

Obtaining independent advice: dos and don'ts

In public service, many key decisions are based on, or supported by, “independent” advice, typically provided by an external subject-matter expert. Agencies often turn to independent auditors, lawyers, economists, town planners, quantity surveyors and experts in information technology, human resources, strategy, change management, and so on. It is also common for agencies to appoint independent members to recruitment and tendering panels. However, if that advice is not really independent – or worse, if it has been deliberately manipulated – the decision-making process may be biased or even corrupt. In some situations, a public official could intentionally hide behind manipulated “independent” advice to distance themselves from a particular course of action.

This document provides public sector agencies with some guidance about the best way to obtain and use independent advice.

The need for independent advice

Public sector agencies frequently require the advice of external, independent experts. In many situations, important decisions hinge on the nature of that advice. It is therefore critical that these experts be engaged, managed and paid in a manner that maintains their independence.

There are two main advantages of seeking independent advice. First, if the advice is truly independent, it should be objective and free of any bias that might derive from the agency's prevailing culture and conventions. Secondly, the adviser is usually an expert and can be relied on to provide technical skills that existing staff might not possess.

Consequently, advice that is labelled as “independent” and “expert” usually carries significant weight and is trusted by decision-makers.

What can go wrong?

Most of the time, the advice given by independent experts is accurate and reliable, the agency is happy to receive it and is comfortable paying the expert's fee. But there may be occasions when the agency and its adviser are at odds. If the adviser is critical of the agency or its staff, recommends an unwanted course of action or simply disagrees with the agency's stance, respective interests may no longer align.

Most independent experts have at least some interest in keeping their paying clients happy and being considered for future consulting engagements. This can create tension between providing frank and objective advice and telling a client what they want to hear. Unfortunately, in some rare cases, this tension can spill over into unethical conduct or even corruption. This can include:

- shopping for an adviser who is unqualified or will agree to give biased advice
- collusion between agency staff and advisers

- advisers who are more focused on pleasing their client than providing good advice
- offering inducements to provide biased advice
- bullying or threats directed at advisers
- conduct that misrepresents or covers up advice
- advisers with undisclosed conflicts of interest.

As defined in the *Independent Commission Against Corruption Act 1988*, corruption involves, among other things, conduct that is partial or biased. In practice, this often entails public

officials making decisions that lack objective merit and confer personal benefits on themselves and their associates. However, if a corrupt official can manufacture a situation where an “independent expert” recommends the particular course of action the official wishes to take, the behaviour will not appear suspicious.

In this situation, the wrongdoer can claim that they were merely acting on the advice of an independent expert. This diminishes the appearance of bias and allows the official to distance themselves from the corrupt decision.

Ignoring independent advice

In its Operation Dasha report, the Commission made a number of serious corrupt conduct findings based on improper favouritism of developer interests by two elected councillors. This included a finding that the councillors corruptly assisted their preferred candidate to be appointed as the director of city planning.

The job opportunity

The council's existing director of city planning – effectively the head of the council's planning department – had resigned, creating a vacancy for an important and influential role. In evidence to the Commission, the outgoing director described the council as “very pro-development”. The two councillors were included on the selection panel.¹

To assist in identifying the most meritorious candidate, the council engaged a specialised recruitment consultant. The consultant assisted with a variety of tasks, including advertising the role, assessing applications, developing a shortlist, and drafting interview questions. She also attended interviews and performed reference checks.

The consultant's advice

At various points during the process, the consultant gave advice that the candidate, who was ultimately preferred by the two councillors:

- did not meet the criteria to be shortlisted (her advice was ignored)
- was treated favourably during the interview process by the two councillors
- was not favoured by referee reports
- should not be preferred ahead of other candidates and that “it would fly in the face of a merit selection process” to appoint him to the role.

Contrary to this advice, the candidate preferred by the councillors was ultimately appointed. During the recruitment process, the consultant wrote to the council's general manager describing her concerns and surprise about the decision and the influence exerted by the two councillors.

