

# Internal Investigations

## 10 point checklist

Internal investigations can be brought for many reasons. They are commonly triggered by regulatory breaches and/or criminal activity but can also be started by the threat of litigation, employment issues or a breach of corporate policy.

The aim of a good internal investigation is to unearth any wrongdoing and ensure that the organisation does all that it can to protect its reputation and prevent criminal or regulatory proceedings and potential litigation.

Although every investigation is unique, this guide provides a checklist of key considerations for an internal investigation for reference and guidance.

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## 1. Selecting an investigations team

The investigation team needs to be selected in line with any organisational policy or procedure that the company or organisation has. Team members, whether internal or external, must be independent and free of bias or influence. They must also have the requisite skills and capacity to undertake the investigation, such as in-house counsel or compliance teams and, where required, external communications experts. The team should be tightly defined and managed to maintain the confidentiality of the investigation and avoid any issues with privilege down the line.

The involvement of legal professionals is almost always required, whether that be an in-house legal department or external counsel. Many issues will arise during the investigation that will require legal advice, including:

- Legal professional privilege
- Preservation of documents, evidence and assets
- Any related employment procedures, where employee conduct is likely to require investigation
- Specific regulatory requirements
- Self-reporting
- Litigation risk and assessment of any potential liability
- Foreign law requirements

Certain circumstances may warrant the instruction of external investigators. For example, if the conduct involves potentially significant wrongdoing, senior individuals or a risk of litigation then the instruction of external counsel can be essential.



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## 2. Privilege and communications strategy

You must think about privilege as soon as the investigation has begun in order to avoid creating potentially harmful documents which you are later required to disclose to authorities or third parties, and to avoid the risk of inadvertently waiving privilege.

There are many steps that can be taken to protect privilege, and you should seek legal advice early on to establish an effective strategy. Procedures should be put in place to limit communications about the investigation and those who are involved in these, and a communications strategy should be implemented so that the team know their parameters.

Legal should be involved as much as possible in any communications to ensure that they are privileged and to protect and maintain this position going forward.

It is also often necessary to seek the advice of experts to advise on the strategy of external communications, for example a public relations team.

## 3. Document preservation and evidence

You must immediately put measures in place to preserve potentially relevant materials, especially where there is potential for litigation or the involvement of regulators.

## 4. Prepare an investigation plan

A good investigation plan will cover the purpose and scope of the investigation, who the investigation team is, the subject(s) of the investigation, the terms of reference, and other key information like deadlines and the form of reporting. Any known regulatory, criminal or litigation risk should be included in the plan so that the team can consider these risks throughout the process and have them in mind when handling issues like privilege and confidentiality.



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## 5. Interim remediation and reporting

Pause to consider any interim remediation and reporting:

- Check the insurance position – do you have an obligation to inform your company's insurers?
- Take any necessary action in relation to employees or directors, such as suspension.
- Consider any reporting requirements, whether to authorities or industry-specific regulators – do you have an obligation to report within a certain timeframe?

## 6. Document management

Collate, search and review the relevant documents using an agreed methodology to ensure consistency and thoroughness. The process and management of the review exercise should be properly recorded and issues like privilege, data protection, privacy, confidentiality and disclosure should be addressed.

## 7. Interviews

The way interviews are handled is crucial for obtaining evidence, preserving privilege and maintaining the independence of the investigation. A select interview panel should prepare for and conduct the interviews with close regard for confidentiality, impartiality, how the interviews will be recorded, the preservation of privilege over any interview notes, and regulatory obligations in relation to certain types of interviews. It is often the case that specialist and experienced interviewers such as external counsel should conduct the interviews.



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## 8. Expert advice

You may require expert advice when the issues under investigation are highly technical or involve specific areas of law such as employment issues or litigation. Legal advice should be sought at this stage as privilege may not apply to communications with expert advisors.

## 9. Findings report

Produce a findings report in the form agreed in your investigation plan, taking into consideration any parties you may have to disclose it to, and setting out any privileged information in such a way that it would be easy to redact. Depending on the circumstances, there may be certain requirements that the report must fulfil, such as in a disciplinary process where the report must comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

## 10. Remediation and other steps

The investigation does not end with a findings report. Where necessary, you must take steps to remediate in order to make the investigation worthwhile and beneficial to your company.

- Challenge any decisions as necessary if the investigation discovers no wrongdoing.
- Prepare a remediation plan – this may include disciplinary action, policy and procedure improvements, and compensation schemes.
- Deal with the regulators / authorities – can you negotiate a settlement? Can you appeal any unfavourable decisions?
- Debrief and reflect on lessons learned.
- Put together an investigation file to make sure any documents can be easily accessed if there is any related litigation or if similar issues come up again.
- Sort out your litigation strategy and seek legal advice for any potential liabilities or claims.
- Manage final communications and any reputational damage, whether this be internal or to the public.



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## Key contacts



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Howard Kennedy's investigations team comprises specialists from across the firm including business crime and regulatory, employment, commercial litigation and company advisors who are skilled at conducting bespoke internal investigations on an organisation's behalf.

There are various factors that can sway an organisation's decision making process throughout the investigation process, including the regulatory environment, company resources and market sectors.

Contact us for further information or for bespoke advice.



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