Foreword

Since establishment in 1975, the NSW Ombudsman has received over 160,000 formal written complaints and over 250,000 informal complaints. We have investigated a wide range of matters concerning the conduct and administration of NSW public sector agencies and public officials.

Based on the extensive knowledge and experience we have accumulated over this time, together with the expertise of several other organisations, including the Department of Local Government, the Premier’s Department, the Audit Office, the Local Government Association and the Shires Association, this manual has been developed to provide assistance in the investigation of complaints of an administrative or disciplinary nature.

Investigative technique has a significant impact on the outcome of an investigation. A deficient investigation has the potential to deliver an outcome that is wrong, has no credibility or creates unnecessary hardship to the complainant, the person who is the subject of the complaint or a third party. There is also a risk that the outcome could be overturned on appeal, despite its merit.

Responsibility for investigating complaints is often delegated to members of staff who are not trained professional investigators or who have experience in investigating criminal or corrupt conduct. The investigation of complaints concerning administrative or disciplinary matters requires a unique approach. Investigating Complaints — A Manual for Investigators has been designed to provide practical and comprehensive guidance on how to investigate these kinds of matters.

We hope that this publication will help public sector agencies better investigate complaints, allegations and other issues of concern to management, be they concerns raised by a member of the public or a member of staff. We are interested to receive your comments and have included a feedback form in this publication for your response on how well it achieves its objectives and any features that could be improved or included in future editions.

Bruce Barbour
Ombudsman
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Denis Streater (formerly of the Audit Office of NSW)
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In developing this manual, a number of resource materials were referred to, including: Internal Investigations, Independent Commission Against Corruption, 1997 and Investigation Procedure Manual, Audit Directorate, Department of Education and Training (then in draft form).
Please Note

This manual has been prepared as an informative guide for public sector agencies. It is designed to contribute to fairness, integrity and good public administration in relation to the investigation of complaints of a disciplinary or administrative nature.

We have done the best we can within our resource constraints. Where an investigation raises complex questions of law, where there is a real possibility of litigation or where the matter is otherwise highly contentious, further legal or other professional advice should be sought before taking action.
Glossary

The following terms are used throughout *Investigating complaints — A manual for investigators*:

- **agency**: may include government departments, statutory authorities, councils, schools and community sector organisations
- **CEO**: refers to the Chief Executive Officer of an agency, including a Director-General, principal officer or general manager of a council
- **complaint**: refers to complaints, disclosures, reports, allegations
- **DET**: NSW Department of Education and Training
- **DOCS**: Department of Community Services
- **DLG**: Department of Local Government
- **FOI**: freedom of information
- **GM**: general manager
- **GREAT**: Government and Related Employees Appeal Tribunal
- **ICAC**: Independent Commission Against Corruption
- **MP**: Member of Parliament
- **PIC**: Police Integrity Commission
Your feedback is important to us

We have attempted to make Investigating complaints — A manual for investigators as comprehensive and as user-friendly as possible. To assess how well this publication achieves its objectives we would like to receive your comments.

We are interested to know what features you found most helpful, what features could be improved, and what additional features you would like to see included in future editions of this publication.

Content

What do you consider to be the biggest challenge in handling complaints?

What section(s) of this publication did you find most helpful?

What section(s) of this publication did you find least helpful?

Are there any sections of this publication that were unclear or that could benefit from more elaboration? If so, which one(s) and in what way does the current section need to be clarified?

Are there any issues that you believe should be covered by this publication but were not? If so, what were they?

Presentation

Did you find the material in this publication easy to find? If not, in what way was it difficult?
What do you like most about the way this publication is presented?

_______________________________________________________________________________

_______________________________________________________________________________

What do you like least about the way this publication is presented?

_______________________________________________________________________________

_______________________________________________________________________________

Can you suggest any ways in which the presentation of the material could be improved?

_______________________________________________________________________________

_______________________________________________________________________________

**Further comments**

Do you have any additional comments on this publication or on your own experiences as a complaint handler/investigator? (Please attach additional pages if required)

_______________________________________________________________________________

_______________________________________________________________________________

_______________________________________________________________________________

*(Optional)*

Name:  __________________________________________________________________________

Position:  ________________________________________________________________________

Agency:  _________________________________________________________________________

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS FORM

Please send your comments to:

NSW Ombudsman
Level 24, 580 George St
SYDNEY NSW 2000

or fax your comments to us on:

**(02) 9283 2911**

or email your comments to us on:

*nswombo@ombo.nsw.gov.au*
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Introduction

This publication seeks to promote good investigative practice by providing guidance on the key matters that need to be considered in the preparation and in the course of an investigation. We have sought to address the topic as comprehensively as possible, by anticipating the range of issues and situations arising out of an investigation.

In this publication you will find:

• assistance on preparing an investigation
• advice on obtaining information during an investigation
• a checklist of matters to be considered in conducting an investigation, highlighting those matters that can easily be overlooked by the non-professional investigator
• practical tips for conducting an investigation, and
• information about retrieving an investigation if things go wrong.

This publication relates to the investigation of complaints raising administrative or disciplinary issues only. The investigation of complaints alleging serious corruption, fraud or other criminal conduct raises a series of additional considerations and should be undertaken by trained professional investigators within an organisation (where available), or the NSW Police, the NSW Crime Commission, the Independent Commission Against Corruption or the Police Integrity Commission (as appropriate).
Executive summary

Assessing a complaint

Members of the public and members of staff often make complaints or allegations about their treatment or things happening in their workplace. Complaints and allegations can range from the very minor and easy to resolve to the extremely serious, which may involve formal disciplinary action.

The first task upon receiving a complaint is to determine the nature of that complaint. Not every complaint requires investigation. This publication identifies a range of factors that need to be considered in determining whether an investigation is appropriate (see 1.1.2).

Determining the nature of an investigation

Once a complaint has been assessed as warranting investigation it must be clearly determined whether the investigation relates to policies, procedures and practices OR the conduct of individuals. Determining the nature of the investigation at the outset has important bearing on issues such as the powers necessary (and in some cases available) to investigate the complaint, the resources that will be needed, the authorisation necessary to undertake the investigation, and the nature of the possible outcome of the investigation (see 1.2).

Understanding the role of an investigator

In all cases the role of the investigator is to ascertain all relevant facts pertaining to a complaint and at the conclusion of the fact finding exercise, to report his or her findings and, if appropriate, make relevant recommendations (see 1.3.1).

Choosing an investigator

Depending on the nature of the complaint, the resources of the agency and any relevant legislative prescriptions, the investigation may be conducted internally or referred to an appropriate external agency (see 1.3.2 - 1.3.3).

Recognising and avoiding conflict of interests

All investigations must be conducted without bias, in an impartial and objective manner. No-one with an actual or reasonably perceived conflict of interests should be appointed or remain the investigator (see 1.4).

Determining powers of investigation

The effectiveness of an investigation will be influenced by the available powers of investigation. At the outset of any investigation an investigator must be aware of his or her power to require witnesses to talk, to obtain information from people about policies, procedures and practices, and to access relevant records (see 1.5).

Where a lack of powers will prevent an investigator from properly conducting an effective investigation into a complaint, the investigator should consider referring the matter to some other person or body with the necessary powers, for example, an appropriate external agency.
Developing the investigation framework

Before embarking on an investigation, the framework of the investigation must be clearly established. The investigation must be validly authorised (see 1.6.1), terms of reference for the investigation must be drawn up and approved (see 1.6.2), and an investigation plan should be prepared and approved (see 1.6.3).

Maintaining confidentiality

Investigators must abide by any confidentiality requirements applying to the investigation. Maintaining confidentiality:

• minimises the risk of harm to the parties to a complaint
• is the most effective protection available to a whistleblower
• reduces the opportunities for evidence to become contaminated
• encourages witnesses to be forthcoming in their evidence, and
• protects the investigator from the possibility of an action in defamation (see 1.7).

Investigators must also impress upon all witnesses their obligation to keep details of the investigation confidential (see 1.7).

Affording procedural fairness

Due process must be observed in every investigation. Any decision affecting an individual that has been made without affording that individual procedural fairness is liable to be challenged and set aside. Procedural fairness requires an investigator to:

• inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for adverse comment in respect of them
• provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise
• hear all parties to a matter and consider submissions
• make reasonable inquiries or investigations before making a decision
• ensure that no person decides a case in which they have a direct interest
• act fairly and without bias, and
• conduct the investigation without undue delay (see 1.8.2).

There are limited circumstances where there may be an overriding public interest in short-circuiting certain procedural fairness requirements. These occasions are very rare, and will normally involve serious risks to personal safety or to substantial amounts of public funds (see 1.8.1).

The obligation to provide procedural fairness should not be viewed as an impediment to conducting a smooth investigation. Providing procedural fairness benefits the investigator as well as the person under investigation. This procedural aspect of an investigation enables an investigator to properly check his or her facts and to identify the major issues. The comments made by the subject of the complaint potentially expose any weaknesses in the investigation and provide advance warning of the basis on which the investigation report is likely to be attacked (see 1.8.1).
Gathering evidence

The task of an investigator is to prove or disprove any matter(s) of fact raised by a complaint. The means available to an investigator to accomplish this is known as evidence. The main categories of evidence available to an investigator are oral evidence, documentary evidence, expert evidence and site inspections (see 1.9.1).

Although only one witness may be required to prove any fact or set of facts, additional evidence in the form of corroboration (i.e., the strengthening of evidence in a material particular) is desirable.

If the allegations ultimately become the subject of legal proceedings, the evidence collected during the investigation may take on the character of forensic evidence. Forensic evidence refers to evidence used in, or connected with, a court of law (see 1.9.2).

The possibility of allegations resulting in the institution of legal proceedings should not be unexpected provided that an investigation plan has been properly prepared at the outset of the investigation. Care can then be taken during the course of the investigation to ensure that evidence gathered will not be ruled inadmissible in such proceedings, in accordance with the rules of evidence (see 1.9.2).

Understanding the rules of evidence

The rules of evidence will not apply to the majority of administrative or disciplinary investigations. Nevertheless, an understanding of the basic rules of evidence is useful for an investigator to ensure that the evidence obtained is the best available, and will be admissible should there be a likelihood of subsequent legal proceedings (see 1.9.3).

This publication therefore considers the rule against hearsay, the rule on opinion evidence, and the issue of cautioning. If an investigator encounters a situation where the issue of cautioning arises, the investigator should question whether it is appropriate for him or her to continue with the investigation.

Obtaining oral evidence

 Oral evidence is the most difficult form of evidence to obtain, since the processes and channels for its transmission and reception are subject to the vagaries of the human condition. Witness recall is imperfect, every witness responds differently to the interview process and every witness’s unique psychology is brought to bear in the interview situation. These complexities are compounded in the case of special classes of vulnerable witnesses, such as children (see 1.10.1).

The quality of the oral evidence obtained depends to a large extent on the interviewing skills of an investigator. Apart from a thorough knowledge of the agency and its policies, practices and procedures, the keys to successful interviewing are good analytical skills, effective communication skills, a high degree of good sense and judgment, professionalism and integrity (see 1.10.2).

Preparation is an essential element of interviewing. The planning of an interview, with a clear idea of what it is that the interview is intended to achieve, will enable the interviewer to set the agenda for the interview (see 1.10.2).

A common investigative error is failing to interview all available witnesses. If all witnesses are not interviewed, an investigator fails in his or her fundamental obligation to ascertain all the relevant facts pertaining to a complaint (see 1.10.2). Subject to certain exceptions, the person the subject of a complaint should generally be interviewed last (see 1.10.2).
Consideration must be given to the timing and location of the interview. An appropriate environment for an interview enhances the quality of evidence that an interviewer can elicit from their witness. Privacy is a major psychological factor which contributes to the success of an interview. The interview setting should be free from internal and external distractions (see 1.10.2). Interviews must be conducted fairly, reasonably and in an impartial manner. The approach adopted by an investigator in an interview situation will to a large extent be tailored to suit the particular witness. Most witnesses should be handled with a ‘soft’ approach, but where an interviewer encounters a difficult or uncooperative witnesses they will need to do some ‘hard interviewing’ (see 1.10.2).

Good listening and questioning skills are indispensable for interviewing. Set questions or lines of inquiry should be prepared in advance to be used as a checklist to ensure all relevant issues are covered. Of course, an interviewer will need to deviate from this list in order to ask follow-up questions and to take account of unexpected or additional evidence from a witness (see 1.10.2).

Techniques available to an interviewer include questions that are open, closed, strategic, hypothetical, provocative and assertive. Generally speaking an interview should be commenced using open questions to encourage narrative responses. Closed questions should only be used to confirm matters after the witness has told their story. Investigators should make full use of both active and passive listening techniques, as appropriate (see 1.10.2).

An investigator must be very careful about offering any benefit, concession or other inducement in return for a witness statement. Inducements can only be made by an investigator where he or she has a discretion to make such an offer, and there is no other legal prohibition (see 1.10.2).

In no circumstances should an investigator offer a witness indemnity from criminal prosecution in return for their cooperation or an undertaking that their evidence will not be used against them. Only the Attorney General is entitled to grant such an indemnity or undertaking (see 1.10.2).

If a witness is determined to be uncooperative, then in the absence of any legal powers of coercion, an investigator has limited redress. However, where the witness is an employee and the failure by that witness to respond to questions posed at the interview amounts to either a failure to comply with a lawful direction or a breach of an employee’s common law obligation of fidelity to his or her employer, then the witness may be liable to disciplinary action for failing to cooperate with the investigation (see 1.10.2).

Face-to-face interviewing is the primary method of receiving evidence from witnesses. Alternatives to face-to-face interviewing include telephone interviews and written requests for information. These methods may be appropriate in limited circumstances, but should be used sparingly (see 1.10.2).

An investigator who proposes to interview a witness who does not have a viable command of the English language or who has a disability that either affects their comprehension or capacity to communicate, must consider the question of whether an interpreter should be used (see 1.10.3).

The most important rule in all cases where oral evidence is being taken is accuracy. The three principal ways in which oral evidence can be recorded are by tape recording, by preparing a record of interview or by creating a witness statement (see 1.10.4). The manner in which oral evidence is recorded will to a large extent depend on the purpose for which the record is taken. The more likely it is that the record will be used as evidence in formal proceedings, the more important it is that a full transcript or fully signed witness statement be prepared.

Witnesses should generally be permitted the presence of a third party during an interview. Having a person of their choice present can make the witness feel more comfortable and this will make the interview easier to conduct (see 1.10.5).
An investigator must ensure that any third party permitted to be present:
- understands that they are an observer, and may not take part in the discussion or interview
- is not a potential witness
- has not agreed to assist any other witnesses to the investigation, and
- undertakes to respect the confidentiality of the issues discussed in the interview (see 1.10.5).

Wherever representation by a lawyer is allowable with leave, in considering a request for legal representation the sorts of factors that should be taken into account include whether:
- there are issues to be determined that require legal argument
- the witness requires assistance to present their position, and whether there are other avenues available to obtain appropriate advocacy or assistance
- there are particularly important interests at stake for the witness applying for leave
- the granting of leave to one party will disadvantage other parties, or conversely act as an 'equalising' force (see 1.10.6).

**Securing documentary evidence**

Documentary evidence is an important and usually reliable source of information available to an investigator. One of the first steps an investigator should take is to secure originals of any relevant documentary evidence. This will preserve the evidence and prevent any attempts at tampering with the documents. A receipt should be left, and the originals should be securely stored, and photocopies used for the investigation. A clear record should also be kept on the investigation file noting when, where and how documents were obtained (see 1.11).

**Considering the need for expert evidence**

Depending on the nature of the matters under investigation, an investigator may require the services of a professional expert, such as a document examiner, a handwriting expert, an accountant, a valuer or an engineer. There is no foolproof formula for selecting an expert. Professional associations, universities or even the telephone book may be a useful starting point (see 1.12).

An investigator should ensure that any expert statement prepared suitably qualifies the maker of the statement, by specifying the things that make the person an expert. This is particularly important if there is any likelihood of the expert evidence being used in formal proceedings (see 1.12.2).

**Inspecting a site**

Sometimes a proper understanding of the issues will require a site inspection. In many circumstances, site inspections can provide visual information and context to a complaint (see 1.13).

**Applying the appropriate standard of proof**

In disciplinary and administrative investigations, allegations must be proved according to the balance of probabilities. This standard of proof requires that it must be more probable than not that the allegations are made out. The High Court case of *Briginshaw v Briginshaw* is authority for the proposition that the strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the seriousness of the issues involved (see 1.14).
Recording and storing information obtained during an investigation

A central investigation file must be maintained by an investigator. The file should be a complete record of the investigation, documenting every step, including all discussions, phone calls, interviews, decisions and conclusions made during the course of the investigation. The file must be securely stored to prevent unauthorised access, damage or alteration, and to maintain confidentiality (see 1.15).

Granting access to documents related to the investigation

An investigator must be aware of any statutory rights of access that the person the subject of the complaint may have (eg under the Freedom of Information Act, the Privacy and Personal Information Protection Act or the relevant disciplinary scheme), as well as any statutory exemptions that apply. Where no statutory guidance is available, an investigator must make a careful judgment based on the following competing interests:

- the right of the person the subject of the complaint to know the case against him or her
- the wish of any third party (especially whistleblowers) to have their identity remain confidential, and
- the general interest in ensuring the integrity of the investigation (see 1.16).

Defending against actions in defamation

Allegations made in a complaint may contain defamatory imputations. Generally speaking, however, an investigator (and a complainant) will have a defence against an action in defamation for any publication of the defamatory material that is genuinely necessary for the purpose of investigating the complaint. Depending on the circumstances of the investigation, the defence of qualified privilege may apply, or communications may have absolute privilege.

In the absence of absolute privilege, investigators (and complainants) must exercise caution when repeating allegations. The defence of qualified privilege may not extend to a ‘publication’ of the allegations to people with no legitimate interest in receiving that information (see 1.17).

Preparing an investigation report

At the conclusion of an investigation an investigation report must be prepared. The report will be for the records of the agency concerned (which may well be subject to outside scrutiny) and may also be required by one of the accountability agencies or the police. This publication sets out the minimum contents of an investigation report (see 1.18).

Anticipating common responses to critical reports

An investigator who produces a critical report may find that the probity of the investigation is publicly questioned by anyone whose interests are adversely affected by the findings of the report. Such attacks are sometimes designed to deflect attention from the substance of the report's conclusions. Outlined in this publication are the most commonly encountered ‘shoot the messenger’ counter-allegations levelled against an investigator and his or her report (see 1.19).
Investigating complaints

Closing the investigation

The end of an investigation requires all paperwork to be completed and filed. As a matter of best practice, a review process should be undertaken at the conclusion of an investigation (see 1.20).

Determining investigation outcomes

A range of outcomes are possible at the conclusion of an investigation. The investigation may lead to:

- disciplinary action
- dismissal of a disciplinary charge
- referral of a matter to an external agency for further investigation or prosecution
- introduction of administrative procedures/policies or practices
- changes to administrative procedures/policies or practices, and/or
- redress for the complainant (see 1.21).

Managing complainants

An important element of any investigation is managing the complainant. This entails:

- managing the complainant's expectations to ensure that they are based on a realistic understanding of what the investigation can achieve
- ensuring the complainant's confidentiality and explaining to the complainant the importance of confidentiality generally
- providing him or her with support and information
- providing him or her with feedback by advising at regular intervals of the progress of the investigation, and
- informing the complainant of the outcome of the investigation or other action (see 1.22.1).

Managing each person who is the subject of the complaint

It is also important to be sensitive to the impact that a complaint may have on each person who is the subject of that complaint. Before approaching each person who is the subject of the complaint, an investigator should be satisfied that the allegations are not spurious. Where it can be established that the allegations are false and the subject of the allegations is unaware of the allegations then there is often little to be gained from alerting the person (see 1.22.2).

If, on the other hand, there is some case to answer, then procedural fairness requires that each person who is the subject of the complaint be given (at an appropriate stage and in the absence of compelling reasons to withhold such information) the chance to hear the substance of the allegations against them. Similarly, where an investigation is to proceed through to a report, each person who is the subject of the complaint has the right to be informed of the substance of any adverse comment to be made in respect of them, and to be given a reasonable opportunity to put their case (see 1.22.2).
Managing other witnesses

It is important not to overlook the needs of witnesses other than the complainant or each person who is the subject of the complaint. Proper support must be offered to these witnesses to reduce any trauma that they might experience as a consequence of their involvement in the investigation process. Where relevant, support should be offered as a matter of best practice and, where applicable, to discharge an agency’s occupational health and safety obligations (see 1.22.3.).

It is vital to impress on all witnesses the requirements of confidentiality. To minimise the potential for information about the investigation to spread, no witness should be told any more about the investigation than is strictly necessary to obtain the required information (see 1.22.3).

Avoiding common investigation pitfalls

In conducting an investigation, investigators should be particularly mindful to avoid the most commonly committed investigation errors. These common investigation pitfalls are:

• lack of planning
• lack of clear investigation objectives and/or unachievable objectives
• lack of objectivity by the investigator (resulting either from bias, conflict of interests or rigid adherence to preconceived views)
• reliance on unproven assumptions
• failure to follow due process
• failure to obtain all of the relevant evidence which is available
• failure to consider evidence which is exculpatory or otherwise does not support the allegations
• lack of resourcing and/or poor use of resources
• shortcuts
• failure to appropriately distinguish the investigation and adjudication processes
• lack of leadership
• poor investigation documentation
• lack of transparency
• lack of continuity
• lack of training
• failure to consider the organisational culture, and
• making unrealistic recommendations.
(see 1.23).

Retrieving an investigation when things go wrong

It is critical that any problems in an investigation are recognised as they arise. Once completed, it is often too late to cure any flaws that may have occurred during the conduct of an investigation. Where a problem with an investigation becomes apparent or is discovered, either by the investigator or someone else, it must be acknowledged straightaway (see 1.24.1). There is nothing to be gained and everything to lose by attempting to hide or ignore the problem. Immediate action should be taken to fix the specific problem. This will not be possible in all cases, but in some cases it may be preferable to recommence or abandon an investigation at this point rather than expend unnecessary
resources and/or risk harm or inconvenience to the parties to the complaint by continuing a compromised investigation.

In all cases where an investigation has gone wrong, investigation procedures should be examined to determine whether they are at fault. If the fault is procedural in nature, procedures must be rectified to prevent future occurrences (see 1.24.1).

This publication contains advice on how to retrieve an investigation in the following circumstances:

- The person receiving the complaint fails to appreciate that the complaint may be a protected disclosure
- An actual or perceived conflict of interest is identified or arises.
- Excessive delay.
- Secrecy which is crucial to the investigation has been compromised.
- An investigator fails to adhere to the principles of procedural fairness at relevant stages of an investigation.
- An investigator fails to properly document interviews with witnesses.
- An investigator inadvertently loses a document integral to the investigation.
- An investigator inadvertently loses a highly confidential document.
- During the course of an investigation it becomes clear that the conduct the subject of the disclosure amounts to a criminal matter.
- The scope or time taken to carry out an investigation blows out.
- The investigation, or a particular aspect of it, becomes too complex.
- The investigation has gone off track or lost focus (see 1.24.2-1.24.13).

**Requesting help or advice - contact points**

The legislative provisions that apply to investigations are often difficult and complex. This publication points investigators to sources of information and advice in relation to specific types of investigations (see 1.25).
Using these guidelines

This publication sets out best practice in the area of complaint investigation. The information and advice it contains applies to the full range of administrative investigations that a public official may be called upon to conduct.

Since no two complaints will generally be identical, each investigation is likely to be unique. Despite the differences in the content of individual investigations, all investigations share the same basic structure and follow the same basic processes. The core elements of an investigation apply irrespective of the nature or subject matter of the investigation. The obligation to provide procedural fairness, for example, is an essential element of any investigation into the conduct of a person.

However, the imperative and degree of formality that accompanies each of these elements will vary according to the nature of the complaint, and on any legislative or procedural prescriptions that apply. For example:

• the elaborateness of the investigation plan will vary according to the complexity of the complaint
• the degree of formality attending the recording of evidence will be affected by the likelihood of such evidence being used in future proceedings
• the detail of the investigation report may depend on whether it will be forwarded to other parties or whether it will form the basis of further action.

Similarly, while the requirement of confidentiality applies to every investigation, this element is more critical in some cases than in others (eg protected disclosures).

As a basic rule of thumb, the more significant the investigation in terms of the seriousness of the issues raised by the complaint or the consequences to any person the subject of the complaint, the more strictly an investigator should adhere to the guidelines set out in this publication. More minor or routine complaints do not require the same degree of compliance.

The table in Annexure A attempts, in general terms, to guide investigators to the circumstances and the degree to which the advice in this publication should be followed.
1.1 **Assessing a complaint**

1.1.1 **Determining the nature of the complaint**

Members of the public and members of staff often make complaints or allegations about their treatment or things happening in their workplace. Complaints and allegations can range from the very minor and easy to resolve to the extremely serious, which may involve formal disciplinary action.

It is up to public officials in management and other responsible supervisory roles to decide whether action should be taken in response to these complaints and, if so, what sort of action is required. This can be a very difficult task.

Such complaints are rarely conveniently labelled by complainants as ‘grievances’, ‘protected disclosures’ or the like. And when they do label their complaints, the label is not always correct. Further, most public sector agencies have a number of different procedures to be applied depending on the type of complaint that is being made or allegation raised. The table on page 14 sets out the variety of different complaints or allegations and procedures that are commonly found in many public sector agencies.

The first task upon receiving a complaint is to determine the nature of the complaint. For simplicity, ‘complaint(s)’ is used to cover complaints, disclosures, reports, allegations and the like.

Given the complexity involved with protected disclosures, specific advice on such disclosures can be found in the Annexures. The requirements that must be satisfied for a complaint or report to be a protected disclosure are set out in Annexure B, definitions of key terms in the *Protected Disclosures Act 1994* are set out in Annexure C, and errors to be avoided in the investigation of protected disclosures are set out in Annexure D.

1.1.2 **Deciding how the matter should be dealt with**

Identifying the nature of the complaint will assist in determining how the matter should be dealt with. Not every complaint will require an investigation. The majority of concerns raised by complaints will be able to be resolved at an informal level or through other processes, such as mediation (for more information on mediation see Chapter 4 of *The Complaint Handler’s Tool Kit, Public sector mediation*, NSW Ombudsman, June 2004.) Many complaints involve communication problems or misunderstandings that can be resolved by discussion between the parties, or with the supervisor.

In determining whether a complaint requires investigation it is necessary to consider a range of factors:

- Are the issues raised by the complaint serious or trivial?
- Is there a more appropriate mechanism for dealing with the complaint?
- What significance does the complaint have for the agency?
- Does the complaint indicate the existence of a systemic problem or a serious abuse of power. An isolated complaint may not appear worthwhile to investigate, but a series of complaints relating to the same matter suggests that an investigation is merited to determine whether there is a pattern of conduct or a broader systemic problem.
• What are the monetary amounts or other benefits involved?
• How many staff are alleged to be involved?

Complaints sometimes are tainted by emotive language or suggestions that they may be malicious or motivated by vindictiveness or a desire for vengeance. Although a complainant's motive may cloud his or her judgment and flavour the complaint, it should not preclude a proper consideration of the substance of the complaint. It is not uncommon for unjust actions to inspire angry, exaggerated or sometimes malicious claims. Careful analysis of such complaints should be made to isolate the basic information sources which should then be assessed on their merits. Clearly vexatious complaints can be easily dismissed.

Complaints should never be written off simply because they are made anonymously, or because the complainant later withdraws the complaint. Although in both these situations it will not be possible to rely on the complainant for evidence, the allegations should still be tested by way of other avenues where it is reasonable to do so.

**Practical tip**

Some of the relevant factors that should be taken into account in determining whether a complaint should be investigated include:

- whether there is an alternative and satisfactory means of redress (e.g., an apology or mediation)
- whether the complaint is trivial, frivolous or vexatious
- how much time has elapsed since the events the subject of the complaint took place
- how serious the complaint is and the significance it has for the agency
- whether the complaint indicates the existence of a systemic problem
- whether the complaint is one of a series, indicating a pattern of conduct or a widespread problem.

There will sometimes be occasions where a complaint which might otherwise justify investigation should not or cannot be pursued. For example, this could be:

- where the issues raised in the complaint occurred a long time ago (in such cases it may be difficult to track witnesses or documents, recollections of events will be limited and evidence unavailable as a result of the passage of time)
- where the issues are the subject of an investigation by some other competent body or person (such as the police, ICAC or the Ombudsman).

Certain matters are not suitable subjects for investigation. For example:

- work performance issues arising from a skills deficit
- a breach of discipline, a breach of the code of conduct, a breach of policy or procedure which is not conduct falling short of the minimum requirements of acceptable behaviour in that occupation.
Most agencies have in place a comprehensive framework for dealing with public and staff concerns. The primary mechanism for dealing with complaints from members of the public is generally a complaint handling policy (however described). Mechanisms for dealing with staff concerns that are likely to be in place in an agency include those set out in the following table.

**Mechanisms for handling staff concerns**

<table>
<thead>
<tr>
<th>Problem</th>
<th>Initial contact</th>
<th>Other options</th>
<th>Workplace mechanism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workplace conflicts or grievances</td>
<td>Supervisor or manager or director</td>
<td>Grievance officer or director</td>
<td>• Grievance policy</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Personnel Officer or EEO coordinator</td>
<td>• Dispute handling policy</td>
</tr>
<tr>
<td>Personnel problems (eg performance issues)</td>
<td>Supervisor or manager or director</td>
<td>Personnel Officer or EEO coordinator</td>
<td>• Discipline policy</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• EEO policy</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Performance management policy</td>
</tr>
<tr>
<td>EEO concerns (eg discrimination on the basis of sex, age, race)</td>
<td>Supervisor or manager or director</td>
<td>EEO coordinator</td>
<td>• EEO policy</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Reasonable adjustment policy</td>
</tr>
<tr>
<td>Harassment</td>
<td>Grievance officer</td>
<td>Personnel officer or EEO coordinator</td>
<td>• Harassment policy</td>
</tr>
<tr>
<td>Occupational health or safety problems</td>
<td>Supervisor or manager or director</td>
<td>OH&amp;S committee member or personnel officer</td>
<td>• OH&amp;S policy</td>
</tr>
<tr>
<td>Process and procedure problems</td>
<td>Supervisor or manager or director</td>
<td>Director, internal auditor or quality management team (if any)</td>
<td>• Internal audit</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Risk management policy</td>
</tr>
<tr>
<td>Ethical or other misconduct concerns</td>
<td>Supervisor or manager or director</td>
<td>Director or CEO*</td>
<td>• Code of conduct</td>
</tr>
<tr>
<td>Corrupt conduct or fraud (where an officer ‘suspects on reasonable grounds’ a matter concerns or may concern corrupt conduct)</td>
<td>Supervisor, manager, director or CEO</td>
<td>NSW Ombudsman, PIC, ICAC, NSW Police*</td>
<td>• Corruption/fraud prevention policy</td>
</tr>
<tr>
<td>Corrupt conduct, maladministration or serious and substantial waste (where there is sufficient evidence to ‘show or tend to show’ the alleged conduct)</td>
<td>Nominated disclosure officer, disclosure coordinator or CEO</td>
<td>NSW Ombudsman, ICAC, NSW Auditor General, PIC or PIC Inspector*</td>
<td>• Protected disclosures internal reporting policy</td>
</tr>
</tbody>
</table>

*Includes the option of referral to in-house trained professional investigators where such exist*

It is not always sufficient just to be assured a mechanism for dealing with complaints by the public or staff exists. While most agencies take their responsibilities for dealing with such complaints seriously, there will be occasions where the procedures in place are inadequate or mere window dressing.

