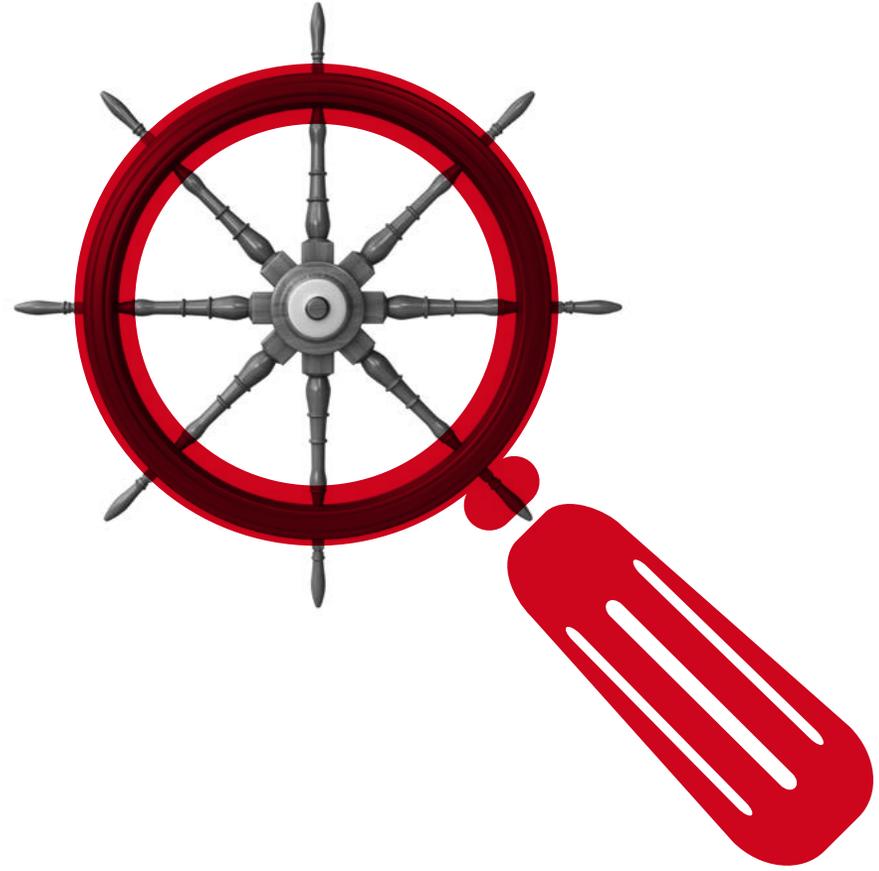


EVERSHEDS
SUTHERLAND

Taking control of events

Your guide to conducting
internal investigations



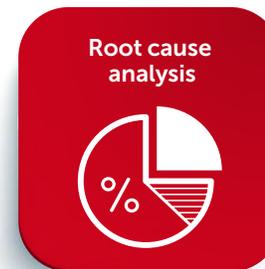


Introduction

With the increase of regulatory and legislative change across all industries, internal investigations are increasingly common in most organisations. There can be a range of triggers for internal investigations, including ongoing business monitoring/audits, customer complaints, a whistleblowing report, a requirement by a regulator, or employee fraud.

Internal investigations have become part of good corporate governance, and reinforce the requirement for good culture and conduct by demonstrating that employees will be held accountable for poor behaviour and/or misconduct.

This guidance is designed to give an overview of the key practical and legal issues that organisations may face at each stage of an investigation. It is not intended to be exhaustive but highlights the key issues which organisations should be considering. Should you have any questions, please [click here](#) for details of our specialist lawyers who would be happy to discuss any issues with you.





Immediate priorities

Identifying and prioritising immediate actions is crucial when an issue is first escalated. If the issue is serious and/or material, it is likely that immediate action will be required.

Ensure proper governance

Establish the team

Notifying regulatory bodies/law enforcement agencies

Identify and notify internal stakeholders and maintain confidentiality

Preserve all potential evidence

Manage communications

Consider privilege

Directors and Officers Insurance

Identify employees and actions to be taken

Is immediate redress required?

