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By email: mbritton@ombo.nsw.gov.au

Dear Professor McMillan

Discussion Paper: The use of external investigators by NSW Government agencies

Thank you for the opportunity to provide comments in response to your Discussion Paper on the use of external investigators. I have responded to each of the questions set out in the Discussion Paper.

1. What are your views on whether agencies need guidance to assist them decide whether an externally appointed investigator is required, or if the situation can and should be handled through a different process?

Legal Aid NSW supports the development of guidelines to assist agencies in deciding whether an investigation is required and, if so, whether an external investigator should be used.

The *Government Sector Employment Rules 2014* at clause 38(2) provides basic guidance on the circumstances in which an employer may decide not to proceed with a matter after an allegation of workplace misconduct has been made. If the employer is satisfied that the allegation is vexatious or trivial, or the conduct did not amount to misconduct, or there is likely to be difficulty establishing the facts of the matter, the employer may decide not to proceed. This is the extent of the guidance provided to assist an agency in determining whether an allegation of misconduct should be investigated, and there is no guidance for determining who should conduct the investigation.

Agencies are required to develop their own guidelines and assessment tools. The quality of these resources would depend on the experience and expertise of the employees who develop the guidelines and make assessments against them. As a medium sized agency, Legal Aid NSW has not had the resources to develop its own guidelines. The Australian Public Service Commission has published a document *Handling Misconduct: a human resource manager's guide* to help APS agencies and employees understand misconduct processes in the Australian Public Service. It includes a section on selecting an investigator, and an appendix with information on engaging an external investigator. A similar guide for the New South Wales public sector would be very useful, and would improve the quality and consistency of decision making around investigations into misconduct.

With improved resources to assist agencies in managing allegations of misconduct, it is likely that smaller agencies would feel able to conduct more investigations internally. While it has been the standard practice at Legal Aid NSW to use external investigators, we are conscious of the benefits of conducting investigations in-house. Legislation including the *Government Sector Employment Act 2013*, the *Public Interest Disclosures Act 1994*, and the *Independent Commission Against Corruption Act 1988*, provide that the agency head is responsible for decisions in relation to allegations of misconduct. It is our view that agencies should take ownership of these decisions. There are benefits for agencies that develop their own capacity for identifying, assessing and resolving allegations of misconduct, including:

- development of a complaint handling culture
- fostering confidence in systems and procedures and a 'speak up' culture, and
- enhancing connections between the relevant business area and the misconduct investigation process to ensure that solutions are the right fit, with less reliance on formal processes.

Legal Aid NSW has created a role within its People and Organisational Development Division with responsibility for complaints and conduct, and has moved down the path of conducting more investigations in-house. We would value guidelines to assist in developing this work, including guidance on the factors that indicate an external investigator should be engaged.

2. What are your views on how external investigators are selected to conduct administrative investigations?

There is currently no formal system within Legal Aid NSW for selecting external investigators. We rely on advice from our partner agencies or a process of trial and error, tending to use those firms we have used in the past where we have been most satisfied with the quality of their work. This approach has disadvantages as the investigators, if overused, will develop conflicts based on their past involvement with particular officers and locations.

It would be helpful if more information was available about the investigators who are available to provide these services, to assist in the selection of a suitably qualified and experienced person. The APSC *Handling Misconduct* Guide includes detailed guidance on selecting an external investigator. Similar guidelines for the New South Wales public sector would be helpful.

3. What qualifications/experience criteria should be applied to selecting an investigator to conduct an administrative investigation?

From our experience, it is important that investigators have experience investigating people issues within the NSW Government misconduct framework. Investigators with a policing background and experience in criminal and forensic investigations tend not to be the most suitable people to conduct administrative investigations. While formal qualifications have not turned out to be a reliable indicator of quality, a detailed knowledge of administrative law principles and the relevant public sector legislation is vital.

Legal Aid NSW is moving towards conducting more investigations in-house, using external investigators for more complex or sensitive matters. For these types of matters a highly skilled and experienced investigator is required. As a legal organisation, Legal Aid NSW tends to value legal qualifications and experience, and see these as an indication that the investigator has the necessary investigative skills and knowledge of administrative law.

4. Should agencies work to approved lists of investigators across NSW for external investigations tailored to specific agency needs? If so, who should run such a scheme?

