



Review of the HSE Human Resources Investigation Process from a local Service Area Level and National Level

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Review of the HSE Human Resources Investigation Process from a Local Service Area Level and National Level

1. Introduction

- 1.1. This review was commissioned by the HSE's National Director of Human Resources, Ms Anne-Marie Hoey, in December 2019. The terms of reference for the review, which cover a wide ambit, are set out at the Appendix.
- 1.2. The purpose of the review is set out in the terms of reference in the following terms: -

“Together with the Staff Panel of Trade Unions, Human Resources management have agreed that a review will be undertaken in order to address the matters relating to HR investigations that were raised in the National Joint Council letters dated 21st and 27th March 2019 addressed to Mr John Delamere, HSE Head of Corporate Employee Relations Services and Ms Rosarii Mannoin, HSE National Director of Human Resources respectively.

The purpose of the review is to consider and address all matters raised in the communications outlined above, having regard to the different functions exercised by local management, local HR, The National Investigations Unit, commissioners and investigation teams”

- 1.3. The mode by which the review is to be undertaken is also prescribed by the terms of reference.
- 1.4. In effect, this review is focused on the operation of the HSE Human Resources Investigation Unit, which was established in or about October 2016 for the purpose of investigating complaints by or against Health Service staff. As appears from its stated purpose, the genesis of the review lies in concerns raised by the Staff Panel of Trade Unions representing HSE staff. Those concerns were outlined in the correspondence from the Unions dated 21st March 2019 and 27th March 2019 (referred to in the passage from the Terms of Reference set out above).
- 1.5. While differently expressed in both letters, the main import of those concerns are encapsulated in the letter from Mr Tony Fitzpatrick, Director of Industrial Relations, INMO, in his capacity as Chair of the Staff Panel. This letter confirms points raised by the Unions at a meeting with HR Management on 21st March 2019. The concerns raised were set out in the following terms: -

“1. The failure of the HSE to engage and consult, as required under the Protection of Employees (Information and Consultation) Act 2006, with regard to the establishment of the National Investigation Unit

2. The issues of concern apply nationally and effect all unions in regard to the operation of the investigation’s

*unit and the interface between the commissioning officers
the National Investigation Unit,*

3. *The unions outlined that there were significant issues of concern at present including:
 - a. *Failure to agree investigators*
 - b. *Failure to agree terms of reference*
 - c. *Delays with Investigations**
4. *Refusal of the HSE to attend third parties when disputes arise with regard to terms of reference and agreed investigators*
5. *Lack of consistency with regard to utilisation of internal and external investigators*
6. *Outcomes for employees are worse and causing greater stress and anxiety as a result of long delays, failure to get information and the lack of a contact point within the National Investigation Unit*
7. *Concerns with regard to transparency, probatory and maintaining natural justice*
8. *Failure to agree investigators with appropriate clinical expertise with regard to various investigations under Trust in Care, Disciplinary and Dignity at work policies*

The unions put forward the following proposals: -

- 1. That the HSE would confirm their failure to appropriately engage and consult with regard to the investigation of the National Investigation Unit*
- 2. That the parties would agree an independent reviewer who would examine the issues of concern between the unions and the HSE under agreed terms of reference and timeframes. The reviewer would meet with the unions to hear their concerns and with the national HR and the Investigation Unit*
- 3. Where matters of dispute currently exist with regard to terms of reference and investigators, that the office of the Director of HR would nominate a person to meet with the relevant union and with a representative of the National Investigation Unit to resolve those difficulties*
- 4. If investigations are being established with agreed terms of reference and investigators they can proceed as normal”*

1.6. Following the meeting of 21st March 2019, the National Director of Human Resources wrote to the Staff Panel, by letter of the same date, addressing the points raised by the unions. In relation to the proposal to undertake a review of the investigation process the National Director said the following:

“In relation to the proposal that an external person be engaged to review the unit, as I indicated at the meeting there are financial constraints on expenditure of this nature. However, as an exceptional matter I can agree in principle to this proposal and invite the unions to nominate a suitable” person.”

2. Methodology

- 2.1. In the course of this review I met with the Staff Panel of Trade Unions, the Management of the Investigations Unit and with a number of HSE Managers who are directly or indirectly involved in the investigation process. The purpose of the meetings was to obtain an insight into how the effectiveness, and possible deficiencies, of the Unit is perceived by those who interact with it. For the purpose of ensuring candour at these meeting they were conducted on the basis of confidentiality. Accordingly, while a general overview of the views expressed will be given, they will not be attributed to any individuals.

- 2.2. The review commenced in December 2019. The Terms of Reference envisaged its completion within a period of eight weeks from its commencement. There were initial difficulties in arranging meetings with the various individuals and groups that I was required to meet. However the principal cause of the delay in completing this review was the intervention of the COVID-19 emergency, which necessitated suspension of work on the project.

2.3. In accordance with the terms of reference for this review, I provided a draft of my report to the National Director of Human Resources, as Commissioner of the review, and to the Chair of the Staff Panel of Trade Unions, for their observations and comment, in July 2020. I received helpful and constructive input on the draft from both parties, which has been taken into account in finalising this report.

3. The Investigation Process

3.1. The Investigation of complaints within the HSE is undertaken pursuant to one of three nationally agreed policies and procedures. They are: -

- Trust in care
- Dignity at work
- HSE disciplinary procedures

3.2. The Trust in Care policy is directed at ensuring that the appropriate level of service is provided to those in the care of the HSE or its agents. It was developed in 2005 and is primarily directed at allegations of abuse against those in care

3.3. The HSE dignity at work policy was developed in 2009. It is directed at ensuring that all employees of the HSE are treated with dignity at work and exercise a duty of care and respect to fellow employees

- 3.4. The HSE Disciplinary procedure was developed in 2007. Like all workplace disciplinary processes, it is directed at promoting proper adherence by HSE staff to acceptable standards of performance, adherence to workplace rules and procedures and dealing with departures from those standards.
- 3.5. Investigations are conducted, under each of these policies, by a unit established within the HSE in 2016 known as the Human Resources National Investigation Unit (hereafter referred to as ‘the Unit’)

4. The Policies within which the Unit Operates

- 4.1. In order to address the matters prescribed by my terms of reference, it is first necessary to examine each of the policies within which the Unit operates. These policies predated the Units establishment. Consequently, they do not expressly assign any function to the Unit in the investigation of complaints made under any of these policies. Each of the policies is intended to address very different types of possible misconduct. Yet they have a number of common features.

5. Trust in Care

- 5.1. The Trust in Care Policy is contained in a document, dated May 2005, which was published by the HSE-Employer Representative Division. It is stated to be “*a policy for Health Service Employers on upholding the dignity and welfare of patients/ clients and the procedure for managing allegations of abuse against staff members*”. The stated aims of the policy are preventative and procedural in nature. In terms of preventing abuse, it emphasises the importance of applying proper human resources policies in

communicating and maintaining high standards of care amongst health service staff. In terms of process, it is directed at ensuring that proper procedures are in place for reporting suspicions or complaints of abuse and for managing allegations of abuse made against health service staff, in accordance with the principles of natural justice.

