Internal Investigations
Tips and Traps

This summary highlights key points in conducting internal investigations.

Be Prepared

- Internal investigations are a process to establish the sequence of facts around controversial questions, suspicions or allegations. They involve extracting and interpreting relevant information to make decisions about what formal action to take in response. Most large organisations should expect to have to conduct internal investigations from time to time.

- A transparent culture with effective supervision and reporting will reduce the risk of questions, suspicions or allegations which may have to be investigated developing unnoticed.

- Investigations may need to be undertaken urgently, so it helps to have a defined set of investigation triggers (e.g., escalated reports, certain formal grievances, whistleblowing reports, and certain inquiries from regulators, stakeholders, and media). It helps to have a standing crisis team to manage internal investigations and to have written investigation procedures or guidelines.

- Understand the organisation’s data universe and how to interrogate it. Most of the information you will need is somewhere on your networks or held by others on your behalf, but it is important to be able to find and drill into it quickly.

Whistleblowing

- The rise of whistleblowing and whistleblower protection increases the prospect of controversial questions, suspicions or allegations emerging.

- Formal whistleblowing mechanisms (32%) and informal internal channels (45%) are the most common triggers for cross-border investigations.

- Whistleblower protection is provided in Ireland by the Protected Disclosures Act 2014.

Immediate Pre-investigation Action

Immediate protective action can be necessary when a serious anomaly, allegation or suspicion arises. This can include:

- Pursuing and freezing the ‘money trail’ and preserving records in cases of suspected fraud.

- Pre-disciplinary administrative suspension where an employee appears to be an unreasonable risk to colleagues or the organisation’s welfare.
• Reporting certain suspected crimes to the Gardaí, bearing in mind risk of withholding information offences (eg Section 19, Criminal Justice Act 2011).

• Reporting certain suspected regulatory breaches to a regulator.

• Immediate remediation or risk reduction action (without admission of liability) where there appears to be a danger to health, property or the environment.

**Planning an Investigation**

• Develop an understanding of the scale of the issues and the impacts the outcome may have on corporate reputation, regulatory and other risk. This will inform from where the organisation should lead the investigation (eg non-executive director for serious matters).

• Lock in the investigation management to a core team (likely to include representatives of legal, comms, HR, and IT, but not everyone in all of them), with a single information repository keeping information confidential and shared on a ‘need to know basis’.

• Exclude anyone with a special relationship to the people or matters under investigation, bearing in mind that an internal investigation cannot be completely independent as the employer is not disinterested in the matters at issue and some or all of the investigators will have had some form of contact/communication around the issues involved.

• Prevent uncontrolled communications internally (which may be discoverable or discloseable) or externally about the investigation.

• Identify any necessary external resources.

• An internal investigation starts as a fact find, not involving allocation of responsibility. However, be constantly alert to the risk that it becomes adversarial – when separate representation and defence rights for employees under suspicion may become necessary.

• Employees are at the heart of internal investigations. They may feel threatened or under suspicion, with their reputations or careers at stake, and in some cases the risk of personal regulatory sanction, disqualification or suspension from industry, or prosecution.

**Sources of Information**

• Use available records (computer/word processing hard drive and portable devices and storage media; e-mail, calendar and voicemail records; expense records, personnel information, time records, CCTV) as a starting point to understand the sequence.

• Be clear about the extent of your right to interrogate these records (whether with or without employees’ consent), in the context of data protection and privacy issues. Illegal or unreasonable surveillance/entrapment may render an investigation outcome void.

• What do your HR policies say about investigations?

• Others (service providers, advisers, suppliers, etc) may hold records on your behalf.

• Employees may hold relevant information on personal devices (eg Bring Your Own Device (“BYOD”) policy).

• Relevant information may be shared on social media or elsewhere on the internet.

• There may be a need for forensic IT assistance.
• There is likely to be a need to conduct investigation interviews; employees may have a duty to co-operate, but third party co-operation is likely to be on a voluntary basis.

**Terms of Reference**

Terms of reference are the road map to the investigation and require careful drafting. They set out the issues, objectives and scope of the investigation and should be clear and concise. Design the terms to fit the investigation of the question, suspicion or allegation at issue. Consider:

• Core issues which need to be addressed in the investigation.

• Review/amendment clause to ensure adaptability of terms of reference – terms may need to be omitted or added as the investigation progresses.

• The investigator’s role and responsibilities and the procedure to be followed.

• Overall timeframe and interim deadlines.

• Identifying the task involved and expected outputs (factual report, recommendations, etc).

• Define the parameters clearly at the outset.

**Working with Parallel External Investigations**

• We operate in a regulatory-heavy environment with a culture of transparency expected.

• Aside from domestic agencies who have responsibilities concerning the issues being investigated, agencies in other States may be entitled to investigate due to location of corporate headquarters, marketing of product in their territories, long-arm reach of their statutes, etc.

• Where issues are multi-jurisdictional, there may be a multi-agency approach.

• However, the attitude of external agencies does not reduce an organisation’s ability, interest or potential duty to investigate into matters affecting it.