Protection of whistleblowers (if any)



Ensure proper governance regarding decision to commence investigation

It will be essential to ensure that any decision to commence an internal investigation is taken in accordance with relevant internal procedures. In particular, depending on the nature and seriousness of the issue in question, it may be appropriate for the board to be informed (whether as a matter of urgency or not) of the launch of a proposed internal investigation; also, again depending on the nature and extent of the proposed investigation, it may be appropriate for prior consideration and approval of the board before any investigation is commenced.



Establish the team to carry out the investigation and all related matters

At the earliest possible stage, the organisation needs to establish who will carry out the investigation and what resources they will need to carry out the investigation and deal with related matters, in particular the various matters identified in this document. It will be essential to ensure that an internal project management team is established, with a clear understanding of who is responsible for what and who is in charge, internally, of the investigation.

The team may well need to rely on an external law firm to assist it. Eversheds Sutherland would be delighted to assist. Depending on the issues that arise, other external experts, such as accountants may also be needed.



Notifying regulatory bodies/law enforcement agencies

Organisations should assess whether any obligation has arisen to notify a regulator or other authority about the relevant issue(s). Certain regulatory bodies, for example, the Central Bank of Ireland, impose obligations on regulated organisations and individuals to notify them as soon as practicable if a regulatory breach may have arisen. It is, therefore, important that thought is given to this at the outset. Thought must also be given to the content of any notification, particularly in circumstances where notification to regulators and/or law enforcement agencies is being made before the investigation has commenced and/or has been concluded.

If it is decided that notification is unnecessary, the reason for that decision should be recorded in writing. This will provide an audit trail if the decision is subsequently challenged by a regulator/enforcement body. Notification obligations should also be kept under review as the investigation develops, and recording the initial rationale will facilitate this.



Identify and notify internal stakeholders and maintain confidentiality

At the start of the investigation, the organisation should identify the range of internal stakeholders who need to be involved and agree how they will be kept informed. It is useful to keep a written record of this so it is clear which stakeholders should be briefed and how much information they should be given. Some stakeholders simply need to be aware that an investigation is underway, whilst others need to be kept closely updated on progress throughout the investigation.

This list of internal stakeholders should be kept under review, in order to ensure that only those with a genuine need for information on the investigation are included on the list. This assists in maintaining confidentiality – which is of itself important – but it is also required in circumstances where the organisation is seeking to assert privilege.

All internal stakeholders who receive any information about the mere existence of the investigation, or the facts and issues under investigation, should be issued with a written note informing them of their confidentiality obligations. This note should address: (i) their confidentiality obligations (by reference to their contracts of employment and/or additional terms specific to the investigation); and (ii) the consequences of a breach of those obligations.



Preserve all potential evidence

The categories of documentary evidence required for the investigation should be identified at the outset, and consideration given as to whether it is necessary to issue a document hold notice to ensure such evidence is preserved or secured.

The notice should outline which categories of data should be retained and for what period.

When deciding whether to issue a hold notice, think about whether any of the individual recipients are, or could be, a subject of the investigation. If so, there may be a risk that they will take steps to destroy or manipulate evidence. In these circumstances, the organisation must ensure that adequate measures have been put in place to prevent this, for example, by suspending the individual, confiscating all portable devices, and/or blocking their access to all systems.



Managing communications

Internal stakeholders who are aware of the investigation should be given guidance on the creation of new documents (including email exchanges, internal reports, updates) as well as what should be communicated to external parties. This guidance should cover:

- a) the importance of keeping communications confidential and discouraging speculation/ opinion about the events which might be misconstrued, or impact any subsequent litigation or enforcement action; and
- b) the need to refer any press enquiries to a designated contact, such as the organisation's press office, where the event under investigation is likely to be subject to public scrutiny.