- 5.2. The process of managing allegations of abuse is contained at Section 5 of the Policy. It provides that individual managers are responsible for maintaining the required standard of care within their area of responsibility and for dealing with any shortfalls in standards or reports of suspected or alleged abuse. It goes on to provide that where a manager receives a complaint of abuse, he or she should cause a preliminary screening to be undertaken so as to establish the facts material to the complaint. This preliminary screening should be undertaken by the immediate line manager of the staff member, or members, against whom the complaint is directed.
- 5.3. The stated purpose of the preliminary screening is to establish if it is *'possible that an abusive interaction could have occurred'*. This appears to be a low standard of probability which is intended to avoid further investigation of complaints that are frivolous, vexatious or plainly without merit.
- 5.4. The Policy provides that the staff member against whom the complaint is directed must be informed immediately of the complaint and that he or she be afforded a right to be heard and to be appropriately represented. It also provides that the manager conducting the preliminary investigation must consult with another member of management, or an appropriate professional colleague,

before making a final decision on whether the appropriate standard of probability has been met before a formal investigation is initiated.

5.5. Where the preliminary screening indicates that an abusive interaction could have occurred, the matter is referred to a senior manager who will decide if the employee concerned has a '*case to answer*' or whether the matter is capable of being dealt with at local level. Where a formal investigation is commissioned, the Policy provides that it be conducted in accordance with the following principles: -

- “The investigation will be conducted thoroughly and objectively in strict accordance with the terms of reference and with due respect for the rights of the complainant and the rights of the staff member to be treated in accordance with the principle of natural justice.
- The investigation team will have the necessary expertise to conduct an investigation impartially and expeditiously. Where appropriate, the investigation team may request appropriately qualified persons to carry out clinical assessments, validation exercises, etc.
- Confidentiality will be maintained throughout the investigation to the greatest extent with the requirement of a fair investigation. It is not possible, however, to guarantee the anonymity of the complainant or any person who participates in the investigation.

- A written record will be kept of all meetings and treated in the strictest confidence
- The investigation team may interview any person who they feel can assist with the investigation. Staff are obliged to co-operate fully with the investigation process and will be fully supported throughout the process.
- Staff who participate in the investigation process will be required to respect the privacy of the parties involved by refraining from discussing the matter with other work colleagues or persons outside the organisation.
- It will be considered a disciplinary offence to intimidate or exert pressure on any person who may be required to attend as a witness or to obstruct the investigation process in any way.”

5.6. The Policy goes on to set out in considerable detail the manner in which an investigation will be conducted. It provides: -

- The investigation will be conducted by the designated person(s) agreed between the parties.
 - The investigation will be covered by clear terms of reference based on the written complaint and any other matters relevant to the complaint. The terms of reference shall specify the following: -

- The investigation will be conducted in accordance with the trust in care policy
- The timescale within which the investigation will be completed.
- The investigation team may set time limits for completion of various stages of the procedure to ensure the overall timescale is adhered to.
- Scope of the investigation i.e. the investigation team will determine whether or not the complaint has been upheld and make recommendations (other than disciplinary sanction) where appropriate
- The staff member against whom the complaint is made will be advised of the right to representation and given copies of all relevant documentation prior to and during the investigation process, i.e.
 - Complaint
 - Witness statements (if any)

5.7. The Policy proscribes how the investigation will be conducted. It provides: -

- The investigation team will interview any witnesses and other relevant persons. Confidentiality will be maintained as far as possible.
- Persons may be required to attend further meetings to respond to new evidence or provide clarification on any of the issues raised
- The investigation team will form preliminary conclusions based on the evidence gathered in the course of the investigation and invite any person adversely affected by those conclusions to provide additional information or challenge any aspect of the evidence.
- On completion of the investigation, the investigation team will form its final conclusions based on the balance of probabilities and submit a written report of its findings and recommendations to senior management
- The staff member against whom the complaint is made will be given a copy of the investigation report and an opportunity to comment before any action is decided upon by management

5.8. The consequence that may flow from a complaint having been upheld are set out as follows: -

“ If the complaint is upheld, the matter will be referred to the chief executive officer (or equivalent) or designated

manager who is empowered to take disciplinary action up to and including dismissal”

6. Observations on the Trust in Care Policy

- 6.1. There are a number of observations that arise in relation to these aspects of the Policy. It is quite prescriptive in nature, and any departure from the strict terms of what is prescribed could result in the investigative process being vitiated. Allegations of abuse directed at a staff member should always be treated with the utmost seriousness, and the requirements of natural justice must be fully observed in their investigation. It is clear that the drafters of this policy were conscious of those requirements and this is reflected in the detailed procedural steps prescribed for an investigation.

- 6.2. It is noted that the policy expressly provides that the investigation will be conducted by a “*team*” and that the members of that team must be agreed between the parties. There is no provision for the appointment of investigators in default of agreement between the parties. I understand that current practice is that the names of two proposed investigators are put forward by management and if the party under investigation objects to any of them he or she must put forward a reasoned basis for their objection. While that may be a reasonable approach, it is not what the policy provides. The requirement is that the investigation will be conducted by the designated person(s) agreed between the parties, *simpliciter*.

- 6.3. Given this requirement, it seems inherently possible that a person whose conduct is to be investigated could frustrate the process by objecting to every investigator proposed.
- 6.4. It is also noted that the investigation team are obliged to formulate preliminary conclusions following an investigation, which must then be communicated to any person adversely affected by those conclusions. Any such persons must then be afforded an opportunity to challenge those preliminary conclusions or the evidential basis upon they were reached. There is no timeframe within which this must be done, although there is provision in the policy for the investigation team to set time limits for completion of various stages of the investigation. It would seem better if a timeframe were prescribed for the submissions of representations concerning preliminary conclusions, with the possibility of an extension in exceptional circumstances.
- 6.5. Finally, it is noted that the Policy appears to provide that at the conclusion of an investigation which resulted in a finding adverse to an employee, disciplinary action may be taken without recourse to the disciplinary procedure. It would seem more appropriate to provide that in these circumstances the disciplinary procedure would be invoked.

7. Dignity at Work Policy

- 7.1. The current Dignity at Work Policy was promulgated in May 2009. It replaced an earlier policy produced in 2004. It is supported by all

Health Sector employers to which it relates and by the trade unions representing those employed by those employers.

- 7.2. The policy deals with harassment and sexual harassment, within the meaning of the Employment Equality Acts 1998-2015 and with workplace bullying. It draws on the various codes of practice dealing with unacceptable conduct of this nature, produced under the Employment Equality Acts, the Safety Health and Welfare at Work Act 2005 and the Industrial Relations Act 1990. The policy adopts the definitions of harassment, sexual harassment and bullying contained in the relevant codes of practice, or in statute. It prescribes the respective responsibilities of management and employees in the observance of the principles contained in the policy.
- 7.3. As with all good Dignity at Work policies, it provides for the possibility of complaints being addressed informally and at the level at which they occur. It also provides for the possibility of a complaint being resolved through mediation. Where a resolution is not achieved in either of these ways, the complaint can move to a formal investigation. The detailed procedural steps to be taken in initiating and conducting a formal investigation are set out in the policy. Those procedural steps can be summarised as follows: -

Preliminary Screening

The purpose of preliminary screening is to determine if the conduct complained of comes within the definition of harassment, sexual harassment or bullying, as the case may be, contained in the policy. For this purpose the complainant is required to provide a written statement giving details of the

basis of his or her complaint. This statement should specify the dates on which the offending behaviour occurred, and the context in which it occurred, together with the names of any witnesses.

