost two and a half times more likely to cite concern around legal proceedings as a factor that prevented the recommendations from being followed through with compared to those who engaged external investigators.
- Two out of three organisations where there was a recommendation to change policies after an investigation cited internal difficulties around implementing these recommendations.
- Organisations that always investigate internally were more than one and a half times more likely to cite uncertainty around how to implement recommendations as a factor in being unable to follow through.

Table: Reasons organisations don't always follow through on recommendations

	Always investigate in house	External investigators depending on circumstances
Uncertainty as to how to implement	25%	16%
Concerned about legal proceedings	50%	21%

Commentary

Almost half of surveyed respondents cited difficulties in implementing recommendations internally as a factor preventing them from following through on the recommended actions arising from the investigation process. This may be attributable to a number of factors, including the internal dynamics of a workplace, inconsistent treatment regarding similar types of matters in the past, or a lack of confidence in managing difficult interpersonal conflict. Having an external investigator make the findings can assist with the implementation process and help to deal with any uncertainty around implementation.

The considerable difference between respondents who engaged external investigators and those who always investigate internally when it comes to concern around legal risks in relation to recommendations is not surprising. The fact that the investigation process and the resulting report has been managed by a legal practitioner can bolster an organisation's confidence that the recommendations will stand up to any legal challenges.

What the survey data shows

Part 4: Review and legal proceedings

Review of investigation decisions

55% of respondents said that their organisation had never been asked to review an investigation decision. Conversely, 45% of respondents had been asked to review an investigation by one of the following:

- the person who made the complaint (or their legal representative) (28%);
- the person about whom the complaint was made (or their legal representative) (25%);
- the Fair Work Commission (9%);
- another employee in the organisation (2%); or
- someone senior in the organisation (13%).

Commentary

This shows that organisations are at risk of being asked to review their investigation decisions from a number of different sources. Seeking a review may be attributable to dissatisfaction with the outcome, but can also reflect a lack of confidence in the integrity of the investigation process undertaken by an organisation.

Legal proceedings following an investigation

While just over 60% of respondents answered 'no' to the question about whether legal proceedings had ever commenced following an investigation, the remaining 40% of respondents answered 'yes' to having legal proceedings commenced at least once following an investigation. This demonstrates that a substantial number of organisations are being exposed to legal proceedings following investigation and have to endure the time, cost and effort involved in defending a legal claim.

Significantly, 53% of respondents said that legal proceedings were commenced following an internal investigation with only 6% of respondents answering that legal proceedings occurred following an external investigation.

Commentary

This data suggests (and is consistent with our experience) that respondents to investigations are more likely to commence legal proceedings in circumstances where they have concerns about the manner in which the investigation process was conducted and its overall fairness. Another factor that may contribute to whether a respondent commences legal proceedings is the perceived appearance of bias. That an organisation is more likely to be exposed to legal proceedings after an internal investigation could indicate that employees perceive an internal investigation process as more questionable or lacking the authority and independence of an external investigation.

Organisations are also at risk of having their decision-making overruled by courts or tribunals and at risk of compensation orders where the processes lack procedural fairness.

Types of legal proceedings

Unfair dismissal was the most common type of action that employees took following an investigation (79%), followed by bullying claims (41%) and general protections claims (38%).

Other claims included were discrimination (21%) and breach of contract (17%).

Unfair dismissal proceedings rank as the most common type of action that an employee takes following an investigation. While a decision to terminate employment inevitably carries with it some risks for an organisation, if the investigation that precedes the decision to terminate is undertaken in a substantively and procedurally fair manner, an employer will be in a strong position to defend any unfair dismissal claim.

Unfair dismissal	40%
Bullying	21%
General protections	19%
Discrimination	11%
Breach of contract	9%

Commentary

Even though the data shows that internal investigations pose a bigger risk in terms of the possibility of legal proceedings being commenced, 41% of organisations are currently more likely to seek advice regarding investigations from internal HR expertise than externally through a law firm or employer association. In addition, on average, organisations only invest one-five days per year in training their staff each year on how to conduct investigations. Some of these practices regarding advice and training may warrant review by organisations.

While external investigations can involve an upfront cost for an organisation (in terms of engaging an investigator to conduct the investigation and provide a report), this needs to be weighed up against the significant costs involved in defending any legal claim and any compensation that may be ordered.

In determining the primary reason as to why organisations engage external investigators, the type of matter and appearance of bias and integrity of process were reported as influential. This suggests a level of awareness on the part of organisations that using an external investigator means that the process is less likely to be challenged on the basis of bias or the integrity of process.