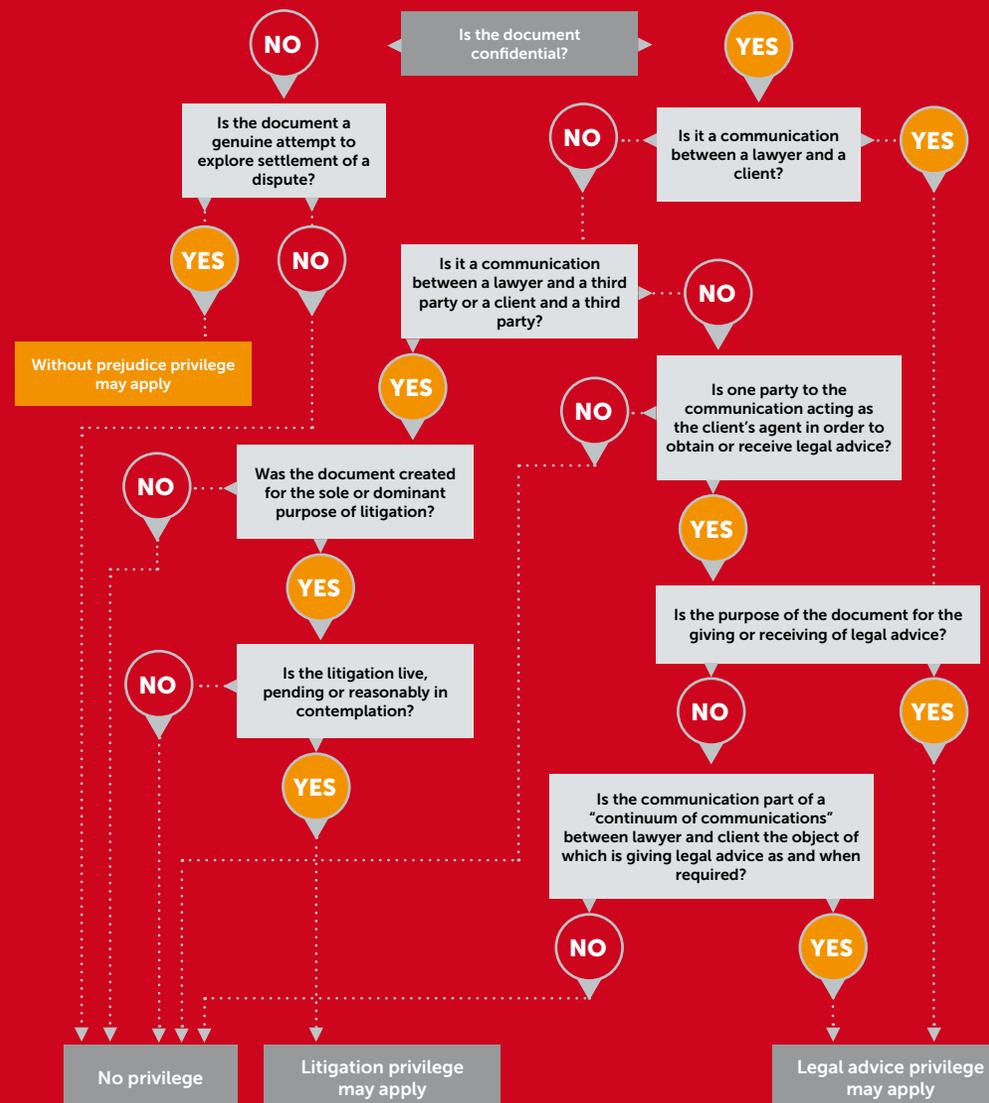
However, any guidance should make clear that it is not intended to affect any employee's ability to make an independent report to a regulator concerning the issues under investigation. This is particularly important in the context of whistleblowing.



Consider privilege

If an organisation wishes to assert privilege over the investigation, care must be taken at the outset to ensure that it is not inadvertently lost, and/or that privilege can be claimed in the particular circumstances.

There have been a series of decisions by the Irish courts over the past year which have brought into focus the question of the availability and scope of legal professional privilege for companies that have conducted, or are engaged in, internal investigations. Common interest privilege may also apply in the context of internal investigations. Under Irish law, Legal Professional extends to communications with both in-house counsel and external lawyers on the same basis however recent case law *CRH PLC v The CCPC* has outlined certain restrictions in competition law matters.





Directors and officers insurance

Some organisations have directors and officers insurance cover for their key management, which indemnifies the organisation and senior management for losses in relation to any legal action (including a regulatory investigation) for alleged wrongful acts by a director or officer. Most policies require organisations to notify the insurer of a potential claim immediately, so this should be considered at the outset of an investigation to ensure that the insurance cover is triggered, where applicable. As with all insurance policies, failure to make a timely notification with the correct information could nullify cover.

When preparing the notification to insurers, care should be taken to ensure it does not have an impact on any competing obligations to notify an authority or regulator.



Eversheds Sutherland

GLOBAL MAP

Scoping and evidence gathering

The purpose and scope of an investigation needs to be clearly articulated at the outset before any meaningful project plan can be developed. This is important so that all involved in the investigation are clear on the shape of the investigation and what it will cover (and importantly not cover).