The policy provides that the initial screening will be undertaken by a member of the HSE HR department, on the basis of the written statement of the complainant only. The complainant must be informed of the outcome of the preliminary screening within seven working days.

Formal Investigation

Where it is decided that the complaint should be the subject of a formal investigation the following procedural steps are prescribed:

- The alleged perpetrator of the offending conduct will be advised of the complaint and that it is to be the subject of a formal investigation.
- He or she will be furnished with a copy of the written complaint and required to respond within two weeks.
- A copy of this response will be furnished to the complainant
- Both parties should be offered the opportunity to avail of in-house counselling and support services

Principles Governing the Investigation Process

The general principles governing the investigation process are set out in the policy, which conform to established best practice. For present purposes it is unnecessary to set out those principles in this report

Conduct of the Investigation

The rules governing the conduct of the investigation are particularised in the policy, as follows: -

1. The investigation is to be conducted by person(s) who are acceptable to the parties and are not connected with the complaint in any way. A footnote to this provision states:

“If issues persist in relation to the acceptability or otherwise of the nominated person, the matter may be referred to the joint chairs of the National Working Group within 2 weeks for a decision regarding the nominated person”

2. The investigator(s) will determine:
 - (i) Whether the complaint falls within the definition of bullying, harassment or sexual harassment as defined in the Dignity at Work Policy
 - (ii) Whether the complaint is upheld as the offending action amounted to bullying, harassment or sexual harassment

- Where appropriate the investigator(s) may make recommendations (excluding disciplinary sanction)
3. The investigator(s) may set time limits for completion of the various stages of the procedure so as to ensure that the overall timescale is adhered to.
 4. Both parties will be given copies of all relevant documentation prior to and during the investigation process, i.e.
 - Written complaint
 - Written response from the alleged perpetrator
 - Witness statements (which should be signed)
 - Minutes of meetings
 5. Both the complainant and the alleged perpetrator may provide details of witnesses or any person whom they feel could assist the investigation
 6. The investigator(s) will conduct separate interviews with the complainant and the alleged perpetrator with a view to establishing the facts surrounding the allegations. Both the complainant and the alleged perpetrator may be accompanied by a staff representative or a work colleague if so desired.
 7. The investigators will interview any witness to the alleged incident of bullying/harassment and other relevant persons. An agreed minute of each meeting will be issued to both parties. Confidentiality will be maintained as far as practicable.

8. Persons may be required to attend further meetings to respond to new evidence or provide clarification on any issues raised
9. The investigator(s) may, depending on the circumstances of the case, convene joint hearings, subject to the agreement of both parties.
10. The investigator(s) will present preliminary conclusions based on the evidence gathered in the course of the investigation and invite any person adversely affected by these conclusions to provide additional information or challenge any aspect of the evidence.
11. On completion of the investigation the investigator(s) will submit a written report to senior management who will ensure that the terms of reference have been complied with
12. Both the complainant and the person(s) against whom the complaint is made will be given a copy of the investigation report and will be advised in writing that they may submit any comments *in writing* **within two weeks**

8. Observations on the Dignity at Work Policy

- 8.1. As previously observed, the dignity at work policy is comprehensive and fully compliant with good practice and the relevant codes of practice. The mode of investigation which it provides is detailed and prescriptive. Inevitably, compliance with the procedural

requirements of the investigation process will be elongated.

However, the requirements of natural justice and fair procedure are of paramount importance in the process as the outcome could, and in most cases will, have serious consequences for both the complainant and the persons against whom the complaint is directed (referred to in the procedure as the ‘alleged perpetrator’)

- 8.2. There are a number of observations on the procedural steps specified that could usefully be made at this juncture. Firstly, as with the Trust in Care Policy there is no mention of, or role assigned to, the Unit. The reason for that is obvious since the policy predated the inception of the Unit. Secondly, like the Trust in Care Policy, there is a requirement that the investigator(s) be acceptable to all parties. However, unlike the Trust in Care Policy there is provision for dealing with situations in which there is a default of agreement. As pointed out above, a footnote to point 1 of the procedure provides:

“If issues persist in relation to the acceptability or otherwise of the nominated person, the matter may be referred to the joint chairs of the National Working Group within 2 weeks for a decision regarding the nominated person

- 8.3. If this provision were to be adhered to, no more than a period of two weeks should elapse between the recording of disagreement on the nomination of investigator(s) and the resolution of that disagreement. That appears not to happen in practice. There may be an explanation for that. The designated decision makers provided for are the joint chairs of the ‘National Working Group’. That appears to be a reference to the working group established to draw up the

Policy. It would appear that on completion of their assigned task the working group ceased to exist and there are now no ‘joint chairs’ to whom a disagreement could be referred for resolution.

- 8.4. Thirdly, the procedure is prescriptive and it is couched in mandatory terms (the word ‘will’ rather than ‘may’ is used in most of the procedural steps). Consequently, strict adherence to the prescribed procedure is required in every investigation undertaken in pursuance of the policy.
- 8.5. Fourthly, the policy makes reference to “terms of reference” in the context of an investigation. There is, however, no express provision for the formulation of terms of reference nor is there any provision for the assignment of responsibility for this purpose. Given the detail prescribed by the policy itself in relation to the purpose of an investigation and process to be observed in conducting an investigation, it is difficult to see how further guidance would be required for investigator(s) in undertaking their role in any particular case.

9. Disciplinary Procedure

9.1. The HSE Disciplinary Procedure, in its current form, came into effect on 1st January 2007. It applies to all employees except the following: -

- Probationary employees (subject to certain exceptions in the case of serious misconduct)

- Employees employed on fixed-term or fixed purpose contracts whose employment is terminated by reason only of the expiry of the terms or the cessor of the purpose of the contract
- Consultants covered by the Common Contract
- Medical doctors and dentists regarding complaints of professional misconduct and clinical capability

9.2. As with the other policies under review, it is comprehensive and accords with established good practice and relevant Codes of Practice. It is also an agreed document. Like the other policies it predates the inception of the Unit and consequently, makes no reference to, or assigns any role to the Unit.

9.3. The responsibility for conducting disciplinary hearings under the policy is assigned to the relevant National Director, although he or she may delegate that function to an appropriate Regional Assistant National Director. A Regional Assistant National Director may, in turn, delegate this function to a Hospital Network Manager.

Investigation Process

9.4. Appendix 3 of the Policy sets out the principles and procedural steps to be followed in the investigation of allegations of serious misconduct. It provides: -

- The investigation will be conducted as expeditiously as possible and without inordinate delay.

- The investigation will be carried out in strict accordance with the terms of reference and with respect for the right of the employee, who is the subject of the allegations, to be treated in accordance with the principles of natural justice including the presumption of innocence.
- The investigation team will have the necessary experience and expertise to conduct an investigation impartially and expeditiously.
- Confidentiality will be maintained throughout the investigation to the greatest extent consistent with the requirements of a fair investigation. It is not possible, however, to guarantee the anonymity of the complainant or any person who participates in the investigation.
- A written record will be kept of all meetings and treated in the strictest confidence.
- The investigation team may interview any person who they feel can assist with the investigation. All employees are obliged to cooperate fully with the investigation process.
- Employees who participate in the investigation process will be required to respect the privacy of the parties involved by refraining from discussing the matter with other work colleagues or persons outside the organisation.

- It will be considered a disciplinary offence to intimidate or exert pressure on any person who may be required to attend as a witness or to attempt to obstruct the investigation process in any way.

