



# Jobs Australia Ltd

# Investigation Handbook

**2021 Edition**

*Retain this Handbook with your copy of relevant awards  
and other industrial relations publications from Jobs Australia*

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## 1. Introduction

(Internal Investigations) Choosing the Investigator: this investigator should be as far removed from the situation as possible. This may not be very practical in a small organisation, however this does not mean that you necessarily need to go to an external source! Any outcome of the investigation should be dealt with by someone who was not involved in the investigation, as much as is practical.

Notes:

- Conflict of interest Declaration
- Terms of Engagement

### Internal or External Investigator?

There are a number of considerations when deciding on an internal or external investigator. Undertaking your own investigation will make you familiar with the process, will allow you to control the process and the costs involved. However in some circumstances an external investigator may be appropriate.

*Positives of using an External Investigator*: First of all an external investigation is useful as the investigator will have fewer preconceptions about the individuals involved and is less likely to be accused of bias. An external investigator is a professional and will have a strong background in investigations.

*Negatives of using an External Investigator*: It is Expensive! You may not receive the outcome that you are seeking, and you have no or little control over the process. The investigator does not know all the players or the quirks and background of your organisation and employees. An External investigation will not always include recommendations, and if they do they will be 'Recommendations' not necessarily 'directions'.

## 2. The Investigation Process – Before you Start

### The Investigation Report

*There is an Investigation Report Template at Appendix B to this Handbook.*

The structure of the Investigation Report should inform the structure of the Investigation, understanding what kind of information is required assists in ensuring that the investigation will be thorough.

Investigation report Outline:

#### 1. Background

Provides information about how the Investigation came about, who commissioned it, basic information about the Investigator, the investigating organisation and the commissioning organisation.

#### 2. The Investigation Process

Provides basic information about how the investigation was undertaken, what date it started, when interviews were undertaken, any other unusual information about why the investigation may have been undertaken in a certain way at the outset (time, distance, limitations, absence of witnesses).

### **3. The Complaint**

Information about how the complaint was made (oral, written, email, complaint form), who it was made by and who it was made against. The actual text should be provided after the basic information, including any remedy requests. If the complaint is particularly long a quotational summary might be required along with a reference to the appendix where the entire text should be included.

### **4. Relevant Instruments**

Outline of all possible legislation, policies, procedures and even values of the commissioning organisation. It is best to establish this before the investigation, however further instruments can be considered as the investigation unfolds. It is best to revisit what legislation is being considered regularly. Values should be considered at the request of the organisation, however they may not form part of any formal recommended outcome, depending on directions from the commissioning member.

#### *Summary of legislation, Policies Procedures and Values considered*

In addition to naming the appropriate legislation it is important to ensure that the investigation can be read in isolation (no need to refer to legislation or policies) as such short excerpts from the relevant instruments should be summarised here, quotations are best.

### **5. Complaint Summary**

This section provides a summary of the complaint, often complaints are long and as such the investigator needs to extract the actual complaints and summarise them in such a way as to clarify what the actual complaint is. All complaints should be listed, regardless of whether the complaint reflects a breach of legislation (or policies or values) or not.

### **6. Evidence Considered**

All evidence should be considered, even if it initially appears irrelevant, all evidence should be listed here (and contained in the Appendices) judgements about relevance are made in the following sections. This is where a list of the interviews should also be contained.

### **7. Findings**

The Findings should be made on a complaint by complaint basis, based on the complaint summary above. There are two main elements to the Findings Analysis of the Evidence and Assessment against Policies and Legislation.

Essentially a Finding is come to regarding the events and what actually happened, based on all the evidence provided, and where evidence is inconclusive, sometimes on the balance of evidence. When using the balance of evidence there needs to be fairly strong evidence that there was likely to have been misleading or contrary evidence provided by one individual, inconsistent evidence provided or that certain evidence is manifestly unlikely.

The Assessment against the legislation analysis whether the events as the investigator has interpreted them in the Analysis of evidence constitutes a breach of any legislation or policies. It is possible for the Investigator to find that a complaint accurately portrays the facts of an incident – but that the incident itself does not breach any legislation or policies.