Scoping the investigation and identifying the relevant evidence



Agreeing the review methodology



Sources of data



Reviewing the data



Retrieving and storing the evidence

Statistical Analysis

GLOBAL MAP

Statistical



Scoping the investigation and identifying the relevant evidence

Prepare a Scoping Document and Action Plan at the commencement of every investigation. This should outline the key issues, the areas for investigation and the steps the organisation proposes to take, including the proposed search methodology for retrieving evidence. It should also outline why the organisation considers the extent of the search is appropriate and proportionate in the circumstances, so there is a record of this should there be any subsequent challenge from a relevant authority and/or regulator.

It is necessary to identify and agree all key custodians and business areas relevant to the investigation and the appropriate time period for the search.

The scope should be governed by the information the organisation currently has in relation to the investigation, but critically the custodians and date range need to be kept under review during the course of the investigation, and may need to be extended in light of any new information.



Sources of data

It is usually necessary to retrieve various categories of evidence, including policy and procedure documents, minutes of meetings, emails, hard-copy correspondence, personnel files, audit reports, board reports, and marketing material. This data is likely to be stored in a number of different locations and held either in hard copy or, more likely, electronically.

Electronic data is stored in many formats, for example servers, desktops, PCs, laptops, notebooks, hand-held devices, PDA devices, off-site storage, removable storage media, databases, emails, instant messaging, voicemail, recorded telephone lines, text messaging, audio files, and video files. Care should be taken to ensure all relevant sources are identified and searched as appropriate.

If the investigation involves cross-border issues, it will be necessary to consider local data privacy laws. Some jurisdictions will not allow data to be removed from the country, and as such measures may need to be put in place to review the data in the relevant jurisdiction.

An organisation is unlikely to have any entitlement to search an employee's personal data without their consent.



Retrieving and storing the evidence

Most, if not all, investigations involve the review of electronic data. Ensure that the data is collected in a forensic manner and is safely processed. The data needs to be securely stored, whilst being accessible and easy to review. Depending on the volume of data to be reviewed, a data platform can assist with the review process. The benefits of using a data platform are as follows:



Early data assessment tools



Advanced analytics



Built in technology assisted review



Automated reporting software



Data hypergraph

Preparing the data for initial review

Once all the relevant data has been collated, ensure that:

- irrelevant material is filtered out at an early stage
- the review of “hot documents” is prioritised
- the review is carried out in a defensible manner



Agreeing the review methodology

Data management and review has become one of the most challenging issues for organisations. Often the data review can span multiple jurisdictions and languages, and involve the collation and processing of many different types of media. Data reviews need to be carried out effectively, efficiently and at a cost proportionate to the issues faced.

When the data is ready for review, implement a plan and review methodology for use by the reviewers. This should explain how documents should be categorised according to their relevance to the issues under investigation, and a process for escalating any queries. It should also outline the composition of the review team, and a quality assurance process to ensure that the review is conducted in a consistent manner.

Management information should be produced and shared on a regular basis so that the project can be properly monitored, and action taken by the project lead to rectify any challenges at an early stage.



Reviewing the data

The subjective and analytical elements of document reviews are fundamentally iterative in nature. A smooth and effective feedback loop within a co-ordinated review team at the subjective/analytical stage is key to a fast, efficient and quality assured review process.

A typical data review lifecycle





Investigative interviews

Witness interviews are an essential part of the evidence gathering stage, so it is critical to ensure that all relevant individuals are interviewed at the right stage of the investigation.



Identify relevant employees and the order of interviews



Conducting the interview



Preparing for the interview





Identify relevant employees and the order of interviews

It may be apparent who the key witnesses are at the outset of the investigation, but this should be kept under review and reconsidered once the document review has been completed as new information may have been uncovered which suggests that other individuals were involved. Those individuals who were directly involved with the issues under investigation need to be interviewed and, in some cases, individuals in their reporting lines. Depending on the nature and complexity of the issue under investigation, a subject matter expert (SME) may also need to be interviewed to provide an understanding of the facts. SMEs should be sufficiently independent from the affected business area to avoid any potential conflict of interest.

Individuals should be categorised according to their relevance to the investigation. This will ensure that the number of interviews and witnesses can be more effectively managed to reach a reliable conclusion on the evidence without having to conduct an investigation which is disproportionate to the issues.

