



BELL GULLY

The internal investigator

Rob Towner and Simon Ladd
7 May 2009

The qualities of the internal investigator

You will be:

- Highly organised and also flexible and adaptive
- Empathetic and also able to direct others
- Responsive to internal and external expectations
- Practical and also acutely aware of the legal context
- Able to leap tall buildings in a single bound

Why are you investigating?

- Internal complaint – dishonesty / serious misconduct, breach of confidence, sexual harassment
- Workplace accident
- Customer complaint
- External investigation

One size doesn't fit all

- Are you investigating current or past conduct?
- What's the timeframe?
- Is the investigation internal or is there a parallel external investigation?
- What are the possible outcomes?

Planning the investigation

- What is the legal context?
- What are the deadlines?
- Who should manage the process?
- Who should investigate?
- What evidence do you need?
- How should you manage employees?
- What are your external obligations?
- How should you protect privilege and confidentiality?
- What are the possible – and desired – outcomes?

What is the legal context?

- What standards does the law require you to meet?
- What process does the law require you to follow?
- What powers do you have?
- What powers do external investigators have?

What are the deadlines?

- Understand the deadlines from the start
- Are external deadlines negotiable?
- What are the implications for resourcing the investigation?

Who should manage the process?

- Identify the person who is responsible
- The privilege-practicality trade-off
- Identify what support they need

Who should investigate?

- Choose the right investigator
 - Judgment – asking the right questions
 - Ability to get employee co-operation
 - Awareness of the legal context
- Do you need (other) external assistance?
 - External investigator
 - Legal advice
 - IT support (possibly forensic IT services)

What evidence do you need?

- What's the purpose of the investigation?
- Who are the relevant witnesses?
- Where are the documents?
 - Electronic
 - Hard copies
 - Archives
- Preserving documents / document destruction

How should you manage employees?

- What are the employees' obligations to participate?
- How do you keep employees motivated?
- Alert employees to confidentiality and privilege issues
- Confidentiality and privacy for employees
- Obligations to employees who may have been involved in breaches

What are your external obligations?

- External investigators
- Should this be reported to the Board?
- Should this be reported to the Stock Exchange?
- Should you notify your insurer?
- Managing media interest
- Managing customer interest

Privilege and confidentiality

- Privilege applies to communications between:
 - client and lawyer for the purposes of legal advice
 - client and lawyer or third party for the purpose of reasonably apprehended litigation
- Implications for management of investigation
- Privilege and external investigators
- Confidentiality not usually ground for declining to provide material to external investigators
- Privilege against self-incrimination

Dealing with outcomes

- Evaluating the evidence
- Consider whether you need to give – or to get – advice
- What is the outcome?
- What can you do to mitigate the situation?
- Who do you need to report to?
- What employment issues arise?
- How do you stop breaches happening again?



BELL GULLY

Questions