### **8. Summary**

This is largely a free form area where the Investigator can make comments on the Findings. Whether it be limits on the investigation, identifying who the complaint was against or witnesses, or findings that a witness was unreliable or that there has been suspected collaboration between witnesses.

## 9. Outcomes

In this section the outcomes are succinctly described as having been ‘Substantiated, ‘Not Substantiated’ or ‘Unsubstantiated’ . It is important to explain to all parties at the start of the investigation that Not Substantiated is a neutral comment that states that there was insufficient evidence to prove that an event occurred. At this point you may also note that whilst incidents were substantiated/ unsubstantiated or not substantiated, they may not constitute a breach of legislation or policy.

This section is the section that is most likely to be provided to the Complainant and the Respondent. When discussing the report with the Member it is important to note that the whole report should not be provided, and in particular the Record of Interviews should not be provided. The Outcome page in the form of an Executive Summary should be provided with open discussion about the Findings from the investigation being made available to the Complainant and the Respondent (urging discretion on behalf of the organisation to ensure individuals who provided evidence are not identified).

## 10. Recommendations

This area may not be provided on all reports, as a member may not want Recommendations. Recommendations can be anything from no further action to training to consideration of a disciplinary sanction up to termination of employment. It is important to note that any recommendations are not instructions and that any further action should be taken in conjunction with advice from the appropriate authorities (internal or external).

# 3. Relevant Instruments

## Policies

Before starting an investigation all the appropriate state and federal legislation should be considered in defining and assessing the Complaint. Possible legislation that should be considered (this is not an exhaustive list):

- Fair Work Act (Cth) 2009
- Age Discrimination Act (Cth) 2004
- Sex Discrimination Act (Cth) 1984
- Occupational health and Safety Act
- State Long Service Leave Acts
- State Child Employment Acts
- Equal Opportunity Act (Vic) 2010

Other Work Safe guidance notes and supporting documentation may be considered where relevant.

## Policies and Values

Before beginning an investigation the investigator should request ALL policies and procedures from the organisation (not just the policies and procedures that the organisation thinks are relevant). Organisational values may or may not be considered as part of policies, if they are not referenced in a Code of Conduct direction from the organisation should be sought regarding whether they would like the Values considered.

## 4. Summarising the Complaint

As mentioned above often complaints are long and as such the investigator needs to extract the actual complaints and summarise them in such a way as to clarify what the actual complaint is.

The best way to go about this is to assess every allegation as if it is a complaint, if on assessment they do not constitute a breach that is a decision to be made when considering the evidence and the legislation. Some 'grouping' of incidents into one single complaint may also be necessary such as: "complainant argues that he was bullied over a period of X, involving three defined incidents of 'belittling', on X date, X Date and X Date".

Further complaints may arise in the interview process these can be added to the complaints, however the investigator should be aware of ensuring that new complaints are reflected in the questioning of the respondent and witnesses.

## 5. Interviewing

Interviewing is the most time and labour intensive part of investigating at least 1 ½ hours should be allowed for each individual and two hours for the respondent and complainant. In a particularly complex case longer will most likely be necessary, and regular breaks should be organised. The space used should be comfortable and private. It is important to be aware of the interviewee's state of mind, if they appear upset or stressed the interview should stop immediately and the interviewee given time to recover (and request a support person). The investigator should also be reasonably satisfied based on observation that the interviewee does not appear to be under the influence of drugs or alcohol.

Support: the interviewee should always be offered a support person, even if they have previously turned the offer down.

The Caution: The interview should be started with a caution and ensuring that the interviewee is comfortable with the process, asking for breaks and the implications of the discussion.

Recording the Interview: Different approaches can be used in line with what the interviewer is most comfortable doing, handwriting, typing or voice recording and later transcribing. It is important to ensure if recording that the interviewee gives their permission, if writing or typing it is best to explain to the interviewee that sometimes there may be a lack of eye contact and that you may need to get them to slow down in order to keep up. Each approach has positives and negatives, recording can make the individual uncomfortable, whereas written accounts are often challenged by the interviewee.