9.5. The policy then goes on to prescribe the procedural steps in the conduct of the investigation. It provides: -

The investigation will be conducted by person(s) nominated by senior management and acceptable to both parties.

- The investigation will be governed by predetermined terms of reference based on the alleged misconduct (which will be set out in writing) and any other matter relevant to the allegation. The terms of reference shall specify the following:
 - The timescale within which the investigation will be completed
 - Scope of the investigation will be confined to deciding whether or not the allegation has been upheld
- The employee against whom the allegation is made will be advised of the right to representation and given copies of all documents prior to and during the investigation process, e.g.
 - Details of the alleged misconduct
 - Witness statements (if any)

- Minutes of any interviews held with witnesses
 - Any other evidence of relevance
- The investigation team will interview any witnesses and other relevant persons. Confidentiality will be maintained as far as practicable.
- Persons may be required to attend further meetings to respond to new evidence or provide clarification on any of the issues raised.
- The investigation team will form preliminary conclusions gathered in the course of the investigation and invite the person adversely affected by these conclusions to provide additional information or challenge any aspect of the evidence.
- On completion of the investigation the investigation team will form its final conclusions based on the balance of probabilities and submit a written report of its findings and recommendations to senior management.
- The employee against whom the allegation is made will be given a copy of the investigation report

On completion of the investigation, the investigation team will submit a written report in accordance with the terms of reference.

However, no decision regarding disciplinary sanction should be decided upon until the decision maker has held a disciplinary hearing with the employee concerned.

10. Observations on the Disciplinary Procedure

- 10.1. As with the other policies reviewed, the Disciplinary procedure is comprehensive, detailed and prescriptive. It undoubtedly accords with best practice and enshrines all of the essential requirements of fair procedure and natural justice.
- 10.2. In terms of the detail in which it is expressed, it goes further than most employment based disciplinary procedures. It is noted, however, that these procedures are reserved for the investigation of complaints of serious misconduct where, presumably, the person against whom the complaint or allegation is made, is on hazard of dismissal. Any departure from the strict terms of this procedure could vitiate the investigation process and expose the HSE to legal action at the suit of an aggrieved employee.
- 10.3. There are two points of particular note. Firstly, as with the other procedures, there is a requirement that the person or persons conducting an investigation be acceptable to all parties. That includes, in particular, the person whose conduct is to be investigated. There is no provision for resolving a disagreement on the appointment of investigators. This again could result in delay and leaves open the possibility of the process being frustrated. The position taken by the HSE, that an objection to a nominated investigator must be based on valid reasons could be seen as

importing into the process a provision that could have been made, but was not made.

- 10.4. Secondly, provision is also made for the formulation of terms of reference by which the process is to be governed. There is no express provision on who is to be responsible for formulating the terms of reference. However, contrary to what many people to whom I spoke in the course of this review believe, there is no requirement for the terms of reference to be agreed with the person whose conduct is to be investigated.
- 10.5. Finally, as in the case of the other policies considered, there is no role specified for the Unit in any aspect of the process.

11. The Unit

- 11.1. As previously stated, the Unit was established in 2016, although it only became fully operational in or about June 2017. It's establishment was preceded by a broadly based consultative process undertaken by the Office of the National Director of Human Resources. Prior to the establishment of the Unit investigations pursuant to the three policies previously considered were conducted and managed through local services and human resources employee relations departments. This, it appears, resulted in inconsistencies in approach across different regions of the Organisation. The Unit was intended to provide a unified, independent national service with the expertise and resources to undertake the investigative process under each of the three policies within its remit.

11.2. The Unit was established in pursuance of two priorities identified in a HSE publication entitled “Health Services People Strategy Leaders in Public Services 2015-2018: -

Priority 6.6:

“Establish a unified National Investigations Unit that provides a timely and efficient response and uses learning outcomes to continuously improve performance”

Priority 6.6.1

“Increase the number of trained investigators to support the work of the Unit and develop their skills and competencies”

11.3. It was intended that the Unit would have exclusive responsibility for the conduct of investigations under the three policies within which it operates. Nevertheless, in the course of this review I was informed that situations have arisen in which the investigation of complaints, which come within the Unit’s sphere of responsibility, have been conducted without reference to it. However the extent of that practice is unknown.

11.4. Organisationally, the Unit is located within the HSE Leadership Education and Talent Development Service. The rationale for this organisational arrangement was stated as being: -

- Those within the Unit would have no prior involvement in any complaint (complaints originate at the local level)

- They would have no involvement prior to the initiation of a complaint
- They would have no involvement in representing the HSE at any third party arising from the initiation or processing of a complaint
- The Unit would be best placed for the independent identification and dissemination of investigation outcomes

11.5. The Unit's remit extends beyond the HSE itself. It exercises its investigative functions in respect to hospital groups and voluntary bodies funded by the HSE. There are, however, only two voluntary section 38 bodies currently involved in a phase two pilot project.

11.6. In terms of its core function, the Unit is seen as providing a service to local managers rather than exercising a stand-alone function in the processing and investigation of complaints. Complaints are initiated at local level where a preliminary investigation is undertaken to test the appropriateness of processing the matter further in accordance with the relevant policy. Where a complaint is referred to the Unit for substantive investigation, the local manager remains the 'commissioner' of the process. That is to say, he or she remains responsible for the process whereas the Unit provides a service to the manager in discharging that responsibility. The Unit sends a draft terms of reference template to each commissioner on submissions of a request for investigation. These templates are policy / procedure specific. The commissioner may the templates to meet the requirements of each investigation. The development of

terms of reference is the responsibility of the investigation commissioner.

11.7. Hence, the management of the overall complaints procedures primarily rests with the commissioning manager. The Unit is a support or facilitation service available to the commissioning manager rather than an autonomous complaint processing body. In that regard, it is noteworthy that the commissioning manager, rather than the Unit, remains responsible for the following stages in the complaint management process: -

- Receiving complaints
- Preliminary screening of complaints
- Initiation of a request for substantive investigations
- Pre-investigation communication with the parties
- Preparation of the investigation file
- Handover of the complaint file to the investigators
- Any administrative support assignments

11.8. Pre-Investigation Support Managers are appointed to liaise with and support local managers from the point of receiving a complaint, advising on terms of reference, where required, and ensuring full compliance with the relevant policies and procedures.

11.9. There is an Investigation Support Manager assigned to each investigation. He or she supports investigation teams in relation to process and procedure during the currency of the investigation.

11.10. The Unit is also responsible for the delivery of training to investigators and to local managers, the focus of which is on the adherence to proper practices and procedures at every level in an investigation.

11.11. Together with its investigative and training roles, the Unit is also responsible for providing a national coaching service to all HSE staff and related health service organisations. The stated aim of this service is *“to enhance employees’ capacity to lead and flourish within their role in order to support the provision of safer and better healthcare for all”*

12. Investigators

12.1. The Unit has at its disposal a panel of persons who are designated as investigators. In the main they are HSE employees, although a facility exists to engage external investigators in exceptional circumstances relating to the nature of the issues to be investigated.

12.2. The investigators are trained in investigation techniques and are validated as competent in that regard. There are currently 203 trained investigators available to the Unit, only two of whom undertake that role in a full-time capacity. All others on the panel of investigators have other substantive roles within the HSE. In any

proposed investigation, not less than two persons from this panel are nominated to the commissioning manager as being suitable and available to undertake the investigation. It is a matter for the commissioning manager to approve or otherwise of the nominations made.