The corrupt conduct

Unbeknown to the consultant, the two councillors had divulged the interview questions to their preferred candidate and were actively supporting his candidacy. The councillors also threatened to dismiss the general manager if he did not appoint their preferred candidate. The Commission found that this conduct was corrupt.

In its investigation, the Commission relied on the oral evidence of the specialist recruitment consultant and the records she created. This evidence helped to demonstrate that the two councillors had failed to act impartially.

As described in the case study on page 4, the new director of city planning engaged in corrupt conduct himself by, among other things, manipulating the assessment of a rezoning application.

Report: *Investigation into the conduct of councillors of the former Canterbury City Council and others* (Operation Dasha), 2021

¹ The Commission ultimately found that these councillors corruptly favoured the interests of a number of development applicants.

When engaging independent advice

In order to receive practical advice, an agency needs to give specific instructions to its independent adviser and set an appropriate scope of work (SOW). It is important that the SOW be sufficiently broad to allow the independent expert to apply their expertise and reach a conclusion based on evidence. Similarly, the independent expert should have sufficient time to complete their work.

For example, assume the head of an agency has directed the human resources (HR) department to engage a workplace health and safety (WHS) expert to inspect its documentation and premises to identify any untreated hazards. This expert's SOW should provide for full access to the premises, existing injury and incident reports and risk register, relevant meeting minutes, previous consultant reports, and so on. But if the SOW is deliberately confined or the expert is not provided with relevant information, the advice could be flawed or subject to numerous disclaimers.

It is good practice to ensure that a person or unit, whose work could be the subject of adverse comment, does not have complete control over selecting the independent expert or setting the SOW. In the example above, if the HR department is responsible for WHS, its staff are probably hoping that the expert does not find too many untreated hazards. The HR staff might even have an incentive to confine the SOW to prevent the WHS expert from finding evidence of managerial failings.

Depending on the significance of the work being performed by the independent expert, it may be worth involving the agency's internal audit or legal units – which are typically independent from frontline management – to manage aspects of the engagement. For large or complex matters, it may be desirable for a central government agency (such as Treasury) or the head office of a cluster to play a role in appointing, funding and managing the independent expert.

Agencies should also be aware that even very minor scope exclusions or assumptions could alter the advice they receive. In the example above, a motivated official could slightly adjust the timeframe to exclude a particular safety incident from the SOW.

In any case, the SOW and any exclusions, disclaimers or assumptions should be transparent to all users of the expert's final advice or report. The expert's report should also describe whether any scope limitations could have affected their findings.

In addition to the scope considerations set out above, the Commission recommends that the following points be considered when engaging independent experts.

- While it is good practice to look for an expert who is reputable, qualified and provides value for money, there is no point “advice shopping”. That is, engaging an expert who is expected or likely to rubber stamp the agency's proposed course of action. Agencies should therefore be prepared to

receive advice that is not consistent with their own point of view.

- Wherever possible, agencies should engage independent experts who are part of a professional association or peak body that has its own code of ethics and professional standards. They should also carry professional indemnity insurance.
- As a general rule, independent experts should not be asked to depart from standardised or industry-accepted methodologies for performing their work. In addition, the SOW (and the expert's report) should reference any relevant standard, methodology or professional standards scheme to be used.
- The independent's fee or incentives should not be dependent on providing particular advice.
- It is acceptable to provide the independent expert with information about the agency's proposed course of action or what it is hoping to achieve. For example, if an agency engages an economist to perform a cost-benefit analysis for a proposed project, it would be acceptable for the agency to identify what it sees as the project's pros and cons. However, the independent expert should be free to disagree and form their own view.
- Variations to the SOW should be in writing and, if necessary, a formal communication protocol should be used that sets out which agency personnel can instruct the independent expert.
- If the engagement entails examining a sample of data, the independent expert should select the sample – not the agency. However, it is acceptable for the agency to express a view about the sampling methodology.
- Preferably, the independent expert, or their company, should not rely on one agency for a large percentage of their work. If the adviser has a range of income sources, they are likely to have fewer reservations about delivering unwelcome advice to a client.
- Where practical, agencies should rotate independent experts from time-to-time or draw from a pool of potential advisers. This lessens the co-dependence between the agency and any one adviser.
- Although an adviser may be independent of a government agency, they can still have other personal and financial interests that could affect their judgment. This can arise if the expert or their organisation is acting for another party whose interests potentially conflict with the agency's. In addition, while an expert may be independent of an agency, they may have personal relationships with agency staff. The agency is entitled to ask about this information and take steps to ensure that any conflicts of interest are disclosed and managed.

