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 wrong-doing. 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.

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 uncontentious, 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.

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

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.

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

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.*

Source: Macken, McCarry and Sappideen, The Law of Employment, LBC Information Services, North Ryde, NSW 1997, 4th edition.

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.

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:

Leading question	**Non-leading question**
Did you go to the records room at lunch time?	Where did you go at lunchtime?
Was it a blue file?	What was the colour of the file?
It was Jones, wasn't it?	Who was it?

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.

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 work place 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, eg 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.

Practical tip

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.

1.16 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 ☐

Source: Reproduced with kind permission of the NSW Department of Education and Training, Audit Directorate, with modifications by us.

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.

Source: Wheeler, C., Shooting the Messenger, Corruption Matters, Independent Commission Against Corruption, June/July, 1998.

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)

- 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 oversight 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