• Where external agencies are interested, understand their legal powers to compel evidence and if they take evidence, understand what they have taken and its implications.

• Work out how closely your interests are aligned with the external agency’s interest and how closely to co-operate.

• Where external agency action (eg administrative investigation or prosecution) is pending, it is usually prudent to suspend taking any action on foot of the investigation findings until such external action is complete.

**Appointing an External Investigator where Necessary**

**Choosing the right investigator**

• Consider what expertise will assist the investigation; a lawyer, an accountant, a business consultant, a medical practitioner?

• Ensure that the investigator is independent and unbiased and has no conflict of interest, financial, personal or otherwise that might influence the investigation and any report.

• Ensure that the issues are within their area of expertise (check profile and published work, if any), as action taken on foot of an investigation by an unqualified person may be open to legal challenge.

**Instructing the investigator and managing the relationship**

• Strike a balance between independence and control – set clear parameters without compromising the investigator’s independence and autonomy.
• Be clear about ‘terms of engagement’ including roles and responsibilities, timescales and the investigative techniques to be employed.

• Explain the terms of reference to ensure that the investigator fully understands the remit and scope of the investigation.

• Consider indemnity arrangements – will the organisation indemnify the investigator or should the investigator provide his/her own cover?

• Independent investigator may need independent legal advice.

• Provide investigator with all available information at the outset and update with relevant information as it becomes available.

• Maintain regular dialogue with the investigator during the process.

• Monitor progress of the investigation.

**Good Practice in Investigations**

The investigator should:

• Embark on the process with an open mind to achieve a ‘cool, dispassionate appraisal of the facts’.

• Assess information and materials that are already available (eg in the public domain, from records the organisation controls) and determine what materials are relevant.

• Identify the people involved in the events or matters and invite them to give information, materials or comments.

• Make the terms of reference and/or written procedures available to those affected.

• Allow such people to make a statement or submission, either at an interview or separately in writing; those wishing to state their position through lawyers should be allowed to do so.

• Provide relevant information and copies of relevant materials touching on the person’s involvement in good time before meeting or interviewing any person involved.

• Try to resolve any conflict of fact or opinion where a person disagrees with such information or materials.
• Allow a person to submit information or materials supporting his or her version of events or contradicting another person’s version, and give anyone whose story is being contradicted this information or material and a reasonable opportunity to comment.

• Where a second person provides a different version of events from a first, put that version to the first person and allow a reasonable opportunity to comment or provide further information (even if the first person previously declined to be interviewed or comment).

• Be alive to the risk of prejudice or bias, or apprehension of either, throughout.

• If it is not possible to resolve a conflict between different versions, record the different versions and say that he or she cannot safely decide which is correct. Where an opinion on disputed facts is recorded, the investigator should highlight the limitations on the conclusions as a result of the conflicting versions.

• Put any draft findings to the person concerned well in advance of their completion and afford a reasonable opportunity to those affected to comment or respond. Any response should be considered (and any draft report changed if appropriate) and noted in or appended to any final report.

Investigation Findings

• Always ask for the findings in draft first; on receipt of the draft findings, consider whether the draft meets requirements of fairness and accuracy.

• Does the draft meet the terms of reference? Consult with the investigator if there are discrepancies between the terms of reference and the findings.

• Does any written report accurately and fairly reflect the findings? Ensure it does not unduly emphasise any findings not warranted by the facts established.

• Is the language reasonable? Ensure the wording does not overstate the position or present an unfair picture.

• Is it appropriate or necessary to name individuals in the report? It may be preferable to publish a version which omits identifying information to safeguard rights to privacy, provided that this does not detract from the findings.

• Does the draft adequately reflect or take account of comments or criticisms received from persons affected by the investigation and the findings?

• Does the draft contain any material or information that is not relevant to the terms of reference? Ensure all irrelevant material is omitted from the final version.

• If the organisation ‘publishes’ any report (to anyone), it will need to be able to stand over its contents or at least show that it ‘published’ in good faith and responsibly, honestly believing that its contents were true. Wide circulation is extremely inadvisable; the report should only go to those who have a legal interest in seeing them.

Deciding what Further Action is Necessary

• Once the findings establish what happened, consider whether, or what, further action is necessary.

• Should the findings (not necessarily any written report) be communicated to any interested agency or stakeholder?
• Is disciplinary action against any employee concerned necessary or justified?
• Should a formal regulatory report be made?
• Do the findings disclose anything about a suspected offence which it is mandatory to report to the Gardaí (e.g. white collar crime, including fraud; money-laundering, etc.)?
• Has remedial action been identified in respect of past or ongoing failures?
• How should internal and external communication of the outcome be managed?

Conclusion

Investigations are often controversial, because the stakes are extremely high for individuals involved. Legal challenges around investigations, or action taken on foot of their findings, are frequent and can be difficult, and catastrophic if errors are found to have occurred. It is crucial that investigations be conducted professionally, independently, using demonstrably fair techniques and procedures and with a constant eye of the rights of those who may feel themselves under suspicion. Good investigation practices will lead to legally defensible outcomes, whatever the investigation uncovers.