

Workplace investigations

Directive: 17/20

Effective date: 25/09/20

1. Purpose

- 1.1 The *Public Service Act 2008* (PS Act) requires the Commission Chief Executive (CCE) to make a directive about the procedures for investigating the substance of a grievance or allegation relating to a public service employee's work performance or personal conduct.
- 1.2 The purpose of this directive is to:
 - (a) outline the procedures for investigating the substance of a grievance or allegation relating to a public service employee's work performance or personal conduct
 - (b) outline how natural justice requirements may be met in relation to a workplace investigation
 - (c) provide for periodic reviews of a workplace investigation, including the period within which reviews must be conducted, to ensure timely finalisation of the investigation.

2. Authorising provisions

This directive is made pursuant to sections 53 and 192A of the PS Act.

3. Application

- 3.1 This directive applies to public service employees as defined in section 9 of the PS Act.
- 3.2 This directive applies to the following entities (each entity being an 'agency' for this directive) and their employees:
 - (a) departments
 - (b) public service offices listed in schedule 1 of the PS Act
 - (c) an entity declared to be a public service office under a regulation and where the regulation applies this directive to the entity (sections 22-23 PS Act).
- 3.3 This directive does not replace, modify or revoke any legislative requirements that apply to the management of particular types of complaints. For example corrupt conduct under the *Crime and Corruption Act 2001*, public interest disclosures under the *Public Interest Disclosure Act 2010*, or complaints under the *Human Rights Act 2019* (HR Act).
- 3.4 Section 52 of the PS Act outlines the relationship between a directive and industrial instrument including how to deal with inconsistencies.

Directive

4. Principles

- 4.1 The Queensland Government supports employees and managers to maintain a high standard of professionalism, conduct and work performance, and to ensure inappropriate conduct or performance is dealt with effectively, and in a timely manner that is proportionate to the allegations or concerns.
- 4.2 In the majority of instances, timely management action or using positive performance management strategies will be appropriate, and may negate the need for a more formal process, including a workplace investigation. Less formal management enquiries by an agency may be sufficient to determine:
 - (a) the relevant facts
 - (b) if a complaint or an allegation is likely to be substantiated or unsubstantiated
 - (c) the appropriate action, including whether or not a workplace investigation process should commence.
- 4.3 There will be some matters where a workplace investigation is warranted such as for matters that may proceed to discipline. In these instances, it is critical that the investigation be well managed by the agency, ensuring it is conducted in an appropriate, fair, timely and resource-effective manner.
- 4.4 A workplace investigation, whether internal or external, is not a disciplinary step. It is a separate process to any formal disciplinary process as provided for under chapter 6 of the PS Act.
- 4.5 Workplace investigations about the substance of a grievance or allegation relating to a public service employee's work performance or personal conduct are to be conducted fairly, and in a timely manner that is proportionate to the allegations or concerns.
- 4.6 Workplace investigations must:
 - (a) be free from conflict of interest or bias, with separation of the role of investigator and decision maker
 - (b) have clear terms of reference that ensure transparency of process
 - (c) be conducted in accordance with the principles of natural justice
 - (d) make allowance for the involvement of support persons and/or industrial representatives
 - (e) be conducted in a way that ensures confidentiality is maintained, as far as possible and to the extent it is essential for a fair investigation
 - (f) be conducted ethically and lawfully
 - (g) be conducted in a timely way that is proportionate to the allegations or concerns
 - (h) involve regular and transparent communication
 - (i) be conducted by an employee of the agency wherever possible. External investigations are the exception.
- 4.7 Under the HR Act a decision maker has an obligation to act and make decisions in a way that is compatible with human rights, and when making a decision under this directive, to give proper consideration to human rights.

5. Determining whether to conduct a workplace investigation

- 5.1 A chief executive may decide to investigate the substance of a grievance or a work performance matter. In deciding to commence a workplace investigation, a chief executive must consider:
- the seriousness of the alleged conduct
 - whether or not there is a sufficient amount of evidence already available (and whether a workplace investigation in these circumstances is an appropriate use of agency resources)
 - how natural justice requirements will be met, and
 - whether there is a more appropriate option to resolve the matter through management action, alternative dispute resolution, or implementation of positive performance management strategies.