If any agency decides to engage an expert who has disclosed a conflict of interest, the ultimate users of the expert's advice should be apprised of the circumstances. In some cases, it may be appropriate for the expert's written advice/report to contain a statement affirming that they do not have a conflict of interest.

- As with any supplier, the agency should carry out proportionate due diligence procedures before engaging an independent expert (see the Commission's publication [Supplier due diligence: a guide for NSW public sector agencies](#)).

Among other things, this includes determining whether experts are bona fide members of whole-of-government panels.

If the process for engaging the expert is itself flawed (for example, it involves an unauthorised direct negotiation or failure to obtain sufficient quotes), the independence of the final advice might be called into question.

Finally, agencies are often provided with "independent" advice that they have not commissioned or paid for. For example, a business pitching a novel unsolicited proposal to an agency might engage its own expert to prepare a business case.

Attempted manipulation of independent advice

One aspect of the Operation Dasha investigation examined the use of independent advice to support the approval of a planning proposal application in a Sydney suburb. The application sought to increase height controls from the existing limit of 10 metres to 18 metres.

Officers in the council's planning team (who were themselves planning professionals) did not support the proposal on the basis that it was not a good fit for the area, and was well outside the existing controls. However, the council's city development committee did not accept this view and supported the applicant's planning proposal.

This triggered a referral to the NSW Department of Planning and Environment for what is known as a Gateway Determination. The department's determination required:

An additional study [emphasis added] that accurately represents and addresses the impact of future development on the character of the local area is to be made available with the planning proposal during the exhibition period.

First independent report

The council engaged an independent urban designer to complete the additional study. This expert found that the proposed height limit would be "excessive" and "inappropriate".

The director of city planning forwarded the report to the applicant to provide an opportunity to address the issues raised. In the meantime, the applicant had engaged his own planning consultant, who, naturally enough, prepared a report ("the applicant's report") that supported its client's desire for a taller building.

The director provided a copy of the applicant's report to the urban designer, asked him to review it and submit a follow-up report of his own. The director was urging the urban designer to adopt the findings in the applicant's report and said the urban designer could "charge us what you would like for that". He also said that the council was compiling a register of consultants that the urban designer should register to join.

Second independent report

As requested, the urban designer reviewed the applicant's report and prepared a further report of his own. He maintained that the planning proposal involved excessive height and disagreed with the applicant's report.

In an email to a junior officer, the director said, "I don't particularly like this recommendation, not quite what we discussed. Let's chat tomorrow please about his wording".

Ultimately, the director satisfied the department's requirement for "an additional study" by ignoring the independent reports prepared by the urban designer and exhibiting the applicant's report instead. In effect, he substituted the independent report with a biased one. This deprived the public and decision-makers of relevant, objective information.

Corrupt conduct

The Commission found that, in return for preparation of a report that supported the rezoning application, the director had offered inducements and had engaged in serious corrupt conduct.

Report: [Investigation into the conduct of councillors of the former Canterbury City Council and others](#) (Operation Dasha), 2021

For obvious reasons, such a business case would only be volunteered to the agency if it supported the proposal. Agencies should therefore take a cautious approach to relying on such advice. Depending on the circumstances, it may be necessary to challenge the advice or for the agency to obtain and pay for its own, separate advice.

What to do if you disagree with independent advice

Independent experts are not infallible. They can make mistakes and, despite their independence, are vulnerable to many of the same unconscious biases as non-experts. It is also the case that reasonable minds can differ in relation to a range of topics.

If an agency wants to represent that it has obtained “independent” advice, the adviser must not be prevented from providing their genuine point of view.