Each investigation must be evaluated and focused from the outset to ensure that a proper basis exists for it, that resources are available to do it properly, and that the outcome is proportionate to the resources required.

### 1.1.3 Deciding whether more information is needed

#### Arranging further questioning

To determine how a complaint should be dealt with, or indeed whether any action should be taken, investigators may need to question complainants more closely about their allegations and the evidence they have or can point to which supports their allegations.
See whether the complainant would prefer to be contacted by a home or other telephone number. Whether or not this is appropriate will depend on the nature of the matters alleged and the preference of the individual complainant.

In asking for further information remember that complainants may feel under considerable strain. They may react badly to a line of questioning which gives the impression that there is serious scepticism about their initial complaint.

**Arranging further questioning where the complaint is or may be a protected disclosure (‘Whistleblowing’)**

If a complaint is or may be a protected disclosure, discretion is particularly needed in arranging further questioning (bearing in mind the requirement to avoid identifying whistleblowers).

Investigators need to talk to whistleblowers about the most appropriate and discreet way to contact them. Think carefully about contacting whistleblowers at work. If the whistleblower is unavailable when telephoned, the investigator may want to consider leaving a message under a first name only without identifying where the call is from or what it is about.

If the investigator's agency has a telephone caller number display facility, he or she should avoid receiving calls from the whistleblower in the presence of others who will be able to identify the person on the other end of the line. Similarly, they should avoid making calls to a whistleblower if there is any possibility that a third party in the vicinity of the whistleblower will be able to identify the caller.

Be careful about the timing and location of interviews. Consider who might observe comings and goings from various offices. Investigators may wish to consider meeting whistleblowers away from the workplace in a location in which they feel more comfortable. Again, this needs to be discussed with the whistleblower.

It is desirable to get a signed record of the additional information obtained from whistleblowers.

For more information on protected disclosures see Annexures B, C and D.

**1.1.4 Approaching an investigation - ‘evidence-focused’ and ‘outcome-focused’ investigations**

One way of making sense of the myriad of formal and informal investigative strategies used to inquire into and resolve issues of complaint is to characterise the various approaches in terms of likely outcomes. That is, it may be useful to characterise these approaches as evidence-focused and outcome-focused.

In general, an evidence-focused investigation is primarily directed at gathering and carefully documenting evidence that may later be considered in formal proceedings against one or more individuals or agencies.

On the other hand, an outcome-focused investigation may include evidence-focused techniques, but is primarily directed at quickly identifying andremedying problems uncovered by the complaint, including addressing the concerns of complainants.
Investigating complaints

In either case, the purpose of an inquiry is to:
• establish and document the facts
• reach appropriate conclusions based on the available evidence, and
• determine a suitable response.

Practical tip

Every complaint should be made in writing or reduced to writing and verified by the complainant (where the complainant is identified).

Since even a slight change of wording can significantly affect the emphasis or seriousness of a complaint, having the complaint in written form will avoid any later dispute about the nature of the complaint.
1.2 Determining the nature of the investigation

1.2.1 Establishing the type of investigation

If it is evident after initial assessment that the complaint warrants investigation, investigators need to be clear about the nature of the investigation required. It is vital to establish this at the outset, since this has a bearing on issues such as:

• the powers necessary (and in some cases available) to investigate the complaint
• the resources that will be needed, and
• the authorisation necessary to undertake the investigation, and the nature of the possible outcome of the investigation.

Investigations generally fall into two broad categories:

• those relating to policies, procedures and practices, and
• those relating to the conduct of individuals (whether or not identified).

It will not always be apparent on the face of the complaint which of these two categories a complaint falls into. For example, if a complaint alleges waste of public money a preliminary inquiry may need to be conducted to ascertain whether the waste is attributable to the conduct of an individual or individuals, or whether it has substantially resulted from deficient practices or procedures.

Generally speaking, if the waste (or other matter at the core of a complaint) was the deliberate outcome of a person's conduct, or resulted from his or her incompetence, negligence or reckless indifference, then the investigation will be primarily into the conduct of the relevant individual. If, on the other hand, the waste (or other matter forming the subject of the complaint) occurred inadvertently and was unintended, then (in the absence of negligence or other relevant mental element) it will generally be a procedural issue.

With some differences in approach or emphasis, the general principles outlined in this publication will apply to both types of investigations.

1.2.2 Investigating the conduct of individuals

If the investigation is to be into the conduct of individuals, it is necessary to determine whether:

• the investigation should be in the form of a pre-disciplinary fact finding inquiry or investigation, or
• there is sufficient information available to warrant the institution of disciplinary inquiries or investigations in accordance with a formal discipline scheme.

About fifty per cent of the public sector has legislation in place dealing with disciplinary matters. Statutes and delegated legislation such as the Public Sector Employment and Management Act 2002, Public Sector Employment and Management (General) Regulation 1996, Teaching Services Act 1980, Education Teaching Service Regulation 2001, Education (School Administrative and Support Staff) Act 1987, Ambulance Services Regulation 2000 and the Fire Brigades (General) Regulation 1997 set out procedures for the investigation of alleged disciplinary breaches by staff.
Agencies covered by a legislative scheme invariably have guidelines setting out how the legislation should be applied eg chapter 9 of the NSW Government Personnel Handbook, September 2002.

Areas of the public sector not covered by such legislative schemes generally have policies or procedures for dealing with disciplinary matters.

The judgments in two cases, *Smith v Allan, Secretary, Treasury of New South Wales (1993)* 31 NSWLR 52 and 49 IR 169 establish that GREAT may consider challenges based solely on compliance with procedural fairness and any applicable statutory discipline scheme, without considering the merits of the case. If the challenge is successful the decision will be set aside. Therefore, the provisions of any statutory disciplinary scheme need to be strictly adhered to.

In the case of *Ward v Director-General of School Education & Anor* (unreported, NSW Supreme Court, Dunford J, 23 February 1998) it was similarly held that where a statute which forms part of the employment relationship prescribes a procedure by which disciplinary action is to be taken against an employee, that procedure must be strictly followed. It is not open to the employer to lay down an alternative disciplinary procedure to that prescribed by the Act.

The GREAT has no jurisdiction over local government employees, however challenges to the lawfulness of decisions affecting local government employees can be made to the NSW Industrial Relations Commission.

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**Practical tip**

Be clear about the nature of the investigation required.

<table>
<thead>
<tr>
<th>Investigation into policies, procedures and their implementation?</th>
<th>Investigation into the conduct of individuals?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fact finding inquiry?</td>
<td>Formal action in accordance with discipline scheme?</td>
</tr>
</tbody>
</table>

This initial classification will assist in establishing the relevant framework governing the investigation.
1.3 Deciding who should undertake the investigation

1.3.1 Understanding the role of the investigator

The investigator is responsible for ascertaining all relevant facts pertaining to a complaint. At the conclusion of the fact finding exercise, the investigator must report his or her findings and, if appropriate, make relevant recommendations.

This task must be conducted in an impartial, independent and objective manner. At the end of the day the success of an investigation will often come down to the integrity and ability of the person conducting it. An investigator must be neutral in relation to the protagonists to a dispute, but must also be aware of any power imbalance between the parties. An investigator must understand the motivation and stress that have led to the complaint, but must not identify personally with the complainant. An investigator must be prepared to be persistent and to pursue complaints that may be unpopular within an agency because of their substance or because of the unpopularity of the complainant.

To be effective, an investigator and an investigation must have the confidence of both sides. The best way to achieve this is by genuinely listening to both sides and giving a thorough and rational consideration to what is being said.

Facts in dispute which could be decisive or relevant to the outcome should not be accepted at face value. Investigating is a constant process of checking, challenging and analysing.

The role and functions of an investigator are quite distinct from that of a mediator, conciliator or adviser, and the procedures used in those processes are generally totally inappropriate to an investigation.

Practical tip

An investigation is an inquisitorial rather than an adversarial process.

An investigator is not on the side of any party to the complaint. An investigator owns neither the complaint, nor the witnesses for or against the allegation(s).

1.3.2 Investigating complaints internally

Except for the circumstances outlined in 1.3.3, complaints should generally be investigated internally. The choice of investigator will be guided by the nature of the complaint, and any relevant legislative prescriptions. Where at all possible, an investigation should not be conducted by anyone with direct involvement with the person or matter the subject of the complaint (see Recognising and avoiding conflict of interests at 1.4).
Choosing an investigator for disciplinary matters

Any legislation, guidelines or policies governing the disciplinary system applicable to an agency will generally set out who may conduct disciplinary investigations.

Choosing an investigator for non-disciplinary matters

In relation to non-disciplinary matters, it is not uncommon for investigations to be made the responsibility of internal auditors, retired former senior officials, or in smaller agencies a senior member of staff.

1.3.3 Referring matters for external investigation

Matters should generally be referred to an appropriate external agency for investigation or other action if:

- a complaint concerns criminal conduct or serious corruption and the agency concerned is unlikely to have adequate powers or expertise to investigate
- a matter is particularly complex or sensitive, or
- the subject of a complaint is the CEO of the agency, or possibly a very senior member of staff.

If a matter is to be referred to an external agency for action the choice will generally be one of six agencies which are either investigating authorities for the purpose of the Protected Disclosures Act 1994, relevant review authorities or the police. These bodies are the:

- Auditor-General*: for serious and substantial waste
- Independent Commission Against Corruption: for corrupt conduct, normally involving the dishonest exercise of official functions by public officials other than police officers
- Department of Local Government**: for matters involving serious and substantial waste, general council management and breaches of the Local Government Act and related Acts
- NSW Ombudsman: for maladministration, misconduct by police, or allegations of child abuse concerning the staff of designated government and non-government agencies
- Police Integrity Commission: for matters involving corrupt conduct or other serious misconduct by police, and
- NSW Police: for criminal conduct and for police misconduct (under the Police Act).

* As the Auditor-General has no jurisdiction in relation to local councils, allegations about serious and substantial waste in local government may be referred to the Ombudsman or the DLG.

** Disclosures about industrial related issues concerning councils are normally outside the jurisdiction of the Ombudsman (unless they arise out of a protected disclosure or relate to child protection) and are better referred to the DLG. Under an administrative arrangement between these agencies, pecuniary interest matters are also usually referred to the DLG for attention.

In some cases an investigating authority or relevant review authority receiving a complaint may refer it to the CEO of the agency concerned for investigation and report.
1.4 Recognising and avoiding a conflict of interests

Generally speaking there can be no confidence in the outcome of an investigation where the process is tainted through actual or perceived conflict of interests, because in practical terms any arguments made by the subject of the investigation about the integrity of the process can never be satisfactorily or totally rebutted.

All investigations must be conducted in an impartial and objective manner. The investigator must not have, and must not be perceived to have, any conflict of interests in relation to the complaint or the people, the conduct or the policies and procedures the subject of investigation.

It is no answer to an allegation of conflict of interests that the investigator is not the ultimate decision maker, because the allegation may be that as a result of the conflict there was a failure to collect all relevant facts, or ask the necessary questions, or otherwise carry out a proper investigation on which the ultimate decision will be based.

Before drawing up the terms of reference and an investigation plan (see 1.6.2 and 1.6.3 respectively), investigators need to specifically address the issue of whether a conflict of interests exists.

It is not always easy to identify a conflict of interests, particularly where the conflict has potential to result in bias. Although the investigation must be conducted impartially, it is not realistic to expect that the investigator will be someone totally independent and having no prior connection with the person under investigation.

Simple acquaintance with the person being investigated, or the fact that the investigator has worked with that person (whether in a supervisory or other capacity), is not sufficient in itself to found an allegation of conflict. An allegation of conflict must be based on something more, or something particular to the investigation.

The relationship of supervisor or work associate may not in itself give rise to a conflict of interests. However, the more serious the complaint, the more important it is that the investigation is conducted by someone off-line or more senior, and more independent of the events the subject of complaint.

**Practical tip**

In assessing whether there is a conflict of interests it is helpful to ask the following questions:

- Does the investigator have a personal or financial relationship with the person(s) the subject of the complaint or identified in the allegations or with the complainant?
- Would the investigator or anyone associated with him or her benefit from a finding adverse to or in favour of the person(s) the subject of investigation?
- Does the investigator hold any personal or professional biases which may lead others to conclude that he or she is not an appropriate person to investigate this matter?
- Has the investigator been directly involved in developing or approving policies, procedures or practices the subject of the complaint?
If in doubt whether a conflict exists or not, an investigator should seek advice from a supervisor or manager and ensure the process is documented.

If the investigator decides that he or she is not an appropriate person to investigate the complaint, advise the CEO, or the relevant delegate in a large agency, so somebody else can be assigned to the investigation.

Remember, even if the investigator is removed from the investigation, he or she may still be bound by confidentiality provisions in respect of information received from the complainant or other sources.

For more detailed consideration of conflict of interests see Good Conduct and Administrative Practice - Guidelines for state and local government published by the NSW Ombudsman in June 2003, Public Sector Agencies Fact Sheet No. 3, Conflict of interests in Annexure E below and Fact Sheet 7 in Annexure G below.
1.5 Determining powers of investigation

1.5.1 Identifying whether necessary investigatory powers are available

In nearly all investigations the three chief sources of information are:

- witnesses
- experts or other people with relevant knowledge or information, and
- records.

At the outset investigators will need to ask themselves what powers they have and, in particular, whether they have the necessary power to get any witnesses to talk to them about relevant events, to obtain information from people about policies, procedures and practices, and to access relevant records.

1.5.2 Ensuring powers are available to investigate policies, procedures and practices

If an investigation is into policies, procedures or practices, provided the investigation is properly authorised by management, there will seldom be any question that adequate powers are available.

1.5.3 Assessing the adequacy of powers to investigate the conduct of individuals

If an investigation is about the conduct of individuals, investigators need to determine whether they have the authority to get access to relevant documents and to question witnesses. In this context, it is important to distinguish between the right to ask and the power to demand. An investigator may have the right to request people to answer questions and provide relevant documents, but if witnesses refuse to be interviewed or access to documents is refused he or she may not have the legal power to compel witnesses to be interviewed, or otherwise provide information or to require that records be provided.

With an internal investigation backed by the CEO there will be strong pressure on any employee of the agency to cooperate with the investigation. There are circumstances where sanctions can be applied against an employee who refuses to answer relevant questions. These are considered at 1.10.2.

However, where people outside the agency appear to be key witnesses, especially if there is reason to suspect they may be reluctant to cooperate, the absence of the necessary legal power may mean the investigation is frustrated in its early stages.

Similarly if the relevant records are all available within the agency then the investigation should be untroubled. However, if records are held by other people or agencies that are reluctant to produce them, then the investigation may stall.

In *Kawicki v Legal Services Commissioner and Anor* [2002] NSWSC 1072, Burchett AJ in the NSW Supreme Court looked at the issue of the scope of an investigation in circumstances where the relevant Act did not specify requirements that had to be satisfied by an investigation:
“The Act does not lay down requirements that must be satisfied by an investigation ... That being so it seems to me it is left to the Legal Services Commissioner to decide, in each particular case, how to go about the necessary investigation, guided by the circumstances and the scope and purpose of the legislation. If a consideration of the terms of a detailed complaint, and a study of documents submitted with it or otherwise available to the Commissions are sufficient, in his opinion, to enable him to reach a decision, I do not think there is anything in [the relevant section of the Act] to require him to refrain from doing so until some further step has been taken” (at para. 18).

Where lack of powers may prevent an effective investigation into a complaint from being conducted, referral of the case to an appropriate external agency should be considered.

The Ombudsman, the ICAC and the PIC have the powers of a royal commissioner, including the legal authority to compel the production of documents and the attendance of witnesses for interviews. Departmental representatives of the Department of Local Government also have the power to compel witnesses to attend and give evidence under oath and to produce documents. The ICAC, PIC and Ombudsman have the power to require a public authority or public official to answer self-incriminating questions.

**Practical tip**

Where an investigation will be into allegations concerning the conduct of individuals, establish at the outset whether the investigator has the necessary powers to get access to the witnesses and records necessary to carry out a proper investigation of the complaint.

If not, referral of the complaint to an appropriate external investigating authority should be considered.
1.6 Establishing the framework for the investigation

1.6.1 Obtaining authorisation to commence an investigation

Every investigation must have one person authorised to take charge and assume ultimate responsibility for the conduct of the investigation. The concept of 'group responsibility' does not work, and nowhere is this more true than in the area of investigations.

The level of authorisation required to commence an investigation will depend on the nature of the investigation. If the investigation is in the nature of a statutory disciplinary inquiry in the public sector, authorisation will be required from the CEO or his/her delegate.

If an inquiry arises out of a protected disclosure, authorisation may be required from the agency's disclosures coordinator or the CEO, depending on the terms of the agency's internal reporting policy.

In other circumstances all that may be required is authorisation from a relevant manager. Presumably this issue has been addressed in each agency either in the formal mechanisms established to deal with various types of complaints or grievances raised by members of the public or staff, or in relevant delegations of authority. Where this issue is in doubt, the matter should be referred to the CEO for a decision.

1.6.2. Drawing up terms of reference for an investigation

It is important to establish a focus and set limits on the investigation. This can be achieved by clearly spelling out, at the beginning, the investigation's objectives and by drawing up terms of reference for the investigation. Objectives must be relevant, realistic, achievable and within jurisdiction. The terms of reference effectively set out the boundaries for an investigation and the investigation can be concluded when the terms of reference have been fulfilled.

Since investigation is the art of the possible, terms of reference should take account of the practicalities of an investigation, particularly the resources available to the investigator. Without terms of reference it may be tempting to take the investigation into areas not necessarily material to the allegations the subject of the investigation. The scope of an investigation may blow out or the investigation may lose direction.

Setting the terms of reference requires the key issues arising out of the complaint to be clarified. In drafting the terms of reference for an investigation the findings that might logically or conceivably be reached by the investigation should be considered, though pre-judgment should be avoided in doing so. This exercise is useful to ensure that appropriate recommendations based on the findings are not precluded. For instance, a complaint might concern specific conduct, which upon investigation might be shown to be in accordance with a policy, but that policy might be an unreasonable one. The terms of reference should be sufficiently broad to permit the investigator to make findings about the policy as well as the conduct. Similarly, if the investigation relates to allegations about the waste of public money, the terms of reference should authorise recommendations (relative to the allegations) for the avoidance of waste in the future.
In other cases, it might be appropriate for the terms of reference to be framed in such a manner as to require the investigator to make recommendations not only about the action that should be taken in relation to the conduct the subject of the complaint, but also about what, if any, redress should be provided for anyone who has suffered detriment as a result of the conduct.

The person who authorised (or is required to authorise) the investigation should formally approve the terms of reference. This procedure obviates any subsequent appeals against the decision to investigate or the ambit of the investigation.

In local government the question may arise as to whether the mayor or the whole council should be informed of the decision to investigate, or whether the ratification of the decision to investigate should be sought from either or both of these bodies. This is a matter for the general manager’s discretion in light of his or her statutory powers, the terms of his or her delegation, and the provisions of council’s code of conduct.

### 1.6.3 Planning the investigation

#### Understanding the importance of planning

The key to every good investigation is planning. Planning is essential to ensure that:
- the investigation is carried out methodically and in a professional manner
- resources are used to best effect and additional resources can be made available if required,
- sources of evidence are not overlooked and opportunities for people to remove, destroy or alter evidence are minimised.

The primary planning tool available to an investigator is an investigation plan, and such a plan should be prepared before embarking on an investigation.

The investigation plan should be completed before conducting any inquiries. This is because the planning process will clarify the approach to be taken. The plan will become the road map of the investigation. It allows the investigator to stay focused on the job and alerts him or her to any potential problems prior to encountering them.

One of the great benefits of an investigation plan is that it also facilitates effective supervision, by informing investigation supervisors or managers of proposed investigative strategies and timelines in advance and during the course of an ongoing investigation.

#### Developing an investigation plan

The first step in preparing an investigation plan is to clarify exactly what is being alleged in the complaint. It is critical to define what it is that is the subject of the investigation. Nailing a complainant down to specifics is not always easy, but reducing the allegations to written (and preferably suitably edited) form helps.

A single complaint may contain a number of separate allegations. Each allegation needs to be individually dealt with.

The investigation plan should deal with each allegation under the following headings:

<table>
<thead>
<tr>
<th>Allegation/conduct to be investigated</th>
<th>Issues for investigation</th>
<th>Benchmarks/criteria</th>
<th>Proofs/facts in issue</th>
<th>Tasks and Timeframe</th>
</tr>
</thead>
</table>
Each identified *allegation/conduct to be investigated* should generate entries under the other headings.

Under the *Issues for investigation* column, the key questions to be answered in the investigation should be listed.

Under the *Benchmarks/criteria* column should be listed the criteria against which issues are to be tested, eg relevant legislation, particular provisions of a code of conduct, particular standards/guidelines, best practice etc.

The fourth column should list the matters that need to be proven or established to determine the truth or falsity of the allegations and whether there has been misconduct. In cases involving a complaint about the conduct of an individual the facts in issue will generally encompass:

- confirming the identity of the person alleged to have engaged in the conduct
- establishing the place and the date that the conduct alleged to have been engaged in occurred
- establishing whether the conduct itself is wrong
- establishing whether the person did the thing alleged, and
- establishing whether the person had authority to engage in the conduct.

In addition, the relevant legislation or procedures alleged to have been breached may contain specific requirements or elements which must all be satisfied in order for a breach to be made out. Each of these elements or requirements comprise the facts in issue or proofs.

In the final column the means by which those facts can be established should be identified ie, the avenues of inquiry or individual tasks required. This may include interviewing specific witnesses, examining documents and so on (see 1.9 - 1.13). This component of the investigation matrix forces an investigator to consider what evidence is required to test the allegations, and what sources may be used to get that evidence. It also compels the investigator to weigh the advantages and disadvantages of different methods of gaining evidence. The final column should also identify timeframes for each task.

Another heading can be added for major or complex investigations that sets out the resources required in terms of investigator time, travel, technical or legal advice, and transcription costs (if relevant) in order to deal with each allegation.

While it is important to start with a plan, investigations rarely proceed as originally predicted. Investigators should therefore be ready to revise their plan, perhaps drastically, as new situations emerge during the course of an investigation. Investigators need to make sure they always follow the facts, rather than trying to make the facts fit into their plan.

Authorisation for amendments to the terms of reference or investigation plan should be sought from the CEO or the relevant person who authorised the investigation under delegated authority. Again, this will obviate subsequent appeals about the matters under investigation.

A case study involving conduct which requires investigation and a sample investigation plan can be found in Annexure H.
Tailoring the plan for specific types of investigation

The general principles outlined above apply to all kinds of investigation. However, modifications to the format of the investigation plan will need to be made to suit the specific investigation being conducted.

For example, in respect of complaints regarding waste of public money, a vital part of the investigation will involve determining the cause of the waste and the amount of the waste. The investigation plan must accommodate these lines of inquiry, and should incorporate the following sorts of matters:

• the methodology to be used
• a standard or benchmark against which waste is to be measured and compared (good or best practice), and
• a set of procedures to be followed to assist in the gathering of evidence based on the audit objectives, criteria and methodology.

In respect of protected disclosures, the investigation plan should incorporate strategies to protect the identity of the whistleblower.

Practical tip

More investigations suffer in terms of quality because of poor investigative planning than for any other single reason.

A good investigation starts with careful planning and preparation, a clear understanding of the parameters of the investigation, and with proper authority. Care and attention spent in getting it right at the outset will avoid considerable difficulties later on.
1.7 Complying with confidentiality requirements

1.7.1 Maintaining confidentiality generally

In the public sector, various statutory or contractual confidentiality requirements will or may apply to the conduct of investigations and their outcomes. Subject to various exemptions and exclusions from the definition of personal information, the *Privacy and Personal Information Protection Act 1998* makes it an offence for a public official to intentionally disclose personal information about another person to which the official has or had access in the exercise of his or her official functions, otherwise than in connection with the lawful exercise of his or her official functions. Unauthorised disclosure of confidential information will also generally be proscribed by the agency's code of conduct.

Confidentiality serves a number of important functions. Preserving the confidentiality of the identity of the person making the complaint and the person the subject of the complaint minimises the risk of harm to these parties.

Another important function of confidentiality is to ensure the integrity of the investigation. If a potential witness feels that they are unable to trust the discretion of the investigator, they will be more reluctant to come forward with relevant information. Where material uncovered in an investigation is kept confidential there is less risk of contamination of evidence. Accordingly, any witnesses interviewed in the course of an investigation should be advised not to discuss the matter with other witnesses or other third parties. Before interviewing any witness, investigators need to ask whether they have discussed the matter with anyone else.

In the absence of any statutory protections or defences at common law, investigators should be aware that a failure to maintain confidentiality – by publishing details of the complaint or any material uncovered in the course of an investigation – may expose them to proceedings in defamation (see 1.17).

1.7.2 Maintaining confidentiality with respect to protected disclosures

Section 22 of the *Protected Disclosures Act 1994* requires investigators, public agencies and their staff to whom a protected disclosure is referred, not to disclose information that might identify or tend to identify the person who made the disclosure. This is a broad requirement and should be interpreted liberally. Further advice on this issue can be found in the Ombudsman’s *Protected Disclosures Guidelines* (5th edition).

This requirement has clear implications with respect to who should be told about the protected disclosure. As a general rule tell only those who need to know about the disclosure in order to ensure that the investigation is effective. Always consider the capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the whistleblower. Impress on those who are told, their strict legal requirement to maintain confidentiality.
Practical tip

At the outset emphasise to whistleblowers the importance of not speaking to anyone about the protected disclosure they have made.

This should be explained in the context of the importance of confidentiality as a protection under the Act.

The Protected Disclosures Act provides that a whistleblower can waive (in writing) their right to confidentiality. It also provides that:

- natural justice (procedural fairness) may require identifying information to be disclosed to a person a subject of the investigation
- the investigating authority, public authority or public official may consider identifying information must be disclosed to investigate the matter effectively, or that it is in the public interest to disclose identifying information.

If an investigator considers that any of these provisions apply, he or she should document the grounds on which this opinion was based.

Before disclosing the identifying information, approval to do so should be sought from the CEO or relevant manager with appropriate delegated authority. The whistleblower should be told, so he or she can prepare themselves.
1.8 Providing procedural fairness (natural justice)

1.8.1 Applying the rules of procedural fairness

At every stage of the investigation the requirements of procedural fairness (ie natural justice) should be considered.

There is a presumption that the rules or principles of procedural fairness must be observed in exercising statutory power that could affect the rights, interests or legitimate expectations of individuals. It would be wise to assume that the rules apply in such circumstances, whether or not the power being exercised is statutory.

In rare cases there may be an overriding public interest in short-circuiting certain procedural fairness requirements. This will normally be in situations that involve serious risks to personal safety or where substantial amounts of public funds may be at risk. In these cases, expert external advice should always be sought and documented.

Reasons for any decision involving procedural fairness considerations should always be recorded in case the investigation becomes the subject of complaint to one of the accountability agencies at a later stage, or the result of the disciplinary inquiry is taken on appeal to any relevant tribunal or court.

Procedural fairness is, at law, a safeguard applying to the individual whose rights or interests are being affected. However, an investigator should not regard his or her procedural fairness obligations as a burden or impediment to an investigation, to be extended grudgingly. Procedural fairness is an integral element of a professional investigation, one that benefits the investigator as well as the person under investigation.

For an investigator, procedural fairness serves a number of related functions:
- It is an important means of checking facts and of identifying major issues.
- The comments made by the subject of the complaint will expose any weaknesses in the investigation, which avoids later embarrassment.
- It also provides advance warning of the basis on which the investigation report is likely to be attacked.

1.8.2 Understanding what procedural fairness means

The content of procedural fairness

The rules of procedural fairness have developed to ensure that decision-making is fair and reasonable. The principles of procedural fairness include giving a fair hearing, not being biased and acting on the basis of logically probative evidence.

The courts emphasise the need for flexibility in the application of the rules of procedural fairness, depending on the circumstances of each individual case. Depending on the circumstances which apply, procedural fairness requires an investigator to:
- inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for adverse comment in respect of them
- provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise
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• hear all parties to a matter and consider submissions
• make reasonable inquiries or investigations before making a decision
• ensure that no person decides a case in which they have a direct interest
• act fairly and without bias, and
• conduct the investigation without undue delay.

Why the person should be informed of the substance of any allegations made against them

Any person who decides any matter without hearing both sides, though that person may have rightly decided, has not done justice. Any person whose rights, interests or legitimate expectations will be affected by a decision or finding is entitled to an adequate opportunity of being heard. In order to properly present their case, the person is entitled to know the grounds on which that decision or finding is to be taken.

The reason that the substance of all allegations and grounds for adverse comment should be put to the person whose rights, interests or legitimate expectations are affected is that this allows that person the opportunity:
• to deny the allegations
• to call evidence to rebut the allegations
• to explain the allegations or present an innocent explanation, and/or
• to provide mitigating circumstances.

The obligation to inform that person of the substance of the allegations does not apply if the investigation does not directly involve proceedings which will affect a person's rights or interests. So, if an investigator is merely collecting information to make a report or disclosure to a nominated disclosure officer, disclosure coordinator, internal auditor or other person so that they can take action, there is no obligation to notify the subject of the complaint.

However, if an investigation will lead to findings and recommendations about the matter, the investigator should provide procedural fairness to the person against whom allegations have been made.

Similarly, the person who ultimately makes a decision on the basis of the investigation report must also provide procedural fairness, by allowing the person adversely commented upon to make submissions regarding the proposed decision and sanction.

When information should be given in the investigation process about allegations or adverse comment, as well as the opportunity to respond

Wherever a statutory obligation to accord procedural fairness exists, the terms of that statute must be followed.

In cases where no clear statutory direction exists, the High Court has determined that where a decision-making process involves different steps or stages before a final decision is made, the requirements of procedural fairness are satisfied if ‘the decision-making process, viewed in its entirety, entails procedural fairness’. (South Australia v O'Shea (1987) 163 CLR 378 at 389, Ainsworth v Criminal Justice Commission (1991) 175 CLR 564 at 579).

The actual investigation is one stage of the decision-making process. The preparation of an investigation report containing findings based on the investigation and possibly recommendations is a further stage in the decision-making process. Finally, a determination is made on the basis of the investigation report.
Arguably each of these steps could prejudice the individual affected, and courts have demonstrated a general trend towards extending the circumstances in which procedural fairness is found to apply.

Certainly the right to be informed as to the substance of allegations or adverse comment, and the opportunity to be heard, must be given before any final decision, determination, memorandum, letter or the like is made.

The point in time at which the person the subject of the complaint is informed of the allegations will depend on the circumstances of each case. In the absence of clear statutory direction regarding the provision of procedural fairness, the Ombudsman suggests that the following basic principles be followed:

- If, on the face of it, a complaint does not disclose a case to answer, it will be appropriate to wait until a fact finding inquiry has determined that there may indeed be a case to answer before the person the subject of that complaint is informed about the allegations (in cases where the complaint is baseless and is not pursued this will save the person suffering unnecessary stress).

- In circumstances where a complaint alleges wrongdoing, but the identity of the alleged wrongdoer(s) is unknown, no-one should be notified of the allegations in that complaint unless and until they are a clear suspect.