12.3. When the proposed investigators are selected the person who is to be the subject of the investigation is informed of their identity. He or she may object but must base any objection on acceptable stated grounds.

12.4. The identity of those on the panel of investigators is not disclosed to the Staff Unions. This is apparently for reasons of confidentiality and data protection and is based on legal advice. This is a matter of some concern to the Unions.

12.5. The commissioning manager remains the accountable person for the investigation at all stages of the investigation process. The Unit provides support to the investigation commissioner and the investigation team within the context of that process.

13. Volume of Cases

13.1. Between June 2017, when it commenced receiving cases for investigation, and November 2019 the Unit has received 380 referrals under the various policies. The breakdown by referral type is as follows: -

Policy / Procedure	Number of Referrals
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Trust in Care	153
Dignity at Work	149
Disciplinary Procedure	78
Total	380

Position of Various Parties

14. The Unions

14.1. The purpose of this review, as stated in the Terms of Reference, is to consider and address a range of issues raised by the trade unions at a meeting of the National Joint Council in March 2019. Those matters are recorded in letter sent by the Staff Panel of Trade Unions (hereafter referred to as “the Unions”) dated 21st March 2019 and 27th March 2019. The detail of those concerns is recorded earlier in this report.

14.2. I met with the Unions in December 2019 and again in June 2020. Some of the issues raised are historic in nature and relate to a perceived deficit in consultation prior to the establishment of the Unit. However, the Unions do not take issue with the establishment of a centralised investigative structure, *per se*. The main thrust of the Unions’ concern relates to four main aspects of the Units operations, namely: -

- Failure to agree investigators,
- Failure to agree terms of reference for investigations
- Delays in investigation
- Difficulty in obtaining information on the progress of an investigation

14.3. The Unions also raised issues concerning what they say is a persistent refusal by the HSE to participate in referrals to the WRC and the Labour Court in disputes relating to the appointment of investigators or the terms of reference for investigations. They also say that there is an absence of consistency in the circumstances in which external rather than internal investigators are appointed. However, the principal issues of concern to the Unions are those listed above.

15. The Unit

15.1. Those involved in the operation and management of the Unit acknowledge many of the problems identified by the Unions which form the backdrop to this review. However, they believe that delays in the processing and finalisation of investigations are largely outside their control. I was told that the division of responsibility for investigations between the Unit and commissioning managers is a frequent cause of delay. Initial screening of complaints under each of the policies is conducted locally and the Unit has no control over the length of time that this process takes. Significant delays can occur between the notification of a complaint to a local manager and the completion of the fact finding and preliminary screening process. Further delays can occur between the completion of the preliminary screening process and the case being referred to the Unit. Delays have also occurred in having the file furnished to the investigation team by the commissioning manager.

- 15.2. When a complaint is referred to the Unit for investigation the Unit is responsible for proposing suitable terms of reference, in the manner described at paragraph 11.6 of this report. It is also responsible for proposing an investigation team. The decision on whether to accept the Unit's recommendation rests with the commissioning manager. It was suggested that in some cases delay is encountered in receiving a response to the Unit's proposals from the commissioning manager.
- 15.3. Those working in the Unit are acutely aware of the importance of fulfilling their investigative role with scrupulous independence and adherence to the principles of natural justice and fair procedure. They drew my attention to a number of decisions of the Superior Courts in which, prior to the establishment of the Unit, the process by which allegations of wrongdoing were investigated within the HSE were successfully impugned, resulting in significant financial liability for the State. It was suggested to me that many of the criticisms directed at the Unit do not take account of the imperative of procedural fairness and impartiality which, as a matter of law, the Unit is obligated to observe. It was rightly pointed out that the observance of the rules of natural justice can be time consuming and the process of investigation cannot be abridged at the expense of adherence to procedural fairness.
- 15.4. I was also told that while all investigations under the three policies should be conducted by the Unit, there have been several examples of investigations being conducted locally. The Unit only became aware of these *ad hoc* investigations when they were contacted by

the State Claims Agency in relation to litigation arising from investigations with which they had no involvement.

15.5. Reference was also made to a lack of adequate resources within the Unit and my attention was drawn to a number of vacancies which remain unfilled. This, they say, inhibits their capacity to discharge their role efficiently.

15.6. In relation to the personnel available to conduct investigations, it was pointed out that they are mainly employees of the HSE who have other substantive roles and who are trained by the Unit in investigative techniques. Yet, their substantive duties often take priority over their investigative role and this is a further factor leading to delay.

16. The Industrial Relations Perspective

16.1. The industrial relations and human resources managers to whom I spoke echoed many of the concerns expressed by the Unions concerning the investigative process. A recurring theme amongst this group was that each of the three policies under which the Unit operates are collectively agreed and while they have responsibility for ensuring adherence to agreed procedures, the Unit is not amenable to any input from industrial relations personnel. It was pointed out that they are frequently required to respond to complaints from Unions about the conduct of investigations, including reference to third parties pursuant to existing agreements, to which they cannot adequately respond.

- 16.2. On these points, I was, however, informed that the Unit provides a case file update for employee relations managers, who contact the Unit, providing notice of preparation of a submission to third parties.
- 16.3. Many of those to whom I spoke are of the opinion that there is an absence of accountability within the Unit and that it sometimes appears to operate independently of the normal and established management and control structures of the HSE. Some industrial relations managers believe that the functions fulfilled by the Unit are essentially of an industrial relations nature and that it should be seen as a facility available to assist in the industrial relations process and this should be reflected in the reporting structures of the Unit.

17. Other Suggestions Proffered

- 17.1. Some of those to whom I spoke in the course of this review are of the opinion that the title of the Unit is misleading. It was suggested that while some of the investigations that it conducts are associated with employee relations issues, in the case of the Trust in Care policy, it is more concerned with the protection of service users. It was suggested that it should simply be known as ‘The Investigation Unit.
- 17.2. Others suggested that the current location of the Unit within the HSE organisational structure is inappropriate and that it should be part of the Human Resources and Employee Relations division
- 17.3. A further proposal made was that the National Coaching Service should not be administered by the Unit. Rather, it was proposed, this service should, more appropriately, report directly to the Assistant

National Director of HR-Leadership, Education and Talent Development.

- 17.4. These issues do not appear to come directly within the ambit of the Terms of Reference for this review. They could, however, be considered further in the context of the implementation on any changes introduced on foot of this review.

Observations and Discussion

18. The Role of the Unit

- 18.1. In the course of this review I was made aware of plans for the creation of Regional Health Authorities (RHAs) within the HSE structure. It is anticipated that, if established, REAs will have responsibility for the delivery of services and related matters, within their areas of responsibility. In the absence of any final detail on what is in contemplation, it is not possible to anticipate what, if any, impact the establishment of REAs will have on the functioning or responsibilities of the Unit. Suffice it to say that these are matters that will have to be addressed at an appropriate time in the future.
- 18.2. The underlying rationale for the establishment of the Unit was that there should be a centralised facility within the HSE for the investigation of complaints arising under the Trust in Care Policy, Dignity at Work Policy and Disciplinary Procedure. It was established against the background of an identified lack of consistency across the Organisation in the manner in which these policies and procedures were applied. Part of that background was also the significant volume of litigation and industrial relations claims taken by aggrieved employees concerning the manner in which investigations were conducted.