Questions: It can be best to pre-prepare some questions, but the investigator should be free to add questions, or ask questions multiple ways to ensure an understanding of both the question and the answer. If you feel you are badgering the interviewee, it can help to explain that it is not that you do not believe them you are simply ensuring that you understand them. Sometimes a question may need to be rephrased or repeated where an interviewee has indicated they do not understand the question.

Finalising the Interview: It is optional, but I believe sensible to get the interviewee to sign the record of interview straight away. If given time to consider the interviewee will want to revise what they have said, but it is also best to get them to endorse the investigators recollection of the interview.

Secondary Interviews: If further allegations or questions arise it is important to re-interview individuals if you need further clarification or to put new allegations to a respondent or complainant. Generally you will only ever need to re-interview the respondent and complainant.

## 6. Evidence

The majority of evidence provided in workplace investigations will be emails and minutes of meetings, however there may also be file notes, postal mail, memos and a range of other written materials. Everything provided to the investigator should be carefully considered and included as an appendix in the investigation report – regardless of the relevance. Often greater weight is given to this evidence over the interviews, however the investigator should seek to confirm the authenticity of emails or other correspondence provided if the evidence is challenged.

## 7. Findings

Findings are generally split into two areas analysis of evidence and assessment against legislation and policy. These can be dealt with as two separate sections or combined as two sections within each complaint. It is important to note that an analysis of the evidence that finds that events occurred, does not necessarily indicate whether there has been a breach of legislation and/or policy. A finding can be made that an event occurred but did not constitute a breach. It is important to still include this in the list of complaints (even if it may not actually constitute a ‘complaint’ in as much as it is not a breach of any legislation or policy). This is so that the Complainant and Respondent understand that the investigator did not find that the event did not happen as alleged, just that it was not a breach. For example, the investigator may find that an individual raised their voice in a certain situation but raised their voice simply to be heard and not as a ‘bullying’ behaviour.

### Analysis of Evidence

All the evidence relevant to the individual complaint should be listed (prose or bullet points are acceptable) as well as an assessment whether the information supports the complaint or does not support the complaint. Depending on the strength of the evidence a judgement call needs to then be made on the overall probability that an event occurred. A ‘balance of probability’ assessment may be made on the evidence available for example:

“Whilst the respondent claims that she did not raise his voice in the room, the receptionist outside her office was able to tell the investigator details of the discussion. As such it is found that, on the balance of evidence, it is likely that the respondent did raise her voice.”

The assessment is made on the evidence availability to determine on the objective test whether it more likely than not that the event occurred. The investigator should be cautious using the ‘balance of probability’ assessment where it is a “He said, She said” situation. The investigator should be able to point to at least one other source of evidence (including corroborating witnesses) when making a ‘balance of probability’ assessment.. Another source of evidence can be a more general assessment of the situation such as “the Respondent was uncooperative and was proven to have lied on several occasions through the interview” however the evidence of this assessment should be strong (such as they denied sending emails that the investigator was able to produce that were then admitted to). It is Okay to be inconclusive if there is not enough evidence to make a call! That may result in a finding

that the complaint item was not substantiated for lack of evidence which does not mean it did not happen but there is insufficient evidence to substantiate the allegation.

#### Assessment against Legislation and Policy

The outcome of the consideration of the evidence should then be considered against legislation and policy. Finding that it breaches one or the other, or one piece of legislation should not stop the assessment considering other policy or legislation as a particular incident may have breached several policies and/or (usually and!) several sections of legislation or several different pieces of legislation (or policy). As stated above it is possible that an incident has occurred but actually breaches no legislation or policy!

## 8. Summary

This area allows you to summarise the investigation and make any additional comments that did not fit anywhere else in the report for example:

Identifying the respondent: This seems obvious however you may need to clarify why you have identified the respondent, or why there are respondents beyond who the complaint was levelled at. For example a complainant may note that they have previously made a complaint to a supervisor, which was ignored, this may constitute a complaint and should be investigated in the report.