- If the person who is the subject of the complaint is to be interviewed, it is appropriate to delay informing him or her of the substance of the allegations until the interview if it appears that evidence could be tampered with or witnesses approached. An investigator should be circumspect about informing the person where there is a risk that:
  - documents may be destroyed
  - records may be modified
  - post-dated records may be produced
  - collusion will take place, particularly where more than one person is involved
  - a vital witness is in a position to be pressured or influenced (for example, a subordinate of the person under investigation).

- In other cases a person may be informed of the allegations prior to being interviewed

- In rare circumstances (such as where the matter has been or is to be referred to ICAC, DoCS or the police), it may not be appropriate to provide any information to the person the subject of the allegations.

There are also no hard and fast rules governing how and when a person must be informed of the substance of any adverse comment in respect of them. Certainly, no final decision can be made affecting a person's rights, interests or legitimate expectations without first providing him or her with an opportunity to respond to any adverse comment. If an investigator's report contains adverse comment and is provided to a more senior officer for a final decision then, subject to any statutory procedural fairness requirements, the person must at the very least be given an opportunity to respond to those adverse comments. This must be done prior to any decision being made.

However, the Ombudsman recommends that this right to be informed of the substance of any proposed adverse comment be afforded prior to presenting the investigation report to the final decision-maker. Because of the general expansion of the notion of procedural fairness and the range of interests protected, this should be done as a matter of best practice.
If an investigation report contains any adverse comment about someone, that person should be made aware of the substance of the grounds for all proposed adverse comments to be made against him or her. If this information has been put to the person the subject of complaint during the interview process it is not necessary to do this before finalising the report and handing it over to management or making it public. However, if the person has only been informed of certain of the grounds, he or she must be made aware of the other grounds being relied on. Similarly, if the grounds for adverse comment have changed significantly since the interview, then these must be communicated to the person prior to finalising the report.

**What the person must be told**

The person the subject of an investigation is generally entitled to be informed of:

- the substance of allegations made against him or her, and
- the substance of the grounds of proposed adverse comment and adverse findings.

While procedural fairness demands that a person against whose interests a decision may be made should be informed of the substance of the allegations against them and proposed adverse comment, this does not require all the information in the investigator's possession supporting those allegations to be disclosed to that person. Indeed it would be imprudent to show the investigator's hand completely by offering too much information upfront to the person the subject of the complaint. However, in disciplinary proceedings, for example, an employer may have to satisfy an industrial tribunal of the reasons why information was withheld at this stage.

**The form in which the person should be allowed to respond to the allegations or adverse comment**

In most cases it will be sufficient to offer the person an opportunity to put their case in writing, but there will be occasions where procedural fairness requires that the person be able to make oral representations.

There are no firm rules on this issue, and the ultimate decision will often reflect a balancing exercise between a range of considerations.

Generally speaking, where the credibility of the person is in issue it is more likely that oral representations should be accepted, since this offers the investigator a better opportunity of assessing the credibility of a person.

The existence of conflicting evidence and the possible significance to the individual of the outcome of the investigation are further factors which tend to favour allowing the individual to make a case in person. On the other hand, if the evidence is incontrovertible, the argument for oral representations is diminished.

**The right to an impartial decision**

Procedural fairness requires that no person decide a case in which they have a direct interest. An investigator who finds himself or herself in a conflict of interests situation should seek to be removed from the investigation (see Recognising and avoiding conflict of interests at 1.4). For advice concerning the situation where the conflict becomes apparent once the investigation is underway, see 1.24.3.

To ensure an impartial decision, the role of decision maker and investigator should be undertaken by different people.
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1.8.3 **Affording procedural fairness in disciplinary investigations**

Investigators should be aware of any statutory procedural fairness requirements that may apply to their investigations. If during the disciplinary process a person is not afforded procedural fairness, such as an opportunity to respond to the allegations against them, a challenge is likely to be mounted on the lawfulness of any adverse decision.

As noted earlier (at 1.2.2), if a statutory scheme for the investigation of breaches is not followed, the subsequent decision will almost certainly be set aside should the matter be taken on appeal. By comparison, a failure to follow policy guidelines will generally not result in a subsequent decision being set aside as unlawful (*Matkevich v New South Wales Technical and Further Education Commission (No 3)* (unreported) CA 40050/95) unless such an approach results in failure to accord procedural fairness (*Hill v Green; Jarvis v Buckley; Wood v Buckley; Young v Buckley* [1999] NSWCA 477). *Hill v Green* emphasises that the courts will insist upon the provision of procedural fairness except where legislation shows by ‘express words of plain intendment’ that Parliament intended to infringe such a fundamental principle.

A disciplinary decision should not be based merely on the findings of an inquiry by any other tribunal or investigative agency. In a practical sense it may well be that evidence and documents from a previous investigation or proceedings may be tendered or relied upon in disciplinary proceedings. However, the person subject to those disciplinary proceedings must always be notified of the material being relied upon, and given an opportunity to make his or her own submissions or call his or her own evidence to rebut that material.

In one case, the Water Board (as it then was) dismissed its Chief Economist on the basis of the findings of an ICAC report into the Board's tendering processes and the conduct of the employee in question. GREAT found that ICAC's finding was not sufficient to allow the Board to determine that the employee was guilty of misconduct, in lieu of an independent investigation by the Board itself.

GREAT determined that the Board should have advised the employee that it proposed to investigate the matters which gave rise to the ICAC finding and then undertaken an investigation of its own. GREAT found that the Board's failure to carry out its own investigation prior to making the decision to dismiss the employee rendered the decision unfair and directed that the employee be reinstated.

Further authority for the proposition that the findings and opinions of a separate inquiry need to be independently tested is found in the decision of *Council of the City of South Sydney v Horiatopoulos* (1992) 47 IR 93. In this case, the Full Bench of the Industrial Relations Commission of NSW held that:

> This appeal, of course, is not an appeal against the [ICAC] Report. However, the appellant Council did not conduct any detailed investigation of the matters in issue but relied entirely upon the findings of fact and the opinions expressed in the ICAC Report. The [Industrial Arbitration Act 1940 (NSW)] while not providing for such an appeal, does provide the opportunity for the respondent to have the whole of the matter, including the proceedings before ICAC, to be ventilated before the Commission.

Practical tip

In any disciplinary investigation and its outcome, an employee must be accorded procedural fairness. To prevent the outcome of a disciplinary investigation being overturned eg by GREAT or the Industrial Relations Commission:

- Make sure due process is followed.
- Be very familiar with the relevant disciplinary procedures, particularly if they are contained in an act or regulation, and take care not to omit any steps.
- Investigators should be careful about adopting the findings of some other investigator – any disciplinary outcome should be based on an independent investigation or on previous findings only if the employee has been given the opportunity to make submissions about the previous findings.
- Any submissions made by the employee must be considered and there should be evidence of this consideration.
- The outcome of the disciplinary investigation must be firmly supported by the evidence.
- The evidence must be complete: All available witnesses interviewed and all documentary evidence gathered.
- Exculpatory evidence should be weighed against evidence supporting a charge.
1.9 **Gathering evidence**

### 1.9.1 Obtaining information during an investigation

Evidence gathering is the process of effectively and efficiently obtaining information relevant to the complaint. Evidence can be either direct or circumstantial, depending on how it is to be applied to the relevant facts in issue. Direct evidence is evidence of what a person saw, heard, felt, smelt, or tasted. Circumstantial evidence is evidence from which facts may be inferred. An inference is a conclusion that possesses some degree of probability, which will depend on the accuracy of the premises from which the inference is drawn.

In an investigation the main evidentiary sources available are:
- oral evidence (recollections)
- documentary evidence (records)
- expert evidence (technical advice), and
- site inspection.

The relative importance of each of these information sources will vary according to the nature of complaint.

In most investigations into the conduct of individuals the predominant types of evidence are the oral evidence of witnesses and documentary evidence. In some cases, however, forensic and/or expert evidence may need to be obtained.

All evidence collected should be relevant, reliable and logically probative, meaning that it can affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. Often, in the course of conducting an investigation, a substantial amount of extraneous information will be obtained. Vigilance is needed to avoid being diverted by irrelevant material and to avoid chasing irrelevant details. To ensure that the investigation remains focused, an investigator should refer constantly to the investigation plan as a reminder that the purpose of obtaining information is to establish proofs or resolve the facts in issue.

Investigators must always conduct themselves with probity. They must never resort to trickery, deception or unlawful means to obtain evidence. It should be noted, however, that withholding information does not amount to trickery or deception (see 1.8.2).

### 1.9.2 Assessing whether evidence is, or may become, forensic

Forensic evidence refers to evidence used in, or connected with, a court of law. Depending on the nature of the allegations and the nature of the evidence gathered or obtained during the course of an investigation, that evidence may take on the character of forensic evidence at a later stage.

The implications for an investigator of evidence being or becoming forensic in nature are very significant. Therefore, if at the start of the investigation planning it appears that the allegations, if proven, may end up being the subject of legal proceedings, it is important to be alert from the outset. The task of preparing evidence will be considerably more onerous and considerably more care will have to be exercised in the way it is obtained and recorded.
If the possible legal proceedings are criminal in nature, the investigation should be conducted by trained specialist investigators only. Where a disciplinary investigation arises out of alleged or proved criminal conduct by a staff member, the disciplinary proceedings should await the outcome of the criminal proceedings.

Perhaps the most important consequence of evidence being forensic is the application of the rules of evidence. The law of evidence is a rich vein of income for lawyers. Disputes about evidence are heard in courts every single day of a hearing or trial. Therefore, non-lawyers who are responsible for an investigation of such a matter may need to get professional advice. This is the benefit of doing a proper investigation plan at the start of the investigation. A proper plan will assist in identifying those questions and issues about which professional advice will be needed. A good investigator will ask for this help.

1.9.3 Understanding the rules of evidence

Applicability of the rules of evidence

The guidelines in this publication are directed at the investigation of complaints raising administrative or disciplinary issues. The context of such investigations is invariably considerably less formal than a court inquiry, and the rules of evidence would seldom apply to the investigation. This will generally be the case in relation to disciplinary proceedings or administrative investigations conducted in-house by a public sector agency. The rules of evidence also do not apply during investigations by the Ombudsman, the DLG or the ICAC.

Nevertheless, a basic understanding of the rules of evidence is useful for an investigator. As noted above, the allegations made in a complaint may in some circumstances ultimately become the subject of legal proceedings. Another reason for investigators having some general familiarity with the main rules of evidence is that even if they don't apply to their investigation, the rules are based on principles which can assist their investigation by directing them to the best evidence.

The most fundamental consideration applying to any evidence is relevance. There must be a minimal logical connection between the evidence and the facts in issue. The test of relevance is equally applicable to inquisitorial proceedings (such as investigations) as it is to court proceedings. However, where the rules of evidence apply, even evidence that is relevant may be inadmissible in proceedings. Some of the more important rules of exclusionary evidence are outlined briefly in the paragraphs which follow.

Hearsay evidence

There is a general rule against hearsay evidence and a number of exceptions to it. The dictionary definition of hearsay evidence is ‘evidence based on what has been reported to a witness by others, rather than what he or she has heard him or herself’. Hearsay should not be totally discounted by an investigator. It can be a useful source of leads to other relevant witnesses. The importance of the rule against hearsay is that it alerts investigators to the need to go to the source itself, rather than rely on what others say. Put another way, hearsay evidence carries less weight than direct evidence, and whenever the primary source is available, it should be used in preference to hearsay evidence.

It is important to note that the rule against hearsay applies only where the rules of evidence apply. Nevertheless, in all situations investigators should make every effort to track down and get direct evidence. If this is simply not possible, eg, because the
source of the direct evidence refuses to be interviewed, then the investigation report should record this.

Investigators should be aware that one of the primary exceptions to the rule against hearsay is statements made by alleged wrong-doers where they admit their wrongdoing. The reason for this lies in an assumption that people don't tend to make damaging confessions against their self-interest. Therefore, any damaging confession is inherently likely to be true.

**Opinion evidence**

As a general rule, a witness statement should not contain expressions of opinion about something or someone unless the witness is an expert who has been requested to provide an expert opinion. As with hearsay evidence, there are exceptions to the general rule and opinion evidence may be admissible if it is based on what a person saw, heard or perceived, and it is necessary to convey an adequate understanding of the witness's perception of the matter. Similarly, where the witness has acquired considerable practical knowledge about a matter through life experience, the witness may be able to express an opinion about that matter even if he or she is not an expert.

**Cautioning**

During the course of an investigation evidence may be obtained which establishes a prima facie case for a criminal offence against a person being interviewed. If this happens, then a caution should be administered advising the person that he or she does not have to say or do anything, but anything that is said or done may be used in evidence.

Evidence that is obtained in the absence of a caution is taken to be evidence that has been improperly obtained, and it can be expected that such evidence will, as a general rule, be excluded from proceedings in a court.

If the issue of cautioning a witness arises, investigators should consider whether they should be continuing the investigation. Is it really appropriate that they conduct what is potentially a criminal investigation? In the Ombudsman's view, the answer is no, at least not without clearing it with the police beforehand. If investigators do proceed with their investigation and the matter is criminal, they risk contaminating evidence, thereby jeopardising any subsequent criminal investigation.

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**Practical tip**

The rules of evidence generally do not apply to administrative investigations.

However, a basic awareness of these rules is useful to ensure that the evidence obtained is the best available and, where applicable, will be admissible in any subsequent legal proceedings that may arise.
1.10 Obtaining oral evidence

1.10.1 Assessing responses to questioning

The oral evidence of witnesses is usually the most difficult evidence to obtain. Witnesses, like most of us, do not tend to recall events clearly in a perfect chronological order. Our memories are imperfect and operate in some odd ways. This poses problems for investigators.

It takes skill to keep an interview focused and to draw out all of the relevant information. The manner in which an interview is conducted can significantly impact on both the extent and the quality of information obtained. Different witnesses will respond in different ways to particular forms and styles of questioning. The degree of cooperation that can be expected from witnesses will vary. Whereas some witnesses will be forthcoming in their responses, others will be more reticent, and others will actively seek to withhold information. Some witnesses may feel confident giving their evidence, some may feel intimidated and require support. Each situation will call for its own approach.

When questioning people about a matter, an investigator needs to be aware of certain ways they may be responding to his or her questioning. People allow personal influences to affect the information they are recounting. These influences will often be present, to varying degrees, without any intent by the person to lie. Some specific response modes are as follows.

Truthful

Many people, particularly those with nothing to hide or gain, are unreservedly truthful and forthcoming when interviewed.

Partial

Some people are basically, or at least partly, truthful but will withhold certain items of information for varying reasons. They do not lie, they simply do not tell the whole truth.

Distorted

People will actually alter some or all of the information recounted so that it presents a better version, in their eyes, of events. They may still be truthful in relation to much of their account.

Exaggerated

Some people will embellish and exaggerate their account of events, sometimes for a definite purpose, but other times simply to make the story sound impressive.

Minimise

People involved in some wrongdoing actively minimise their own involvement in the matter and this will be reflected in their account.

Maximise

Conversely, other people seek to maximise their part in a situation in order to boost their own feeling of importance. This is sometimes noticeable when a person is interviewed on camera and what is known as 'Hollywood syndrome' occurs, where the person behaves as if playing to a camera, and embellishes evidence for dramatic effect.
Complete lies

Of course, some people are untruthful when questioned and actively tell lies. This may be to hide facts, to divert the focus of an enquiry, or simply because they enjoy lying (the pathological liar).

One of the uppermost concerns for an investigator obtaining oral evidence should be to minimise the possibility of the witness subsequently denying, changing or contradicting their evidence. In order to address each of these considerations, an investigator should apply some basic rules in all cases where oral evidence is being taken. Extra considerations apply when children are being interviewed. These are considered in Annexure L.

Guidance on the conduct of a disciplinary interview can be found in Chapter 9 of the NSW Government Personnel Handbook.

For advice on the administration of cautions during an interview, see 1.9.3.

**Practical tip**

When dealing with witnesses investigators should be aware of the following:

- The timing and location of any interviews should be discreet.
- What evidence the witness can give.
- Letting witnesses give their version of events.
- Whether they have all the necessary documents they want to show the witness.
- Making a record of the documents which have been viewed by the witness, together with the witness’s response to them.
- Any relevant objects, photographs or documents provided by the witness need to be tagged, dated and initialled.
- Always remain objective.

1.10.2 Adopting good interview techniques

**Objective and key criteria for effective interviewing**

The objective of any interview is to ascertain facts and to endeavour to gain sufficient information to confirm or deny the basis of the complaint. In order to properly do this all relevant witnesses must be interviewed.

Preparation is one of the keys to good interviewing. There is rarely, if ever, an adequate substitute for proper and rigorous preparation for an interview. Planning an interview, and having a clear idea of what he or she is trying to get out of it, will enable the interviewer to set the agenda. Logic and careful analysis are required for this.

As part of the planning process, contingencies should be prepared to deal with possible difficulties that may arise during the course of the interview, such as:

- dealing with emotional, hostile or resistant witnesses
- dealing with irrelevancies
- keeping the interview on track, and
- dealing with disruptions.
All interviews call for a high level of skill. Apart from a thorough knowledge of the agency and its policies, practices and procedures, the keys to successful interviewing are good analytical skills, an ability to communicate effectively and a high degree of good sense and judgment, professionalism and integrity.

It is important to remember that although interviewing may be second nature to the skilled interviewer, training, updating skills and constant review of staff performance in this area is important.

The skills and tips set out in the following sections are largely appropriate for consideration in relation to any interviews conducted prior to or during a public sector disciplinary inquiry. Further guidance on the conduct of a disciplinary interview can be found in Chapter 9 of the *NSW Government Personnel Handbook*.

### Practical tip

There is no single correct formula for conducting an interview. However, a useful and commonly used format for interviews is as follows.

**Introduction**

- The time, date and location of the interview.
- Details of everyone present at the interview.
- A short explanation of how the interview is going to be conducted.
- Witness details.

**Recitation of uncontroversial, agreed events**

Where applicable, this component of the interview is used to go back over events that occurred before the interview and obtain the witness’s confirmation that this is what actually happened.

**What happened**

During this part of the interview the witness is invited, through the use of open questions, to describe events in his or her own words.

**Specific questions**

Clear up ambiguities or address facts in issue that have not been covered.

**Closing the interview**

The witness should be given the opportunity to provide any further information that he or she may wish to add.

**Adoption of the interview**

Whatever means is being used to record the interview, the witness should be asked to adopt the record of it.

When investigators are interviewing the person who is the subject of the complaint, the person should be allowed to respond to allegations and factual matters uncovered during the investigation. The allegations may need to be paraphrased to protect the identity of a protected complainant.

*Source: Internal Investigations, ICAC, 1997.*
Deciding who should be interviewed

During the course of an investigation, all relevant witnesses should be interviewed. As part of the process of preparing the investigation plan those persons who can assist in the inquiry should be identified. If other evidentiary sources become apparent during the course of the investigation, the investigation plan should be revised and the additional sources added to the witness list.

Determining the order of interviews

The first interview usually occurs when a statement is taken from the complainant as part of the initial inquiries and planning. The order in which the remaining witnesses are interviewed will depend on the importance of their evidence, their degree of association with the person the subject of the complaint and their availability. When witnesses are interviewed sequentially, avoiding delays between one interview and the next will minimise the opportunity for collusion.

As a general rule, the person the subject of a complaint should be interviewed last. However, it may be necessary to inform the person of the substance of the allegations prior to the interview (see 1.8.2). An admission from the person at that point would remove the necessity of interviewing other witnesses.

By interviewing the person the subject of the complaint last an investigator will have collected as much information as possible from other sources, which is a good position to determine the appropriate questions to ask the alleged wrongdoer. It also minimises the risk of evidence being tampered with or witnesses being intimidated.

There will be situations where this general rule about interviewing the alleged wrongdoer last does not apply eg in cases where the available documentary evidence clearly demonstrates the conduct alleged it may be appropriate to interview the alleged wrongdoer first.

Practical tip

Witnesses should ordinarily be contacted at their place of work to attend an interview.

In determining the most appropriate way of contacting potential witnesses, investigators should have reference to:

- established protocols
- any special need to protect the confidentiality of the witness
- the privacy of staff
- any special, cultural, gender or other factors
- the risk of interception of the communication.

Choosing an interview setting

The preferred choice of interview setting will vary according to the person being interviewed. Ideally, the room in which the interview is conducted should be free of external distractions (such as public address systems, the comings and goings of other staff, or activity seen or heard through windows or partitions) and internal distractions (such as telephones, or an office full of papers that can easily allow a person's focus to become distracted).

An investigator should have control over the setting in which the interview is to take place. If neutral territory is unavailable, the location of the interview can affect the dynamic of the interview. Some witnesses may feel more comfortable withholding information if they are in their own space. On the other hand, an investigator may wish to make some witnesses feel as much at ease as possible.

Special considerations apply when interviewing whistleblowers (see 1.1.3) or children (see Annexure L).

Conducting an interview

There are certain guidelines that apply in relation to every interview:

- As with every facet of the investigation, when interviewing an investigator must be, and must appear to be, impartial.
- At the outset of every interview it is important that the interviewee is clearly informed of the reason for the interview, although it is not necessary to inform him or her of all the factors relevant to the subject under discussion at this stage.
- Avoid making any statements that cause a witness to believe that he or she will obtain any privilege, concession or immunity from official action (see 1.10.2).

Within these bounds, an investigator has a fair degree of flexibility in the conduct of an interview.

There are two broad types of approach to interviews, ‘soft’ interviewing and ‘hard’ interviewing. These are shorthand terms and do not have any technical meaning.

The terms seek to describe the appropriate approach for two different sets of circumstances. The vast majority of witnesses should be handled with the ‘soft’ method. Such interviews are characterised by a relatively friendly and non-threatening approach, the use of open questions, and requests to offer any information that might be of assistance in casting light on the issues the subject of investigation. However, even in these cases, investigators sometimes have to go in hard and ask unpleasant questions eg, it is not unknown for persons giving evidence to be ‘economical with the truth’. As the principal function of an investigator is to get at the truth of the matter, they must sometimes cross-examine witnesses and ask difficult questions.

Further, these techniques may sometimes have to be applied to witnesses to test the credibility or reliability of their evidence. A ‘hard’ approach does not, however, mean that investigators bang the table and shout at the witness or become abusive to them. This approach would be counter-productive. ‘Hard’ interviewing means asking questions that the witness may find objectionable or uncomfortable.

If asking such questions, it may be useful in some circumstances for investigators to preface the question with some explanation such as ‘I’m sorry if the question I am going to ask you is upsetting to you, but I have to ask it in order to properly investigate this matter.’ It also means probing in depth the answers given to questions by appropriate supplementary questions to test the credibility and reliability of the witnesses’ answers.
An interview should never be used to cause a person to break down and confess. If undue pressure is indicated, part or all of the interview may be held legally inadmissible in any subsequent court or tribunal proceedings.

There will be occasions when difficult witnesses will be encountered. Difficult witnesses are not only those who are obsessive or irrational, but also those who are unfocused and continually change the subject, or who embroider their answers with unnecessary detail or gossip. Other witnesses may trivialise the issues or attempt to undermine the investigator's authority. Such occasions require 'hard' interviewing. Here 'hard' does not mean asking difficult or demanding questions, but rather taking a firm hand in the interview to control the process. However, great care has to be taken by interviewers of difficult witnesses to sift through the evidence to ensure that real or genuine allegations, admissions or rebuttals are not missed.

**Practical tip**

Wherever an investigation requires interviews, investigators should:

- Prepare set questions or lines of inquiry in advance to be used as a checklist to ensure all relevant issues are covered. However, these need not be rigidly adhered to, and investigators should respond to evidence as it emerges in the interview.
- Avoid assumptions; if in doubt, ask further questions.
- Be familiar, and comply, with any relevant legislation or approved procedures.
- Ensure all relevant witnesses are interviewed.
- Remain focused on asking questions and obtaining factual evidence.
- Resist any temptation to enter into discussion or argument with the person being interviewed.
- Gather all relevant information, not just information that supports the complaint.


**Dealing with uncooperative witnesses**

There are many reasons why a witness may refuse to cooperate with an investigation eg witnesses might be afraid of what will happen to them if it becomes known that they have assisted with the investigation. In these situations it is appropriate for the investigator to reassure witnesses that they will not suffer reprisals, and that any attempted reprisal action taken will be dealt with. However, before any such assurance is offered, the investigator must be confident that he or she has both the authority and discretion to make this assurance. This will clearly be the case where the witness is making a protected disclosure.

Another reason why the person the subject of the complaint or other witness may be reluctant to cooperate is because they may have 'unclean hands'. In other words, they may have been involved in the relevant misconduct. In such cases an investigator must be very careful about offering any privilege, concession or other inducement in return for the witness's statement. Such an inducement can only be made where the investigator has an actual discretion to make such an offer and there is no other legal prohibition.

There are a number of circumstances where inducements are specifically precluded. Section 3(2) of the Protected Disclosures Act stipulates that beneficial treatment is not to be given in favour of a person if the purpose (or one of the purposes) for
doing so is to influence the person to make, to refrain from making, or to withdraw a disclosure. Moreover, the Act specifically provides that a disclosure that is made solely or substantially with the motive of avoiding dismissal or other disciplinary action is not a protected disclosure.

It is similarly not open to an investigator to offer a witness an indemnity from criminal prosecution in return for their cooperation or an undertaking that their evidence will not be used against them. Only the Attorney-General can grant such an indemnity or undertaking.

No matter how skilful an interviewer is, he or she will not always be able to overcome witnesses who are determined to be uncooperative. However, where the witness is the employee the subject of complaint, the investigator is not necessarily devoid of any recourse.

If the employee is under a legal obligation to comply with lawful directions, then it will be a disciplinary offence for that employee to ignore a direction given under that provision. Consequently an employee who refuses to answer questions that he or she has been lawfully directed to answer may incur disciplinary action.

In public sector employment, the obligation on employees to answer questions from their employer relating to matters within the scope of their employment is usually specified by statute or regulation. For instance, the *Education Teaching Service Regulation 2001* provides, at clause 17, that a member of the education teaching service who has been charged and called to a disciplinary inquiry must not, without cause, fail to give evidence, fail to produce documents or knowingly give false or misleading evidence.

While the question is not beyond doubt, in the absence of any statutory requirement to comply with lawful directions, there is some legal authority to suggest that a failure by an employee to answer questions that he or she is properly required to answer could be so serious as to render the employee liable to disciplinary action and possible dismissal.

This proposition is based on an employee's common law obligation of fidelity to his or her employer. In *Blyth Chemicals v Bushell* (1933) 49 CLR 66, Dixon and McTiernan JJ said:

> Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal. But the conduct of the employee must itself involve the incompatibility, conflict or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.

According to the authors of *The Law of Employment*:

> if an employee is requested at the proper time and in reasonable manner to state to his employer facts concerning the employee's own actions performed as an employee ... generally speaking (the employee is bound) to make such disclosure. Questions asked relating to the employee's activities could be so reasonable and fair that to refuse the information may well be disobedience justifying dismissal.

As authority for this proposition, the authors cite Herron J, who stated in *Associated Dominions Assurance Society Pty Ltd v Andrew* (1949) 49 SR (NSW) 351, that a duty lies upon an employee in general terms to give information to her or his employer such as 'is within the scope of his employment and which relates to the mutual interest of employer and employee'.

If a witness insists on offering the 'Bart Simpson'-type defence 'I wasn't there, I didn't do it, nobody saw me do it, you can't prove a thing' then an investigator will ultimately have to look elsewhere for evidence to assist the investigation. If a witness resolutely refuses to cooperate with the enquiries, he or she should be advised that the investigator is required to make a finding and will do so, whether the witness cooperates or not. Remember that witness statements are useful but they are not necessarily essential. Remember also that in administrative proceedings the failure of a witness to provide evidence may mean that evidence adverse to that witness is not contradicted and may therefore be regarded as convincing.

The comments of a Full Bench of the Industrial Commission of South Australia in *BiLo Pty Ltd v Hooper* 1992 53 IR 224 at 233 are instructive in this issue:

> "As the employee was given every reasonable chance to advance an explanation to the employer which would either exculpate him from any misconduct, or at least throw reasonable doubt on any such conduct, or which in the instant matter may have explained the disappearance of the carton of cigarettes, he cannot subsequently be heard to complain of the dismissal, where such dismissal is based, at the very least in part, on his own failure to offer to the employer a reasonable explanation for the disappearance of the carton of cigarettes." (per Stanley P, Cawthome CP, Stevens C).

Furthermore, the view expressed by Windeyer J at 321 in *Jones v Dunkel* (1959) 101 CLR 298:

> "In a civil trial there will often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore be open in such a case to conclude that the failure of a party (or someone in that party’s camp) to give evidence leads rationally to an inference that the evidence of that party or witness would not help the party’s case”

has been cited with approval by a majority of the High Court in *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ, and in *Azzopardi v The Queen* [2001] HCA 25 (3/5/01) per Gaudron, Gummow, Kirby and Hayne JJ at [34].

Note however, that an employee is not obliged to answer questions if the responses would be self-incriminating and expose the employee to the risk of criminal prosecution.

We have been advised by senior counsel that the privilege against self-incrimination is not confined to investigations concerning alleged criminal actions but extends to civil and disciplinary proceedings that may result in the employee being penalised as a result of the investigation.

However, the mere claim of the privilege will not support an adverse inference against the employee. A finding of any breach of discipline would have to be supported by sufficient evidence pointing to the guilt of the employee. If the employer disciplined an employee on the basis that the employee claimed the protection of the privilege and without sufficient evidence to support a finding of guilt, then it is likely that the disciplinary action will be overturned by an industrial tribunal or court if challenged.
A claim of the privilege must be supported by information that shows that the danger of self-incrimination is genuine if the requirement to answer is to be set aside. As Barwick CJ noted (at 289) in Sorby v The Commonwealth (1983) 152 CLR 281:

“*The mere fact that the witness swears that he believes that the answer will incriminate him is not sufficient; *to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer*: Reg. V Boyes (1861) 1 B&S 311, at pp329-330 (121 ER 730, at p738). That statement of the law has been frequently approved.”

While an employee’s claim of privilege cannot be used as a basis for inferring guilt, the employee is still required to cooperate with the employer, and non-cooperation extending beyond the claim of privilege is a breach of the employee’s responsibilities to the employer. In Patty v Commonwealth Bank (980007) (1998) IRCA 19/2/98, Ryan JR found that:

“the applicant’s refusal to cooperate with the investigators and his refusal to comment on or elucidate the issues troubling the respondent [employer] also amounted to conduct which justified termination of employment. This conduct itself was misconduct such as constituted a valid reason for termination” (at p.27).

Ryan JR noted that the privilege against self-incrimination was not infringed:

“The information was within the scope of his employment and related to mutual interest of applicant and respondent. The applicant was requested often, at proper times and in a reasonable manner to clarify his actions. The applicant was not obliged to answer questions which might have exposed him to the risk of criminal prosecution” (at p.28)

**Listening**

Listening skills may be either active or passive. Active listening involves:

- demonstrating that the message has been heard and understood
- demonstrating that the listener has understood the feelings behind the message, and
- building rapport between speaker and listener.

Reflective questioning and summarising are features of active listening. Reflective questioning feeds back to the witness the investigator's understanding of what has been said. This ensures that the witness knows that the investigator is interested in what has been said and that the broad message has been received and understood. It also assists in prompting witnesses to clarify their answers or offer more details eg ‘So, you said you felt distressed and unsure of what to do when you received the report?’ ‘And you felt X looked guilty when you saw him emerging from Y's office?’