The order of interviews is also important. For example, it may be necessary to interview the SME first to obtain a clear understanding of the issues which will assist with questioning in later interviews.



Preparing for the interview

Once the interviewees have been identified, decide whether they are a witness of fact or under investigation. The distinction between these categories of witness can be crucial because it affects how the interview should be approached and may also affect an organisation's regulatory obligations. This decision should be continually monitored and tested as evidence emerges and the investigation develops to ensure there has been no change in status.

It may be useful to provide the interviewee with a bundle of contemporaneous documents prior to the interview. This needs to be balanced against the fact that their recollection may be influenced by the material. It is also important to consider whether the information is confidential and/or privileged, to the extent that the interviewee would not otherwise have had access to it. If it is, then it may not be wise and/or in some instances possible, to disclose it.

An interview plan should also be prepared to ensure that all relevant issues are covered during the interview to avoid unnecessary follow up interviews, which are likely to delay the conclusion of the investigation.

Often employees ask whether they can have a representative present at the interview. This is not necessary during a fact find interview and, unless there are exceptional reasons for doing so, should be discouraged.



Conducting the interview

Interviews tend to be conducted by either someone from a support function, such as HR or Legal, or an external party, such as a lawyer instructed by the organisation. The interviewer must be sufficiently independent of the affected business or individual under investigation. Interviews are also best conducted by someone with experience of handling witnesses and with a strong knowledge and understanding of core interview techniques.

At the outset of the interview, the interviewer should explain its purpose and structure. In particular, the interviewee should be told that the interview is confidential and should not be discussed with anyone else. It should also be made clear that it is a fact finding interview and does not form part of any disciplinary process.

If a lawyer is conducting the interview, it may be necessary to provide an “Upjohn” warning at the start of the interview. This is to explain that the lawyer is acting on behalf of the organisation and not the employee and as such, the organisation can waive privilege at any time and disclose the content of the meeting. For further detail on privilege **[click here](#)**.



Reporting on outcomes

Keeping key stakeholders informed throughout the investigation is crucial, particularly when new issues arise. It is equally important to have a clear reporting structure and a defined group of individuals who should receive the information in order to preserve confidentiality, and where applicable, privilege.



Preparing the investigation report



External/internal communications



Consider notification obligations





Preparing the investigation report

The key issues under investigation, as outlined in the Scoping Document, should provide a good basis for preparing a report. Does the evidence that has been collated and considered address all of these issues and achieve the objectives set at the outset? If not, it may be necessary to record any outstanding gaps and suggest follow up enquiries. It may also be necessary to recommend further investigation if other issues have been identified during the course of the investigation.

Before a report is drafted, consider who the potential recipients will be. The report should set out the facts which have been established, but should not prejudge the outcome of any potential action.

Consider what lessons can be learned from the investigation and, where necessary, what should be done to change practices/processes to ensure these lessons are taken on board. Review meetings to track progress on implementing any changes and reassessing the risk should take place. Consideration should be given to carefully documenting the rationale behind any risks identified and the changes agreed upon.



External/internal communications

If the matter has received media attention, consider agreeing a press statement to communicate the outcome. The content of the statement will depend upon the nature of the issues and the findings of the investigation.

It may also be necessary to publish an internal statement to all employees. Again, it will be important to provide guidance in relation to what should be communicated externally – **[click here](#)** for further detail.



HR considerations

If the investigation involves potential employee misconduct/poor behaviour, it is likely that HR will need to be closely involved at all stages.



Risks associated with disciplinary proceedings



Suspension of employees



Protected disclosures, whistleblower protection and obligations to report criminal behaviour





Risks associated with disciplinary proceedings

An act of suspected misconduct or other issue that triggers a regulatory investigation is likely to be the subject of concurrent disciplinary proceedings. A delicate balance must be struck between an investigation for regulatory purposes and disciplinary proceedings. Compliance, HR and Legal departments need to work cooperatively, whilst ensuring the decision making processes are kept separate. Employees who are the subject of allegations are entitled to fair procedures. Failure to follow full procedures can taint any subsequent dismissal or even lead to an injunction to restrain the process from continuing.

Organisations should carefully consider what sanctions should be imposed on an individual. For example, if the decision maker considers that the issue is not serious and imposes a first written warning and a regulator disagrees, this might suggest systemic issues or a misunderstanding of regulatory principles to the regulator. An organisation has to balance reducing risk with its primary duty to any regulator.