The NSW Procurement Performance and Management Services Scheme is useful for streamlining the process of engaging external service providers, and the NSW Government recommends agencies use the scheme. Providers have been pre-screened and a provider selected from the scheme is engaged under an existing contract. Most of the Legal Aid NSW investigations would cost less than \$50,000. Service providers registered to provide services below this value are not fully assessed before being included in the Scheme. Service providers who have been fully pre-qualified have been assessed as demonstrating capability and experience in the specified capabilities, which include investigation services. By selecting a supplier from the list who has been prequalified to provide investigation services, an agency can be confident that the service provider is able to conduct investigations, and also meets the other requirements for participation in the scheme which mainly relate to the soundness of the business. But the scheme does not allow for comparative assessment of registered suppliers to select the supplier best suited to the particular investigation. The scheme works well as a mechanism for engaging a service provider who has been selected based on information available from other sources.

Legal Aid NSW engages very few external investigators, and so has limited knowledge of the available investigators and their specific skills. Currently we seek recommendations from partner agencies, or rely on investigators we have used previously. This approach means we are selecting from a very small number of possible investigators, who may not have the specific skills needed for a particular investigation. Also, this approach means we use the same investigator on numerous occasions, which can raise concerns about conflict and bias.

We would value a list or panel of approved investigators which provides details of their qualifications and experience, as this would provide a larger pool of potential investigators from which to select the one most suited to the particular investigation. We have no views on which agency would be best placed to co-ordinate such a panel.

5. ***[For Local Councils Only] Would there be merit in having a central panel of investigators specifically for the conduct of investigations in local government, given the complexities of investigating matters in accordance with legislation such as the Local Government Act 1993 and the Environmental Planning and Assessment Act 1979?***

This question is not applicable to Legal Aid NSW.

6. **In light of how the IAB previously assessed, accredited and managed investigators prior to its disbandment, is there a need for a government body that is able to assess, accredit and manage investigations on behalf of other government agencies?**

Legal Aid NSW does not feel that a specialised government body of this type is warranted. From our experience, the quality of investigations conducted by IAB investigators was no better than the quality of investigations conducted by private firms. Also, when using IAB we did not get the opportunity to directly choose the investigator, but rather were limited to IAB's available panel. We would prefer to have control over selection of an investigator to ensure their skills and experience are appropriate for the particular investigation. If an investigation involves Aboriginal employees, or employees with special needs, or aggressive employees, it is particularly important that the investigator has the appropriate background and experience to be able to address all the relevant issues.

Rather than developing a specialist investigation agency, it is preferable that agencies develop their own expertise, and are provided with support and resources to do so. It is important to note that when an allegation of misconduct has been made, the decision maker is not bound by the findings or recommendations of an investigator. The decision maker must bring his or her own mind to the matter and decide whether the alleged conduct has been established, whether it constitutes misconduct, and any action that should be taken.

Having an additional level of quality assurance for external investigators does not change the fact that the decision maker must exercise judgement. It is more important that agencies have internal expertise and are able to assess the quality of an external review, and determine the weight to be given to the external investigator's findings and recommendations.

At Legal Aid NSW we have made the decision to manage investigations internally wherever possible. In 2014-15 twelve misconduct investigations were completed. Eight of these matters were referred for external investigation. In August 2015 Legal Aid NSW established a new role of Senior Consultant Workplace Standards. In 2015-2016 21 workplace complaints were recorded. The creation of this in-house role saw a 40% reduction in the use of formal investigation as a means of complaint resolution and, despite the increase in the number of complaints, only two matters were referred for external investigation.

It is important for an agency to have the capability to conduct its own investigations, as this is conducive to a complaint handling culture, and enhances confidence in the agency's procedures. If this capability is reduced, an agency will have no option but to refer the majority of matters for external investigation, but will be less able to work effectively with external investigators. Without internal investigation capability, an agency lacks the skills to assess potential investigators prior to selection; engage with the external investigator in developing appropriate terms of reference; and assess the quality of the investigator's report, findings and recommendations.

7. [For government agencies only] Does your agency have a policy or other guidance material for assessing, selecting and managing external investigators conducting administrative investigations? Is so please provide copies.

Legal Aid NSW does not have any policies, procedures or guidelines for assessing, selecting and managing external investigators. The role of Senior Consultant Workplace Standards was recently created with its primary purpose being to:

- deliver and maintain professional standards in the management of workplace complaints and governance and drive positive behaviours in people issues and ethical conduct across Legal Aid NSW, and
- undertake case management of investigations and provide support and assistance to the Manager Workplace Relations on conduct and workplace behaviour matters.