However, excessively enthusiastic reflective listening is to be avoided. The investigator must remember that he or she is there to get information from the witness. Investigators must not agree with or endorse the concerns being expressed, and must be careful to avoid putting words into the witness's mouth. They must also avoid outlining the allegations or evidence as a substitute for the witness doing so.

Summarising requires the investigator to accurately and briefly summarise the issues raised by the complainant. This can often be used to bring the interview to a conclusion with the witness feeling confident he or she has been heard and understood.
Investigating complaints

When summarising, care should be taken to personalise the information to the witness eg 'You have said...' and 'It seems from your perspective...' This avoids giving the impression that the listener endorses the witness's description of events.

Sometimes, passive listening is more appropriate than the active approach. Listening in silence and responding through eye contact, nodding and leaning forward may be more appropriate where it is important for the witness to be encouraged to continue talking, or where the witness is hesitant.

Questioning

It is recommended that an investigator prepare all the questions to be asked prior to an interview with a witness. It may be necessary to deviate from the prepared questions to ask follow-up questions. An investigator should not be reluctant to follow tangents raised by a witness during the course of the interview. However, having pre-set questions will assist in covering all the ground that needed to be covered. As part of planning, possible responses should be anticipated, and further questions determined to test these responses. When developing questions, investigators should bear in mind that the object is to gather information which will prove or resolve those facts in issue identified in the investigation plan.

Questions form part of the listening process. Appropriate questions can maximise the confidence of the witness that they are being listened to. The types of questioning techniques that an appropriately skilled interviewer might use include: open, closed, strategic, hypothetical, provocative or assertive.

Open questions

Open questions revolve around questions beginning with how, why, where, when and what. These questions allow the witness full range in answering the questions and do not lead the witness in any particular direction. They are particularly useful where it is important that the information being provided by the witness is not contaminated by facts or other matters which are not known to the witness eg 'What happened then?'

Closed questions

Closed questions are not usually appropriate as the first method of choice. Closed questions are those questions to which the answers are 'yes' or 'no'. They are useful to confirm matters once information has been obtained, but tend to foreclose the opportunity for witnesses to articulate positions for themselves.

Strategic questions

Strategic questions are those which take the interview away from information gathering to solution finding. They ask the witness to have some input into how the matter could be resolved and are therefore particularly useful when interviewing whistleblowers eg 'How do you think this can be resolved?' or 'What do you want to get out of this at the end?' These questions are quite dynamic and involve the witness in coming up with possible investigation outcomes.

Hypothetical questions

Hypothetical questions allow ideas to be discussed with the witness in a non-threatening manner. They are often a useful tool in questioning witnesses for the purposes of exploring possible resolution strategies or exploring possible recommendations that might relevantly flow from the investigation. For example, the closed and challenging 'Don't you think management will reject that proposal', could be replaced with 'What would you think/feel/do if management were not able to accept that proposal?'
Provocative or assertive questions

These kinds of questions are designed to provoke an immediate and possibly ill-considered response from the witness. They would generally be used only as part of an interrogation. There is a widely held view that this may not be the most effective way to obtain information from a witness.

There is an order in which questions should generally be put to a witness in an interview. Consider beginning the interview with some general questions about the witness's recollections of the relevant matters under investigation. It is also helpful to ask questions in their chronological order. Closed questions should only be asked after the witness has told his or her story. An investigator should aim not to ask leading questions of the witness during the earlier part of the interview unless he or she is experiencing some difficulty in extracting information from the witness. The following examples may help:

<table>
<thead>
<tr>
<th>Leading question</th>
<th>Non-leading question</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did you go to the records room at lunch time?</td>
<td>Where did you go at lunchtime?</td>
</tr>
<tr>
<td>Was it a blue file?</td>
<td>What was the colour of the file?</td>
</tr>
<tr>
<td>It was Jones, wasn't it?</td>
<td>Who was it?</td>
</tr>
</tbody>
</table>

Whereas in a court, or other adversarial proceeding, leading questions are generally only permissible in cross-examination, this rule is not applicable in inquisitorial proceedings. Nevertheless, persistent and continued use of leading questions is not recommended.

When interviewing the person the subject of the allegations, all the allegations should be put to him or her so he or she can respond prior to the writing of the investigation report. Long and drawn out questions should be avoided, as they only serve to confuse a witness. Multiple questions shouldn't be asked as a single question. Investigators should try to avoid expressing their opinions in words or via their body language.

On some occasions the person being interviewed may refuse to answer the questions put to them. This silence may be in response to specific questions. For example, some questions that an investigator asks may call for a response which tends to incriminate the witness. Investigators should be aware of their powers and obligations with respect to asking such questions (see 1.5 and dealing with uncooperative witnesses in the current section).

Practical tip

Keys to effective questioning

- Remember that the purpose of an interview is to obtain answers to six categories of question - who? what? when? where? how? and why? (The answers to the latter two questions are important in terms of correcting policy or implementing new procedures).
- Avoid narrow or closed questions, especially during the early parts of an interview. Such questions should be reserved for clarifying aspects of the evidence presented.
- Avoid leading questions.
When questioning a witness about a document it is advisable to ensure that it is clearly identified by that witness, so that there can be no later dispute about which document was being discussed. It will not be sufficient to merely show the witness the document in question. It should also be described in a way that distinguishes it eg ‘a letter dated such and such, from x to y’. The witness should be required to acknowledge or express ownership of the document eg by identifying it as a document written, received or previously seen by him or her. The document may then be attached to the statement, if relevant.

**Practical tip**

**Commencing an interview**

Evidence is more likely to be forthcoming from a witness who is relaxed and at ease. In advance of the interview, consider whether an interpreter will be necessary and, where appropriate, arrange for an interpreter to be present.

To help create a comfortable environment for the witness, an investigator should start by setting the scene by doing the following:

- introduce him or herself
- explain in general terms the purpose of the interview
- let the witness know what is going to happen ie explain how the interview will be conducted and how the interview fits into the investigation process as a whole
- advise the witness how their evidence will be recorded; if the interview is to be taped, inform the witness of this
- where appropriate, confirm with the witness that he or she has been offered the opportunity to have a support person or observer present at the interview
- assure the witness of the investigator’s impartiality
- let them know that, except for the purposes of reporting to management, the information provided will remain confidential
- consider and deal appropriately with any objections that the witness raises
- ask the witness whether they have any questions before beginning the interview.

**Alternatives to face-to-face interviewing**

The two alternatives to face-to-face interviewing are telephone interviews and written responses.

Face-to-face interviews have a number of distinct advantages. They:

- are more responsive and flexible
- are more spontaneous, and
- allow the interviewer to observe and respond to both verbal and non-verbal cues.

Consequently, face-to-face interviewing should be adopted as the primary method of receiving evidence from witnesses, and alternatives to this form of interviewing should be used sparingly.

Because of the possibilities for misunderstanding, the importance of non-verbal cues and the difficulty in getting the witness to immediately acknowledge statements made, telephone interviews should only be conducted if the statement is needed urgently and
the witness is located far away. If at all possible, a copy of the statement or the record of the interview should be faxed to the witness to approve, or amend and approve. A telephone interview may also be acceptable if details simply need to be clarified, or if brief or less formal information is required.

Written requests for information will on occasion be an appropriate method of eliciting information. Because this process gives the respondent time to consider and prepare his or her response, written requests for information will be suitable where detailed or more formal information is required. An investigator should be aware of the drawbacks of this form of information gathering. The formality of written requests can be intimidating and time consuming for respondents, and they are clearly not appropriate for people who have difficulty in communicating in writing. Conversely, inquiries by correspondence may offer the skilled respondent the opportunity to carefully craft his or her words or responses. Written requests create more delays in the investigation than would result from face-to-face interviewing, and investigators should also be aware of the risk of loss of confidentiality and of collusion between witnesses in this form of evidence gathering.

1.10.3 Using an interpreter

If a person to be interviewed does not have a sound and viable command of English, then the use of an interpreter for the primary language of the interviewee needs to be considered. Wherever possible, this need should be considered as part of the planning stage for the interview so that the issue does not arise suddenly or unexpectedly. Similarly, if a person to be interviewed has a communication barrier other than language, for instance deafness or verbal incapacity, then a specialised interpreter for the relevant disability should be used.

The imperative to use an interpreter increases according to the likelihood of the evidence being used in future proceedings. This will reduce the opportunities for a witness to subsequently retract their statement on the basis that they had not properly understood the questions. Wherever the substance of an interview may be used or considered as evidence of any sort, or is to be relied upon in any legal sense, and an interpreter is viewed as necessary to communicate with the interviewee, then only an accredited interpreter should be used. These trained and accredited interpreters are then able to give evidence as to the substance of the interview as they are regarded as legally qualified to interpret.

It may be permissible for the interviewer to find a third party with some ability in the interviewee's language in order to act as an intermediary if:

- what is required from the witness is simply some basic information as opposed to evidentiary material
- the conversation is only intended as a preliminary stage before a full interview is considered, or
- there is a situational urgency in conversing with the person.

This intermediary person, however, has no legal or evidentiary standing to interpret.

It is particularly important to avoid, wherever possible, using family or friends of an interviewee as interpreters. A very real danger in this situation is of an interpreter empathising with the interviewee to the extent that objectivity is lost and the responses are prompted, coached, or inaccurately interpreted.
The workplace may have a number of staff who participate in the Community Language Allowance Scheme. However, wherever an investigation involves a fellow member of staff, an investigator should be very circumspect in the use of workplace interpreters. There are several reasons for preferring the use of an external interpreter. Confidentiality is one of the prime considerations.

A witness may also be less inclined to give evidence in the presence of a colleague. Moreover, there is a chance that any partiality by the workplace interpreter, either in favour or against the witness, may taint the translation.

The interpreter needs to be clear as to their role and to the requirement to exactly interpret only what is said, and not to put any of their own interpretations or meanings into the process. The obligation for confidentiality and impartiality must be strongly impressed upon the interpreter.

### 1.10.4 Recording oral evidence

**How, why and who**

There are three principal ways in which oral evidence can be recorded: by tape, by preparing a record of interview, or by creating a witness statement.

The most important rule in all cases where oral evidence is being taken is accuracy. The most reliable way of ensuring accuracy is to tape record the interview. If the necessary equipment is not available, or the witness or subject of the investigation refuses to answer questions if the conversation is to be taped, meticulous notes will have to be kept of the questions asked and answers given. This can be very time consuming. In such circumstances, investigators can read back to the witness the notes they have taken and if possible get the witness to sign off on the notes to indicate they are accurate. Where resources allow, as another check to assist with accuracy, witnesses can be interviewed in the presence of a colleague who should also take notes.

Witnesses will often ask if they can get a copy of the tape of the interview, or of the investigator's notes. These requests should be granted. However, in so doing serious consideration must be given to the question of maintaining the confidentiality of the investigation. This may mean making copies of the tape or notes available to witnesses only after the alleged wrong-doer, or another witness who is to corroborate the evidence of the first witness, has been interviewed. In other words, making the tape and notes available to witnesses may be a question of timing.

**Tape-recording an interview**

If an interview is to be tape recorded, the parties to the conversation must be informed before taping commences.
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**Practical tip**

At the beginning of a tape recorded interview an investigator may find it useful to include the following in his or her introductory statement.

- The interviewer's name and the names of anyone else in the room.
- The time, date and location of the interview.
- The request for the witness's consent to the tape recording of the interview ie 'This is Jane Green at 1.00pm on Friday 27 March 1998 in the Blue Hills Council offices. With me is Belinda Smith. Belinda do you understand that I want to record this interview today? Do you consent for me to do so?'

Once the tape is recording, one of the first things that should be done is to repeat the request for the interviewee's consent to the recording of the interview and his or her giving of consent. Then the time, date and place of the interview and the names of every person who is present in the room, and in what capacity, should also be fully identified on the tape, as well as any third parties who are present and the purpose of the interview. It is preferable to have each person present identify themselves on the tape for the purposes of voice identification.

**Making records of interview**

A record of interview is a verbatim record of the interview. Any record of interview should include information about the date, place and people present at the interview. Records of interview are most commonly used in serious or formal cases, or where there is likely to be dispute about certain elements of the conversation.

Use of records of interview for administrative or disciplinary investigations is not encouraged because the formality of the process makes it harder for the interview subject to relax, and the flow of conversation is impeded.

**Practical tip**

To take a record of interview:

Set up the format of the record of interview eg on computer, and take witnesses through the questions in the order of:

- opening questions
- story questions which let the person tell their own story uninterrupted, using prompts such as 'what happened next?'
- clarifying questions which might challenge the story based on facts or documents you have obtained.

*Source: Investigations Procedures Manual, Audit Directorate, Department of Education and Training (draft).*

**Taking witness statements**

The third means of recording oral evidence is by means of a witness statement. In essence, the witness statement captures in written form the relevant parts of the witness's oral evidence.
The guidelines in this publication are not designed for use in criminal investigations because investigation of matters that appear to be criminal should be undertaken by a trained, professional investigator. However, investigators should be aware of the possibility of the evidence they prepare being used in formal proceedings and adopt certain basic precautions when drawing up a witness statement.

Statements should be prepared immediately. It is not appropriate or acceptable for a few notes to be taken at the time, with lengthy notes being prepared several days later.

A separate statement should be prepared by every witness to a single event. Joint statements must not be used. To avoid collusion by witnesses, do not show one person's statement to a second witness.

**Practical tip**

*To take a statement:*

- listen to the person's story, ask questions and take notes
- organise the notes in a logical eg chronological order
- record the statement eg on computer, by taking the person through each step of their story and recording it in their words.

*Source: Investigations Procedures Manual, Audit Directorate, Department of Education and Training (draft).*

The following guidelines establish best practice for preparing a witness statement, particularly where the statement may need to be introduced into evidence in any subsequent legal proceedings.

- Start by giving the name, position and business address of the witness.
- Finish with the witness signing the statement and dating it with both the date and the time:
  - the witness's signature should also be 'witnessed' by the investigator.
- If there is a likelihood that the matter under investigation may end up before a court, it may be prudent to prepare a sworn statement and, in such cases, legal advice should be sought.
- Witness statements should be detailed and accurate, but should contain only relevant information:
  - if there is some doubt whether a piece of information provided by the witness is relevant, the rule is 'if in doubt put it in'
  - this rule should also be applied if there are doubts about whether something is hearsay and might not be admissible in legal proceedings (see 1.9.3)
  - inadmissible material can always be excluded later whereas it is considerably more difficult to try and introduce what appears to be new evidence at some later stage.
- Witness statements should quote the exact words used:
  - avoid the temptation to improve a witness's grammar, syntax or use of the vernacular
- if the witness is quoting a conversation or the remark, recount the conversation by using the format:
  I said 'How you going'?
  She said 'Bloody awful. Those bastards in accounting are going to do me real good.'

- In preparing a witness statement the first person 'I' should be used, and the third person 'she/he'.
- If a witness is offering an opinion such as 'I believe she was angry', the witness should be asked the basis for that opinion if it is not otherwise volunteered and the witness statement should set out the basis for that opinion before stating the opinion eg:
  - 'After I said that to her, she banged the table with her fist, raised her voice and said 'Those bastards have betrayed me'. She also began pacing around the room and punched a hole in the wall. In my opinion, she appeared to be quite angry.'

- Don't translate oral evidence obtained during an interview into a witness statement using vocabulary that the witness never uses or simply doesn't understand:
  - translating the witness' own words into 'official jargon' or deleting or replacing 'politically incorrect' text may give a misleading impression of the genuineness of the statement.

- Annex to the statement a copy of any document referred to by the witness in the statement.
- Ask the witness to read the statement before he/she signs it:
  - getting the witness to read the statement aloud is one way to ensure that the witness actually understands the statement and agrees with it.
- Ideally, the pages of the statement should be numbered, the witness should initial all pages and the witness should also fully sign on the last page immediately below the last section of text (this guards against the interviewer later adding additional text).
- If the witness refuses to sign the statement the investigator should make a clear file note that he or she went through the statement with the witness and offered him or her a copy and the reason given by the witness for refusing to sign should be noted.
- If after the witness signs the statement, the witness wants to alter the statement or add something to it, get the witness to do another statement rather than amending the first statement:
  - if in the second statement the witness contradicts something in the first statement ensure that the reasons for this contradiction are explained in the second statement.

- All notes connected with the interview should be carefully preserved.
Practical tip

• While not necessarily needing to be physically divided by headings, each witness statement should be structured to start with an introduction, which sets out those matters about the witness that may be relevant to the incident in question and (particularly where the witness is an expert) their credibility.

• Following the introduction the witness statement should contain a body of events. In this part of a witness statement should be set out all points with the potential to have direct bearing on any identified, or anticipated, facts in issue.

• Every point, event, activity or incident should be listed chronologically. The starting point is the first activity that caused the witness to become involved with the matter under investigation. The impact of particular events or conclusions drawn from them should be explicitly stated, ensuring that the grounds for drawing such conclusions are clearly articulated.

1.10.5 Addressing requests for the presence of third parties

Witnesses will sometimes ask if they can have another party present during their interview.

In some cases witnesses will have a statutory right to have a third party present during the interview. For example, some legislative discipline schemes in the public sector may make provision for officers under investigation to have a person of that officer’s choice present as an observer. The presence of a third party may help the witness feel more comfortable and this will make the interview easier to conduct. Consequently, in the absence of any specific statutory right such requests should usually be granted. The decision should be subject to the following considerations:

• It should be made clear to the third party that his or her role is simply to observe, and not to take part in the discussion or interview:
  - make sure that the third party understands his or her role is not to advocate for the witness during the interview (this is particularly important in relation to union representatives or lawyers)
  - make it clear to them that they are there to be a witness for the person being interviewed and to provide him or her with support and that they are not there to give evidence themselves or to question any evidence that may be put to the witness.

• If the third party is a person likely to be called or asked to give evidence, then they should not be allowed to be present during the interview of another witness.

• The issue of confidentiality must be addressed with both the witness and any third party:
  - the aim should be to ensure that the confidentiality of the process is maintained and, where the intervention of third parties may put this in jeopardy, action should be taken to prevent this happening
  - the issue of confidentiality must be balanced against the legitimate right of witnesses to have a support person of their choosing present during their interview
  - it should be made crystal clear to both the witness and the third party that they should not talk about the contents of the interview
- an undertaking should be sought from the third party that they will respect the confidentiality of the issues discussed during the interview with the witness
- if the third party will not or is unable to provide such an undertaking they should not be allowed to be present during the interview.

• In some cases the third party may be asked by more than one witness to attend the interviews:
  - where this may create evidentiary difficulties or put the third party in a difficult position, the third party should not be placed in a position where he or she could inadvertently (or intentionally) contaminate the evidence
  - a potential conflict of interests can be avoided by asking the third party whether he or she has been asked to assist any other witnesses eg a workplace union delegate may have been asked to represent them all
  - in such cases, discussions should be held before starting the interview to establish whether other representatives would be available
  - in these situations, it may be preferable for a paid union official to act as the third party rather than involving the workplace delegate
  - these are matters for the investigator's judgment, common sense and negotiation with witnesses and third parties.

**Practical tip**

Wherever a support person is present during an interview with a witness, either by right or by leave, it is necessary to ensure that the third party:

- understands that they are an observer, and may not take part in the discussion or interview
- is not a potential witness
- has not agreed to assist any other witnesses to the investigation
- undertakes to respect the confidentiality of the issues discussed in the interview.

**1.10.6 Addressing requests for representation by lawyers**

Where an inquiry is being investigated using the powers under the *Royal Commissions Act 1923*, witnesses have a right to seek leave to be represented by a lawyer. It is a matter of discretion of the person exercising these powers as to whether to grant such an application.

Not all disciplinary schemes have the same rules regarding legal representation. Some prohibit legal representation whereas others grant it as a right.
Practical tip

Wherever representation by a lawyer is allowable with leave, in considering a request for legal representation the sorts of factors that should be taken into account include whether:

• there are issues to be determined that require legal argument
• the witness requires assistance to present their position, and whether there are other avenues available to obtain appropriate advocacy or assistance
• there are particularly important interests at stake for the witness applying for leave
• the granting of leave to one party will disadvantage other parties, or conversely act as an ‘equalising’ force.
1.11 Securing documentary evidence

Some of the most reliable evidence in an investigation is documentary evidence. On the whole, documents don't tend to tell lies, except of course where they are forgeries or manufactured after the event to mislead. One of the first steps that should be taken at the start of an investigation is to secure any relevant documentary evidence eg all relevant files, diaries, computer disks or the like. If all relevant documents are secured as a first step, people with a personal interest in the outcome of the investigation may be prevented from destroying or removing them. This may also prevent the file being amended by the addition of retrospectively concocted documents. Any documentary material that is produced after the file has been taken into the investigator's possession or control should be regarded with suspicion.

Records should be made of when, where and how the documents were seized, as well as how the documents were stored. This can be important where accusations are made at a later stage that the investigator mishandled documents, or allowed them to be mishandled, during the course of the investigation.

An investigator should always take original documents rather than accept photocopies. Often, useful information is written in pencil in the margins of documents or appears on Post-it notes. By taking the originals, an investigator will have access to these tidbits. Having seized the originals, the investigator should have them photocopied and then use the photocopies during the course of the investigation. The original documents should be kept secure under lock and key.

Where appropriate, the authenticity of the documents should be verified with the person indicated as being the author of that document.

Wherever documents are seized, a receipt or other record of that seizure should be provided, together with the investigator's contact details in case anyone needs to access the documents. If the documents relate to ongoing every day issues for the agency, either a complete copy, or a copy of the pages relating to the current period, will need to be given to the person who held them. In some cases the item (eg a sign-on book) can be removed if a new one is made available.

Practical tip

In relation to documents relevant to an investigation:

- Keep all such evidence in a secure place.
- Make sure originals are not marked, changed, lost or damaged in any way.
- Take photocopies for use during the investigation.
- Keep a record of when, where and how they were seized or otherwise obtained, and how they are stored.
- When any documents are removed, leave behind a receipt or record together with your contact details.
1.12  Considering expert evidence

1.12.1  Using document examiners and handwriting experts

Depending on the nature of the matters under investigation, the services of a document examiner or handwriting expert may be required. The telephone book contains listings of such people. These experts may be needed to establish when documents came into existence, whether they are forged and the identity of the forger. If an expert is required, he or she should be contacted as soon as possible for guidance and assistance about the proper storage and dispatch of the documents. The Ombudsman is aware of cases where documents were mishandled by investigators with the consequence that no amount of examination by experts could reveal anything useful.

Generally, when handwriting on a particular document is in issue, the identity of the author may be established by:
• the author giving evidence to the effect that he/she wrote it
• evidence from a person who has knowledge of the author's handwriting from long acquaintance with it
• evidence from a person who saw the document being written, and
• evidence from an expert in the field of handwriting comparison who has formed the opinion that the writing is that of a particular person.

1.12.2  Obtaining other professional experts

An investigation may also be assisted by the use of other professional experts such as accountants, valuers or engineers. Once again this will be guided by the nature of the matters under investigation. There is no foolproof formula for selecting an expert. Professional associations can be a good start to obtain some highly recommended members. Other useful sources of relatively affordable and independent expertise are the universities and TAFEs. If an expert produces a statement, the first paragraph of an expert's statement should specify the things that make the expert an expert, such as qualifications and training.
1.13 Inspecting a site

Where visual information or the context is important in terms of the allegation or an understanding of the issues, a site inspection may be necessary.

Practical tip

If you decide that you will be making a site inspection as part of your investigation:

• be clear about why you are visiting the site
• take detailed notes, draw diagrams
• make most use of the time and use the opportunity to interview witnesses, as appropriate
• arrange an appointment time and explain the purpose
• take care not to be drawn into too much informality with parties
• be discreet about the site inspection to minimise the knowledge of outside parties
• store any photographs, diagrams, drawings, or other evidence in the secure central case file.

Source: From the workshop, 'Investigation procedures for district superintendents', August 1998, Industrial Relations Services, Department of Education and Training.
1.14 Applying the appropriate standard of proof

In disciplinary and administrative investigations the civil standard of proof applies. This means that allegations have to be proved on the balance of probabilities. This is a lower standard than that required in criminal matters, where allegations must be proved beyond reasonable doubt. Consequently, an acquittal in criminal proceedings will not necessarily demand that disciplinary proceedings be discontinued. Balance of probabilities essentially means that in order to be proved, it must be more probable than not that the allegations are made out.

The strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the seriousness of the issues involved. In the case of *Briginshaw v Briginshaw* (1938) 60 CLR 336, Dixon J remarked that:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved.

Investigators must be careful to ensure that they do not reduce the standard of proof dictated by the test in *Briginshaw* by erroneously taking into account extraneous considerations. This can sometimes be a difficult task, e.g. where considerations such as the safety and protection of children are at stake. In this situation an agency's duty of care owed to the children using its services does not operate to reduce the standard of proof which must be satisfied to prove the allegations.

At the conclusion of many investigations, of whatever nature, it will ultimately be an issue of one person's word against another's. In deciding which witness is the most credible a range of factors should be considered, including the demeanour of the witnesses, the cooperation they have shown, their possible motives and any inconsistencies. Only in exceptional circumstances should the past behaviour of any party be taken into account. The criteria that must be satisfied before evidence of past behaviour should be permitted to influence the finding is where it is identical, relevant, recent and/or serious.
1.15 **Recording and storing information obtained during an investigation**

It is essential to make contemporaneous notes of all discussions, phone calls and interviews. File notes should be legible, include relevant dates/times, clearly identify the author of the note, and contain a file reference in case the note becomes detached from the main file. Every person who has been told about the complaint in the course of your investigation should be able to be identified from these records.

All information, including original documents and other evidence to be examined during the investigation, should be promptly placed on a central case file which is maintained in a locked cabinet. It is essential to prevent unauthorised access to the case file, especially by anyone the subject of the complaint or their associates.

All documents should be stored in a manner that maintains their original condition. Do not staple, fold, excessively handle or in any way mutilate the documents. Place documents in a resealable bag or envelope with an identifying label on the bag, not on the document. Avoid storing documents in plastic bags because they sweat and could become damaged.

Confidentiality requirements (see 1.7) demand that strict security should surround the conduct of any investigation into a complaint, particularly those relating to the conduct of an individual.

Whistleblowers in particular are, often justifiably, highly anxious about the prospect of leakages of information about their disclosure. Demonstrating to them that the investigator takes a very serious view of security can often allay that anxiety. Maintaining confidentiality is particularly crucial in handling whistleblower cases.

A valuable practice for investigators to develop is to maintain a ‘running sheet’ particularly for investigations where there are a number of tasks to be performed or investigations involving more than one investigator or team of investigators. Placed on the inside cover of the investigation file, a running sheet is essentially a chronology of events that have taken place in the investigation. At a minimum, running sheets provide a record that can easily be audited of who did what and when. They are particularly useful where:

- an investigation is long running, complicated, involves a range of issues or comprises several strands
- there is more than one investigator, or
- there is a transition in staff during the course of the investigation and a new investigator takes over the conduct of that investigation.

A running sheet may contain several columns with such headings as date, task, event, responsibility, timeframe, completed, notes, etc.

The importance of preserving a record of information obtained during an investigation is reinforced by the provisions of the *State Records Act 1998*, which require:

- that each public office make and keep full and accurate records of the activities of the office, and
- the safe custody and proper preservation of state records.

Record keeping in relation to child protection investigations is the topic of Fact Sheet 1 in Annexure G.
As an investigator it is crucial that a paper trail of your actions in an investigation is created. This will serve as a protection at a later stage if the methodology or conclusions become the subject of a complaint to an outside agency.

The following basic rules help to ensure that the investigation is transparent (and therefore accountable):

- Don't make any decision that can't or won't be defended.
- Document all investigative actions.
- Document the reason for deciding against completing any identified tasks in the investigation plan.
- Document any action (or any inaction) taken which is contrary to accepted best practice.
Granting access to documents related to the investigation

An investigator may be confronted by someone the subject of the investigation who wants to gain access to documents relating to the complaint and the investigation.

Access to such information involves the balancing of two competing principles. There is the interest of the person under investigation to know the allegations made against him or her, and the nature of the evidence gathered that both supports and contradicts those allegations. There is also the need to ensure the integrity of the investigation. By revealing critical evidence, the investigation might be prejudiced. Moreover, there may be circumstances where it is not in the best interests of the investigation for identifying information to be disclosed.

The decision about which of these public policy considerations should prevail is not always one that is open to the investigator to make. As a threshold issue the investigator should be aware of any statutory rights of access that the person the subject of the complaint may have.

The Freedom of Information Act 1989 (FOI Act) confers on a person a legally enforceable right to be given access to an agency's documents. Similarly, a statutory right of access exists under the Privacy and Personal Information Protection Act 1998. Section 14 of that Act provides that:

A public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.

If a request to inspect documents related to the investigation is made under the FOI Act a document may be exempt from release. A government department, public authority, council and the holder of a public office may refuse access to a document under FOI if it is an exempt document (s.25(1) of the Act).

For example, a document may be exempt from release if it contains matter the disclosure of which:

- would disclose matter relating to a protected disclosure (clause 20(d) of Schedule 1 of the FOI Act). It is important to note that this exemption is framed in very wide terms (ie ‘relating to’) and goes further than merely the name of the person who made the disclosure and the actual information which is the subject of the disclosure
- could reasonably be expected to prejudice the investigation of a possible contravention of the law (clause 4(1)(a))
- could reasonably be expected to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained (clause 4(1)(b))
- could reasonably be expected to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency, and would on balance be contrary to the public interest (clause 16(a)(i))
- could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel, and would on balance be contrary to the public interest (clause 16(a)(iii)), or
• would involve the unreasonable disclosure of information concerning the personal affairs of any person (clause 6). However, this exemption cannot be used where the information concerns the person by, or on whose behalf, an application for access to the document is being made.

Depending on the circumstances, other exemptions contained in the FOI Act may also be available.

The coverage of the FOI Act has recently been extended to the private sector, by providing rights of access to information held by non-government agencies in a very discrete context. Section 43 of the Commission for Children and Young People Act 1998, entitles a person to apply for access to and/or correction of information about disciplinary proceedings taken by the person's employer, where those disciplinary proceedings involve alleged child abuse or sexual misconduct by the person, or acts of violence committed by the person in the course of employment.

An investigator should also be aware of any other statutory rights of access to documents that may exist. For example, an officer the subject of a disciplinary inquiry under the Public Sector Management (General) Regulation 1996, or any person acting on the officer's behalf, is entitled to inspect the department's papers, correspondence, reports or other documents relating to the matter at such time as may be arranged with the person conducting the inquiry (clause 26 (2)). It is open to question whether this entitlement is an exception to the confidentiality requirements imposed on agencies under the Protected Disclosures Act 1994.

Different considerations apply where documents are subpoenaed by a court. There are only limited grounds for objecting to production of documents pursuant to a subpoena, and if confronted with a subpoena, legal advice should be sought.
1.17 Defending against actions in defamation

Under the *Defamation Act 1974*, various people who have made complaints have the defence of absolute privilege in proceedings for defamation. This includes people who have made disclosures under the *Protected Disclosures Act 1994* or complaints to the Ombudsman, ICAC or PIC. Investigation reports produced by these bodies or pursuant to the *Protected Disclosures Act* will also have absolute privilege from any action for defamation.

An investigation report or complaint not covered by absolute privilege may nevertheless attract the defence of qualified privilege. The statutory defence in the *Defamation Act* reads as follows:

(1) Where, in respect of matter published to any person:

(a) the recipient has an interest or apparent interest in having information on some subject,

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,

there is a defence of qualified privilege for that publication.

(2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest. (s.22).