18.3. The Unit was intended to work collaboratively with investigation commissioners to support the delivery of a consistent and effective investigation service across the organisation. It was intended that the Unit would develop a high level of expertise in the process of investigation, using professionally trained investigators and providing training and expert advice to commissioning managers.

18.4. Most of the groups to whom I spoke during the course of this review support the concept of a centralised investigative facility and the objectives underling the establishment of the Unit. The Unit became operational in 2017 and to an extent it is still in a pilot stage. The commissioning of this review is timely and, hopefully, the observations and recommendations that follow will assist in strengthening the utility of the Unit as an important facility in administering the three policies that it supports.

19. Procedural Issues

19.1. Those administering the Unit attach considerable importance to its independence and to the strict observance of the procedures and safeguards known as the Rules of Natural Justice. They cannot be criticised for that. Each of the policies require the investigation of complaints alleging serious misconduct on the part of individuals, whose good name, standing and, in many cases, continued employment is placed in jeopardy. It is crucial that the process of fact finding in these types of cases be undertaken in compliance with the requirements of fair procedure which have been developed by the courts and are now firmly established as a Constitutional imperative. The procedural steps of investigation prescribed by the

procedures themselves reflect this imperative. Given the seriousness of the type of complaints that these policies are intended to deal with, there can be no scope for abridging or departing from those procedures. That is not to say that an employment related investigation must be conducted in a manner that replicates courtroom procedures.

19.2. That said, an equally important requirement of a fair investigation is that it be conducted as expeditiously as possible. The experience of many of those to whom I spoke in the course of this review is that of inordinate delay in completing some investigations. Delay can cause prejudice and lead to injustice. Peoples' recollection of events can become blurred over time, witnesses may cease to be available and records can be lost. Furthermore, any person accused of wrongdoing will suffer stress and anxiety while under investigation which is compounded by delay. An employee under investigation may have been removed from the workplace for precautionary reasons and this, in and of itself, can be a further source of injustice if the complaint against them is subsequently found not to be well founded. The mental strain on complainants caused by the continuance of an investigation is also considerable and is exacerbated by delay.

19.3. There is, therefore, a balance to be struck between the need for ensuring procedural fairness and the need for expedition and they are not mutually exclusive imperatives. Fairness and justice are concepts of substance rather than form. The process of investigation should be so organised as to apply timescales to the various procedural stages and these should be adhered to. Each of the three

policies within the remit of the Unit do provide for time-limits for the various procedural stages, and while some degree of flexibility can be exercised in relation to them, they should generally be observed.

20. Independence

20.1. A cardinal tenant of the rules of natural justice is that those charged with establishing facts are independent of the parties and are demonstrably independent. At a most basic level, the fact finders must not be subjected to interference or influence by anyone outside the investigative process. It is, therefore, entirely proper that the Unit should guard and protect its independence.

20.2. There is, however, a substantial difference between functional independence in the conduct of its investigative role and administrative independence or autonomy in terms of its governance. The Unit is a service of the HSE and it must be subject to the same level of governance as other services, in relation to the manner in which it operates, the use of its resources and the efficiency of the service it provides. This distinction may, at times, be subtle but it is substantial. While the independence of the Unit in the conduct of investigations must be supported and protected it must remain accountable within the normal governance structure of the HSE for the quality and efficiency of its work. It must also operate within the policies of the Organisation, including adherence to relevant collective agreements.

20.3. It seems desirable that these matters should be set out in a clearly defined protocol covering the role, functions and responsibilities of the Unit and its relationship with other functional divisions of the Organisation.

21. Undue Influence and Communication

21.1. Another matter that was raised with me, and is referred to in the terms of reference, concerns investigators being subjected to undue influence in the course of their work. I have been told of instances where investigators have been contacted by those involved in the investigative process or by persons acting on their behalf. If the purpose of contacting an investigator is to influence the outcome of the investigation, or to provide “off the record” information that is entirely improper and should be resisted.

21.2. If an investigator is contacted solely to obtain information on the conduct of an investigation, that is less objectionable but is nonetheless inappropriate. According to the Unions, there is an absence of a clear communications pathway for obtaining information on the progress of investigations. Particularly where a member may be suspended from work while under investigation, it is understandable that a Union would seek to establish the state of progress in the investigation. Currently, queries in relation to the progress of an investigation are addressed to the commissioning manager. According to the Unions, commissioning managers are frequently unable to provide information on an investigation once it is passed to the Unit, and there is no clear communication pathway to the Unit.

21.3. This could be accommodated by nominating a liaison officer within the Unit, who is not involved in the investigation, who could deal with queries of this nature, or provide other information without interference in the investigative process.

22. Interaction with the Policies

22.1. Any consideration of the operation of the Unit must be undertaken in the context of the three policies that it supports. Those policies have been examined elsewhere in this report. Each of these policies have been agreed with the Unions and they are seen by the Unions, and by many industrial relations specialists on the management side, as having the status of collective agreements. A significant source of difficulty is that these policies were formulated before the establishment of the Unit and in some respects the investigative process envisaged by the policies are at variance with those of the Unit.

22.2. One example, which is a source of considerable controversy, is that each of the policies provide for the investigation of complaints by agreed investigators. The current practice is that investigators are proposed to commissioning managers by the Unit. If those proposed are accepted by the commissioning manager, the parties to the investigation are informed of their identity. If an objection is made to those appointed, the objecting party is expected to advance a reasoned basis for the objection. That may be considered an efficient and reasonable mode of procedure. But it is not what the policies provide.

- 22.3. With regard to terms of reference for an investigation, the Staff Unions have taken a position that these should be agreed before an investigation is commenced. While this is not expressly provided for in any of the three policies to which the investigation process relates, disputes have been raised through the industrial relations processes concerning the content of terms of reference. This has been a further cause of delay. I have addressed this point in my recommendations.
- 22.4. Each of the policies provide that investigations are to be undertaken by a 'team'. In practice this is taken to mean that at least two investigators are assigned to each investigation. The reason for that provision is unclear. The need for a more than one person to conduct investigations can be a further cause of delay and would appear to be a somewhat inefficient use of resources. There are, undoubtedly, many situations in which a mix of skills are required to properly conduct an investigation, particularly where clinical, legal or technical considerations are in issue. This requirement could be satisfied by maintaining a panel of suitably qualified person in various disciplines, who could work with a designated investigator as an assessor. This matter is addressed further in my recommendations.
- 22.5. Any review of the practices and procedures of the Unit must also involve a re-examination of the procedural aspects of each of the three policies. These policies were agreed with trade unions and they should be involved in revising those procedures to give effect to any decisions taken on foot of this review.

Causes of Delay

23. Division of Responsibility

23.1. From what I have been told, the causes of delay are multifaceted and both structural and procedural. The division of responsibility between the commissioning manager and the Unit frequently results in delay. There may be delay in concluding a preliminary screening of a complaint. There may also be delay on the part of some commissioning managers in referring a complaint for investigation after the preliminary screening is completed, or in furnishing the complaint file to the investigation team.

23.2. When a complaint is received, the Unit assists in the development of terms of reference, in the manner referred to at paragraph 11.6 of this report. The Unit also propose an investigation team. There can be further delay in obtaining a final response to these proposals and in the adoption of terms of reference by the commissioning manager. When an investigation is completed the outcome is reported to the commissioning manager who must decide on what, if any, further action is required.