The Commission recommends that agencies consider the following:

- The agency should be free to point out possible factual errors or differences in opinion and ask the expert to recheck or reconsider their findings. This is sometimes accomplished by reviewing a draft report. However, the independent expert should not be directed or subjected to repeated or aggressive attempts to amend their advice. As noted in the Operation Dasha report, the Commission agrees that public officials are “entitled to test the limits of what the expert or consultant was prepared to support”.
- The agency can ask for clarification or further detail regarding how the expert reached their conclusions.

Biased advice

In Operation Tilga, the Commission made serious corrupt conduct findings against a private sector consultant who was engaged to provide specialist advice about security systems. Public officials with relatively little knowledge of security relied on the consultant to provide advice about the most suitable security systems to purchase and which suppliers to engage.

The Commission found the consultant had undisclosed personal and financial relationships with a number of security systems suppliers and also accepted cash payments in order to improperly assist them to win work with the government agencies he was advising.

Report: [*Investigation into allegations of corrupt conduct in the provision of security products and services by suppliers, installers and consultants*](#) (Operation Tilga), 2013

Flawed advice

Operation Gerda primarily examined the practice of “ghosting” – false and inflated claims for shifts not worked by security guards. The investigation also considered the tendering process that led to the appointment of the university’s security contractor.

The Commission found that the chair of the tender evaluation committee (TEC) to select a security contractor held discussions with the independent member of the panel about the evaluation methodology and weightings. Subsequently, the independent modified his scores to match the chair’s scores. This took place outside any formal meeting of the TEC and contrary to the agreed evaluation plan.

While these unofficial discussions and scoring did not constitute corrupt conduct, a senior official of the university told the Commission that they “defeated the purpose of requiring an independent member to sit on the TEC and that the process was fundamentally flawed as a result”.

Importantly, decision-makers tend to have confidence in a process in which there is agreement between the internal members of an evaluation committee and the independent member. Consequently, any collusion involving an independent panel member can have substantial adverse consequences.

Report: [*Investigation into the over-payment of public funds by the University of Sydney for security services*](#) (Operation Gerda), 2020

- If the expert has changed their advice based on feedback from the agency, they should be free to explain this in their report.
- The agency must not promise or hint that the independent expert will be provided with future work if they agree to amend their advice.
- The agency should not de-scope or re-scope the SOW during the engagement for the purpose of removing advice it does not want to receive.
- While it is acceptable for the agency to suggest areas where the expert could consider amending their report, it can be problematic if the agency drafts actual text with the expectation that it will be adopted as the view of the independent expert. It is important that the report represent, and be seen to represent, the views of the independent expert.
- If the independent expert is a member of an agency’s recruitment or tender panel, they should be free to express a dissenting view, verbally or in writing. This means that the evaluation process should not compel panel members to reach a consensus.

- It is desirable to require or allow the expert's report to set out any assumptions, caveats or qualifiers. It is acceptable to ask the expert to submit findings based on a range of alternative scenarios, but this should be made clear in the report. For example, an expert valuing a parcel of land could be asked to provide different values based on current market conditions, a potential change in zoning, and the proposed completion of a nearby infrastructure.
- An agency should maintain complete records of correspondence with its adviser, including draft reports.
- Do not cherry-pick the expert's report by selectively quoting from it. Preferably, the entire report should be made available to the relevant decision-makers (including all appendices).
- Similarly, the existence of the expert's engagement and report should never be concealed from relevant decision-makers.
- If an official disagrees with an expert's findings, they should be able to submit their counter arguments to the relevant decision-makers. Any other advice – internal or independent – should also be made available to the decision-makers.
- As a general rule, agencies are not compelled to follow the advice of independent experts. However, if the decision-maker decides to depart from the advice of the independent expert, the reasons for doing so should be documented.
- As should be the case with all suppliers, independent advisers should be able to escalate any concerns they might have about the conduct of agency officials, or even make a formal complaint. Similarly, agency staff should be encouraged to speak up if they identify possible misuse of independent advice.



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