The common law defence of qualified privilege may also be available. This common law defence will generally fall within one of the following three broad categories:

- statements made by a person who is under a duty to make the statement in question to a person who has either a duty to receive the information in question or an interest in receiving it
- statements made by a person in the furtherance of his or her own interest to a person who has a duty to receive the information in question or an interest in receiving it, or
- statements made by a person in the furtherance of an interest to a person with a common interest.

The defence of qualified privilege will be defeated if it can be shown that the defendant was motivated by malice. Malice has been described in the High Court as ‘any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff’ (per Goudron, McHugh and Gummow JJ in *Roberts v Bass* [2002] HCA57 at para 75), and ‘... a motive for, or a purpose of, defaming the plaintiff that is inconsistent with the duty or interest that protects the occasion of the publication’ (at para 79). The Court also said ‘... qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication’ (at para 76).
1.18 Preparing an investigation report

After completing an investigation a report must be prepared. The investigation report is an important document. The report is the agency’s record, and may well be subject to outside scrutiny eg by one of the accountability agencies such as the NSW Ombudsman, Audit Office, ICAC or the police. Once completed, the investigator should sign the investigation report and mark it ‘confidential’.

The following material should be included in an investigation report.

- Executive summary or covering memorandum.
- The terms of reference of the investigation.
- The name of the investigator and details about authorisation of the investigation.
- Sources of information and methodology used.
- Relevant legislation and/or policies.
- A statement of all relevant facts and evidence.
- The conclusions or findings reached and the basis for them (all separate allegations contained in a complaint must be addressed and a finding made). If the matters under investigation all relate to one issue, then it may be best to present each line of argument then make one conclusion and recommendations with respect to the single issue. However, if the allegations relate to more than one distinct issue, then each issue should be addressed separately within the report.
- Recommendations to overcome any actual or potential shortcomings or problems identified eg an investigation report may recommend the institution of disciplinary proceedings, changes to policies or procedures, other remedial action, or referral of the matter for consideration by a more qualified or suitable authority. The table below is a useful checklist for investigators to ensure that they have considered the full range of findings or recommendations that may be made in an investigation report.
- Any other general issues raised by the investigation should also be addressed in the investigation report (this may include recommendations for systems improvements, the introduction or alteration of policies or procedures).
- Statements and other items of evidence may be attached to the report.

A good investigation report will use headings to help the reader identify the evidence relating to each issue. The evidence should be appended, tabbed and referenced in the report.

Guidelines or legislation may specify in more detail the required content of the investigation report.

Practical tip

In an investigation report be careful to distinguish findings of fact and findings of opinion based on those findings of fact. If the investigation is being conducted pursuant to a statutory power, it is important to determine the extent of the investigator’s power to draw conclusions and to be clear about the nature of the conclusions he or she is entitled to draw.
Investigation Report Findings

Recommendations: Complete as many as necessary

1. No action
   (other than correspondence to affected parties)

2. Improved management controls
   (State what you plan to discuss with management prior to report writing)
   • Who to be responsible?
   • To do what?

3. Counselling
   • Who to be counselled?
   • By whom?
   • On what?

4. Recovery of funds
   • From whom?
   • By whom?
   • How much?

5. Disciplinary action
   (Indicate what the grounds for disciplinary action might be, more than one is possible)
   • Who to be disciplined?
   • For what?
   - Breach of Act or Regulation
   - Misconduct – including breach of Act or policy, namely:
     - uses alcohol or drugs to excess
     - disobeys lawful order
     - negligent, careless, inefficient or incompetent (circle)
     - disgraceful or improper conduct
     - reprisal for protected disclosure
     - reprisal for internal disclosure
     - other

6. Referral to police

7. Referral to ICAC

8. Rectification or compensation

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1.19 **Anticipating common responses to critical reports**

It is not uncommon for someone whose conduct is critically reported to attempt to deflect the criticism by making counter-allegations about the professionalism or probity of the investigation. Investigators should be prepared for this type of reaction so that they can avoid being diverted from bringing the matter to a proper conclusion.

Some of the most common counter-allegations are set out below.

**Jurisdiction**
- The investigation, report or finding is outside jurisdiction or outside terms of reference.

**Complainant**
- Complainant is a disaffected member of staff, or an unbalanced citizen.

**Procedure**
- The official was denied procedural fairness in the rush to judgment or, alternatively, there was a delay in finalising the report.
- Insufficiently formal investigation or overly formal investigation.

**Focus**
- The investigation failed to follow all relevant avenues of inquiry, or it chased ‘every rabbit down its burrow’.
- Over emphasis on adverse allegations, or insufficient emphasis on counter-allegations.

**Content**
- Facts or interpretation are incorrect, or submissions were not properly considered.
- The report is either insufficiently detailed or overly detailed.
- Addressing trivial issues.

**Approach**
- Hidden agenda, ie a conspiracy theory, bias or bad faith.
- The organisation is conducting a vendetta or victimisation on behalf of the complainant.

**Cost**
- Waste of taxpayer’s money.


These counter-allegations are classic shoot-the-messenger reactions. Provided the investigation has been conducted in accordance with the basic principles outlined in this publication, such counter-allegations should not be sustainable.
1.20 Closing the investigation

1.20.1 Finalising the file

The end of an investigation requires all paperwork to be completed and filed. There is a tendency for eager investigators to ignore the less interesting aspects of finalising files.

Practical tip

As an investigation is finished, the following points need to be considered:

- Is the file ready to be sent to storage? Will someone retrieving it in 2 years time be able to understand the process and paperwork?
- Have all appropriate notifications been made? It is easy to forget to let relevant people know the result of an investigation if they are not the central players. So, make a list of all those parties who should be informed and ensure they are.
- Are there any other actions arising out of the investigation? Is the documentation organised accordingly? Quite often one investigation can trigger another one. So, as the first one ends, it may be necessary for there to be some coordination with the new file.

Finally, the most searching question:

- Is my file good enough for an outside or management review as it stands?

An investigator should not part with the investigation file unless he or she is entirely satisfied that all aspects are fully completed and the file is presentable.

1.20.2 Reviewing the investigation

Whilst not always practicable, best practice dictates the incorporation of a review process at the conclusion of an investigation. A review serves a dual purpose. It enables the specific investigation to be assessed (and ideally, the integrity of it to be affirmed), and it also operates as an important developmental tool, highlighting any investigation mechanisms that can be improved.

The review should preferably be conducted by someone more experienced than the investigator and independent of him or her. The review should preferably not be undertaken by anyone in the investigator's chain of authority, as this may cast doubts on the objectivity of the review.
1.21 Determining investigation outcomes

At the conclusion of an investigation a range of outcomes are possible.

Where the complaint relates to the conduct of an individual, and the investigation was in the nature of a fact-finding investigation, an agency may decide to pursue disciplinary action. Where the investigation was in the nature of a disciplinary inquiry, an agency may find the allegations unsubstantiated or alternatively, it may impose a disciplinary sanction. Another possible outcome may be for the complaint to be referred to an external agency for further investigation or prosecution.

Both complaints about practices or procedures and complaints about the conduct of individuals may result in recommendations being made for changes in administrative procedures and practices. Where such recommendations arise as a result of an investigation into the conduct of an individual, the purpose of such recommendations would be to prevent similar conduct from recurring. Accordingly, the investigation report may comment on existing internal controls, accountability mechanisms and supervision practices, the risk of similar problems occurring in other areas and preventative measures that could be implemented. The investigation may have also uncovered procedures that could be improved to facilitate future investigations.

Where someone has suffered detriment as a consequence of the conduct of the subject of the complaint, the investigation may result in recommendations for redress for the aggrieved complainant. The range of redress options are considered in Chapter 5 of *The Complaint Handler’s Tool Kit, Options for redress*, NSW Ombudsman, June 2004.
1.22 Managing the different parties involved in investigating a complaint

1.22.1 Managing the complainant

An important element of any investigation is managing the complainant. The following is a non-exhaustive list of matters for dealing with whistleblowers in particular, but generally also relevant to other complainants.

Managing expectations

It is vital to ensure that a complainant's expectations are realistic. If a complainant develops unrealistically high expectations, dissatisfaction invariably results with the way in which their complaint is handled, the manner in which the investigation is conducted, or the outcome of any investigation or other action.

At the outset, tell the complainant that the objective is to give fair and impartial consideration to their complaint. If the capacity to investigate or take action is restricted by any legal limitations, fully explain these to the complainant. Make sure the complainant is asked to outline his or her expectations of what should happen to their complaint and of what the outcome should be. If these expectations seem unrealistic, the reasons for this view should be fully and clearly explained to the complainant up front. This message could then be reinforced to the complainant at various times during the course of any investigation or other action taken in response to the complaint.

As part of the process of managing complainant expectations, it is important to explain to the complainant either:

- the reasons why no action, or action that does not meet their expectations, is to be taken on their complaint, or
- what action is proposed to be taken in relation to the complaint (whether internal investigation, referral to some outside body, or some other action).

All information provided to the complainant, whether in writing or face-to-face, should be in plain English. Avoid the use of technical legal terms. Any oral advice to a complainant should be promptly documented on the case file.

Ensuring confidentiality

The confidentiality provisions that may apply (see 1.7) should be explained to the complainant at the outset, together with an undertaking that if identifying information is to be disclosed, the complainant will be given prior warning. If it is decided at any time that it is necessary to disclose information that might identify or tend to identify the complainant, and confidentiality is an issue, they should be so advised before such action is taken.

Where confidentiality is an issue, be sure to impress upon complainants the need for them to be very circumspect in the information they give to colleagues, and in their conduct in the presence of colleagues, so as not to prejudice the confidentiality of the complaint. It should be pointed out that this is important:

- for their own protection
- for the integrity of any investigation that may be, or is being, carried out, and
- to respect the rights of the people who are the subject of the complaint.
Providing support and information

It is very important to seriously address any concerns expressed by complainants about fears of harassment, victimisation or other detrimental action in reprisal for their complaint.

In addition to providing reassurance about confidentiality, complainants should be advised of any legal protections that may be available (for example those protections provided by the Protected Disclosures Act 1994) and about any support and/or protection that is available from or through the agency. The Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission recommended that public authorities adopt a number of administrative protections. These are outlined in the Ombudsman's Protected Disclosures Guidelines (5th edition).

Providing feedback

The most common source of criticism or complaint about the conduct of an investigation is that the investigator did not give sufficient and ongoing feedback to the complainants. Complainants should be kept up to date regularly and advised, in general terms, of progress in investigating or otherwise dealing with their complaints and the time frames that apply. It is important to reassure complainants that their complaint is being taken seriously.

The agency should nominate an individual (either a Protected Disclosure Co-ordinator, a relevant senior manager, or the person responsible for investigating or otherwise dealing with the complaint) to be the point of contact with the complainant for the purposes of the investigation or other action. This person should be responsible for providing information to the complainant and for answering any questions or concerns the complainant may raise.

In relation to whistleblowers, remember s.27 of the Protected Disclosures Act requires whistleblowers be notified, within six months of their disclosure date, of the action taken or proposed to be taken in respect of the disclosure. Normally that notification should be written and, if not, the notification procedure used and the reasons for it should be comprehensively recorded on the case file (see Part B in the Ombudsman's Protected Disclosures Guidelines (5th edition)).

Reporting on outcomes

It is important to inform the complainant of the outcome of the investigation or other action. If the outcome does not meet the complainant's expectations, it is important they be given a full explanation of the reasons justifying the outcome. Complainants should be told that any new or further information that they may make available will be carefully assessed, and they should also be informed of any appeal process that may be available.

It is important to provide whistleblowers with sufficient information to demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of their disclosure. Without such information it would be difficult for the whistleblower to make a proper assessment of whether the outcome warrants a subsequent disclosure to an MP or journalist as provided for in s.19 of the Protected Disclosures Act.
**Practical tip**

Managing the complainant is an important aspect of any investigation. This requires an investigator to recognise and acknowledge the fears and expectations of the complainant and, as much as possible, address these by carefully explaining in plain English what can realistically be achieved through an investigation.

Complainants should be given all reasonable support and information to allay any fears and should be kept informed about the progress and outcome of the investigation.

There is specific advice about errors to be avoided in handling protected disclosures in Annexure D.

### 1.22.2 Managing the persons the subject of a complaint

**Ensuring confidentiality**

While the needs and concerns of the complainant must be appropriately addressed, it is equally important to be sensitive to the impact that a complaint may have on the persons the subject of that complaint. Unnecessary disclosure of the identity of people, or of the subject matter of the complaint, might do considerable damage to them, even if the subsequent investigation totally exonerates them.

It is of course important to maintain a balance. Persons the subject of complaint should be given, at an appropriate stage, the chance to hear the substance of the allegations against them and to answer them. Procedural fairness requires no less. But the process needs to be handled sensitively.

**Fact finding inquiries**

Generally speaking, a fact finding inquiry should be conducted before the person the subject of the complaint is approached. The purpose of this inquiry would be to test the veracity of the allegations. As there is no value in asking someone to answer spurious allegations, it is important to be certain that there is some case to answer before allegations are put to the individuals concerned. Preserving confidentiality may also mean that an employee is not unduly distressed by having to answer false allegations.

Where it can be established that the allegations are false, and the subject is unaware of them, then there is little to be gained from alerting that person to the allegations. They may have been made with the intention of harassment and the investigation and disciplinary process should not be used for this end.

**Procedural fairness**

In an investigation, where the person the subject of the allegations and/or any witnesses are to be questioned, the person who is the subject of that complaint has the right to be informed as to the substance of the allegations in all but the most exceptional circumstances.

If an investigation is to proceed through to a report to some person or body other than the investigator, the person who is the subject of the complaint has the right to be informed as to the substance of any adverse comment to be made in respect of them. They should be given a reasonable opportunity to put their case, either orally or in writing, to the person carrying out the investigation (see 1.8). However, there will be
some circumstances, eg if the matter is one that has been or is to be referred to the ICAC, DoCS or the police, where the person who is the subject of the allegations should not be told about any fact finding investigation. The point at which the people who are the subject of the allegations should be informed will depend on the type of conduct at the centre of the complaint (see 1.8.2).

Managing persons the subject of investigation

There is a principle of the criminal law that a person is innocent until proved guilty. This is another way of saying that the starting point is for the prosecution to prove guilt, not for the accused to prove innocence. While this principle of the law is often touted as a truism (an obvious truth), in practice it is limited in its application. The principle only applies to the legal status of a person in certain limited circumstances:

- the person must be accused of committing a criminal offence
- the principle primarily applies during the trial of such a person.

The principle does not apply:

- to strict liability offences where an on-the-spot fine has been imposed
- after a person pleads guilty to an offence (and may not apply where a person admits guilt in a formal record of interview)
- in any administrative proceeding or disciplinary action that does not involve determining whether an offence or crime has been committed (although requirements of procedural fairness do apply).

The principle does not prevent steps being taken to control any risk that a person subject to an allegation may present to public safety, the ‘victim’, any witness or the integrity of the investigation.

In criminal matters, those charged with investigating an alleged offence are entitled to develop hypotheses that the offence was committed by a particular person or persons for the purpose of their investigation (ie to obtain sufficient evidence to put before a court to prove the guilt of the accused people). The police are empowered to deprive a person of his or her liberty (by arrest) for the purpose of placing the person before the court if they believe that they have sufficient evidence to prove the person guilty of committing an offence. The presumption of innocence also does not prevent an accused being remanded in custody if bail is not granted or conditions of bail cannot be met.

There is no legal principle that requires employers or investigators to ignore the fact that a person has been accused of or charged with a criminal offence when looking at or considering a management or disciplinary response to an allegation of misconduct arising from the same or related circumstances.

In administrative proceedings a person subject to an allegation may be transferred to other work, directed to take leave or be suspended with/without pay if such steps appear necessary to protect vulnerable people, the integrity of an investigation, or the interests or reputation of the employer.
1.22.3 Managing other witnesses

Providing support

The needs of witnesses, other than the complainant or the person subject of the complaint, can easily be overlooked. Even though these witnesses do not have a direct stake in the outcome of the investigation, they will often play an essential role in the investigation process.

An investigator should be aware that people may find the experience of being a witness traumatic. Despite the investigator's best efforts at making a witness feel at ease, the interview situation can be very stressful. Some witnesses may feel concerned that by assisting the investigation through the provision of information, they are being disloyal to a friend or colleague. Other witnesses may fear that they will suffer intimidation, harassment or other detriment for cooperating with the investigation.

It is important to deal with any sources of stress to the witness by providing appropriate support and reassurance. If the witness is an employee, the investigator should bear in mind the agency’s obligation to ensure the health, safety and welfare of its employees at work under the Occupational Health and Safety Act 2000.

Ensuring confidentiality

A witness should not be told any more about the investigation than is strictly necessary to obtain the information required from that witness.

Understandably, witnesses may wish to know why they are being asked specific questions. If a witness asks an investigator for more detail about the nature of the investigation than he or she is required or prepared to give, or asks for the identity of any of the relevant parties, the investigator should tell the witness that this information cannot be disclosed, and that the investigator’s role is to establish the facts and to collect evidence.

It is vital to impress on all witnesses the requirements of confidentiality. Witnesses should be advised not to talk to anyone about the matters discussed during the interview, though this direction is unenforceable in most cases. They should be asked not to raise the subject themselves, and to refrain from engaging in discussion about it if approached by anyone else.
1.23 Avoiding common investigation pitfalls

At the National Investigation Symposium held in Sydney in October 1998, John Noonan, a chairperson of GREAT, made the following observation:

"It is the experience of the Tribunal generally, and certainly for my own part as a Chairperson, that investigations of alleged disciplinary offences are seldom well done. In more than a few cases, the failure to conduct a proper investigation has resulted in the Tribunal setting aside the disciplinary decision."

While Mr Noonan was referring specifically to disciplinary investigations, his comments regarding the importance of a proper investigation have much broader application. From the Ombudsman's experience, the ten most common reasons investigations are not done correctly are:

• lack of planning
• lack of clear investigation objectives and/or unachievable objectives
• lack of objectivity by the investigator (resulting either from bias, conflict of interests or rigid adherence to preconceived views)
• reliance on unproven assumptions
• failure to follow due process
• failure to obtain all of the relevant evidence which is available
• failure to consider evidence which is exculpatory or otherwise does not support the allegations
• lack of resourcing and/or poor use of resources
• shortcuts, and
• failure to appropriately distinguish the investigation and adjudication processes.

In addition to these common errors, other pitfalls that may cause an investigation to fail, show limited success or become subject to heavy external criticism include:

• lack of leadership
• poor investigation documentation
• lack of transparency
• lack of continuity
• lack of training
• failure to consider the organisational culture, and
• making unrealistic recommendations.

1.23.1 Lack of training

The guidelines in this publication are designed primarily for people called upon to conduct investigations who have no formal training in the art of investigation. However, even with the existence of resources such as this publication, the limitations within an agency or a section of an agency should be recognised. Within a larger agency there should not be any reluctance to hand over responsibility for an investigation to a more qualified area of the agency.

Smaller agencies should not be reticent about seeking external assistance if they are not confident about any aspect of an investigation.
1.23.2 Failing to consider the organisational culture

While the requirements of natural justice or procedural fairness are intended to prevent any bias on the part of the investigator, investigators must also be mindful of any biases or culturally entrenched practices or attitudes within the agency that may impact on the matters giving rise to the complaint and to the investigation itself.

A complaint cannot always be investigated out of its context. Investigators must be aware that the organisational context or culture can affect the decision-making process and can determine attitudes to practices and procedures. For example, if a complaint concerns a breach of policy or procedure by a particular individual it is pointless for the investigator to make adverse findings against that individual in isolation, if there is evidence that those policies or procedures are routinely ignored throughout the agency. The investigator should also be addressing the wider issues, such as management's commitment to those policies or procedures.

1.23.3 Making unrealistic recommendations

In a similar vein, investigators need to be wary about making recommendations that are unlikely to be accepted, either because they ignore practicalities or do not logically follow from the findings. For example, if an investigation uncovers inappropriate conduct or an unorthodox approach by an individual, there is no point in recommending disciplinary action against that individual if there is no evidence that the conduct has ever been explicitly proscribed, or that procedures establishing an organisational protocol have ever been implemented.
1.24 Troubleshooting - retrieving an investigation when things go wrong

1.24.1 Obeying the golden rules

When an investigation goes wrong, investigators should always obey the following golden rules.

**Acknowledge the problem as soon as it is discovered**

As well as acknowledging to themselves that a problem has arisen, investigators must consider who else should be notified. Depending on the nature of the investigation and of the problem, this may involve notifying the person who authorised the investigation. Usually anyone who has been unfairly prejudiced as a consequence of the problem should also be notified, but this does not apply if notification would have the effect of exacerbating the problem or compromising the investigation.

**Fix the specific problem**

Act to right the wrong immediately. Unfortunately this will not always be possible, and in some cases the investigation will not be able to be recovered.

**Fix the general problem**

In all cases where an investigation has gone wrong investigators should examine their investigation procedures to determine whether there is a fault with the procedures. If the fault is procedural in nature, they should act to rectify this across the board. Considered below are some of the common examples of what can go wrong in an investigation, and what can then be done to retrieve the investigation.

1.24.2 Failing to identify the complaint as made by a whistleblower (eg a protected disclosure)

The main dangers of failing to identify that a complaint was made by a whistleblower (eg a protected disclosure) are failing to provide confidentiality and breaching time obligations in the *Protected Disclosures Act* for reporting back to the whistleblower.

**Failing to provide confidentiality**

To retrieve the situation:

- inform the whistleblower immediately and ask them their views on what should be done
- preserve confidentiality henceforth
- if the person the subject of the disclosure is aware of the whistleblower's identity, remind them that any detrimental action taken against the whistleblower would be an offence, and warn them the situation will be carefully monitored to ensure that no detrimental action is taken
- consider any practical steps that should be taken eg if there is sufficient evidence to justify it, consider moving the whistleblower, or in some circumstances the person the subject of the allegations, to some other work location (any detrimental impact on their career is a factor that must be taken into account before initiating such action)
Investigating complaints

- document all these matters on the file.

Advice on this issue is set out in the Ombudsman’s *Protected Disclosures Guidelines* (5th edition).

**Breached time obligations**

To retrieve the situation:
- disclose the failure to the person who authorised the investigation
- apologise to the whistleblower
- inform the whistleblower of the current position as to action taken or proposed on their disclosure
- ensure that a satisfactory strategy is developed and implemented to expeditiously complete the investigation, and
- document each of these actions on the file.

1.24.3 **Responding to an actual or perceived conflict of interests**

A conflict of interests on the part of the investigator may be discovered or alleged after an investigation has already got underway. Either an investigator becomes aware of facts or circumstances that were not apparent at the outset that show or indicate a conflict, or an allegation of conflict of interests may be levelled by someone else after the investigation has commenced. Retrieving an investigation in these circumstances can be a complex issue.

As soon as the conflict becomes apparent or is alleged, the person who appointed the investigator and, where practical and/or appropriate, the complainant and the person the subject of the investigation should be advised and their views ascertained. Only in limited circumstances should such information be withheld from the person under investigation. For example:
- If the complainant raises conflict of interests in relation to an investigation of a protected disclosure or any investigation where the person who is the subject of the complaint has not already been notified that an investigation is being conducted, or
- If the issue which gives rise to the conflict is inextricably linked to the issue being investigated and, by disclosing the conflict, some vital information must be disclosed that should strategically be withheld from the person the centre of the allegation.

In these circumstances the investigator must still inform the person who appointed him or her and prepare suitable documentation for the file. Where appropriate, the actual or alleged conflict of interests should be disclosed to all other affected parties. In no circumstances should the investigator make a judgment about the existence of an actual or perceived conflict of interests on their part.

Responsibility for determining whether a reasonable perception or actual conflict of interests exists will usually lie with the person authorising the investigation, or the person to whom the investigation report is to be given. If the complaint under investigation is a protected disclosure then it should be the protected disclosures coordinator, or CEO, who makes the determination. In the education arena, the determination will ordinarily be made by the head of the Department of Education and Training’s Employment Performance and Conduct Unit or Internal Audit in the case of government schools, and the School Board in the case of private schools.
If the investigation falls under Part 3A of the *Ombudsman Act* then the existence of the conflict of interests should be referred to and checked by the Ombudsman. In local councils the decision should be made by the general manager.

The preferred course of action in all cases where a real or reasonably apprehended conflict of interests has come to light is for the investigator to be removed from the investigation and a new investigator appointed. In practice, however, it may not always be viable to continue the investigation due to the passage of time or the state of the investigation eg witnesses or other evidence may no longer be available. If such investigations can be retrieved, steps must be taken to overcome the damage that the conflict would otherwise generate. The steps or strategies used to eliminate the perception that the matter has not been properly handled will depend largely on the investigation. It may involve bringing in a third party to oversee or cross check the investigation. If it has become impossible to re-interview a witness, that third party may review the witness statement or record of interview. Some aspects of the investigation may be severable, so that, for example, the factual materials already obtained can be used, while other aspects of the investigation (such as interviewing of witnesses) is done again from scratch. In may involve the appointment of a probity auditor to vet the investigation report, or it may involve seeking advice from an appropriate external oversight body.

In determining whether an investigation tainted by conflict of interests can be salvaged, relevant considerations include the remoteness of the actual or alleged conflict, the nature of the conflict, and the seriousness of the allegations being investigated. The more serious the allegations under investigation, the more important it is that there is no actual or alleged conflict of interests.

Where the investigator accused of having a conflict of interests is to continue with the investigation, or where material produced by that investigator is to be relied upon by a different investigator, the consent of all relevant parties should be obtained. Unless this consent is obtained the weight placed on the report at the conclusion will be diminished.

All decisions and actions must be documented.

### 1.24.4 Responding to excessive delay

Either the complainant or the person the subject of complaint may complain about the excessive delay in completing the investigation.

**Retrieving an investigation - steps to be taken by the investigator**

The usual procedure for an investigator seeking to retrieve an investigation which has been excessively delayed is to:

- apologise immediately
- review the investigation plan to see if it can be streamlined
- develop a timetable and meet those time commitments
- consult with affected parties who are aware of the investigation to explain the problem and its causes and to obtain agreement and understanding for what is being done (unless such a course would be prejudicial to the investigation itself)
- finish the investigation
- document the reasons for the delay and how the delay is addressed, and
- explain, in writing, to the person who authorised the investigation.
In some circumstances of excessive delay the whole investigation may have to be terminated. This will be the case if the delay causes unfairness or otherwise prejudices the investigation, in that witnesses have died, moved interstate or simply forgotten, or documents have been destroyed.

The seriousness of the allegations being investigated is a factor that must be taken into account whenever consideration is being given to discontinuing an investigation. The more serious the allegations, the more disinclined an investigator should be to drop it.

**Retrieving an investigation - role of supervisor**

Often it will be the investigator's supervisor that discovers the delay. However identified, in order to retrieve the investigation, the supervisor must act to address the reason(s) for and the effect of the delay. He or she should:

- provide an apology to all parties concerned who are aware of the investigation, giving reasons
- investigate why the investigation was delayed
- determine whether it would be fair to proceed with the investigation, or whether in the interests of justice it should be dropped
- consider whether a new investigator should be appointed or the matter reallocated if the investigation is to proceed
- determine whether any action is required to be taken as a matter of urgency, and prioritise all action that needs to be taken
- set a timetable for completion
- review the investigation plan to see if it can be streamlined in any way, and
- closely monitor and supervise the completion of the investigation.

### 1.24.5 Responding to breaches of secrecy

An investigator cannot afford to ignore the loss of secrecy. Where word has leaked out about an investigation, he or she should:

- ascertain the source of disclosure
- take steps to protect all witnesses
- where appropriate meet with relevant parties, and lay down some ground rules
- take the steps outlined in 1.24.1, if the complaint under investigation is a protected disclosure
- determine the effect that the loss of secrecy has had or will have on the investigation
- in the areas where the investigation has been compromised, undertake a risk assessment including an examination of the prospects of a successful completion (in some cases it may not be valid to continue the investigation), and
- if the investigation is to be continued, make adjustments to, or redesign, the investigation plan.

### 1.24.6 Failing to adhere to the principles of procedural fairness at relevant stages of an investigation

The basic rule is that so long as no final decision has been made, things can always be rectified by going back and affording the procedural fairness (or natural justice) that has been denied.
If a decision that affects the rights, interests or reputation of somebody has already been made, then the appropriate course is to go back and afford the procedural fairness (or natural justice) that has been denied. Then, if at all possible, to avoid any perception of pre-judgement, get somebody else to reconsider all relevant facts of the case and any submissions made by the people affected.

In practice it will not always be possible to remedy a denial of procedural fairness eg a draft or final report making adverse findings against a person may have already been circulated, without a copy first having been provided to the person adversely affected. In such circumstances it may be unsound to act on any recommendations in the report and it may be best, if practicable, to hand all relevant information to a new investigator who provides procedural fairness, makes a new recommendation or finding and produces a fresh report (which may in practice be based largely on the original report).

### 1.24.7 Failing to properly document interviews with witnesses

A failure to properly document interviews may result in a number of problems, eg the witness statement may contain errors or it may omit details which, on original drafting, were considered peripheral to the investigation.

In all cases action should be taken to correctly document interviews. Check the contents with the person interviewed. In most cases this should pose no problems and a proper account of the interview can be created.

More difficult is the situation where the interview subject has forgotten the content of the interview, or more critically, changes his or her evidence. If no-one else was present and the interview was not properly recorded or otherwise documented properly there is very little that can be done.

If an investigator discovers that evidence has not been properly documented, he or she should admit the problem and note any other supporting or relevant extrinsic evidence, together with the steps taken to verify the investigator's account of the interview.

### 1.24.8 Losing a document integral to the investigation

This may be a document or record obtained from someone else, a document not saved on disk, a receipt, or the such like. Upon discovering that it has been lost:

- record that loss on the file
- check whether any other copies are available or can be recreated, and
- if there are no other copies, try and adduce that evidence in some other way.

Adducing that evidence in some other way may involve attempting to recreate the document. Whenever this is done, investigators must explicitly state in the document that it has been recreated based on their recollection. A failure to acknowledge that it has been reconstructed will render it inadmissible should a matter proceed to court, or make it unsafe for anybody to rely on it or place any weight on it in other circumstances.

In the case of a lost receipt or similarly unreproducible document, investigators should draw up a statement indicating that they have seen it, that it was previously in their possession, and record what it said, including corroboration from any other witness(es).
1.24.9 Losing a highly confidential document

If a highly confidential document is lost, rather than merely misplaced, and there is a strong potential that the document may fall into the hands of one or more third parties:

- identify who would be prejudiced by the loss
- alert them that it has been lost
- attempt to locate it
- demonstrate that there was no impropriety in its disappearance
- undertake a risk assessment of the likely consequences of the loss and take appropriate remedial action
- advise anyone who could possibly be embarrassed or detrimentally affected by the loss, and
- look at any systems failure that may have contributed to the loss and implement necessary changes.

1.24.10 Failing to identify criminal matters during the course of the investigation

Proper advance planning will reduce the likelihood of failing to identify that conduct the subject of a disclosure amounts to a criminal matter. However, if it does occur, be aware of the dangers of proceeding. In particular, the effect this may have on the admissibility of evidence in any criminal proceedings must be considered (see 1.9.3 for discussion in relation to evidence obtained in the absence of a caution) along with the possibility of evidence being contaminated.

There are no hard and fast rules. Generally speaking, the most appropriate response is to stop immediately, alert the police and provide them with all material obtained.

