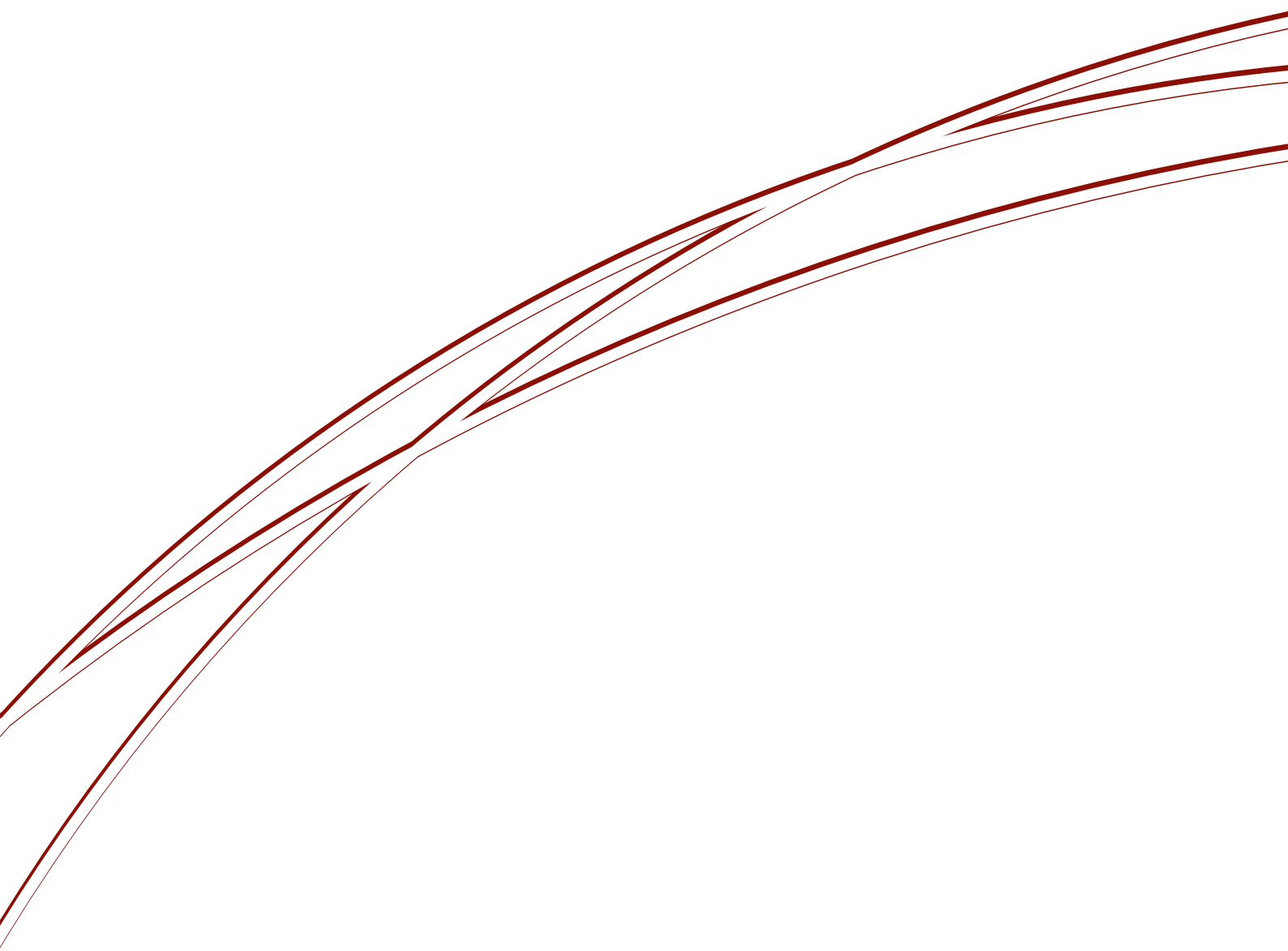
ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

FACTFINDER: A GUIDE TO CONDUCTING INTERNAL INVESTIGATIONS

APRIL 2022



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This publication and further information about the Independent Commission Against Corruption can be found on the Commission's website at www.icac.nsw.gov.au.

Public sector organisations are welcome to refer to this publication in their own publications. References to and all quotations from this publication must be fully referenced.

ICAC

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Chapter 1: Introduction and key principles

From time-to-time, all public sector agencies have to deal with potential wrongdoing. Being able to conduct an effective internal investigation is essential for successfully managing these situations. A well-conducted internal investigation helps ensure that workplace wrongdoing is substantiated and dealt with appropriately. It can also ensure that those who have been wrongly accused have their circumstances clarified and the suspicion removed.