What the survey data shows

Part 5: Best practice in conducting investigations

Common mistakes

The top five mistakes that are often made by employers in investigating a workplace complaint are:

1. a lack of pre-investigation planning;
2. a morphing of the investigation and disciplinary steps;
3. relying on 'untested' information, unduly favouring one account and ignoring discrepancies;
4. failing to establish a process that is perceived as independent and free of bias; and
5. delay in undertaking an investigation that fuels speculation and gossip and can jeopardise appropriate disciplinary action.

Minimising the risks

Pivotal aspects of best practice include the following:

- Understand and comply with applicable policies and procedures. Employers are also encouraged to review any applicable policies and procedures dealing with workplace investigations regularly to ensure they reflect prevailing best practice.
- Identify the scope of the investigation and the powers and functions of the investigator (if this is not already provided for in the applicable policies and procedures). Where necessary, make it clear that the purpose of an investigation is to make a determination in respect of the factual matters the subject of any complaint, and that any disciplinary process in respect of those findings will be undertaken separately.
- Appoint an appropriate (internal or external) investigator to undertake the investigation and identify the relevant decision maker. The investigator and the decision maker should be individuals who are perceived to be independent in order to reduce the risk of any perceived or actual bias in the investigation or its outcomes.
- Plan the investigation. Even what may appear to be the most simple of workplace investigations can become quite complex, and there are significant risks for the employer if the investigation is not conducted properly and the employer then seeks to rely on the investigation findings. Adequate planning around the 'who', 'what', 'when', 'why', 'where' and 'how' at the outset of any investigation will minimise these risks and help the investigator maintain an orderly process in respect of the conduct of the investigation. The investigation plan should be reviewed regularly during the investigation to ensure that it remains appropriate.
- Establish communication and confidentiality protocols for participants in the investigation. This will assist in establishing boundaries for agreed disclosure that allows for useful discussions while maintaining strict confidentiality principles.

- Maintain accurate documentation of the investigation process and the contributions of all of the participants in that investigation. This includes communications with participants confirming any directions that were issued to them about matters such as confidentiality and victimisation. Ideally, any investigation interviews should be recorded, with transcripts produced and signed off by the interviewees to ensure a reliable and accurate record of allegations made and responses given.
- Ensure that the investigation is conducted in as timely a manner as possible, without compromising the integrity of the investigation. If timeframes are communicated to participants and a change in circumstances means that those timeframes can no longer be adhered to, communicate this effectively to manage the expectations of the participants.
- Interview not only the complainant and respondent, but also relevant witnesses and factor in documentary evidence. This prevents inaccurate opinions being formed solely on the basis of one person's word against another's. Re-interviewing key participants may be necessary in some circumstances.
- Conduct all processes in a manner that ensures all parties involved are respected and have their opportunity to state their version of events. This is imperative in making sure that procedural fairness is provided to all parties, and to maintain employee goodwill and protect the employer's reputation.
- At the conclusion of an investigation, prepare a detailed report setting out an evaluation of the situation and an assessment as to whether the specific complaint(s) has been proven and detailing the evidence that supports that assessment. This investigation report may be used as evidence if the decision is to be reviewed by a Court or tribunal, unless legal professional privilege can be established.
- Ensure that the decision-maker is empowered to make an independent determination based on the evidence and to determine any consequences that flow from the investigation's findings and recommendations.
- Communicate the outcomes of the investigation to the participants in a timely manner and as appropriate to their role in the investigation.
- Review the investigation process and the findings of the investigation to identify ways of preventing similar occurrences and any improvements that could be made to the processes.

About PCS



People + Culture Strategies (PCS) is a unique provider of labour and employment legal and strategic solutions in Australia. The PCS model is based on an end-to-end holistic service with the emphasis on acute awareness and the importance of partnering with clients at the front-end of decision-making and problem solving.

Founded in 2010, PCS now has offices in Sydney, Melbourne and Brisbane and has established itself as one of Australia's most innovative and value-creating professional services firms. PCS works with employers, many of whom are global brand names, to service their legal and strategic needs in people management in Australia.

PCS has a unique approach to partner with clients to ensure it is ready to respond strategically to any crisis in the most appropriate way across areas and activities such as contract disputes, discrimination, bullying and harassment investigations, unfair dismissal and adverse action claims.



People+Culture Strategies

Labour & Employment Law

Sydney

Level 9, NAB House
255 George Street
Sydney NSW 2000
T +61 2 8094 3100

Melbourne

Level 9
136 Exhibition Street
Melbourne VIC 3000
T +61 3 8319 0500

Brisbane

Level 8
40 Creek Street
Brisbane QLD 4000
T +61 7 3046 0300

E info@peopleculture.com.au
www.peopleculture.com.au