In other cases though, any admissions of criminality or guilt may fall outside the terms of reference. If the subject matter of the admission and of the investigation are not inextricably linked, it may be possible to simply flag the admissions. Investigators should not pursue the criminal issue but continue on the path of their own investigation, and pass on the flagged material to the police later.

In interviewing a child, extreme caution must be exercised. Investigators should be extremely conscious of the risks of contaminating evidence. The interview should be discontinued in all but exceptional circumstances, such as where there is a duty of care to that child and there is an immediate threat to him or her. If this arises, the interview should be continued only so far as it is necessary to establish the risk to the child, without probing any further.

1.24.11 Retrieving an investigation when the scope is too broad or the deadline is unrealistic

When the scope of an investigation, or time taken to carry out an investigation, blows out, the investigator and the person authorising the investigation should review the investigation plan to see if its scope is too broad or deadlines are unrealistic.
1.24.12 Retrieving an investigation which has become too complex in whole or in part

If investigators feel out of their depth due to the complexity of an investigation, they should:
- acknowledge it
- seek additional resources from the person authorising the investigation, and
- revisit the investigation plan.

1.24.13 Retrieving an investigation when it has gone off the track or lost focus

Often an investigator will be unaware that this is happening, and it will only become apparent when the issue is raised with someone senior to the investigator by a party affected by the investigation, or when the investigator reports to management.

This situation calls for a strong supervisory role by the person authorising the investigation. It may be possible for the investigation to be brought back on track by getting the investigator and person who authorised the investigation together and talking through the issues, revisiting the investigation plan, identifying where, why and how the investigation has lost track, and by formulating the future direction of the investigation.

If the investigation is beyond the competence or capability of the investigator it will be necessary to replace the investigator. If the track that the investigation has taken has irreparably compromised the investigation it may be necessary to abandon the investigation entirely.
1.25 Requesting help or advice - contact points

The legislative provisions that apply to investigations are often difficult and complex. If there are any doubts about any matter either before or during an internal investigation, advice can be sought.

1.25.1 Requesting advice in relation to protected disclosures

In relation to protected disclosures, advice is available from one of the agencies listed below. Each has a designated officer to handle such inquiries. First instance telephone inquiries are best directed to the Ombudsman. The Ombudsman has agreed to be the first point of contact in providing advice to public officials who are:

- contemplating making a protected disclosure, or
- charged with responsibility for the implementation of the Act.

Requests for advice from the Ombudsman are invariably oral and in the absence of special circumstances do not constitute a complaint under the Ombudsman Act (which must be in writing). Public officials considering making a protected disclosure can therefore informally seek advice about the Act without actually making a formal complaint.

The telephone numbers of relevant agencies are:
- NSW Ombudsman: (02) 9286 1000
- Auditor-General: (02) 9285 0155
- ICAC, Assessments Section: (02) 8281 5999
- Department of Local Government: (02) 4428 4100

1.25.2 Requesting advice in relation to other matters

Further information and advice in relation to specific types of investigations are available from the following sources.

For assistance concerning the disciplinary scheme under the Public Sector Employment and Management Act 2002 contact:
- Premier's Department: (02) 9228 3592

For assistance concerning local council investigations contact:
- Local Government Association of NSW and the Shires Association of NSW: (02) 9242 4000

For assistance in relation to investigations into allegations of child abuse contact:
- NSW Ombudsman's Child Protection Team: (02) 9286 1000
Annexure A: Using these guidelines

This table is for general guidance only. Each investigation must be conducted in accordance with an assessment of the merits of each complaint and the investigation tailored to suit the particular circumstances of the complaint under investigation.

<table>
<thead>
<tr>
<th>Complaint about the conduct of individuals</th>
<th>Complaint about policies and procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious*</td>
<td>Not so serious</td>
</tr>
<tr>
<td>Must the complaint be investigated?</td>
<td>Yes.</td>
</tr>
<tr>
<td>Might external investigation be appropriate?</td>
<td>Yes. External investigation may or will be appropriate if the complaint concerns criminal conduct or serious corruption; if the matter is particularly complex or sensitive; if the subject of the complaint is the CEO or other senior member of staff; or if there are inadequate powers or expertise to conduct the investigation within the agency.</td>
</tr>
<tr>
<td>Is it vital that the investigator has no conflict of interests?</td>
<td>Yes. The more serious the allegations the more important it is that the investigation be, and be seen to be, conducted impartially and without bias</td>
</tr>
<tr>
<td>Must the investigation be authorised?</td>
<td>Yes.</td>
</tr>
<tr>
<td>Are terms of reference for the investigation required?</td>
<td>Yes.</td>
</tr>
<tr>
<td>Is an investigation plan necessary?</td>
<td>Yes.</td>
</tr>
<tr>
<td>Do confidentiality requirements apply?</td>
<td>Yes. The obligation to maintain confidentiality is of particular importance in relation to protected disclosures.</td>
</tr>
<tr>
<td>Do the rules of procedural fairness apply to the investigation?</td>
<td>Yes.</td>
</tr>
<tr>
<td>Is it possible that the evidence collected may become forensic evidence?</td>
<td>Yes.</td>
</tr>
</tbody>
</table>
### Investigating complaints

**Complaint about the conduct of individuals**

<table>
<thead>
<tr>
<th>Serious*</th>
<th>Not so serious</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Do the rules of evidence apply to the investigation?</strong></td>
<td>No. Subject to any legislative provisions to the contrary, the rules of evidence would generally not apply to the internal investigation into the conduct of individuals. However, if the evidence does become forensic, the rules of evidence will apply in relation to any subsequent legal proceedings.</td>
</tr>
<tr>
<td><strong>Does a caution need to be administered before receiving evidence?</strong></td>
<td>Only if the evidence establishes a prima facie case for a criminal offence against the person being interviewed. If this circumstance arises consider carefully whether it is appropriate to continue with any internal investigation.</td>
</tr>
<tr>
<td><strong>How should oral evidence be recorded?</strong></td>
<td>The more serious the allegations, the more care that is required in obtaining an accurate record of the witness’s evidence. Tape recording, records of interview or witness statements are all appropriate means of recording oral evidence. The most applicable method will depend on the circumstances of the case. The degree of formality accompanying the preparation of a witness statement is directly related to the seriousness of the complaint.</td>
</tr>
<tr>
<td><strong>Should third parties be entitled to be present during witness interviews as support persons?</strong></td>
<td>Yes.</td>
</tr>
<tr>
<td><strong>What standard of proof applies to the investigation?</strong></td>
<td>Balance of probabilities. The more serious the complaint, the stronger the evidence necessary to establish the complaint on the balance of probabilities.</td>
</tr>
<tr>
<td><strong>What safeguards should be implemented when recording and storing information obtained during an investigation?</strong></td>
<td>A paper trail of all actions taken in the investigation must be created. All relevant information should be placed on a central and secure file. Always issue receipts for property received or collected. Keep records of where, when and by whom evidence is collected. Obtain all original documents, but use copies during the investigation.</td>
</tr>
</tbody>
</table>
Complaint about the conduct of individuals

<table>
<thead>
<tr>
<th>Serious*</th>
<th>Not so serious</th>
</tr>
</thead>
<tbody>
<tr>
<td>Could the complainant or investigator be liable for defamation as a result of the complaint or its investigation?</td>
<td>If the complaint is a protected disclosure, absolute privilege against proceedings in defamation applies to the person making the disclosure. In relation to other bona fide complaints, the defence of qualified privilege would normally apply. However, the possibility of an action in defamation is one very important reason for maintaining confidentiality during the course of an investigation.</td>
</tr>
</tbody>
</table>

| What is the form and content required of the investigation report? | The detail required of the investigation report will depend on the seriousness of the complaint, the purposes for which the report is intended and/or who the intended audience of the report is. | The less serious the complaint, the less attention is required to be given to the detail of the investigation report. | The detail required of the investigation report will depend on the seriousness of the complaint, and who the intended audience of the report is. |

* In determining the seriousness of the complaint the following factors are relevant:

- whether criminal or disciplinary proceedings may potentially arise from the investigation
- the impact or effect of the investigation on the reputation of an individual or institution
- whether it is likely to affect an individual’s career prospects
- whether the report of the investigation is for the agency alone or for wider distribution or public release, and
- whether the subject matter of the complaint is notifiable (eg under the Children (Care and Protection) Act or the ICAC Act).
Annexure B: Requirements for protected disclosures

1. The allegation must have been made voluntarily

Sometimes there is confusion as to whether an allegation is made voluntarily where an agency has a code of conduct that requires employees to report corrupt conduct, waste or other misconduct to managers or supervisors. If a code of conduct requires staff to report these matters, any such report is still made voluntarily for the purposes of qualifying as a protected disclosure.

However, the situation is a little different with respect to CEOs, director-generals and GMs of local councils. Under s.11 of the Independent Commission Against Corruption Act, these office holders are obliged to report to the ICAC any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct. What follows from this is that these office holders cannot, with respect to reports of suspected corrupt conduct, satisfy the requirement of ‘voluntariness’.

The same principle applies to mandatory notifications of child abuse to the Department of Community Services under s.27 of the Children and Young Persons (Care and Protection) Act 1998 or notifications of child abuse allegations made to the Ombudsman under to Part 3A of the Ombudsman Act 1974.

2. The allegation must have been made by a public official

Only public officials may make protected disclosures under the Protected Disclosures Act. Public officials are defined in s.4 of that Act as:

- persons employed under the Public Sector Employment and Management Act 2002
- employees of local government authorities (ie councils and county councils)
- any individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by the:
  - NSW Ombudsman
  - ICAC
  - Auditor-General
  - Police Integrity Commission (PIC)
  - PIC Inspector.

This definition includes public servants, council employees, councillors, MPs, ministers, and police officers. From the specific terms of the Act, a protected disclosure can be made by a public official about a public authority even if the public official has never been or is no longer employed by that public authority.

It is open to question whether the protection of, and the obligations imposed by, the Act should extend to a public official where there is no obvious connection between the public official making the disclosure and the public authority or public official the subject of the disclosure. For example, public officials who make disclosures about traffic police with whom they come into contact while driving their private vehicles, or council staff who deal with the private development applications of public officials.

Another way of looking at this issue is to consider whether the connection between the person making the protected disclosure and the public authority or official the subject of a disclosure is sufficiently tenuous that the likelihood of detrimental action is so minimal as not to warrant extending the protections in the Act to the person who makes the disclosure.
While the matter is not beyond doubt, the Ombudsman prefers the view that it is not the intention of the Act to extend protection to disclosures by people of information or material of which they became aware or obtained otherwise than by virtue of the fact that they are public officials and in that capacity.

3. The allegation must have been made to one of the persons or bodies recognised by or under the Act

To be a protected disclosure, the allegation, report or complaint must have been made to one of the following:

- the CEO of the agency
- a person nominated in an internal policy or internal reporting system to receive protected disclosures, or
- one of the nominated investigating authorities under the Act which are the NSW Ombudsman, the ICAC, the Auditor-General, the Director-General of the Department of Local Government (for allegations of serious and substantial waste in local government), the PIC, or the PIC Inspector.

There are model internal reporting systems in the Ombudsman’s Protected Disclosures Guidelines (5th edition). The guidelines also contain an extensive discussion about such systems.

4. The allegations must show or tend to show (not merely allege) corrupt conduct, maladministration or serious and substantial waste of public money

In other words, unsupported allegations may not qualify. These terms are defined in Annexure 3C.

5. The allegation was not made substantially to avoid disciplinary action

6. The allegation must not principally involve questioning the merits of government policy

7. The allegation must not include any wilful statement or attempt to mislead (a criminal offence)

8. The allegation may be anonymous

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**Practical tip**

Assess an allegation against the following checklist to see whether it qualifies as a protected disclosure:

- it has been made voluntarily
- it has been made by a public official or former public official
- it has been made to the CEO of the agency or to a person nominated in an internal reporting system adopted by the agency to receive protected disclosures, or to the Ombudsman, ICAC or Auditor-General, PIC or PIC Inspector, or DLG (re serious and substantial waste)
- it shows or tends to show (not merely alleges) corrupt conduct, maladministration or serious and substantial waste of public money
- it was not made substantially to avoid disciplinary action.
Annexure C: Definitions of key terms in the Protected Disclosures Act 1994

Maladministration

Maladministration is an umbrella-like term covering many different types of conduct. For the purposes of the Act, maladministration is defined as conduct that involves action or inaction of a serious nature, that is:

Contrary to law

- Decisions or actions contrary to:
  - an Act or Regulation
  - the common law
  - a lawful and reasonable order from a person or body authorised to make such an order
- Failure to comply with:
  - obligations under an Act or Regulation
  - the common law
  - a legally binding document or contract
- Continuation of practices or procedures which the courts have found to be unlawful
- Decisions or actions ultra vires, ie not authorised (the decision-maker had no power to make the decision or to do the act)
- Breach of natural justice/procedural fairness, including:
  - failure to give or inadequate notice
  - failure to give or inadequate opportunity to be heard
  - bias
- Incorrect
  - interpretation of the law
  - application of the law
- Legal requirements or procedures not observed
- Improper exercise of a delegated power:
  - decision or action not authorised by delegation
  - fettered discretion/acting under the direction or at the behest of another, ie acting under ‘dictation’
- Criminal or corrupt conduct
- Decisions or actions induced or affected by fraud
- Acceptance of bribes or secret commissions
- Unauthorised disclosure of confidential/secret/private information
- Breach of trust or fiduciary responsibilities

Unreasonable

- Decisions or actions:
  - inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained
  - inconsistent with other decisions or actions which involve similar facts or circumstances
- made or taken without obvious relationship to the facts or circumstances
- not justified by any evidence
- partial, unfair or inequitable
- made or taken by a person with a conflict of interests
- arbitrary
- so unreasonable that no reasonable person could so decide or act (ie irrational)
- unconscionable
- based on information that is factually in error or misinterpreted
- unreasonably delayed
- Inconsistent decisions or actions not adequately explained
- Policy applied inflexibly without regard to the merits of individual cases
- Application of procedure which fails to achieve the purpose for which it is intended
- Relevant considerations not adequately taken into account
- Irrelevant considerations taken into account
- Important facts omitted from reports or deliberations, or ignored
- Denial of procedural fairness, including inadequate:
  - notice of proposed action, decision or hearing
  - advice as to rights
  - reasons for decisions or actions
  - consultation
  - opportunity to be heard
- Failure to give notice of rights where reasonable to do so
- Wrong, inaccurate or misleading advice leading to detriment, whether inadvertent or deliberate
- Failure to apply an Act, Regulation or the common law
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
  including restraints imposed upon people or property that are not necessary to preserve and protect rights of others
- Abuse of power, eg use of power for unauthorised purpose
- Failure to rectify identified mistakes, errors, oversights or improprieties
- Failure to appreciate impact on the public or an individual, or giving undue weight to agency’s convenience, interests.
- Failure to properly comprehend complaint or to respond appropriately to complaint
- Breach of trust
- Failure to properly investigate
- Negligence or the absence of proper care and attention.

**Unjust** (s.26(1)(b))
- Decisions or actions:
  - not justified by any evidence
  - partial, unfair or inequitable
  - made or taken by a person with a conflict of interests
  - arbitrary
  - so unreasonable that no reasonable person could so decide or act (ie irrational)
  - unconscionable
- Refusal of otherwise valid claims based on minor procedural defects
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
• Abuse of power
• Negligence or the absence of proper care and attention
• Unfair or inequitable application of law so that burden or benefit does not reach all those to whom it is intended to apply

**Oppressive**

• Decisions or actions:
  - unconscionable
  - punitive, harsh, cruel or offensive
• Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
• Abuse of power/discretionary authority
• Imposition of unreasonable preconditions to the provision of a legal entitlement
• Intimidation or harassment
• Use of superior position or knowledge to place a person at an unreasonable disadvantage or to obtain compliance with wishes in respect of an otherwise unrelated matter

**Improperly discriminatory**

• Inconsistent application of laws, policies, etc. when there is no reasonable, justifiable or appropriate reason to do so
• Inconsistent application of policies or practices
• Distinctions applied not authorised by law, or failure to make a distinction which is authorised or required by law
• Failure to perform duties impartially and equitably

**Improper motives**

• Decisions or actions:
  - for a purpose other than that for which the power was conferred, ie the intent of a law, policy or procedure is ignored or disregarded in order to achieve a particular outcome
  - motivated by favouritism or personal animosity
  - for personal advantage
  - made or taken by a person with a conflict of interests
• Misuse of confidential information to obtain improper advantage
• Bad faith
• Dishonesty
• Seeking or accepting gifts or benefits in connection with the performance of official duties.
• Misuse of public property, official services or facilities
• Favouritism or promotion of personal objectives other than those which merit and equity dictate.

**Corrupt conduct**

Corruption is defined in the ICAC Act in broad terms to include:

• the dishonest or partial exercise of official functions by a public official
• conduct of a person when it adversely affects the impartial or honest exercise of official functions by a public official.

For the ICAC to become involved, generally speaking, the disclosure will concern conduct which could constitute or involve:

• a criminal offence
• a disciplinary offence, or
• be reasonable grounds for dismissal.

Corruption can take many forms. Taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are just some examples. Some examples of corrupt behaviour include:
• a public official accepts money from a company in payment for choosing that company to do a job for the government agency
• a public official uses public resources for private purposes
• the police let a driver who is ‘over the limit’ go because he is a well known sportsman.

**Serious and substantial waste**

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised and unauthorised, which results in a loss or wastage of public funds or resources.

In addressing any complaint of serious and substantial waste, the Auditor-General has advised that regard will be had to the nature and materiality of the waste.

Types of waste:
• absolute – the value of the waste is regarded as significant
• systemic – the waste indicates a pattern which results from a system weakness within an authority
• material – the waste is material in terms of:
  - the authority’s overall expenditure
  - a particular type of expenditure
• affects an authority’s capacity to perform its primary functions.
• material by nature, not amount:
  – the waste may not be material in financial terms but may be significant by nature ie it may be improper or inappropriate.

‘Shows or tends to show’

To be protected, a disclosure must disclose information which ‘shows or tends to show’ certain things. To comply with this requirement it is most likely that it is necessary to do more than merely allege.

Matters must be stated which, if substantiated, amount to the relevant conduct, or tend to do so. It is necessary to assess the supporting material provided with a disclosure to determine its adequacy for the purpose of the Act before a decision is made as to whether it appears that a disclosure is protected.

If the disclosure appears to satisfy the above criteria, then the complaint and allegations should be treated as a protected disclosure.

Evidentiary requirements must be considered. Therefore, every effort should be made to get the disclosure in written form even if the investigator has to transcribe it and get the complainant to sign it. This reduces the chance of subsequent disputes about the precise nature of the disclosure and whether it should have been treated as protected.
Annexure D: Avoiding errors in handling protected disclosure

The following organisational errors in the management of whistleblower disclosures occur more often than many may think and can have serious consequences. They have the potential to effectively contaminate the relationship between the whistleblower and the investigating authority and prejudice the integrity of any investigation.

The errors include:
- failing to observe the confidentiality of a disclosure by having information pass through a series of hands with few checks as to who has, or who should, view the material
- telling anyone who asks about the details and investigation of the disclosure
- reporting to the work group who the whistleblower is, what the allegations are, and who they are about
- interpreting procedural fairness to mean that a person has an immediate right to know when a disclosure has been made about them and who made it
- always as a first step, asking the subject officer about the allegation
- forwarding the disclosure and action on it through the chain of command so that as many people know about the matter as possible
- forewarning the person who is the subject of an allegation in plenty of time about the allegations and providing them with investigation details
- allowing personal biases about the personality of the whistleblower to influence the assessment of a disclosure
- not taking seriously the concerns expressed by a whistleblower about the possibility of reprisal
- ignoring potential conflict of interests when deciding who should assess or investigate the disclosure
- allowing political considerations to influence the assessment of a disclosure or the findings of an investigation
- delaying the investigation for as long as possible so that any evidence of wrongdoing can be altered or destroyed.

Annexure E: Public Sector Agencies Fact Sheet
No. 3: Conflict of Interests

Conflict of Interests

Public officials should avoid situations in which their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties and the public interest. Public officials should not allow the pursuit of private interests to interfere with the proper discharge of their public duties.

The meaning of the term ‘conflict of interests’

The term ‘conflict of interests’ refers to situations where a conflict arises between public duty and private interest which could influence the performance of official duties and responsibilities. Such conflict generally involves opposing principles or incompatible wishes or needs.

Conflict of interests can involve pecuniary interests (ie, financial interests or other material benefits or costs) or non-pecuniary interests. They can involve the interests of the public official, members of the official’s immediate family or relatives (where these interests are known), business partners or associates, or friends. Enmity as well as friendship can give rise to an actual or perceived conflict of interests.

Conflict of duties

A distinction can be drawn between ‘conflict of interests’ involving actual, potential or reasonably perceived conflicts between public duty and private interests, and ‘conflict of duties’ involving a conflict between competing or incompatible public duties.

In some circumstances a conflict of duties is acceptable, or at least unavoidable, for example where the holding of one public sector position or office is the prerequisite or qualification for the holding of another position or office.

In most other circumstances, as a matter of principle a conflict of duties is either unacceptable and to be avoided, or at the least a problem to be disclosed and carefully managed. These circumstances would include where a public officer holds positions in or otherwise performs duties for more than one public sector agency:

- where those agencies have interests or objectives that are, or are likely to be, competing or incompatible
- where issues concerning one agency or position are, or are likely to be, considered or decided by the other agency or the holder of the other position, and such consideration or decision-making is required to be impartial, or
- where the activities of one agency are, or are likely to be, regulated or subject to review or oversight by the other agency.

Where conflict of interests can arise

Sometimes, by virtue of their public official status, position, functions or duties, public officials have the power to make decisions or act in ways that can further their own private interests (eg, to gain financial or other benefit for themselves, their immediate family, relatives, business associates or friends). This may cause a real or reasonably perceived conflict between the public official’s private interests and the public interest.

It matters little whether a conflict of interests is actual or merely a conflict that could be reasonably perceived to exist by a third party. Both circumstances negatively impact on public confidence in the integrity of the system.

A real or reasonably perceived conflict may exist even if a public official is not the ultimate decision-maker. For example, it may be that as a result of the official’s conflict of interests, there had been a failure to collect all relevant facts or ask the necessary questions, or otherwise to carry out a proper investigation or assessment of the facts on which the ultimate decision was based.

It is not always easy to identify a conflict of interests. Human nature being what it is, if a person has, or has the potential to have, a personal or otherwise private interest in a matter, it is unlikely to be in the person’s interests to recognise or identify the existence of such a conflict if this would preclude them from further involvement in the matter.

It is sometimes unrealistic or even undesirable to expect that the official dealing with a matter will be someone having no prior connection with the person or issues concerned. Some matters may have significant histories that involve the same members of the public and the same agency staff. Simple acquaintance with a person concerned, or the fact that an official has previously had official dealings with that person, is not sufficient in itself to indicate that the official has a real or reasonably perceived conflict. There must be something more, or something particular to the matter in question.
Disclosure of conflict of interests

Decision-makers, and people advising or reporting to decision-makers, should promptly, fully and appropriately disclose any actual or potential conflict of interests they may have in a matter under consideration. Where this conflict involves the interests of a public official’s family or friends, those interests should be disclosed to the extent they are known to the public official.

Public officials should also bring to notice any circumstances that could result in a third party reasonably perceiving a conflict of interests to exist (ie wherever a reasonable person could perceive that an official may not bring an impartial and unprejudiced mind to the making of a decision due to an actual or perceived conflict of interest or bias).

Such disclosures must be made at the first available opportunity to an appropriate senior officer of the agency for a decision as to what action should be taken to avoid or deal with the conflict.

Issues to be considered in assessing whether there is a conflict of interests

In assessing whether a public official has an actual, potential or reasonably perceived conflict of interests, it may be helpful to ask the following questions:

• How serious is the matter and does it directly impact on the rights or interests of any person or of the general public?

• Does the official have a current or previous personal, professional or financial relationship with an interested party and if so, how significant is or was the relationship (eg. is the relationship one of simple acquaintance, previous work experience, close friendship, business partnership)?

• Would the official or anyone associated with the official benefit from or be detrimentally affected by a decision or finding in favour of, or adverse to, any interested party?

• What does any relevant code of conduct require in relation to conflict of interests?

Options to avoid or deal with a conflict of interests

Where a disclosure of an actual, potential or reasonably perceived conflict of interests (including a pecuniary interest) is made to an appropriate officer, depending on the circumstances of the case, the options available include:

• taking no further action because the potential for conflict is minimal or can be eliminated by disclosure or effective supervision

• informing likely affected persons that a disclosure has been made, giving details and the agency’s view that there is no actual conflict or the potential for conflict is minimal

• appointing a ‘probity auditor’, or independent third party to review or oversee the integrity of the process/decision (this will be particularly appropriate where there is a reasonably perceived – but not actual – conflict of interests or the conflict is only identified at or near the conclusion of the process or after the making of the decision)

• appointing further persons to a panel/committee/team to minimise the actual or perceived influence or involvement of the person with the actual or reasonably perceived conflict

• where the persons likely to be concerned about a potential, actual or reasonably perceived conflict are identifiable, seeking their views as to whether they object to the person having any, or any further, involvement in the matter

• restricting the access of the person to relevant information that is sensitive, confidential or secret

• directing the person to cease supporting a third party whose actions may conflict with the agency’s interests (for example a person or organisation taking legal proceedings against the agency)

• requesting the person to relinquish or divest the personal interest which creates the ‘conflict’ (where the position of such an interest is not prescribed as a qualification for the person’s official position)

• requesting the person to make arrangements for the relevant private interest to be held and managed in a ‘blind’ trust

• removing the person from duties or from responsibility to make decisions in relation to which the ‘conflict’ arises and reallocating those duties to another officer (who is not supervised by the person with the ‘conflict’)

• transferring the person to some other area of work within the agency, or some other task or project

• transferring the person to some other agency

• persons with a ‘conflict’ who are members of boards, committees or councils absolving themselves from or not taking part in any debate or voting on the issue

• in serious cases, requesting or directing the person to resign, or terminating the person’s employment or appointment (having complied with the rules or procedural fairness).

For further information on this and related topics see Good Conduct and Administrative Practice (2nd edition) NSW Ombudsman, June 2003.

Contact details

Level 24 580 George Street
Sydney NSW 2000

Inquiries 9–4 Monday to Friday
Other times by appointment

General inquiries: 02 9286 1000
Toll free (outside Sydney metro): 1800 451 524
Tel. typewriter (TTY): 02 9264 8050
Facsimile: 02 9283 2911
Email: nswombro@ombo.nsw.gov.au
Web: www.ombo.nsw.gov.au

Telephone Interpreter Service (TIS): 131450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.
## Annexure F: Checklist for a good investigation

### Part 1 – Receipt and assessment

<table>
<thead>
<tr>
<th>No.</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>n/a</th>
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</thead>
<tbody>
<tr>
<td>1.</td>
<td>Was there a prompt response to the allegation?</td>
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<td></td>
<td>Comment</td>
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<td>2.</td>
<td>Was the complaint properly documented?</td>
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<td>Comment</td>
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<td>3.</td>
<td>Was an assessment conducted?</td>
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<tr>
<td>3.1</td>
<td>Did it determine the issues, and if so what action should be taken?</td>
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<td>3.2</td>
<td>Was the preservation of evidence considered?</td>
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<td>3.3</td>
<td>Were the rights of the person the subject of the allegation considered?</td>
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<td>3.4</td>
<td>Was a risk assessment carried out?</td>
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<td>3.5</td>
<td>Was the safety and welfare of all people considered (if applicable)?</td>
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<td>4.</td>
<td>Were the appropriate mandatory notifications made (if applicable)?</td>
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<td></td>
<td>Comment</td>
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</table>

### Part 2 – Preparing for the investigation

<table>
<thead>
<tr>
<th>No.</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>n/a</th>
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<tbody>
<tr>
<td>5.</td>
<td><strong>Investigators</strong></td>
<td></td>
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<tr>
<td>5.1</td>
<td>Was the investigator qualified for the tasks?</td>
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<td>5.2</td>
<td>Did the investigator have sufficient authority to deal with the matter?</td>
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<td>5.3</td>
<td>Were there sufficient resources to undertake the investigation?</td>
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<td>5.4</td>
<td>Were the investigators independent of the allegations?</td>
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<td>5.5</td>
<td>Were there any conflict of interests?</td>
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<td>Comment</td>
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<tr>
<td>6.</td>
<td><strong>Plan of action/Investigation plan</strong></td>
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<tr>
<td>6.1</td>
<td>Was there any contingency plan/investigation plan in place to deal with allegations?</td>
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<tr>
<td>6.2</td>
<td>If yes, was that plan utilised?</td>
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<td>6.3</td>
<td>Did the plan include terms of reference or objectives?</td>
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<td>6.4</td>
<td>Did the plan set definite time limits for stages of the investigation?</td>
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<tr>
<td>7.</td>
<td><strong>Confidentiality</strong></td>
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<tr>
<td>7.1</td>
<td>Was confidentiality maintained with respect to notifier (if practical)?</td>
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<td>7.2</td>
<td>Was confidentiality maintained with respect to the person the subject of the allegation?</td>
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<td>7.3</td>
<td>Was the matter a protected disclosure?</td>
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<td></td>
<td>- If so, were the appropriate steps taken to ensure confidentiality?</td>
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<td>7.4</td>
<td>Was confidentiality maintained with respect to child (if practical and applicable)?</td>
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### Part 3 – The investigation

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<tr>
<th></th>
<th></th>
<th>Yes</th>
<th>No</th>
<th>n/a</th>
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<tr>
<td>8. Information gathering</td>
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<tr>
<td>8.1 Was all information obtained and considered?</td>
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<tr>
<td>8.2 Was the information obtained considered in an objective way?</td>
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<tr>
<td>8.3 Was all culpatory/exculpatory evidence considered?</td>
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<td>8.4 Were all possible witnesses interviewed?</td>
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<tr>
<td>8.5 Were statements obtained?</td>
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<tr>
<td>- If so, were they properly recorded?</td>
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<td>8.6 Was expert opinion/advice sought (if relevant)?</td>
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<td>8.7 Were interviews conducted fairly and legally?</td>
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<tr>
<td>8.8 Were interviews properly recorded?</td>
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<tr>
<td>8.9 Were the rules of evidence adhered to (if applicable)?</td>
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<td>8.10 Was the investigation properly recorded?</td>
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<td>8.11 Were all the relevant documents collected?</td>
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<tr>
<td>8.12 Was the chain of possession of the documents assured?</td>
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<tr>
<td>8.13 Was all relevant physical and documentary evidence obtained, recorded and secured?</td>
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<tr>
<td>8.14 Were background checks conducted on the person subject of the allegation (if applicable)?</td>
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**Comment**

### Part 4 – Procedural fairness

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<tr>
<th></th>
<th></th>
<th>Yes</th>
<th>No</th>
<th>n/a</th>
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<tbody>
<tr>
<td>9. Employees’ rights</td>
<td></td>
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<tr>
<td>9.1 Was the person the subject of the allegations given an opportunity to make submissions?</td>
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<tr>
<td>9.2 Were any submissions, made by the person the subject of the allegation, properly considered?</td>
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<tr>
<td>9.3 Were the submissions of the person the subject of the allegations properly recorded?</td>
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<tr>
<td>9.4 Was the person the subject of the allegations informed of substance of the adverse comment proposed to be made?</td>
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<tr>
<td>9.5 Were any submissions received properly considered?</td>
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<tr>
<td>9.6 Was consideration given to issuing a caution to the person (if relevant)?</td>
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</table>

**Comment**

### Part 5 – Related issues

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<tr>
<th></th>
<th></th>
<th>Yes</th>
<th>No</th>
<th>n/a</th>
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<tbody>
<tr>
<td>10. Industrial relations issues</td>
<td></td>
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<tr>
<td>10.1 Was information on the investigation process given to all affected people?</td>
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<tr>
<td>10.2 Were any administrative actions legally available (if applicable)?</td>
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<td>10.3 Were the disciplinary procedures for the agency adhered to?</td>
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<td>10.4 Were any criminal offences and/or corruption identified?</td>
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<tr>
<td>- If yes, were the appropriate authorities notified?</td>
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<tr>
<td>- Was the standard of proof applied to the matter appropriate?</td>
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**Comment**
### Part 6 – The conclusion

<table>
<thead>
<tr>
<th>Question</th>
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<th>n/a</th>
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<tbody>
<tr>
<td>11. Concluding the investigation</td>
<td></td>
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<tr>
<td>11.1 Did the investigation reveal any systemic failures or issues that require correction?</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>11.2 Did the investigation reveal other matters, which require investigation or action?</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.3 Were referrals to other agencies complete, timely and appropriate?</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.4 Were the investigation findings documented?</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.5 Are the findings justifiable from the investigation?</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.6 Should further findings have been made?</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.7 Were recommendations made?</td>
<td>☐</td>
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<tr>
<td>11.8 Were the recommendations comprehensive and adequate?</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.9 Have all parties entitled to know, been given the findings and recommendations?</td>
<td>☐</td>
<td>☐</td>
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<tr>
<td>11.10 Have the findings and recommendations been acted upon?</td>
<td>☐</td>
<td>☐</td>
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</table>

**Comment**
Annexure G: Fact sheets to assist agencies conducting investigations into child protection matters

These fact sheets are ‘help’ sheets to assist agencies when faced with a child protection matter involving an employee. They are not comprehensive, and agencies should seek advice when in any doubt about how to proceed:

• Fact Sheet No. 1 Keeping records
• Fact Sheet No. 2 How we assess an investigation
• Fact Sheet No. 3 Planning an investigation
• Fact Sheet No. 4 Conducting an investigation
• Fact Sheet No. 7 Recognising and managing conflict of interest
• Fact Sheet No. 9 Risk management following an allegation of child abuse against an employee
Keeping records

Good record keeping assists in improving accountability and provides transparent decision making. This simple ‘help’ sheet is intended to assist agencies. It is not comprehensive and agencies should ensure their record keeping meets any relevant legislative requirements.