In addition, the ability to conduct reliable and fair internal investigations contributes to an agency's overall integrity objectives. Good investigations help to set clear boundaries for unacceptable conduct, encourage complainants to come forward with important information and create a sense of workplace fairness.

About this guide

This publication by the NSW Independent Commission Against Corruption ("the Commission") is a practical guide for those involved in the conduct of internal investigations. It details the core features of a quality investigation and provides advice on the central objectives of determining the truth and ensuring that all affected persons are treated fairly.

The majority of investigations performed by a public sector agency are into the conduct of an employee or contractor over whom the agency has some authority. However, there are occasions when an agency may need to investigate the conduct of external parties such as a supplier, business partner, grant recipient, a cybercriminal or customer. In such cases, it is self-evident that the agency will have fewer investigative powers and limited scope to make and act on relevant findings. In other instances, an agency may need to commence an investigation without knowing whether the subject of the allegation is likely to be an employee.

In addition, most agency investigations are about alleged or potential wrongdoing. In terms of seriousness, this can range from minor policy breaches through to criminal conduct. However, agencies can also make use of investigative methodologies in situations that do not necessarily involve deliberate wrongdoing. This can include investigations into workplace health and safety incidents, customer complaints, the veracity of an insurance claim, non-performance of a contract or a post-implementation review of an unsuccessful project.

Primarily, this publication is aimed at assisting NSW public sector agencies to investigate potential wrongdoing by staff; however, it may also be appropriate for other types of investigations and organisations.

The remainder of this chapter sets out some principles that should be followed during any investigation. These include the requirements of procedural fairness.

Chapter 2 describes the factors that an agency should consider when deciding whether to commence an investigation.

Chapter 3 contains advice on how to plan an investigation.

Chapter 4 provides guidance on how to gather and handle evidence.

Chapter 5 explains how to analyse evidence, make factual findings and prepare an investigation report.

Chapter 6 contains information about post-investigative actions, including disciplinary matters and evaluating an agency's investigation function.

Appendix 1 is an investigation plan template. Appendix 2 is an interview plan checklist. Appendix 3 is a sample outline of an investigation report.

This publication is not intended to be a comprehensive instruction manual. Agencies should be aware of their own legislative requirements, policies, directives and industrial obligations that apply to the management of misconduct or the handling of complaints. If agencies have any doubt as to their powers or responsibilities in conducting an investigation, they should seek appropriate legal advice. It should also be noted that this publication does not constitute guidance pursuant to the *Government Sector Employment Act 2013* ("the GSE Act") or in relation to Part 8 of the Government Sector Employment Rules.

Principles for conducting an investigation

This publication provides some detailed information about how to perform particular investigative procedures. Before addressing this detail, it is important to understand some basic principles that should be observed throughout any internal investigation.

Procedural fairness

Because an investigation has the potential to adversely affect those involved, it is essential that it be conducted in accordance with accepted principles of procedural fairness. The High Court of Australia has found that

> *…in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions.*[1]

Investigators must apply the rules of procedural fairness throughout the investigation; not just at the end or before the interview of the subject of the investigation. The inability to rely on a fair, unbiased and defensible investigation creates a risk of internal and external criticism. An absence of procedural fairness can affect the correctness and quality of any finding and decision, create a risk of internal and external criticism about the process and the agency's capability, and detract from the legitimacy of any finding.

If an investigator fails to adhere to these principles of procedural fairness, their findings may be challenged, invalidated or simply be wrong.

Procedural fairness can be broken down into three main rules.

The hearing rule

This rule is the right to a fair hearing, during which the subject of the investigation is informed of the case against them, presented with the evidence relied on and given sufficient time to review that information and challenge it. This usually involves giving an affected person the opportunity to review material and make written submissions on the evidence prior to any final report.

Put another way, an investigator should not make adverse findings without providing the subject of the investigation a reasonable opportunity to provide their version of events and refute the allegations. In addition, the investigator must carefully consider the version of events and evidence offered by the subject.

It is also good practice to give the subject an opportunity to comment on or correct any apparent contradictions, errors or falsehoods in their own evidence.

What is a "complainant" and a "subject"?

In this publication, the term "complainant" is used to describe the person who provides information that the agency may decide to investigate. This information does not necessarily have to specify allegations or amount to a formal complaint. Other terms used in investigations include: reporter, source, notifier, discloser or whistleblower.

