

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 (ie 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).

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 (eg 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

Problem	Initial contact	Other options	Workplace mechanism
Workplace conflicts or grievances	Supervisor or manager	Grievance officer or director	<ul style="list-style-type: none"> • Grievance policy • Dispute handling policy
Personnel problems (eg performance issues)	Supervisor or manager or director	Personnel Officer or EEO coordinator	<ul style="list-style-type: none"> • Discipline policy • EEO policy • Performance management policy
EEO concerns (eg discrimination on the basis of sex, age, race)	Supervisor or manager	EEO coordinator	<ul style="list-style-type: none"> • EEO policy • Reasonable adjustment policy
Harassment	Grievance officer	Personnel officer or EEO coordinator	<ul style="list-style-type: none"> • Harassment policy
Occupational health or safety problems	Supervisor or manager	OH&S committee member or personnel officer	<ul style="list-style-type: none"> • OH&S policy
Process and procedure problems	Supervisor or manager	Director, internal auditor or quality management team (if any)	<ul style="list-style-type: none"> • Internal audit • Risk management policy
Ethical or other misconduct concerns	Supervisor or manager	Director or CEO*	<ul style="list-style-type: none"> • Code of conduct
Corrupt conduct or fraud (where an officer 'suspects on reasonable grounds' a matter concerns or may concern corrupt conduct)	Supervisor, manager, director or CEO	NSW Ombudsman, PIC, ICAC, NSW Police*	<ul style="list-style-type: none"> • Corruption/fraud prevention policy
Corrupt conduct, maladministration or serious and substantial waste (where there is sufficient evidence to 'show or tend to show' the alleged conduct)	Nominated disclosure officer, disclosure coordinator or CEO	NSW Ombudsman, ICAC, NSW Auditor General, PIC or PIC Inspector*	<ul style="list-style-type: none"> • Protected disclosures internal reporting policy

**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 and remedying problems uncovered by the complaint, including addressing the concerns of complainants.

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.

Practical tip

Be clear about the nature of the investigation required.

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graph TD; A[Investigation into policies, procedures and their implementation?] --- OR1[OR]; OR1 --- B[Investigation into the conduct of individuals?]; B --- OR2[OR]; OR2 --- C[Fact finding inquiry?]; OR2 --- D[Formal action in accordance with discipline scheme?];
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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:

Allegation/conduct to be investigated	Issues for investigation	Benchmarks/criteria	Proofs/facts in issue	Tasks and Timeframe

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

- 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.

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.

Source: Noonan, J., 'Disciplinary investigations – where they go wrong', a paper presented at the National Investigation Symposium, October 1998.

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.