What we will look for

Documentation of the following:

- the allegation (a brief summary of what has been said and by whom)
- any initial response you provided to the person making the allegation, the alleged victim(s) and the subject of the allegation
- a plan detailing how the investigation is to be carried out, including whether the Department of Community Services/Police need to be notified
- your interim risk assessment, including any interim management arrangements/decisions made about the employee and the rationale/support and/or counseling for the child or employee
- any interviews conducted, including details of who is being interviewed, any other people present, the name and position of the interviewer, and the date of the interview
- records or notes from interviews:
  - this should include details of questions and responses, and be signed by the interviewee
- any decisions made, during and at the conclusion of the investigation, including their rationale, the position and name of the person making the decision and the date
- any contact/discussions/e-mails with anyone about the matter:
  - this should include the date, the discussion/questions/advice/outcome, the name of the person making contact, details of their position/agency and where appropriate reason for the contact
- a summary report that details the allegation, the investigation process, the final determination (including the reason), the final risk assessment (which includes any final decision about the employee and the factors that have been considered) and any subsequent action that is to be/has been taken.

We will also expect that you will:

- advise the employee of the final determination in writing
- have an organised information management system:
  - for example all the documents should be kept together in a file and readily located
- have records in a safe and secure place.

General points to remember

- Clearly record the initial allegation(s)
- Document your planning process
- Ensure all records are legible, signed and dated
- Avoid subjective language
- Include all notes (however rough) in the file
- Document all decisions (and their rationale)
- Document all advice (both given and received)
- Issue clear guidelines for staff about record keeping
- Document all discussions and place on file (includes copies of all e-mails)
- Keep records in a safe and secure place for the required period
Investigating complaints

Tip
If you want to objectively examine your own record keeping before we do, then ask yourself:
If someone needed to read my investigation file in ten years time, would they be able to understand at a glance the process I used in my investigation, what decision I reached, my rationale and the action I subsequently took?

Common faults in record keeping
The following information is often not adequately recorded:

- Initial report/complaint of allegation(s)
- The process of planning prior to the investigation
- The assessment of risk posed by the employee (subject of allegation) and action taken
- Discussions/inquiries relating to the investigation
- Any action taken with child and employee, e.g. counselling
- Decisions made during the investigation (including decisions not to do something, e.g. a decision not to interview the child).

The standard of investigations is often difficult to assess due to:

- Insufficient details from interviews conducted with child/employee/any other witnesses
- Records that are illegible, undated and/or unsigned
- Insufficient or unclear information about the findings of the investigation (including their rationale)
- There is no letter to the employee stating the outcome.

If you have any queries or comments, we are here to assist you.
Call our child protection team on the numbers provided.

Contact details
Level 24  580 George Street
Sydney NSW 2000

Inquiries 9–4 Monday to Friday
or at other times by appointment

General inquiries: 02 9286 1000
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This brochure is one of a series of information brochures produced by the NSW Ombudsman. For more information, contact the Publications Officer on 9286 1072. Feedback is welcome. First printed Feb 2000. Reprinted June 2002.
How we assess an investigation

This simple help sheet is intended to assist agencies investigating allegations of child abuse against employees. It is not comprehensive and agencies should seek advice when in any doubt about how to proceed.

What we will look for

Below are the major features we will be looking for when we assess your response to a child abuse allegation:

- Was the immediate safety of children considered:
  - When the allegation was first made?
  - During the investigation?
  - At the conclusion of the investigation?
- Has appropriate assistance such as counselling, union referrals and management support, been offered, where necessary, for the child (and family), the employee and other parties as warranted?
- Was the overall response by your agency to the allegation prompt and timely?
- Was the allegation clearly defined and treated seriously?
- Was there an adequate investigation plan?
- Were all the relevant people and witnesses approached to give information/evidence (interviews, statements, etc)?
- Should the child have been interviewed directly or was that evidence better obtained from other sources when the child had already been interviewed?
- Was the child appropriately interviewed and that evidence adequately documented?
- Was the employee the subject of the allegation(s) interviewed and given an adequate chance to respond?
- Was all relevant evidence collected and considered?
- Were parents/carers adequately and promptly informed and involved at all appropriate stages?
- Were the necessary reports made internally, and externally to the Department of Community Services (DoCS), Police, Ombudsman, etc?

- Has everything been documented? (ie phone calls, email, meetings, conversations, decisions, etc)
- Has confidentiality been respected?
- Was the finding reasonable given the evidence?
- Has appropriate action been taken as a result of the finding?
- Have policies/procedures been adhered to?
- Is the process transparent and accountable?

General points to remember

- safety of children paramount
- natural justice and procedural fairness for employee
- clear procedures and policies
- no conflict of interest or bias
- proper investigation plan and logical structure
- thorough documentation and record keeping
- all relevant evidence collected
- all relevant evidence considered
- consultation with relevant bodies (eg Associations, DoCS, Police, Ombudsman, Unions, legal, etc)
- confidentiality
- appropriate policies and procedures that deal with workplace child protection issues should be in place.
Investigating complaints

Tip
If you want to objectively examine your own investigation before we do, then ask yourself these questions

If it were my child subject of the alleged abuse, would I be satisfied with the process?

If I were the employee subject of the allegation, would I be satisfied with the process?

If I were a concerned member of the public, would I be satisfied with the agency’s process?

Common faults
Some common faults in investigations are:

- failure to plan the investigation
- inadequate documentation
- all relevant witnesses not interviewed
- all relevant information/evidence not assessed or collected for assessment
- witness statements illegible, unsigned, undated
- lack of risk assessment throughout
- investigation documents disorganised
- findings do not flow from the evidence
- conflict of interest/bias for investigator/key decision-maker
- inappropriate interviewing of child
- confidentiality breached
- possible medical evidence not sought
- decisions and rationales not documented and decisions made before all evidence collected

If you have any queries or comments, we are here to assist you.

Call our child protection team on the numbers provided.

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Planning an investigation

This document is intended to be a simple ‘help’ sheet to assist agencies. It is not comprehensive and agencies should seek advice when in any doubt about how to proceed.

It is essential to spend some time before commencing an investigation planning the action to be taken and documenting any decisions that are made. This focuses your efforts, identifies the information you need to obtain and reduces the chance of overlooking information or duplicating the action taken.

One way of documenting these decisions is to write an Investigation Plan. This is a record of what you intend to do to carry out the investigation, why you are doing it, how it is to be done, and when it needs to be done. This can be a formal, typewritten document or simply notes in your file that address these points.

What we will look for

The planning process should include the following stages:

- summarise the information provided about allegations so you are clear about what has been alleged:
  - for example, an allegation of child abuse may be described as ‘teacher X hit child Y across the face with an open hand’
- consider what your objectives or terms of reference are: that is, the purpose of, or what you hope to achieve, by investigating the allegations
- identify the information you need to gather in order to achieve your objectives
- determine the action that needs to be taken to gather this information, and determine a timeframe for these tasks
- anticipate possible problems and plan for them
- consider the available resources and prioritise tasks according to their urgency and the resources available
- document the decisions made; particularly when you decide not to do something
- allocate tasks.

Investigation process

1. Begin your investigation.
2. Make any necessary preliminary enquiries. For example, consult relevant people about procedures or clarify initial information.
3. Review the investigation plan during the investigation to ensure that you are achieving your objectives.
4. As part of the investigation you may need to conduct interviews (including the alleged victim, any relevant witnesses and the person who is the subject of the allegations), gather statements, undertake site visits, gather physical evidence (eg photographs), consult relevant experts, review relevant policies, and review documents/records.
5. Once all information has been gathered, review the relevant facts and formulate your findings.
6. Write a report summarising your investigation, your findings and any recommendations you may have.
7. Consider and act on the requirements of procedural fairness.
8. It is good practice for information gathering/report writing and decision-making to be separate functions if possible. If appropriate, provide your final report to the person responsible for the final decision-making.
9. Undertake any required action to finalise the investigation (eg advise all relevant parties of the outcome, finalise documentation).
Investigating complaints

General points to remember

- Ensure that you have spent some time planning what you are going to do before taking action.
- Know what your authority is and the powers that you have.
- Ensure that the investigator is adequately trained.
- Ensure adequate resources are allocated to the investigation.
- Record all of the action taken and decisions made.

Common faults

Some common faults in investigations are:

- Failure to plan the investigation, particularly to set out objectives, and to define the allegations.
- Appropriate advice is not sought from relevant agencies regarding the action to be taken (e.g., DoCS, legal services).
- Failure to provide procedural fairness to persons the subject of investigation or adverse comment.
- Decisions are not documented.
- All available evidence is not gathered and documented.

If you have any queries or comments, we are here to assist you.
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This brochure is one of a series of information brochures produced by the NSW Ombudsman. For more information, contact the Publications Officer on 9286 1072. Feedback is welcome. First printed Mar 2000. Reprinted June 2002.
Conducting an investigation

This document is intended to be a simple ‘help’ sheet to assist agencies. It is not comprehensive and agencies should seek advice when in any doubt about how to proceed.

<table>
<thead>
<tr>
<th>STAGE</th>
<th>KEY ISSUES TO CONSIDER</th>
</tr>
</thead>
</table>
| Initial response    | • Clarify the allegation. Exactly what has been alleged? Who, What, When, Where?  
• If it is a matter that needs to be reported to the Department of Community Services (DoCS), decide who is going to do this.  
• Assess any risks posed by the employee to children in the agency’s care. Take any necessary interim action to ensure the safety and wellbeing of the children.  
• Address any support needs of both the child and the employee who is the subject of the allegation.  
• Identify all the people you consider should be consulted or who might provide relevant information, including witnesses (if any). |
| Planning            | • Decide whether to interview the child (or children). When DoCS or the Police are involved, consult with them before interviewing the child or the employee who is the subject of the allegation. Interviews of children should only be carried out when DoCS or the police are no longer involved and then preferably by trained interviewers.  
• Document your investigation plan (refer to NSW Ombudsman child protection fact sheets No 2 ‘How we assess an investigation’ and No 3 ‘Planning an investigation’). |
| Information gathering| • Collect sufficient relevant documentary evidence (eg medical reports, roster schedules etc) and information to assist you in your decision making.  
• Interview the child (if appropriate) and all relevant witnesses. Ensure all interviews are adequately recorded (eg taped and summarised, or close to a verbatim record written during the interview). Where possible, ensure records are signed and dated by all involved.  
• Review your initial risk assessment and take any further action to address concerns, if warranted. |
### STAGE: Employee response

When you have obtained all the relevant evidence, put the allegation to the employee at an interview and give them the opportunity to respond, both during the interview, and if they wish, in a written submission.

### STAGE: Making a finding

- Consider all the information gathered.
- Make a finding, based on the information gathered, as to whether, on the balance of probability, the allegation is sustained or not sustained. The rationale behind the finding should be clearly documented. Ideally, the person making this decision should be separate to the investigator.

### STAGE: Taking action

Make a decision about what subsequent action to take, if any, as a result of the investigation, including possible disciplinary action, amendments to policy and/or procedures, and a final review of risk.

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**If you have any queries or comments, we are here to assist you. Call our child protection team on the numbers provided.**

**Contact details**

Level 24  580 George Street  
Sydney NSW 2000  
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or at other times by appointment  
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Recognising and managing conflict of interest

Ideas about how to deal with conflict of interest in the investigation of child abuse allegations.

What does ‘conflict of interest’ mean?

“Conflict of interest” refers to situations where a conflict (clash) arises between duty (position) and self interest (person). Such conflicts generally involve opposing principles, or incompatible wishes or needs, which are based upon a family or close relationship, or feelings of hostility towards another person.

Why is it important in investigations?

As a rule, it is important for investigators to be objective and impartial, and to be perceived as such. One factor that can affect an investigator’s neutrality is a conflict of interest between their role as an investigator and other personal or professional views or responsibilities.

Personal views or private interests can influence and compromise a person’s capacity to perform their duties. Given the sensitive nature of child abuse allegations, and the serious potential outcomes for those involved, the need for objectivity and impartiality is particularly important.

What should happen when a conflict of interest is identified?

Ideally this means that investigators and/or any person deciding matters who has a conflict of interest (actual or perceived) should not be appointed or remain involved.

In smaller agencies, and in particular in the non-government sector, this option is not always available. It may not be possible in every case to have an investigator who is totally independent and/or has no prior connection with the person under investigation. Indeed this is not necessary. For example, the relationship of supervisor or work associate may not in itself give rise to a conflict of interest.

However, in all cases where there is, or might be, or might be perceived to be, a conflict of interest, it is important to acknowledge and assess the issues, and deal with them prior to an investigation commencing.

Where it is assessed that the investigator is unable to remain neutral and objective, the investigation must be transferred to someone more independent. Where this is not possible, contact us to discuss how the situation can best be resolved. Your policy should reflect the possibility of this occurring and offer alternative arrangements for dealing with such circumstances.

What can happen if conflict of interest is not dealt with?

A conflict of interest, or the perception of such, in an investigation can have damaging and long-term effects for all concerned. For example: the victim’s family is less likely to be satisfied with the outcome, and may seek other redress, such as legal action; the reputation of the agency may suffer; there can be a loss of faith/trust by the community in the agency; and the reputation of the employee may suffer if it is perceived that the reason for a ‘not sustained’ finding was because of bias.
Managing conflict of interest

- What strategies can be employed to minimise any adverse influence? Do these strategies include steps to ensure all relevant facts are collected, the necessary questions/inquiries asked, and a proper investigation carried out?
- Have the details of the perceived or actual conflict of interest/disclosure been fully documented?
- Has the actual or alleged conflict of interest been disclosed to all affected parties and their response obtained?
- Will the investigator undertake, as far as they are able, to perform their duties impartially, and uninfluenced by fear or favour?
- Have decision making responsibilities been passed, as far as is possible, to another person?
- Is it possible to bring in a third party to oversight/cross-check the investigation?
- Is it possible/acceptable for the head of agency to call on an external investigator or expert to undertake the investigation? This is recommended where the agency determines that it does not have the expertise to satisfactorily conduct all elements of a particular investigation and/or where there is a conflict of interest.
- Can the agency enter into a cooperative arrangement with other agencies so that when an investigator is required, one can be chosen from a ‘pool’ of investigators from one of the other agencies party to the arrangement.

Assessing conflict of interest

- What is the nature of the conflict? Does the investigator have a personal, financial or other type of relationship with the person(s) against whom the allegation has been made?
- How significant is the relationship/interest? For example, is the relationship one of simple acquaintance, or that the investigator has worked with the person being investigated, or is it the ‘conflict’ based on something more likely to give rise to personal feelings?
- How serious is the alleged abuse being investigated? The more serious the allegation, the more important it is that there is no actual or perceived conflict of interest. In less ‘serious’ investigations, or those involving complaints about policies and procedures it is less vital that the investigator has no conflict of interest.
- Would the investigator or anyone associated with them personally benefit from a particular investigation finding?
- How is the conflict of interest likely to impact upon the investigation and outcome?
- How likely is it that the person with the conflict of interest will be, or might appear to be, influenced in their role?
- Does the investigator hold any personal or professional biases which may lead to the conclusion they are not an appropriate person to investigate the matter?
- Does the investigator believe they can remain impartial?
- Has the investigator and/or any person deciding the matter previously demonstrated their ability to deal with situations involving conflict?
- Is the investigator aware of the potential for conflict? Did they volunteer information/acknowledge the conflict?
- What are the views of the alleged victim/family/complainant? Do they object to the proposed investigator?
- Is it possible to have the roles of investigator and decision maker performed by separate people? (NB: This should be the case wherever possible).
- Is the allegation about the head of the agency? What steps have been taken to address this?
Risk management following an allegation of child abuse against an employee

This fact sheet is intended to provide an overview of risk management issues in relation to allegations of child abuse against employees. It is not comprehensive and agencies should seek advice when in doubt about any of these issues.

What is risk management in child-related employment?

Risk management means identifying the potential for an incident or accident to occur and taking steps to reduce the likelihood or severity of its occurrence. Employers need to assess the inherent risks in their agency to children* for whom they have responsibility.

All employment situations do not carry the same risks; nor do all employees. Neither will all children have the same vulnerability. Recognising and acknowledging that the risk of child abuse is present in any child-related employment situation is the first critical step towards effective risk management. Child-related agencies should therefore have a risk management plan in place which includes procedures to prevent child abuse occurring in the workplace as well as procedures for responding to incidents or allegations of child abuse against an employee.

* The use of the words child(ren) includes young people.

Initial risk assessment

One of the first steps following an allegation of child abuse against an employee is to conduct a risk assessment. The purpose of undertaking a risk assessment when an allegation is made is to identify and minimise the risks to:

- the child(ren) who are alleged to have been abused by an employee
- the other children with whom the employee may have contact
- the employee against whom an allegation of child abuse has been made
- the employing agency
- the proper investigation of the allegation.

When taking action to address the identified risks, the agency must take into consideration both the needs of the child who is alleged to have been abused and the employee against whom the allegation is made.
Dealing with employees

Does the agency’s child protection policy and code of conduct state that anything should happen to an employee immediately following an allegation of child abuse against them? For example:

- Should the employee remain in their current position, be moved to another area or be suspended?
- If the employee remains in the workplace, what duties should he/she undertake and who will monitor and assess the risk of continued access of the employee to children in the care of the agency. Factors to be considered include:
  - nature and seriousness of the allegation
  - vulnerability of children e.g. age of child, verbal skills, disability etc
  - nature of the position occupied by the employee e.g. level of interaction with children
  - level of supervision of the employee.
- The disciplinary history, safety of the employee and risk to the investigation may also be factors to consider when deciding to leave the employee in position while the investigation is conducted.

Agencies need to include in their child protection policy that a decision to take action on the basis of a risk assessment, following an allegation of child abuse against an employee, has no relevance to the findings of the matter. Until the investigation is completed and a finding made, such action is not to be considered as an indication that the employee did abuse the child(ren). The action taken by the agency is in recognition of the serious potential consequences of the child abuse allegation (whether or not it is proven) and is seeking to manage the risk.

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Protecting children

The immediate response to an allegation should be one that protects the child or other children from further potential abuse or victimisation. Consideration therefore needs to be given to the following issues:

- Is the child ‘at risk of harm’? If so, a report to the Helpline (Department of Community Services) needs to be made and advice received about what action (if any) they intend to take and when, regarding the child and the employee.
- What steps need to be taken to prevent further abuse?
- Where possible the child’s daily circumstances should remain unchanged. Exceptions might be where the child is considered to be at risk of victimisation by peers or staff as a result of the allegations or because the alleged abuse has occurred in out of home care, for example, in foster care.

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- What steps need to be taken to prevent further abuse?
- Where possible the child’s daily circumstances should remain unchanged. Exceptions might be where the child is considered to be at risk of victimisation by peers or staff as a result of the allegations or because the alleged abuse has occurred in out of home care, for example, in foster care.
Ongoing risk management

During the investigation period it is important to manage any risks that arise and to review the risk management plan in the light of new information which emerges during this process. It is important that employers also ensure that adequate/necessary support is being provided for:

• the child(ren) who it was alleged had been abused by an employee
• the employee who has had an allegation of child abuse made against him/her
• other relevant parties:
  – this may include parents/carers of the child as well as other children or employees affected by the allegation for example, a witness to the alleged abuse

Risk management at the conclusion of the investigation

At the completion of the investigation a finding is made in relation to the allegation. A review of the investigation should then be conducted to ensure that all relevant ‘risk’ issues have been considered. This information will provide the employer with an opportunity to put in place measures to minimise any further risk of harm to children in its care. Such measures may include:

• training for one or more employees
• changing work practices in certain situations
• changes to the physical environment
• reviewing the child protection policy.

Other issues to consider

Confidentiality

An agency’s child protection policy should highlight the importance of confidentiality following an allegation of child abuse against an employee. It particularly needs to highlight:

• the importance of all parties maintaining confidentiality during the investigation
• the risk that breaches of confidentiality pose to the investigation process and to the privacy of all parties
• what action will be taken if there is a breach of confidentiality
• that breaches need to be reported to the ‘head of agency’ and the systems that are in place to deal with such breaches
• how to respond to the media if they become aware of a child abuse allegation against an employee.

Recording information

It is important to record the reasons why you decided to take, or not take any action as a result of your risk assessment and management of the allegation of child abuse against an employee (for more information about recording information please refer to our child protection fact sheet No 2 ‘Keeping records’).

Conflict of interest

A conflict of interest, or the perception of such, if not properly dealt with in an investigation of a child abuse allegation, can compromise that investigation and adversely affect all parties. If potential or actual conflict of interest is identified it is important to develop strategies to address this (for more information about conflict of interest please refer to our child protection fact sheet No 7 ‘Recognising and managing conflict of interest’).
If you have any queries or comments, we are here to assist you. Call our child protection team on the numbers provided.

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Annexure H: Investigation case study

Here is a case study involving conduct which requires investigation

You are the corporate services manager, and the Nominated Disclosure Officer, for a government agency and you are responsible for approving major equipment purchases for the agency’s four work locations.

Jay, an administrative officer, approaches you in confidence to make a protected disclosure about Rowan, the agency’s operations manager.

Jay says Rowan recently favoured a consultant when purchasing technical equipment for the agency. Jay alleges that Rowan wrote the tender specifications so narrowly that only one supplier could meet the agency’s needs. The supplier was an engineering consultant who was used regularly by Rowan to provide engineering services and who had recently set up business as an equipment supplier. Rowan chaired the selection panel and recommended that the former consultant’s bid be accepted. Jay has recently seen a confidential fax message sent by the consultant to Rowan and suspects Rowan now has a personal interest in the consultant’s business.

As the delegate who approved the contract, you are concerned. You are also aware of rumours that Rowan and Jay have had a falling out over a private matter. Jay also has a reputation for bearing grudges against fellow workers.

You think the matter is a protected disclosure and you plan to investigate Jay’s allegations in accordance with the agency’s internal reporting system.

Drawing up terms of reference and an investigation plan

Before drawing up your terms of reference and investigation plan, you will need to particularise the allegations ie:

Particulars of the allegation:

• That Rowan wrote the tender specifications so narrowly that only one supplier could meet the agency’s needs.
• That Rowan has a personal interest in the consultant’s business.

An investigation plan

Once drawn up, an investigation plan is not set in stone. As an investigator you should remain flexible and regularly revise the plan in light of any new evidence and/or situations which emerge during the investigation.

Also, remember that your investigation plan should follow the facts, don’t make the facts fit into your pre-determined plan.

Your investigation plan for the allegations in the case study should look something like the table over the page.
<table>
<thead>
<tr>
<th>Allegation/ conduct</th>
<th>Issues for inquiry</th>
<th>Benchmarks/Criteria</th>
<th>Proofs/facts in issue</th>
<th>Tasks/avenues of inquiry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allegation 1:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>That the tender</td>
<td>Whether the tender</td>
<td>Breach of in-house</td>
<td>That Rowan had a hand</td>
<td>Get the file — this may not tell you who wrote the specifications but you will see the specifications and if necessary, interview other staff to find out who wrote specifications</td>
</tr>
<tr>
<td>specifications were</td>
<td>specifications were</td>
<td>or other public sector</td>
<td>in drawing up the</td>
<td>Obtain all relevant tendering guidelines and check for conformity</td>
</tr>
<tr>
<td>narrow</td>
<td>intentionally drafted</td>
<td>tendering guidelines</td>
<td>specifications</td>
<td>Get an independent expert to look at the specifications to see whether they are too narrow</td>
</tr>
<tr>
<td></td>
<td>narrowly by Rowan</td>
<td>(ie maladministration)</td>
<td>That the</td>
<td>Interview Rowan about his role in developing the specifications</td>
</tr>
<tr>
<td></td>
<td>for an improper purpose</td>
<td></td>
<td>specifications are</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>unnecessarily narrow</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>That Rowan drew the</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>specifications so</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>narrowly that only the</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>successful tenderer</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>could win the tender</td>
<td></td>
</tr>
</tbody>
</table>

| Allegation 2:       |                    |                     |                       |                         |
| That Rowan has a    | Whether Rowan chaired | Breach of in-house  | That Rowan has some   | Find out about the successful tenderer and the shareholders — presumably some information is on file (get the fax that Jay referred to), if not you may have to search publicly available company records |
| personal interest   | a selection panel    | or other public service | personal interest in  | Review previous contact between agency and tenderer and Rowan and tenderer |
| in the successful    | that recommended     | tendering guidelines | the successful        | The successful tenderer was formerly a consultant to the agency — search agency records for information about the consultant, interview other staff |
| tenderer             | acceptance of the   |                       | tenderer              | Interview relevant staff who might be aware of any benefit that Rowan may have obtained |
|                     | successful tenderer  |                       |                       | If you can establish the personal connection between Rowan and the successful tenderer, put this to Rowan in an interview, together with all other evidence |
|                     |                    |                       |                       |                         |
|                     |                    |                       |                       |                         |
Annexure I: Procedures relating to conduct and performance under the Public Sector Employment and Management Act 2002

The Public Sector Employment and Management Act 2002 (PSEM Act) (at Part 2.7, ss.40 - 53), and procedural guidelines made under that Act, set out the provisions for dealing with:

- unsatisfactory performance
- misconduct
- serious criminal offences.

The statutory provisions relating to conduct and performance commenced on 16 June 2003 and apply to staff in departments, other than chief executives.

The commentary and guidelines on the management of conduct and performance are available in html and PDF formats on the Premier’s Department website at www.premiers.nsw.gov.au. They are in Publications under Performance, Conduct and Ethics. The clauses referred to in the tables below, setting out steps for dealing with unsatisfactory performance, misconduct and serious offences, are in the following guidelines:

- Unsatisfactory Performance – Appendix 9-2
- Misconduct – Appendix 9-1
- Serious Criminal Offences – Appendix 9-3

### Unsatisfactory performance

The Act and procedural guidelines made under it contain six separate steps for dealing with unsatisfactory performance.

**Steps for dealing with unsatisfactory performance**

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1</td>
<td>Where concerns are raised about performance, management may intervene through informal counselling (cl.7).</td>
</tr>
<tr>
<td>Step 2</td>
<td>If performance remains unsatisfactory, then the department head becomes involved and the officer may be formally counselled (cl.8 and s.47(1)).</td>
</tr>
<tr>
<td>Step 3</td>
<td>Following formal counselling remedial action may be taken and reviewed (cl.9 and s.47(2)).</td>
</tr>
<tr>
<td>Step 4</td>
<td>If performance remains unsatisfactory, consideration can be given to disciplinary action or further remedial action (cl.10 and s.47(3)). If disciplinary action is to be taken, the officer is to be given an opportunity to respond within 14 days.</td>
</tr>
<tr>
<td>Step 5</td>
<td>If, after considering the officer’s response, the department head decides to take disciplinary action, the officer must be given an opportunity to make a submission within 14 days in relation to the disciplinary action being considered (cl.11 and s.47(4)).</td>
</tr>
<tr>
<td>Step 6</td>
<td>Implementation of final decision which may be to take disciplinary action, remedial action or no action (cl.12 and s.47(3)).</td>
</tr>
</tbody>
</table>

In summary:

- The officer concerned must be given a reasonable opportunity to improve his or her performance. If informal counselling is not successful, the department head may decide that the officer should be formally counselled and that other remedial action should be taken such as a performance improvement plan.
- If performance remains unsatisfactory after a reasonable opportunity has been given to the officer to improve, the department head may impose a disciplinary penalty. This is a separate process to that laid down for dealing with misconduct (see below).
**Investigating complaints**

- The officer concerned is to be given an opportunity to be heard in relation to both the opinion about continuing unsatisfactory performance and, if applicable, any disciplinary penalty being considered.
- After any submissions or representations have been considered, the department head is to decide what final action should be taken ie disciplinary action, remedial action or no action at all.

**Misconduct**

The Act and procedural guidelines made under it contain eight steps for dealing with misconduct.

**Steps for dealing with misconduct**

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1</td>
<td>Where an allegation of misconduct is made, the department head decides whether to treat the allegation as a disciplinary matter or otherwise (cl.10 and s.46(1)).</td>
</tr>
<tr>
<td>Step 2</td>
<td>If it is decided to treat the allegation as a disciplinary matter, a person is appointed to conduct an investigation (cl.11).</td>
</tr>
<tr>
<td>Step 3</td>
<td>During the course of the investigation, the officer is given an opportunity to respond to the allegations (cl.11.6.3).</td>
</tr>
<tr>
<td>Step 4</td>
<td>The report on the investigation is given to the department head. The report must include the investigator’s view on whether the officer has engaged in the alleged conduct (cl.11.11).</td>
</tr>
<tr>
<td>Step 5</td>
<td>The department head decides whether, in his/her opinion, the officer has engaged in misconduct (cl.12 and s.45(2)).</td>
</tr>
<tr>
<td>Step 6</td>
<td>The department head determines whether to take disciplinary action or otherwise (cl.13).</td>
</tr>
<tr>
<td>Step 7</td>
<td>Where the department head decides to take disciplinary action, the officer is advised of that opinion and the disciplinary action being considered, and given an opportunity to make a submission (cl.13.1 and s.46(3)).</td>
</tr>
<tr>
<td>Step 8</td>
<td>The department head makes a final decision which may be to take disciplinary action, remedial action or no action (cl.14 and s.46(2)).</td>
</tr>
</tbody>
</table>

In summary:

- Misconduct may relate to an incident or conduct that occurred while an officer was not on duty, or before the officer was appointed to his or her position.
- If an allegation of misconduct is to be treated as a disciplinary matter, a person is to be appointed to conduct a fact-finding investigation. During the investigation, the officer is to be provided with the details of the allegation and given a chance to respond.
- After considering the investigation report, the department head is to decide whether, in his/ her opinion, the officer has engaged in misconduct. If the department head decides to continue down the discipline path, the officer is to be given the opportunity to make a submission and request an interview in relation to the disciplinary penalty being considered and on matters to that stage.
- After any such submission or representations have been considered, the department head is to decide what final action should be taken ie disciplinary, remedial or no action at all.
Serious criminal offences

The Act, the Regulation and procedural guidelines made under the Act contain various steps for dealing with serious criminal offences.