For financial services firms, where the firm becomes aware that there may be issues with the fitness and probity of a person in the firm occupying a controlled function, the CBI expects the firm to 'investigate such concerns and take action as appropriate without delay'. Also, the firm must notify the CBI of any action taken on foot of the investigation (eg written warning, suspension etc.).



Suspension of employees

Organisations should check whether there is a contractual right to suspend pending investigation. Even where there is, a suspension is not a neutral act and only appropriate in a limited number of circumstances. Organisations should consider whether a lesser alternative is viable, for example, requiring the employee not to contact certain individuals/not carry out certain functions. However, in a regulatory context, suspension is often the best option. A lengthy suspension should be regularly reviewed to ensure that it remains appropriate.

On suspension, organisations must consider any regulatory notification obligations. **Click here** for further detail.



Protected disclosures, whistleblower protection and obligations to report criminal behaviour

The Protected Disclosures Act 2014 gives extensive protection to any worker who discloses information which tends to show a relevant wrongdoing. Depending on how wrongdoing came to light, one or more employees may have protected status. Apart from giving protection from penalisation or dismissal, the Protected Disclosures Act gives a statutory right to seek an injunction where an employee believes his or her dismissal is linked to their having made a protected disclosure.

There may also be an obligation to report wrongdoing to the Gardai. Where a person fails to report information which might be of material assistance in preventing a crime or ensuring a prosecution or conviction for committing a crime, that failure is a criminal offence. The obligation to report and when to report must often be considered alongside an investigation.



Redress/remediation

Depending on the issues under investigation, it may be necessary to undertake a customer redress exercise and/or remediate past business failings.



Is redress/remediation required?



Project Management



Scoping and Planning



Supporting the management of regulatory relationships



Development and Testing





Is redress/remediation required?

Redress should address any detriment suffered by customers that may have been impacted by different issues in relation to their business relationship with the organisation. So, any proposed redress scheme should take account of any case-by-case circumstances including customer feedback where appropriate so that individual issues can be addressed and redress is tailored to the personal circumstances of that individual customer.

The redress should seek to return the customer to the position they would have been in, had the problem not occurred and customer not been disadvantaged. Senior management should be alert to the fact that various lines of business can be engaged with the concurrent remediation projects and take steps to ensure that the treatment of customers is coherent across lines of business.



Scoping and planning

To ensure an effective remediation programme, proper preparation is vital. Ensure that the end objectives are defined at the start. Time spent scoping and planning at the outset avoids a project lacking in direction, inaccurate process-mapping and poor alignment to project milestones, thereby avoiding re-working, operational inefficiency and escalating costs – not to mention strained relationships in project teams.



Development and testing

Developing clarity around the sampling framework, product types, customer types, distribution channel, transaction values, etc. helps to define a sampling matrix which, if developed effectively, can inform/determine where certain segments (possibly risk-related) exist and how best to prioritise or treat these as discrete reviews in the early phases of the programme. These mini- reviews are essential as they provide statistically reliable information about how a wider population is likely to trend if the review is extended. A complex review comprising multi-product and multi- channel sales can often be intelligently sampled to inform further activity required that can then be determined in proportion to the scale of the issues being addressed.



Project management

Thought should be given to whether the business would benefit from having a skilled and qualified project manager running the remediation programme. Understanding the synergies created from the individual components of the programme saves time and unnecessary expense in wasted or inefficient resource allocation. An effective project manager can oversee and expedite: population identification, data analysis and purging, data extracts, mailing programmes and execution, response handling, incoming document handling, document management (scanning/storage/retrieval), batch processing, call recording/analytics and routing, business process management, outbound customer contact, reviewer capability and management, workflow design and development, reporting and analysis, quality assurance, steering, risk identification and planning, and resource planning.



Supporting the management of regulatory relationships

Some remediation programmes are under regulatory scrutiny. It is, therefore, important to engage with the regulator at an early stage. An open dialogue, a pragmatic approach to focusing on outcomes and breaking down the programme into easily identifiable stages or phases often result in timescales becoming more flexible and resourcing being viewed differently by the organisation's regulator or other enforcement bodies.