Access to All Possible Witnesses: Whilst it is unusual you may find that during the investigation you are unable to access a witness, this may be because they have travelled overseas, are ill, have left the organisation, refuse to speak to the investigator or the organisation refuses access to the individual. This should be noted wherever the evidence provided by the individual could have been relevant for example:

“The investigator did not have access to the receptionist to access whether the receptionist heard raised voices in the room, as such there is no corroborating evidence about whether there was or wasn’t shouting in the room”.

It may be particularly important to note this where a Complainant or Respondent has indicated that a particular witness was present. It is important that these types of Caveats are summarised on the outcome page, as this may be the only page that the Complainant and respondent receive.

The Summary should include any integral general statements about the investigation report or outcomes. If a Respondent was particularly unhelpful or proven to have lied this may be the place in the report for such observations. However avoid personal comments or observations and show evidence and examples to support any statements made in the summary

## 9. Outcomes

### **Substantiated / /Not Substantiated /Unsubstantiated**

As stated above once you have assessed the findings they should be summarised in the Outcomes section. Outcomes are succinctly described as having been ‘Substantiated, ‘Not Substantiated or Unsubstantiated’. It is important to explain to all parties at the start of the investigation that Not Substantiated is a neutral comment that states that there was insufficient evidence to prove that an

event occurred. At this point you may also note that whilst incidents were substantiated / unsubstantiated or not substantiated, they may not constitute a breach of legislation or policy.

This section is the section that is most likely to be provided to the Complainant and the respondent. Care should be taken to be succinct without omitting important information. It is important to understand that the outcomes may appear to make judgement calls but are simply statements of outcomes and should be supported through analysis. Whilst the whole report should not be provided, and in particular the Record of Interviews should not be shared, discussions with the respondent and complainant should be as open and transparent (urging discretion on behalf of the organisation to maintain privacy and confidentiality in not identifying individuals who provided particular evidence).

## 10. Recommendations

All recommendations should read as options for the organisation– not directions. It is best that multiple options are put forward where appropriate to encourage input from the organisation in the practical outcomes of the investigation. There may be a preferred option outlined with an explanation provided for organisations to have as much ownership as possible in the practical outcomes. Discussions with the organisation about what training they provide and when it was last provided (if not discussed during the investigation) should be had before making recommendations around training. Most investigations will advise some kind of training as an outcome, as well as possible de-briefing and counselling, particularly where a process has been particularly distressing for the respondent or complainant.

## 11. Troubleshooting

Many issues may arise during the investigation, where it is impossible to resolve issues it is important to note in the investigation what the issues may have been and if, in the opinion of the investigator, these issues impacted upon the investigation. Below is a note that was included in an investigation where the employer denied the investigator access to potential witnesses, these witnesses may or may not have impacted on the investigation however it was important to note in the investigation what had happened.

*Note: These findings may be compromised as the investigator sought to also interview the two other witnesses, access to these two individuals was denied (see Appendix F). As such the evidence assessed in considering the complaint was incomplete.*

This note was added at several points in the investigation, including on the Outcomes page, the page that the complaint and respondent would most likely have had access to.

Investigation Format: Investigations should be provided in a protected PDF format to ensure that the report retains its integrity (this can also help resolve issues with different word versions etc. As well as forwarded to the organisation in hard copy. An executive summary can be prepared to provide to the complainant and respondent outlining the outcomes - however the complainant does not require access to any recommendations.

## 12. Conclusion

Double check your reports and conclusions with at least one other (uninvolved) person for peer review before finalising.

The Outcomes page in the form of an executive summary should be provided to the Complainant and the Respondent. There should be a one on one (with support people where requested and/or required) discussion with each of the individuals about the findings. The discussion should be as open and honest as possible without revealing which ‘witnesses’ have assisted in the conclusions. Where possible the investigator should not be the individual who conducts this discussion, this allows the manager (or whoever has the discussion), to freely point out that the finding was an ‘on balance decision of the investigator’ without being the subject of recrimination from the respondent or the complainant.