Steps for dealing with serious criminal offences

| Step 1 | If advice is received of a criminal charge against an officer (cl.100A of the Regulation), confirmation must be obtained as to whether it is a serious offence. If so, the proceedings must be monitored (see matters for consideration in cls.5-7). |
| Step 2 | If the officer is convicted (which includes a guilty finding where no conviction is recorded), the department head is to consider whether to take disciplinary action, remedial action or no action (cls.7-10 and s.48). If the officer is found not guilty, the department head may still decide to deal with the matter as an allegation of misconduct (cl.13). |
| Step 3 | If the department head decides disciplinary action is appropriate, the officer must be notified of that opinion and given an opportunity to make a submission in relation to the disciplinary action being considered (cl.11.2 and s.48(2)). |
| Step 4 | The department head makes a final decision, which may be to take disciplinary action, remedial action or no action (cl.12). |

In summary:
- Convictions for a serious offence (ie an offence that may be punishable by 12 months or more imprisonment) include guilty findings where no conviction is recorded.
- Where an officer is convicted of a serious criminal offence, the officer’s department head may also impose a disciplinary penalty where the conviction has a direct or relevant connection with the officer’s position and duties.
- The officer concerned is to be given an opportunity to be heard before any such disciplinary penalty is imposed.
- After any submissions or representations have been considered, the department head is to decide what action should be taken ie, disciplinary action, remedial action or no action.
Annexure J: Disciplinary procedures in councils

Responsibility for directing and dismissing staff resides with the general manager (Local Government Act 1993, s.335). However, the general manager may delegate any of his or her functions to any person or body, including another employee of the council (s.378).

Disciplinary procedures for local government employees are covered by the Local Government (State) Award 2001, clause 28. There are no guidelines or procedures to supplement the Local Government (State) Award 2001 for breaches or discipline by council employees. However, specific council based awards currently apply to Sydney, South Sydney, Newcastle and Wollongong Councils and the County of Yancawinna and these awards include disciplinary procedures which apply in those councils.

Under the Local Government (State) Award 2001, where an employee’s work performance or conduct is considered unsatisfactory the employee must be informed by his or her immediate supervisor, or other appropriate officer of the council, of the nature of the unsatisfactory performance or conduct and of the required standard to be achieved. If there is reoccurrence of unsatisfactory work performance or conduct, the employee must be warned formally in writing by the appropriate officer of council and counselled. If the employee’s unsatisfactory work performance continues or resumes following the formal warning and counselling, the employee must be given a final warning in writing giving notice of disciplinary action should the unsatisfactory work performance or conduct not cease immediately.

Disciplinary action can include warnings, demotions, suspension without pay for a period of time or termination.

At all times during the disciplinary process an employee:
- has access to his or her personal files and may take notes and/or obtain copies of the contents of the file
- is entitled to sight, note and respond to any information placed on his or her personal file which might be regarded as adverse
- is entitled to make application to delete or amend any disciplinary or other record mentioned on his or her personal file which he or she believes is incorrect, out-of-date, incomplete or misleading
- is entitled to request the presence of a union representative or the involvement of his or her union at any stage
- is entitled to make application for accrued leave for whole or part of any suspension during the investigation process.

A council’s rights during the disciplinary process are:
- to suspend an employee with or without pay during the investigation, provided that the conditions specified in the Local Government (State) Award 2001 are satisfied
- to take other disciplinary action before or during disciplinary procedures, in cases of misconduct or where the employee’s performance warrants such action
- in appropriate circumstances, to terminate an employee’s services
- to request the presence of a union representative at any stage.

A council has a corresponding obligation to properly conduct and speedily conclude an investigation into the alleged unsatisfactory work performance or conduct.

The Industrial Commission of NSW and the Australian Industrial Relations Commission have the right to interpose themselves upon application and review any disciplinary action of a council against an employee. Both tribunals apply the principles of procedural fairness in determining whether they will intervene in any disciplinary matter.
However, procedural fairness is only one of several factors that may be considered. In determining a claim, NSW Industrial Tribunals will consider:

‘...whether a reason for the dismissal was given, ... if any such reason was given ... its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment, and ... such other matters as the Commission considers relevant.’ (Industrial Relations Act 1996, Chapter 2 Part 6)

In some cases, such as summary dismissal for misconduct (or serious and wilful misconduct), the facts of the dismissal will overcome any procedural deficiencies.

Senior staff whose position requires the performance of engineering duties (as defined) are covered by a specific federal award, the Local Government Engineers Senior Staff (NSW) Award 1999. Senior staff who meet this definition have access to the unfair dismissal provisions of the federal Workplace Relations Act.

The general manager and other ‘senior staff’ nominated as such under s.332 of the Local Government Act are employed under performance-based contracts. The Local Government Act makes it clear that the employment of the general manager or other nominated senior staff on any matter, question, or dispute relating to any such employment is not an industrial matter for the purposes of the Industrial Relations Act 1996. Termination of such contracts can be with or without notice, depending on the circumstances and on the provisions of the contract. Although disciplinary procedures in relation to senior staff are a contractual matter, a council must still follow the principles of procedural fairness.

Other positions of a senior nature but not nominated as ‘senior staff’ under the Act by the Council are also covered by the provisions of the Award, even if employed on the basis of a contract.
Annexure K: Essential elements of a discipline scheme

Essential elements of a discipline scheme

In many circumstances a risk management approach will be the preferred approach for dealing with allegations of misconduct. For those circumstances in which it is felt that a disciplinary system is appropriate or necessary, care should be taken to ensure it incorporates the following elements.

Authorisation

Provisions for the authorisation of persons to be responsible for:
- instituting disciplinary action
- carrying out disciplinary inquiries/investigations, and
- imposing any appropriate penalty.

Powers

Provision of necessary powers to conduct a disciplinary inquiry/investigation, within the scope of the legal powers available to the agency itself. For example the authority to ask staff members to attend an interview and to answer questions, and the authority to access relevant records.

Breaches of discipline

A list of the types of conduct that may result in the institution of disciplinary action, eg:
- contravention of the enabling legislation or charter for the agency
- engaging in any misconduct
- breaching provisions of a code of conduct
- consuming or using alcohol or drugs to excess
- intentionally disobeying or intentionally disregarding any lawful orders made or given by a person having authority to do so
- negligence, carelessness, inefficiency or incompetence in the discharge of duties
- engaging in disgraceful or improper conduct
- taking detrimental action against a whistleblower, or
- conviction for a serious offence.

Charges/notifications

Procedures for notifying the individual that disciplinary action has been instituted arising out of an alleged breach of discipline.

Suspension

Provisions for the suspension of employees the subject of disciplinary action during the course of such action where it is inappropriate for the person to remain at work during the investigation.
Natural justice/procedural fairness

Procedures for ensuring that persons the subject of disciplinary action are given procedural fairness, eg:

- giving the person an opportunity to make written representations or oral representations on the matter(s) the subject of a disciplinary inquiry/investigation
- allowing the person to be represented by another if it appears that the person is not able to speak effectively on his or her own behalf
- giving the person an opportunity to comment on the substance of any adverse comment proposed to be made, and
- giving the person a copy of the final report if any adverse finding is made and/or detrimental action proposed.

Confidentiality

Prohibiting those responsible for implementing disciplinary action from disclosing confidential information obtained during the disciplinary action except for the purpose of the action or any proceedings arising from it.

Reports

Provisions requiring the production of reports by those responsible for a disciplinary inquiry/investigation which set out:

- at least brief facts on which the person who conducted the inquiry/investigation relies in reaching the conclusions set out in the report
- conclusions, and
- recommendations for further action.

Punishments and management action

A list of the types of penalties that can be imposed on or management action taken in relation to employees by the agency.
Annexure L: Interviewing children – some basic guidelines

Proviso

Interviewing children is a highly complicated subject and, when done properly, is a discipline all in itself. An investigator, or a person performing an investigative role, may be proficient at interviewing adults and obtaining information, but may be unable to glean even basic material from a child. In fact, it is far harder to effectively interview a child than it is an adult.

It takes in-depth specialised training and many years of professional experience in order to become an expert at interviewing children.

The following precis is only a guide to assist people who find themselves having to interview a child for whatever situational reason.

Investigators who are not trained properly to interview children should only do so:
• as a last resort, or
• if there is some urgency in obtaining information from a child, or
• if the agency concerned is responsible for investigating the allegation (ie it is not a matter that can be or has been referred to the police or the Department of Community Services for investigation, or these agencies have declined to act on the matter) and no better trained or experienced person is available.

The material in this guide is primarily aimed at interviewing children who have been subjected to some form of abuse. However, the underlying principles relating to how to interview children hold true regardless of the context.

If investigators can find a qualified and experienced person to interview the child in question, they should do so.

Sources: The Interpol Standing Working Party on Offences against Minors and The NSW Department of Community Services

The ‘do’ and ‘don’t’ checklist

Do:
• learn the relevant background first
• respect the rights of the child
• build a rapport with the child first
• brief the child on the purpose of the interview
• understand the developmental stage of the child
• talk to the child in appropriate language
• ask simple and clear questions
• limit the number of people present during the interview
• allow the child a support person where appropriate
• thank the child at the end of the interview
• interview a child when information is urgently needed
• minimise distractions and interruptions.
Don’t:
• ask leading questions
• touch the child
• intimidate the child
• make the child feel bad about what they’re disclosing
• ask more than one question at a time
• interview a child on more occasions than is absolutely necessary
• interview a child when someone more qualified is available to do so.

Introduction

Interviewing a child is one of the most difficult interviews that an investigator will undertake. It is important that, whenever possible, only trained and experienced investigators interview children. The principal bodies responsible for the investigation of allegations of abuse against children in NSW are the police and the Department of Community Services (DoCS). There are occasions however, particularly in disciplinary matters, where an investigator, or a person performing an investigative role, may have to interview a child. It is for those occasions that this guide has been prepared.

It is also possible that a person investigating a disciplinary matter will find themselves having to obtain information from a child after other authorities, such as the police or DoCS, have interviewed the child. This may be where an investigation by such an authority has been concluded with no criminal or welfare action being taken, but disciplinary enquiries still need to be attended to. In such cases it is highly preferable that an investigator tries to obtain copies of the child’s interview with the other investigative authority and to glean the required information from those sources, rather than seeking to interview the child again and possibly cause further trauma. Such other investigative bodies will usually release a copy of a child’s interview to the child’s parents or guardians.

If in doubt about whether or not to interview a child, seek the advice of an investigative body such as the NSW Police Service Child Protection Squad (CPS) or a Community Services Centre of DoCS.

Remember that where an interview reveals some form of child abuse, ensure that DoCS and the police are notified. An interview that reveals serious child abuse should be terminated as soon as practicable and a qualified person brought in to continue obtaining information.

There are no easy guidelines for investigators on how to conduct an interview with a child. Ideally, interviewers should be trained and experienced in interviewing children. This guide is not exhaustive and is only intended to provide a broad overview of some of the principles involved in interviewing children.

Part 1: Preparing for the interview

Investigators should be clear about the purpose of the interview and should make themselves familiar with the fundamental interviewing stages outlined elsewhere in this chapter. Ideally, they should have a good understanding of the issues surrounding interviewing children. Particular attention should be placed on the items listed below.

Contingency plans

From the outset an investigator should have predetermined plans to deal with possible contingencies that may arise. When interviewing children, this is particularly relevant in respect to an interview becoming something other than it first appears. For instance, where an interview appears initially to involve only relatively minor physical abuse of the child, but then there is a sudden disclosure of serious sexual abuse. The interviewer should be in a position to be able to deal immediately with the change in circumstances.
Investigating complaints

Developmental stages of children

It is obviously important for the investigator who wishes to obtain information from a child to take into account the different stages of childhood and to select the style of interview, interviewer, and method of recording, most appropriate to the chronological and developmental age of the child. To assist in this determination Attachment A contains a list of some indicators of the developmental stages of children and how they relate to questioning.

Ability of children to recall events and convey information

Depending on their physical and intellectual capacity, children may not be able to convey recollections, inner feelings and thoughts satisfactorily in a verbal manner. The type of questions asked and the ability of the interviewer will assist the child to give their account of what happened.

Children’s names for parts of their bodies, and particularly the genitalia, are often very private, idiosyncratic and ambiguous. For example, the child may use the word ‘bottom’ to describe all the area between the legs. It must also be remembered that a child’s concepts of in/out, up/down, front/back, on top/underneath, on/off etc. should not be taken for granted and must be clarified.

Aids to the interview

With younger children the trained interviewer may wish to provide drawing materials, telephones, a doll’s house including furniture and occupants, a few cars, soft toys or puppets to help children express their feelings and memories of what happened to them. It is important to note, however, that it is recommended that the use of such aids be undertaken only by properly trained and experienced investigators.

Concentration span

Children have a much shorter concentration span than adults. This is important with regard to the length of interviews. Frequent breaks may assist some children.

The importance of interviews as a source of information

Since many alleged incidents, especially in the field of sexual assault, have no impartial witnesses and leave no traces, the main method of investigation will be by way of interview. In the majority of cases the first and foremost reason for children to be interviewed will be to establish what happened (who, how, when, what, where, why).

The right of children not to make a statement

A child, like an adult, has the right to opinions and understanding of circumstances and events. Children have the same rights as adults with regard to making a statement and either they, or their parent or guardian on their behalf, may refuse to participate in an interview.

Background briefing

As with adults each child is an individual person, with a personality that has been formed by environment, social standing and upbringing. Before interviewing a child it is important for investigators to find out as much information as possible regarding:

• the child’s state of mind
• the child’s physical condition
• the child’s age and developmental stage
• the child’s communication skills
• any learning difficulties
• medical and social history
• sexual understanding and vocabulary used
• the child’s first language and the possible need for an interpreter or the selection of an interviewer speaking the language
• any hearing or speaking difficulties which may require the presence of a person skilled in the sign language used by the child or picture cards developed for interviewing children with a developmental handicap.

Rapport building

The interviewer must develop a good rapport with the child. The more comfortable a child feels with the interviewer, the more likely that child is to disclose details of the alleged incident. Where the child is not comfortable, he or she becomes reticent and the interviewer runs the risk of not obtaining important information.

Rapport building can be done while talking with the child about favourite subjects, playing with the child or indeed, rapport building can be incorporated into the body of the interview. This is done while the interviewer obtains information on the child’s understanding of pronouns and prepositions, concepts, and discusses truth and lies. Whatever way the interviewer chooses to build rapport, it should be done in a planned way and with the result that the child feels comfortable with talking to the interviewer.

Briefing children

It is extremely important that the nature of the interview is discussed with the child before the interview. The roles of the people present in the interview should be discussed. Children should be made aware that they have done nothing wrong (unless inappropriate), that they have nothing to fear about the interview and that they will be treated fairly.

Venue and facilities

It is important for investigators to locate appropriate neutral and child-friendly premises that can be used for interviewing children. These premises may be located in police, hospital, education or social service buildings for example. The child should not be interviewed in the place where the allegation was said to have taken place. Ideally, special child interview suites greatly assist the child in making him or her comfortable and at ease with the interview process. Where special premises are not available it is important that the interview is conducted in appropriate neutral surroundings, with few or no distractions, where there will not be disturbance from traffic noise, telephones ringing and people entering the room.

Recording facilities and equipment

Ideally, depending on the purpose and duration of an interview, video recordings of correctly conducted interviews can be of considerable value. They provide a clear record of the child’s own account, showing his or her demeanour at the time of the interview. They can be particularly useful with younger children where the interview may have included the use of dolls, toys or drawings to explain the nature of the incident. For this reason video recording is preferable to audio tape recording.

Where video facilities are not available, the interview with the child should be recorded at the time of the interview. The record of the interview should accurately reflect the exact words used by both the interviewer and the child. Paraphrasing of a child’s statement is not sufficient as interviewers run the risk of placing their own interpretation on the words used.
Investigating complaints

The interviewer

Worldwide there are many variations about who conducts interviews of children the subject of allegations. One common point however, is that whoever the interviewer may be, that person must be trained and experienced in the interviewing of children. In matters where the child is to be interviewed by agency officials of the same agency as the accused person, great care should be taken to ensure there are no conflicts of interests.

The lead interviewer

If it is decided that two interviewers are to be used it is important that, during the pre-interview rapport building session with the child, they evaluate which of them will be best suited to lead the questioning in the subsequent interview.

The conduct of the interviewer

Interviewers of children must consider their own role carefully. Children tend to react strongly to the atmosphere around them during an interview session. Throughout interview sessions interviewers must maintain a professionally neutral distance from their own feelings and never show children that they are angry or feel sorry for them.

Persons to be present at the interview – the accompanying adult

In order not to intimidate and distract the child it is important to limit the number of people present. However, especially with small children, it is recommended that a supportive adult is also present to comfort and reassure the child. Ideally this would be the child’s parent or close family member. Particular care should be taken with respect to cultural issues when deciding who should be present.

The supporting adult will need some briefing from the investigating team regarding the nature of the interview and their precise role. This will enable them to explain the purpose and method of the interview to the child. The interviewer will also need to explain that the supporting adult will not be permitted to question the child during the interview.

The supportive adult present during the interview should accompany the child to and from the interview premises. Interviewers should never touch the children, not even with a comforting pat on the head or shoulder. Such reassurance should be left to the chosen accompanying adult. This adult should be someone whom the child knows and trusts.

It should be noted that in some situations it could be inappropriate for the accompanying adult to be one of the child’s parents or guardians. Such situations could be where a parent or guardian is alleged to have, or is suspected of having, abused the child or there are reasons, such as adolescence, that would inhibit the child from talking openly in front of a parent.

It must be further stressed that it is also inappropriate, where one parent or guardian is suspected of abuse against the child, to have the other parent or guardian present as the accompanying adult. This is because the child is likely to be unduly influenced by the presence of an adult who is inherently connected to the alleged abuser.

It must also be highlighted that in certain circumstances a child has a legal right to have an independent adult present during questioning. This is particularly applicable where the child themselves is suspected of a possibly criminal matter.
Part 2: The interview

The structure of the interview

The purpose of the interview is to discover what happened. The interviewer must approach the interview with an open mind. The quality of the interview will depend largely on the skills of the interviewer. It is important for the interviewer to listen.

Conducting an interview with a child is demanding and requires careful preparation. An interviewer will usually prepare a plan for the interview. A suggested outline plan for an interview is:

- an introductory phase
- rapport building
- concepts
- raising the allegation
- collecting detail
- finishing.

In the introductory phase, investigators should review the reasons for the interview and remind the child of the importance of being honest in his/her explanations. They should also explain to the child that he/she has the right not to talk to them, and also to say ‘I don’t know,’ ‘I don’t remember,’ or ‘I don’t understand.’

The interviewer should explore the issues surrounding the child’s understanding of truth and lies. The child must agree to tell the truth. If the child cannot differentiate between truth and lies, the information he or she is able to supply may still be useful in ensuring the safety of the child. The fact that the difference is not understood does not preclude such a child from being interviewed.

Concepts raise such issues as colours, numbers, pronouns and prepositions, understanding of the truth and lies, make believe and promises.

Listening to children

With children it is important to be patient and not to interrupt, even if they seem to take long pauses. It is vital to let children proceed in their own way, at their own pace and by using their own phrases.

It is common for children to ‘test out’ the interviewer by initially only relating certain information which may in fact have nothing to do with what the child wants to disclose, and will disclose, when they are comfortable with the interviewing adult. It is entirely possible, therefore, for an interview to begin as totally innocuous, and remain that way for some time, and then suddenly involve the most serious of disclosures, once the child is at ease to talk. Sometimes this may also be a manifestation of avoidance of disclosure by the child.

Interviewers must attempt to listen in a different way and try to put themselves in the child’s situation and pursue the child’s way of thinking.

The style of questioning to be used

The interviewer must take care with the formulation of questions. Those beginning with ‘why?’ can contribute to children’s feelings of guilt or shame, and indeed the child may not know the reason why.

A question should not be repeated straight away as the child may feel that this is a criticism of their previous answer. It may be useful to repeat the answer the child gave in order to reinforce the fact that what was said was understood.
If a question is repeated several times this will often lead to children giving an answer contrary to their immediate conception, changing the answer to what they think the interviewer wishes to hear.

A child should never be asked more than one question at a time. The interviewer should ensure that the questions are simple and do not involve confusing forms of language.

Once an interviewer starts questioning a child, careful consideration will need to be given on how to do so without the use of leading questions (i.e., questions where the child is offered no alternative but to answer ‘yes’, ‘no’, or which suggest an answer).

Bearing in mind that the purpose of the interview is to find out what happened, direct and sometimes leading questions may have to be asked. The interviewer should weigh up the interests of the child’s safety against the use of the interview in a court or similar tribunal.

A guide to leading questions, their use and abuse and suggestions for change are included at Attachment B.

If possible interviewers should leave any use of direct questions to the end of the interview. If a child seems unwilling to answer, or seems forgetful, the interviewer may try to get the child to talk using a more open question such as:

‘Are there some things that you don’t like to talk about?’ or ‘Are there some things that you would rather talk about?’

rather than asking questions such as ‘Tell me about…’

Once again it is important for the interviewer not to interrupt children when they are relating something even if it does not make immediate sense, or seems to be a repetition of something already mentioned. Children should be allowed to finish their explanations, then the interviewer can seek clarification by reflections, using the same words that the child used.

Establishing dates and times

When the interview has reached a point where it is necessary to ask for more details regarding a given explanation, e.g., the date of a certain event, it may be productive to relate to events which have more relevance for children, than to relate to actual dates and named days of the week. Often children have no concept of time as such whereas highlights such as Christmas, birthdays, school holidays, outings and other breaks in the daily routine will be more likely to be remembered. Likewise with times of the day, incidents may be better remembered as before or after meal times, television programs, school or bedtime.

Explanations

With other issues, such as where the interviewer cannot understand what a child is explaining, or where a child cannot understand the interviewer’s question, it may prove fruitful for the interviewer to ask the child to make a drawing or to demonstrate by way of pointing.

It is not always possible for a child to put his or her thoughts into words.
Part 3: Terminating the interview

When interviewers decide to terminate an interview they should:

• leave sufficient time to check with children that they have correctly understood anything which has been explained
• review what the child has said
• explore child’s expectations of interview outcome
• anticipate retraction pressures
• answer any questions the child may have
• explain what will happen next
• arrange next contact with child and give them your name and telephone number
• thank the child
• help the child re-enter the day-to-day world.

Interviewers should not let children leave an interview feeling that they have failed or not been believed.

It is important to ask children if there is anything more that they wish to say, or if there are any questions which they wish to ask the interviewer. Interviewers must remember to thank children for their time and effort.

Attachment A

Developmental stages – Interviewing children

To ensure a successful interview the interviewer must plan and prepare for the interview, and use child-centred interviewing techniques such as responding to the child’s needs and avoiding interrogation of the child. When conducting interviews with children the interviewer needs to take account of, and direct their approach to:

• the child’s level of comprehension and language skills
• the developmental level or stage the child is at currently, and
• the child’s background, gender and any special needs.

The primary purpose of the interview will be to discover the ‘what, who, where, and when’ of events. The following gives an indication of what can generally be expected when interviewing children of different ages. These are only a guide and can be affected by a wide range of other factors such as the level of the child’s distress and the amount of support provided to the child.

‘What’

<table>
<thead>
<tr>
<th>Developmental age</th>
<th>Notes to interviewer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2–3</td>
<td>• ask the same questions several times to ensure consistency</td>
</tr>
<tr>
<td></td>
<td>• expect child to answer with 1-3 word sentences</td>
</tr>
<tr>
<td></td>
<td>• children do not know colours</td>
</tr>
<tr>
<td>4–5</td>
<td>• expect multi-word sentences</td>
</tr>
<tr>
<td></td>
<td>• children know colours</td>
</tr>
<tr>
<td>6 and over</td>
<td>• can answer open-ended questions and provide a lot of descriptive detail</td>
</tr>
</tbody>
</table>
### ‘Who’

<table>
<thead>
<tr>
<th>Developmental age</th>
<th>Notes to interviewer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2–3</td>
<td>• ask the same questions several times to ensure consistency</td>
</tr>
<tr>
<td></td>
<td>• very unlikely a child will confuse a close person with another person</td>
</tr>
<tr>
<td>4 and over</td>
<td>• can consistently and reliably identify significant persons</td>
</tr>
</tbody>
</table>

### ‘Where’

<table>
<thead>
<tr>
<th>Developmental age</th>
<th>Notes to interviewer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2–3</td>
<td>• child can give almost no detail about location</td>
</tr>
<tr>
<td>4–5</td>
<td>• child will usually only give incomplete answers</td>
</tr>
<tr>
<td></td>
<td>• may be able to describe the local environment</td>
</tr>
<tr>
<td></td>
<td>• cannot identify places by address</td>
</tr>
<tr>
<td>6–8</td>
<td>• child can identify place by good local description, possibly by street</td>
</tr>
<tr>
<td>Over 8</td>
<td>• child can identify by address</td>
</tr>
</tbody>
</table>

### ‘When’

<table>
<thead>
<tr>
<th>Developmental age</th>
<th>Notes to interviewer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2–3</td>
<td>• child can give no answers</td>
</tr>
<tr>
<td></td>
<td>• all answers are usually unreliable</td>
</tr>
<tr>
<td>4–5</td>
<td>• child can give some more descriptive information eg it was dark outside</td>
</tr>
<tr>
<td>6–8</td>
<td>• child can give some more expanded descriptive information but not a full description</td>
</tr>
<tr>
<td></td>
<td>eg ‘I was on holidays’</td>
</tr>
<tr>
<td>Over 8</td>
<td>• child can give more exact information eg it was the day before my birthday</td>
</tr>
<tr>
<td></td>
<td>• by age 10–12 years child may be able to give dates</td>
</tr>
</tbody>
</table>
Attachment B

Leading questions

Leading questions may:
• usually be answered with a yes or no
• contain an answer, or a choice of answers
• name an accused person
• specify the alleged misconduct, and
• link the suspected offender and the offence before the child has given these details in the interview.

Leading questions are a problem because they can:
• confuse a child
• suggest an answer which may not be true, or as the child remembers it, and
• reduce or destroy the reliability or weight of a child’s evidence.

To avoid using leading (or suggestive) questions, it is important:
• not to assume that there has been any misconduct/wrongdoing (even in the most suspicious circumstances there may be an innocent explanation)
• not to assume that the identity of the accused person is known (it may be someone else)
• not to presume what happened is already fully known (it may not be), and
• that the interviewer’s tone, manner or phrasing do not suggest that a particular answer is wanted or expected, or that the child will be praised for telling (or not telling).

The following examples should help explain the concepts.

Questions must not suggest an answer, or choice of answers

<table>
<thead>
<tr>
<th>Leading questions</th>
<th>Non-leading questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did it happen at school?</td>
<td>Where did it happen?</td>
</tr>
<tr>
<td>Did he tell you not to tell?</td>
<td>What did he say? Did he say anything?</td>
</tr>
<tr>
<td>Were you scared, angry or sad?</td>
<td>How were you feeling when…?</td>
</tr>
<tr>
<td>Were you in the classroom or the corridor?</td>
<td>Where were you?</td>
</tr>
</tbody>
</table>

Questions must not name the person who is the subject of the complaint (accused person) before the child has identified them?

<table>
<thead>
<tr>
<th>Leading questions</th>
<th>Non-leading questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>When did Mrs B. touch you there? (when the child has not yet said Mrs B. did anything).</td>
<td>What happened?</td>
</tr>
<tr>
<td>We’ve been told you are having a problem with Mr D.</td>
<td>Are you have having any problems? (If yes) Who are you having problems with?</td>
</tr>
<tr>
<td>Where was the table in the room?</td>
<td>What was in the room? How were things placed?</td>
</tr>
</tbody>
</table>

Questions must not assume unproven facts or knowledge/details of the alleged misconduct or offence.

<table>
<thead>
<tr>
<th>Leading questions</th>
<th>Non-leading questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Which hand did he hurt you with?</td>
<td>How did he hurt you?</td>
</tr>
</tbody>
</table>
Investigating complaints

Questions must not contain the interviewer’s assumptions.

<table>
<thead>
<tr>
<th>Leading questions</th>
<th>Non-leading questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>We are going to ask you some questions about what happened</td>
<td>We are going to ask some questions.</td>
</tr>
<tr>
<td>to you.</td>
<td></td>
</tr>
<tr>
<td>Where was the table in the room?</td>
<td>What was in the room? How were things placed?</td>
</tr>
</tbody>
</table>

Leading questions should only be used when the questions relate to matters not in dispute, such as a child’s name and address or to repeat details the child has already given in the interview, eg:

*Child:* Mr X touched me.

*Interviewer:* Where did Mr X touch you?

*Child:* In the toilets.

*Interviewer:* Which part of your body did Mr X touch?

**Suggestive statements**

Suggestive statements, like leading questions, are extremely problematic. Some examples of the types of comments to avoid include:

<table>
<thead>
<tr>
<th>Suggestive statements</th>
<th>Non-suggestive statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>We’ve talked to children about these things before … there’s no need to feel ashamed.</td>
<td>Tell us how things are going for you.</td>
</tr>
<tr>
<td>If you tell me about it I’ll be able to stop it happening.</td>
<td>It’s important to know what happened.</td>
</tr>
<tr>
<td>It’s good that you remembered.</td>
<td>Perhaps briefly paraphrase what has been said to ensure your understanding is accurate.</td>
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Generally, avoid leading or suggestive questions and statements unless there is no alternative.

The primary purpose of an interview is to discover the ‘what’, ‘where’, ‘who’, ‘why’, ‘how’ and ‘when’ of events. The majority of questions should therefore begin with these types of words. In addition, an interview will generally lead to some decision-making about what happens next. If children are asked leading questions, their evidence may be compromised, and any subsequent decisions made may be potentially flawed and open to criticism.

The best way of ensuring a child is able to give an account of events in their own words is to promote ‘free narrative’ from the child. Open-ended, non-leading questions enable children to provide more information without pressure. More specific, yet non-leading questions can be used to extend and clarify information. Remember that child-centred interviewing meets the child’s needs, focuses on listening, and does not make suggestions or impose the interviewer’s views on the child.
Attachment C

Below are a few contact points in NSW for further information and/or training in relation to interviewing children:

- Department of Community Services
- Child Protection Squad (NSW Police)
- Commission for Children and Young People
- Charles Sturt University, Wagga campus, Child Protection Investigation course
- Child psychologists
- Private consultants (often advertised in Public Service notices and the media)
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