6. Conduct of investigations

- 6.1 Before commencement of a workplace investigation, a chief executive must authorise an investigation terms of reference that clearly outlines the terms and scope of the investigation.
- 6.2 The chief executive must demonstrate consideration of conflicts of interest and ensure conflicts of interest are declared, monitored and appropriately managed by all parties to the workplace investigation.
- 6.3 A subject employee must be given reasonable opportunity to participate in the investigation, this includes being advised of allegations against them, the opportunity to seek industrial advice and representation and being afforded reasonable opportunity to provide information about the allegations.
- 6.4 A chief executive may direct a public service employee to participate in a workplace investigation where it is lawful and reasonable to do so.
- 6.5 A subject employee has an obligation to cooperate with the investigation process, where they have been lawfully and reasonably directed to participate, which may include:
- attending an interview and answering questions relevant to the authorised terms of reference
 - answering questions truthfully and to the best of their knowledge
 - providing a response to written allegations relevant to the authorised terms of reference
 - producing any documents or other objects that were created in the course of their employment or are the property of the agency.
- 6.6 A person required to attend an interview as part of a workplace investigation:
- must be given reasonable notice of the interview so that the person can seek advice and arrange a support person
 - must be given a copy of their record of interview, if requested.
- 6.7 The findings of an investigation:
- are not binding on the chief executive
 - are not evidence that can be relied upon by the chief executive. The chief executive may only rely on the evidence that has informed the findings.

7. Support persons and industrial representatives

- 7.1 A subject employee may be supported by a person of their choosing and/or represented by an industrial representative of a union to which the person is a member provided the support person:
- is not otherwise involved in the investigation (for example, as a subject employee or witness)



- (b) does not provide direct evidence on behalf of, or otherwise talk for the subject employee.
- 7.2 If a support person is an officer of a union to which the employee is a member, the officer also has a role to support their member's interests, including actively ensuring that natural justice and procedural fairness has been afforded to their member.

8. Natural justice in investigations

- 8.1 Investigations must be conducted in a fair and balanced manner with no predetermined views.
- 8.2 An investigator must:
 - (a) act fairly and without bias, ensuring they do not make findings for which they have a conflict of interest
 - (b) inform a subject employee of the substance of any allegations against them, or grounds for adverse comment about them
 - (c) give participants in an investigation a reasonable opportunity to put their case, whether in writing or at an interview, or otherwise hear all relevant parties and consider submissions from them
 - (d) make reasonable enquiries before finalising an investigation
 - (e) conduct the investigation in a timely way.
- 8.3 Natural justice does not require that the subject employee be given access to every document seen by, or information given to an investigator. The subject employee must be made aware of what they are accused of and by whom, with sufficient particularity to be able to answer the allegations, and be given the opportunity to answer the allegations.

9. Use of external investigators

- 9.1 An external investigator may only be engaged if it is reasonably necessary or expeditious to do so.
- 9.2 An external investigator must conduct an investigation on the same basis that an internal investigator must conduct an investigation (that is, in accordance with the PS Act and this directive).
- 9.3 The circumstances in which an external investigator may be engaged include:
 - (a) the requirement for specialist skills
 - (b) the existence of a conflict of interest
 - (c) the risk to public confidence
 - (d) resourcing, capability and capacity.
- 9.4 The chief executive must comply with all relevant procurement obligations when engaging an external investigator.
- 9.5 A suitably qualified external investigator must be selected from the relevant standing offer arrangement unless a different provider is approved in writing by the CCE prior to commencement of the investigation.
- 9.6 The chief executive must report on the conduct of the external investigation in accordance with the directive relating to workforce profile and work performance information.
- 9.7 An external investigator's related legal practice or other advocacy entity must not be engaged to advise or act for the agency in actual or contemplated proceedings related to an investigation.



10. Periodic review of investigations

- 10.1 This section applies to a work performance matter, other than a corrupt conduct matter.
- 10.2 A chief executive is required to finalise an ongoing investigation in a timely way.
- 10.3 An investigation commences when a chief executive authorises an investigation terms of reference.
- 10.4 An investigation may be extended by the chief executive, following review:
 - (a) at six months by an independent decision maker in the agency
 - (b) at nine months by the chief executive
 - (c) at 12 months:
 - (i) for employees of the department responsible for health, in accordance with section 62(2) of the PS Act, by the chief executive of that department
 - (ii) for employees of the department responsible for education, in accordance with section 62(2) of the PS Act, by the chief executive of that department
 - (iii) for employees of all other agencies, by the CCE.
 - (d) at 18 months by the CCE, and every three months thereafter.
- 10.5 The review must consider:
 - (a) whether the investigation complies with the PS Act and this directive
 - (b) whether the investigation has been conducted in accordance with the investigation terms of reference, and
 - (c) the reasons for any delay finalising the investigation.
- 10.6 An investigation may continue while the review is completed.
- 10.7 The findings of the review must be communicated to the employee in writing.