23.3. There may have been good and sound reasons for this division of responsibility in the process of investigation. But it seems cumbersome and inefficient. There are cogent arguments for a more streamlined arrangement in which the Unit would be assigned responsibility for all aspects of the investigative process, from its initiation to its completion. That could include responsibility for selecting investigators and formulating terms of reference (matters

relating to terms of reference are dealt with later in the report). The question of whether the responsibility for the preliminary screening of complaints should be assigned to the Unit is less clear-cut and there are cogent arguments for and against that proposition. An argument in favour of transferring this responsibility to the Unit is that there can be inconsistency at local level in the application of the standard of probability necessary to justify the referral of a complaint for investigation.

- 23.4. A centralising of this function could better ensure that common standards were applied. It might also expedite the process, particularly where a local manager's workload may not allow prioritisation of this work. Against that proposition is the argument that in many cases complaints can be disposed of by early informal intervention between the parties and that local managers are best placed to bring about a resolution in that way at the preliminary screening stage.
- 23.5. It is incontrovertible that many issues that give rise to complaints can be resolved informally, often by no more than an explanation or an apology. Except in the most serious of cases, that should be the first approach of any manager. There is also a cogent argument for considering the possibility of introducing a facility for voluntary mediation, by skilled mediators, before a formal investigation is embarked upon.
- 23.6. Local managers should always consider the possibility of resolving issues arising between employees or between the service provider and a service user, and there should be no obstacle to that approach.

But where local resolution is not possible, whether by mediation or otherwise, the matter must be referred for investigation. If it is considered that the Unit should have responsibility for the investigative process from start to finish, it would seem logical that it would also have responsibility for deciding if a complaint warrants full investigation.

24. Other Causes of Delay

- 24.1. When a decision is made to appoint investigators and terms of reference are finalised, the parties involved (and their Trade Union) may take issue with either the proposed investigation team or the terms of reference. There can be prolonged discussion around these matters and, I understand, instances have arisen in which Unions have invoked the agreed industrial relations procedures and sought to have the issues of difference to be adjudicated upon by the WRC. It has been suggested to me that in some instances the HSE has declined to use the services of the WRC in these disputes, and this is a further cause of complaint by Unions.
- 24.2. The reference of disputes concerning aspects of the investigative process to the WRC, in individual cases, would undoubtedly cause significant delay in commencing or completing an investigation. However, existing agreements between the HSE and the Unions require that the WRC be used in cases of industrial relations disputes, with the possibility of an appeal to the Labour Court. This is a very time-consuming process and it is easy to understand the reluctance of some managers to engage in that process on what may be regarded as an unreasonable objection to either a proposed

investigator or to aspects of proposed terms of reference. However, adherence to these agreed dispute resolution procedures is obviously in the interests of both unions and employers and neither party can be selective in deciding what disputes will or will not be processed through these procedures.

- 24.3. Where disputes arise in relation to any aspect of an investigation consideration should be given to a fast-tracked third-party adjudication process. This could be achieved by the nomination of an independent person to act as a standing adjudicator where such disputes arise, whose decision would be final. A process could be agreed whereby the adjudicator could investigate and determine disputes of this nature quickly by either conducting a hearing or by way of written submissions.
- 24.4. Delay can also be caused in proceeding through the various stages of an investigation by an absence of cooperation by one or more parties. Where statements are taken from witnesses or interested parties they must be recorded in writing and submitted for observation to others affected. There can be delay in obtaining a response and the response may be such as to require a reversion to the maker of the original statement. While all of this may be necessary, I can see no good reason why strict time-limits should not be applied for the completion of each of these procedural stages.
- 24.5. It is also desirable that at the commencement of an investigation an indicative timescale should be given for its completion. If, for any reason, that timescale cannot be met, the parties should be informed before its expiry and appraised of the reason for the delay.

25. Selection of Investigators

- 25.1. As stated elsewhere in this report, investigators are selected internally. The Unit has responsibility for delivering or sourcing high level training in investigative skills and techniques. The vast majority of investigators hold other substantive roles within the Organisation. There is a facility to engage external investigation services, although this is rarely necessary.
- 25.2. It appears from documents with which I was furnished, that when the Unit was being established, the Unions were offered a facility to nominate persons to the panel of investigators. However, that invitation was not taken up by the Unions.
- 25.3. As previously stated, an issue of concern to the Unions is that they cannot obtain information on the identify of those on the panel of investigators. HSE has received legal advice to the effect that providing this information could be regarded as an infringement of data protection law. I have seen a copy of that advice, but it has not been furnished to the Unions. I have made proposals, below, as to how matters of this nature may be overcome.
- 25.4. It appears that difficulty can arise where investigators cannot devote the major part of their time to an investigation. I have been told that often the pressures of their substantive role can distract them from the work associated with an investigation leading to delay. A suggestion was made that personnel could be deployed within the

Unit as full-time investigators, but this would have significant resource implications for the HSE.

- 25.5. There is, nonetheless, a compelling argument in favour of recruiting some full-time investigators, augmented by a panel of external suitable and acceptable persons who could be called upon to undertake investigations as and when required. If that model were to be adopted, HSE Unions could be involved in the selection process, of both full-time and external panel investigators and those selected would be deemed to be acceptable to conduct any investigation to which they may be assigned, without the necessity for agreement in individual cases. It would seem appropriate that all persons appointed as investigators should hold that position for a fixed term of not more than three years.

26. Terms of Reference for Investigations

- 26.1. The requirement, under the Trust and Care Policy and the Dignity at Work Policy, to agree terms of reference in respect to every investigation can be a source of delay in commencing the process and has been the subject of industrial relations disputes. From an examination of each of the policies, details of which are set out earlier in this report, it is clear that they are quite prescriptive as to how the investigation is to be conducted. In these circumstances it is difficult to see a need to agree more detailed terms of reference. It should be possible to agree generic terms of reference, based on what the relevant policy provides, to which detail of the subject matter of the investigation could be added. This again would

alleviate the need for agreement in individual cases and eliminate what is currently a frequent source of delay.

Recommendations

The following recommendations are made for consideration by the relevant parties.

- 1. The HSE Human Resources Investigation Unit should continue to have responsibility for conducting investigations under the Trust in Care Policy, The Dignity at Work Policy and the investigation of complaints of serious misconduct under the HSE Disciplinary Policy**
- 2. The Unit should be independent in the exercise of its day to day investigative functions while remaining subject to the normal management and governance structures of the HSE in terms of its administrative functions.**
- 3. A clearly defined protocol should be formulated setting out the role, functions and responsibilities of the Unit and its governance and accountability within the HSE management structure.**
- 4. The Unit should have responsibility for all stages in the investigative process.**
- 5. Consideration should be given to recruiting a complement of full-time investigators and to establishing an external panel of suitably qualified, competent and independent persons who could be called upon, as and when required, to provides investigation services. Those selected should be trained in adjudicative skills and procedures and should only be appointed on successful completion of that training. It would seem appropriate that all investigators should be appointed for a fixed-term not exceeding 3 years.**
- 6. Selection of full-time investigators and persons for inclusion on this panel should be made in conjunction with Staff Trade Unions and**

those selected should be deemed acceptable and competent to conduct any investigation to which they may be assigned by the Unit without seeking agreement to their assignment in any particular case.