Additionally, the term "subject(s)" or "subject(s) of the investigation" is used to describe the person(s) whose alleged conduct is being investigated. Other terms sometimes used in investigations include person of interest, affected person, respondent or alleged offender/wrongdoer/culprit.

The bias rule

Public officials involved in scoping, managing and conducting an investigation must be free from any bias or reasonably apprehended bias. Officials who make determinations based on investigation findings must also be free of bias. Those responsible should consider whether they have a conflict of interest, where a reasonable person might perceive that their personal interests could be favoured.[2] Responsible persons need not be totally unconnected to the subject of the investigation. However, it is inappropriate for investigators, for example, to have a close relationship with witnesses or subjects involved in their investigation; nor should they investigate their immediate colleagues or work unit.

[1] *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, 4 November 2015.

[2] See NSW Independent Commission Against Corruption, *Managing conflicts of interest in the public sector*, April 2019, at www.icac.nsw.gov.au/ArticleDocuments/232/Managing-conflicts-of-interest-in-the-nsw-public-sector_June-2019.pdf.aspx .

An investigator should be careful about allowing the predetermined views of agencies, complainants, witnesses or subjects to impair their independence. An investigator should also be cautious about letting others determine how their investigative skills and decision-making should be applied, such as who will or will not be interviewed, allowing direct managers of witnesses or subjects to sit on an interview, or unreasonable pressure to have material findings of an investigation report revised.

For this reason, many agencies rely on staff who have a degree of organisational independence to carry out internal investigations; typically, the internal audit or legal department. Larger agencies may have specialist in-house investigators.

Adhering to the bias rule means that investigators should be motivated to discover the truth. An unbiased investigator wants to "solve the case" but is unconcerned about whether this entails substantiating or not substantiating the allegations.

It is normal for an investigator to have a case theory in mind – the working hypothesis of what happened. But to avoid bias, an investigator must be open to amending the case theory as new evidence is collected and analysed. That is, investigators must keep an open mind.

Avoiding bias also requires an investigator to identify and weigh exculpatory evidence (evidence that tends to indicate that the allegation is *not* substantiated) as well as inculpatory evidence (evidence that tends to indicate that the allegation *is* substantiated).

The evidence rule

Any decision or outcomes must be rational and based on evidence that is logically probative of the facts in issue; not mere speculation or suspicion.

The rules of evidence do not apply to the majority of administrative or disciplinary investigations. Nevertheless, an understanding of the rules of evidence contained in the *Evidence Act 1995* is useful for an investigator. It ensures the best available evidence is obtained that can rationally affect, directly or indirectly, the probability of the existence of facts relevant to the case, and that evidence will be admissible if the matter is the subject of subsequent legal proceedings.

Some more information about weighing evidence and drawing inferences from evidence is set out in chapter 5.

Other principles for conducting an investigation

In addition to observing procedural fairness, there are some other general principles that investigators should follow.

Professionalism and duty of care

Investigators should always act with a high degree of professionalism. Because investigators are sometimes tasked with making adverse findings about the conduct of others, it is also imperative that their own behaviour is ethical and complies with all relevant codes and policies.

An investigator is entrusted with access to information and powers in the conduct of investigations. This access and power should be used for the purpose for which they were given and for no other purpose. Investigators should be aware of their powers, which may be established by statute, the agency's policies and procedures, contract or a relevant award or other industrial agreement.

In addition, being the complainant, subject or a witness in an investigation can be an emotional and stressful experience. As all employers have a duty to provide a safe workplace for their staff, it is important for relevant persons to be provided with any necessary support and information. Often, the internal investigator plays a role in providing this.

Confidentiality

An investigator will often be entrusted to collect and hold information that is highly confidential. It is important that internal investigations proceed according to a general principle of confidentiality because:

- knowledge that allegations have been made or that an investigation is under way can generate unhelpful speculation
- evidence collected by an investigator can include information that is personal, commercially sensitive or marked with a government security classification
- investigative outcomes can adversely affect the reputation and career of the persons involved
- complainants and witnesses may be subjected to reprisal action
- some investigations commence with a covert phase of work in which evidence is collected before it can be destroyed
- individuals are more likely to cooperate if they have confidence in the investigation process.

Information obtained should only be accessed or disclosed for legitimate purposes in the proper course of the investigation. However, as noted elsewhere in this publication, while investigators should endeavour to maintain confidentiality, they should not *promise* to keep all aspects of their investigation confidential.

Recordkeeping

Steps and decisions taken during the investigation should be documented.