A key accountability of the role is to 'undertake the case management of investigations into alleged breaches of departmental policies and/or improper conduct and related workplace issues and prepare reports, briefings and investigation plans and make recommendations to improve governance across Legal Aid NSW.'

We agree with the comment in the Discussion Paper that a crucial quality assurance element in the use of external investigators will be the appointment of an agency officer to manage the contractual arrangements, and we agree that the person undertaking that role should have experience in assessing the conduct of investigators and be familiar with administrative law principles. One of the major responsibilities of the Senior Consultant Workplace Standards role is the negotiation of contracts with external investigators, management of the investigative process and evaluation of the soundness of the investigation, as well as other related functions. This role is separate from the person responsible for making decisions in conduct matters, the Legal Aid NSW Chief Executive Officer.

8. Should NSW develop minimum standards for administrative investigations, similar to the Commonwealth, which must be complied with? If so, what should those standards contain?

The Australian Government Investigation Standards apply to all investigations conducted by Australian Government agencies, including criminal investigations conducted by the Australian Federal Police. This is necessarily a very high level document. Legal Aid NSW would support the establishment of minimum standards for investigations conducted by New South Wales agencies. However, standards of this type would need to be supported by more detailed guidelines specific to investigations into allegations of misconduct, such as those in the *APSC Handling Misconduct Guide*.

9. Should the quality of external investigations be audited/monitored? If so how?

As discussed on our response to question 6, agencies should retain and develop the capacity to conduct investigations in-house. With these skills agencies would be able to assess the quality of the investigations conducted by external investigators engaged by them. Supporting agencies in developing their in-house investigation skills would ensure that agencies are informed consumers of external investigation services. This is likely to be more effective in improving the quality of external investigations than an audit or quality assurance process conducted by an independent agency.

10. [For NSW Government agencies only] In your experience, does outsourcing investigations provide value for money?

In our experience, outsourcing investigations does not provide value for money. In 2014-2015, prior to the appointment of the Senior Consultant Workplace Standards, Legal Aid NSW spent \$101,590 on external investigations in eight matters. In 2015-2016, following the appointment of the Senior Consultant Workplace Standards, the number of recorded workplace complaints more than doubled, from eight to 21, but only two investigations were outsourced at a cost of \$16,000.

If the in-house role had not been created and Legal Aid NSW had continued to rely on formal external investigations, the cost of external investigations would have been significantly greater than the cost of the new role.

11. [For larger NSW Government agencies only] In your experience is there evidence to indicate it is more cost effective to have qualified internal investigators in large agencies than to outsource the function?

While Legal Aid NSW is not a large organisation, we have found it to be more cost effective to have the in-house capacity to undertake investigations. There are also additional benefits from having in-house skills in this area. Legal Aid NSW is better able to assess and manage workplace complaints since the appointment of the Senior Consultant Workplace Standards. There has been less reliance on formal investigation and, as a result, more timely and effective resolution of these complaints. Formal investigations take, on average, 50 days to finalise, with external investigations taking longer than internally conducted investigations. By contrast, informal resolution of complaints takes, on average, 12 days.

12. In some small agencies limited resources may make it impractical to engage external investigators. In your view, are options available to ensure matters are appropriately dealt with in these instances?

At Legal Aid NSW we have enhanced our internal capacity to respond to allegations of misconduct by the creation of the Senior Consultant Workplace Standards role. This role can undertake investigations directly. We have also commenced a process whereby other employees are being trained to undertake investigations, under the guidance of the Senior Consultant Workplace Standards. In the longer term we propose to develop a panel of employees capable of conducting investigations, to reduce reliance on the Senior Consultant Workplace Standards and external investigators.

We believe that we now have good processes in place to ensure that we deal effectively with misconduct matters, with an emphasis on resolving matters internally, and a clear understanding of the types of matters which are more appropriately referred for external investigation. We are continuing to develop our capabilities in this area.

While the costs of engaging external investigators is significant, it is difficult for small agencies to develop the in-house capability to undertake this work. If guidelines similar to those in the APSC *Handling Misconduct* Guide were available, together with training for NSW Government employees with responsibility for handling workplace complaints, small agencies would be better able to deal with conduct matters within their existing resources.

If you would like further information please contact Annmarie Lumsden, Director Strategic Planning and Policy on annmarie.lumsden@legalaid.nsw.gov.au.

Yours sincerely

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