11. Subject employee may ask Public Service Commission for review of investigation

- 11.1 This section applies to a workplace investigation related to a work performance matter, other than a corrupt conduct matter.
- 11.2 A subject employee may ask the commission to conduct a review of a procedural aspect of the agency's handling of the workplace investigation, provided:
 - (a) the subject employee reasonably believes the chief executive has not complied with this directive
 - (b) the subject employee has utilised internal review procedures under the directive on individual employee grievances
 - (c) having utilised the procedures at clause 11.2(b) the subject employee is dissatisfied with a decision made following the internal review, and
 - (d) a decision has not been made for the work performance matter that the subject employee may appeal under chapter 7, part 1 of the PS Act.
- 11.3 The subject employee must request the review in writing.
- 11.4 The request under clause 11.3 must address the eligibility for review under clause 11.2 and include:
 - (a) a clear statement of how the employee believes the agency has not complied with this directive, and
 - (b) the action the employee seeks from the review.
- 11.5 On receiving the request, the commission may, but is not required to, conduct a review of a procedural aspect of the agency's handling of a work performance matter contemplated in section 88IA of the PS Act, and may but is not required to give the chief executive a report on the review.



- 11.6 The CCE must provide a written decision to the subject employee, along with reasons for the decision, including when the CCE decides not to conduct a review under clause 11.5.

12. Appeal rights

- 12.1 A subject employee has a right of appeal in relation to a direction given to a chief executive about the handling of a work performance matter, to the extent the direction affects the subject employee, as provided for under section 194(1)(ba) of the PS Act.

13. Transitional arrangements

- 13.1 Section 296 of the PS Act provides the transitional arrangements for disciplinary processes, including relevant investigations under section 187(1)(a) or (f)(ii) or (iii) as in force immediately before commencement.
- 13.2 Provisions relating to periodic reviews under clause 10 and provisions relating to reviews requested by a subject employee under clause 11 apply to work performance matters that commence after the commencement date of this directive.

14. Definitions

Agency—see application section

Balance of probabilities refers to the civil standard of proof. For an allegation to be substantiated on the balance of probabilities, the evidence must establish that it is more probable than not that the alleged conduct occurred. The strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the:

- (a) relevance of the evidence to the allegations
- (b) seriousness of the allegations
- (c) inherent likelihood or improbability of a particular thing or event occurring
- (d) gravity of the consequences flowing from a particular finding.

Chief executive in the context of exercising a decision making power, includes a person to whom the chief executive has delegated the decision making power.

Disciplinary process means anything done in making (or in contemplation of making) a disciplinary decision under chapter 6 of the PS Act, including making a disciplinary finding under section 187, section 187A, or section 188AB and taking disciplinary action under section 188, section 188A, section 188AB, section 188AC or section 188AD.

An **external investigator** is a person or service provider that is engaged through a contract arrangement to conduct a workplace investigation. Suitably qualified external investigators may be sourced through the Professional Services Standing Offer Arrangement (SOA), unless the required expertise is not available under the SOA.

An **internal investigator** is a suitably skilled Queensland Government employee who is appointed by the chief executive to conduct a workplace investigation.

A **management enquiry** involves a manager or other assigned person making enquiries into a matter to inform a decision about how to progress. The enquiries may involve conversations with employees and/or a review of documents, obtaining a version of events, in writing or verbally. Management enquiries do not involve terms of reference, formal 'investigative interviews' or an external provider conducting or supporting the enquiry.

Natural justice is a right recognised and defined by law that involves two key elements—the hearing rule (everyone is entitled to a decision by a disinterested and unbiased adjudicator), and the bias rule (the parties shall be given adequate notice of the case against them, and a right to respond)

Work performance matter means a matter involving a public service employee's work performance or personal conduct, including, for example, an allegation against the employee that constitutes or would, if proved, constitute a disciplinary ground.

Union, for the purpose of this directive, means an employee organisation registered under chapter 12 of the *Industrial Relations Act 2016* or under the *Fair Work (Registered Organisations) Act 2009* (Cth).

A **workplace investigation** occurs when a chief executive decides that an investigation should be conducted. An investigation can be defined as the unbiased gathering and evaluation of evidence.

15. Related resources and reference materials

This material does not form part of the directive but may assist in the interpretation and application of the directive and should be considered by the chief executive:

- Chapter 3, Part 6 (Functions of commission relating to work performance matters) of the PS Act are relevant provisions for workplace investigations
- [Managing workplace investigations: a practical guide for the Queensland public sector](#)
- [Commission chief executive guideline: discipline](#)
- QIRC information about [public service appeals](#)
- [Directives about positive performance management, employee suspensions, workplace investigations, appeals](#)
- [Find resources about managing employees](#) in the Queensland Government
- [Role of a support person](#) in the Queensland Government
- Crime and Corruption Commission's [Corruption in focus: a guide to dealing with corrupt conduct in the Queensland public sector](#).