- 7. A facility should also be provided for the assignment of assessors with particular professional expertise, to assist investigators in exceptional cases in which such expertise is required to conduct the investigation.**
- 8. Consideration should also be given to the provision of a mediation service, within the Unit, which parties could avail of as an alternative to formal investigation in suitable cases.**
- 9. A Liaison Officer should be designated in respect of each investigation being undertaken who could provide a communications pathway to interested parties. The Investigators should keep the Liaison Officer generally apprised of progress in the investigation.**
- 10. A timescale should be prescribed for each stage in an investigation and an overall time scale for its completion should be included in the terms of reference for the investigation.**
- 11. A generic or model terms of reference should be developed in conjunction with the Staff Panel Trade Unions, which should be used in all investigations, suitably modified so as to reflect the subject matter of the particular investigation and the timescale envisaged for completion of the investigation.**
- 12. Consideration should be given to the nomination of a suitable external person to adjudicate on disputes arising between unions and management in relation to aspects of the investigative process that are currently referable to external third parties under existing collective agreements. Adjudication under such a system should be completed within four weeks from the date on which the issue or dispute is referred to the Adjudicator. This should not apply to a decision to initiate an investigation or to the outcome of an investigation.**

- 13. The current practice of assigning a least two investigators to every investigation should be reconsidered. Where particular expertise is required in the conduct of any investigation, the facility referred to at Recommendation 7 could be utilised.**
- 14. The procedural aspects of the Trust in Care, Dignity at Work and Disciplinary Policies should be modified so as to provide for the investigation of complaints by the Unit and in particular to reflect Recommendations 4, 6, 7, 11, 12 and 13**

Appendix

Draft Terms of Reference – A review of the HSE Human Resources investigation process from a local service area level and national level

1. Introduction

HR investigations in the HSE are conducted under one of three nationally agreed policies and procedure, namely Trust in Care, Dignity at Work and the HSE Disciplinary Procedure. A number of different functions are exercised under those policies and procedures.

- Under Trust in Care and Dignity at Work, preliminary screening of all complaints is carried out. Preliminary Screening is carried by a line manager (Trust in Care) or a member of the HR department (Dignity at Work). Only complaints that meet the applicable screening standard are sent forward for investigation.
- There is no preliminary screening under the Disciplinary Procedure, but instead a preliminary fact-gathering process is undertaken by local senior management.
- Where an investigation is to occur, such an investigation is commissioned by an appropriate senior manager (described as “the commissioner”).
- Investigations are conducted by investigation teams who are normally employees of the HSE but who are independent in the conduct of the investigation. Under the relevant policies and procedures, the investigation team members must be agreeable / acceptable to the relevant parties.
- The work of investigation teams is governed by the terms of reference set by the commissioner.
- Each investigation teams completes an investigation report. This report is furnished to the respective commissioner. In appropriate circumstances the commissioner may arrange for disciplinary action to follow from the investigation report.

The National Investigations Unit was established to support and enhance the internal processes, engagement and management of investigations throughout the health service within the context of agreed national HR policies and procedures.

The Health Services People Strategy Leaders in People Services identified the requirements for a HSE Human Resources National Investigations Unit. This was outlined as follows:-

“Priority 6 Performance

Priority 6.6 - Establish a unified National Investigation Unit that provides a timely and efficient response and uses learning outcomes to continuously improve performance

Priority 6.6.1. - Increase the number of trained investigators to support the work of the National Investigation Unit and develop their skills and competencies.”

The HSE introduced a central National Investigations Unit to support investigations under the three applicable HR policies and procedures and to introduce learning outcomes across the entire system.

The Unit has developed template documents for consideration by commissioning managers and investigators.

The Unit provides training to commissioners and investigators and briefings to managers. The Unit does not select investigation team members, but it does propose (from its panel of trained investigators) names for consideration by commissioners (subject to the requirements of the relevant policies and procedures that investigators be agreeable / acceptable to the parties).

An annual report is issued each year by the Unit.

The Unit works collaboratively with the commissioners to support the delivery of a consistent and effective investigation service across the organisation.

The Unit provides advice and support to investigation teams (who have been appointed by commissioners) to assist those investigation teams in respect of the investigations that those teams are conducting independently. Advice is only provided when it is requested by a commissioner or an investigation team.

Not all commissioners, and not all investigation teams, request the advice of the Unit.

The purpose of the review

Together with the Staff Panel of Trade Unions, Human Resource management have agreed that a review will be undertaken in order to address the matters relating to HR investigations that were raised in the National Joint Council letters dated 21st and 27th March 2019 addressed to Mr. John Delamere, HSE Head of Corporate Employee Relations Services, and Ms. Rosarii Mannion, HSE National Director of Human Resources respectively.

The purpose of this review is to consider and address all matters raised in the communications outlined above, having regard to the different functions exercised by local managers, local HR, the National Investigations Unit, commissioners and investigation teams.

This will be achieved by focusing on specific aspects of investigations within the HSE including but not limited to:

- Methodology
- Policies
- Procedures
- Investigation communication pathway
- Administration
- Volume
- Confidentiality and data protection
- Investigation team independence
- Undue pressures and influence
- Health and Safety of investigators
- Effectiveness of the pre-screening process.

Scope and methodology of the review

The scope of this review will encompass the overall HR investigative process. All aspects of the investigative process are to be considered.

The reviewer(s) will:

- consider and evaluate the interaction of the three relevant policies and procedures with the administration of investigations;

- consider and evaluate the remit and responsibilities of each of the respective participants in the investigation process, including commissioners, local managers, the National Investigations Unit, investigation teams, trade unions, local HR, and other persons;
- consider and make recommendations in respect of the suite of template documents provided by the National Investigations Unit for support of commissioners and investigation teams;
- consider and make recommendations in respect of the training provided to investigation commissioners and investigation team members by the National Investigations Unit;
- identify any issues that may adversely affect the timely completion of investigations and make recommendations about how they may be addressed; and
- consider data capture, methodologies reporting and communications in respect of HSE investigations.

The reviewer(s) will meet with HSE management, National Investigations Unit management, Trade Union Officials, HSE HR/ER staff, and other HSE management as appropriate. The reviewers will consider and address any documents provided to the reviewers by any appropriate person.

All parties will provide all appropriate assistance to the review, including by sharing information as appropriate but having regard to obligations under data protection law and the requirement to ensure confidentiality in the case of individual investigations

The findings and recommendations of this review should be set out in such a way that the separation of functions and responsibilities is clearly identifiable eg to distinguish the responsibilities of the National Investigations Unit from those of local commissioners and line managers.

The outcome of the review should support the delivery of the HR investigation function supported by the National Investigations Unit. Of paramount importance is for the review to help ensure that the investigation process provides due process, fair procedures and constitutional and natural justice to all persons who are subject of an investigation. The investigation process should also support the creation of an environment that meets the strategic objectives and future requirements of the HSE.

Reviewer(s)

This review will be undertaken by [TBC]. An expected time line for completion of the work will be provided by the reviewers, this should be no later than three months from the commencement date of the review.

Report

A draft written report shall be produced by the reviewers for comment to all parties. The draft report shall contain both preliminary findings and preliminary recommendations in respect of the review of the HSE Human Resources investigation process from a local service area level and national level to include separately findings and recommendations in respect of areas and matters outside of the remit of the Unit.

A final report will then be produced following an opportunity for all parties to comment on the draft report.