Through intelligent sampling, informed programme design and significant delivery experience, there are aspects of programme design that can influence how a regulator/enforcement body views some of the activities undertaken as part of an end to end remediation programme.



Root cause analysis

When conducting a past business review it is key to conduct a root cause analysis (RCA) in order to identify and remedy potential systemic failings. Learning points from a RCA can be used to identify whether the root causes affect other business areas and to shape future approaches to product design and internal systems and controls, including policies and procedure manuals.



Identification of the issue challenging your business



Identify corrective actions and implement solutions



Ask "why" and identify root causes



Assess the success of the solution and whether further action needs to be taken





Identification of the issue challenging your business

A failure to clearly identify the problem at the outset inevitably leads to wasted efforts. There are a number of key issues to be considered before starting any analysis, including:

- **Data Sources** – the information the organisation must review as part of its analysis. The organisation's analysis is only ever as good as the data it collects. If the organisation has not collated all the necessary information, its analysis will be flawed
- **Team** – ensuring the organisation has the right team of people involved who understand the issues and are familiar with processes and systems is critical
- **Objectives** – having a clear understanding of the end result to be achieved helps focus the analysis
- **Technology** – considering whether the use of software tools to streamline or simplify the process, and facilitate a more structured approach to capturing and analysing data.



Ask why and identify root cause

Start with the problem and work backwards to sequence all of the contributing events. Ask why the incident happened. Take that answer and ask why again, drilling down until the organisation reaches a cause that cannot be broken down any further. Explore all potential causes initially, and narrow down the list to the most likely culprits. The aim is to end up with a cause and effect diagram that should lead to the source of the problem. Note that there may be multiple root causes, each of which must be addressed to prevent similar incidents occurring in the future.

Where there are multiple root causes of an issue that has arisen, or where the root cause(s) are complex, organisations should consider whether they should review their culture and consider whether the culture of the organisation is a root cause. In financial services in particular, the CBI is very focused on reviewing organisations' culture as the CBI has found that the culture of a firm can be a root cause of misconduct.

Eversheds Sutherland provides a Culture Audit service for firms, which enables firms to assess their culture and take appropriate actions where weaknesses have been identified.



Identify corrective actions and implement solutions

Once the organisation has identified the root cause of the issues and made a diagnosis, it can then consider the lessons learned and any specific corrective actions that need to be implemented to prevent similar problems reoccurring in the future. Corrective actions should be directly linked to the root cause(s) identified, and may include:

- changes to internal reporting lines
- changes to internal procedures
- the need for further training for specific business areas
- improvements to internal systems

Once solutions have been identified, these need to be implemented and effective control frameworks put in place to monitor this process.



Assurance

The quality and effectiveness of any new systems and controls which are implemented as a result of issues identified during an investigation should be tested periodically. This mitigates against the risk of further issues and/or helps to identify potential issues at an early stage.



Initial set up and scoping



**Monitoring and reviewing results/
internal reporting**



Agreeing a methodology



Initial set up and scoping

Establish and define the scope of the review, including:

- the objectives to be achieved and the expected output
- responsibilities for those objectives
- the relevant communication channels and communication approach
- any internal/external reporting requirements
- timescales
- allocation of appropriate resources



Agreeing a methodology

The assurance review methodology should be agreed upfront to ensure a consistent approach and that outcomes/objectives are met. Thought should be given to:

- the data and information required (and the collation of such data including custodians, date ranges and keywords)
- the key individuals, if any, that will be interviewed
- the size of the sample (if required) to be reviewed and whether there is a need to stratify (for example product type as well as channel and sales person)

- how the results will be documented, reported and presented
- how the results will be reviewed and monitored to record progress and whether a further sample is required
- whether benchmarking is required
- what quality control measures will be put in place

Ensure that appropriate resources are allocated to the review process and that consideration is given to whether there are software tools that can be utilised to assist.



Monitoring and reviewing results/internal reporting

The assurance review process must be monitored and the results reviewed at regular intervals to ensure that the review is achieving the desired results. If it is not, changes to the methodology can be made to deal with this.

Effective monitoring/output review strategies should comprise one or more of the following:

- regular meetings with project manager and key stakeholders
- sample reviews of output, where appropriate, to test progress
- delivering relevant and timely information to key stakeholders

Robust programme governance requires the right information to be provided to the right people, at the right time. Thought should, therefore, be given as to how and when this Management Information (MI) is presented and what it contains.





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