Comprehensive recordkeeping assists the overall performance of an investigation, and:

- allows an investigator to be strategic, locate all sources of information and manage persons involved in the investigation
- contributes to an understanding of the circumstances of the conduct
- helps the investigator to demonstrate how procedural fairness and other principles in this chapter have been upheld
- enables decision-makers, supervisors, oversight agencies or appeal bodies to assess the professionalism and quality of the investigation
- facilitates handover if the matter is allocated to someone else.

When collecting evidence, it is important to document where it came from, who provided it and the dates/times when it was received and handled (see chapter 4 for more detail).

While an investigator's physical and electronic records should be complete and accurate, access to those records should be restricted to those with a legitimate need.

Flexibility

Investigations often change direction at various points. The totality of the evidence available at the end of the investigation may bear little resemblance to the material available at its commencement. Consequently, investigators should adopt a flexible approach.

In addition, investigators operating in a public sector setting should remember that their activities have the potential to disrupt the normal delivery of government services. The Hon James Spigelman, former chief justice of NSW, once said "Government does not exist for the purpose of being investigated".[3] Investigators should therefore be mindful of the need for the important work of public sector agencies to continue.

Timeliness

Investigations should be completed within a reasonable timeframe. Of course, the length of time for each investigation can vary depending on the complexity of the alleged misconduct and issues involved, the number and availability of witnesses, the need to seek expert advice, and delays caused by individuals who are unavailable or uncooperative.

Having a policy or procedure

It is desirable for agencies to document a clear policy or procedure setting out, among other things, who may approve and undertake an investigation and how investigations are to be undertaken and monitored. Such a policy or procedure should be consistent with relevant legislation and industrial instruments.

Agencies may also wish to incorporate aspects of this publication into their policy or procedure.

[3] "The Significance of the Integrity System", address to the Australian Public Sector Anti-Corruption Conference, 24 October 2007. Accessed at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2007.pdf on 18 February 2021.

Chapter 2: Assessing the need for an investigation

This chapter focuses on the factors that an agency should consider when deciding whether to commence an investigation. This includes the performance of any preliminary enquiries.

Sources of information

Most investigations stem from a complaint or concern, which may or may not contain clearly articulated allegations. Many complaints are made by employees, but they can also come from contractors/suppliers, customers or members of the public. Information warranting an investigation can also be referred from an external organisation, such as the Commission or a regulatory body, an agency's bank or the media.

Complainants can also be anonymous. There are many reasons for a complainant wishing to remain anonymous; the most obvious being that they fear reprisal action if identified. The Commission recommends that all agencies accept anonymous complaints and refrain from making assumptions about the motives of an anonymous complainant. Good practice is to simply assess the merits of the available information.

The potential need to undertake an investigation can be triggered in other ways; not just by complaints. These triggers may include:

- information provided by an individual that does not amount to a complaint
- evidence of a loss (for example, missing cash, inventory or other assets) or a breach (for example, incursion by a cybercriminal or unauthorised access to confidential information)
- a system-generated alert, which might point to a physical or IT security threat
- an audit or review identifies non-compliance with established controls, policies or directives
- bank reconciliations or other routine finance controls identify the potential misuse of funds or policy breaches

Obtaining information from complainants

To determine whether the alleged conduct warrants investigation, it is important to obtain as much information as is possible from a complainant to understand the nature of their concerns, the people and timeframes involved. For instance, to gauge whether alleged conduct is serious or systemic. A complaint that is vague, does not point to any lines of enquiry or simply refers to feelings or consequences of unspecified behaviour, may not be suitable for investigation.

Extract details of what, when, where, how and why in connection with the concerns raised. The following questions to a complainant can also be useful.

- "How did you become aware of the information?"
- "What documentary evidence can you provide?"
- "Do you know of any other person or evidence that might be helpful?"
- "Have you reported the matter elsewhere?"

Where possible, it is good practice to summarise the complaint and put it in some form of order. This could be chronologically, from most to least serious allegation, or grouped by topic area. If the complainant uses hyperbolic or emotional language, it should be translated into a more neutral statement that reflects the substance of the concerns.

- data or transactional analyses identify a red flag[4]
- due diligence checks or other steps in the procure-to-pay process identify a red flag
- the agency is considering legal action against a counterparty or is defending legal action. Or, similarly, the agency is making or defending an insurance claim
- a person self-reports their misconduct (that is, makes unprompted admissions).

Since an investigation can arise from sources other than a complaint, the Commission recommends that an agency's relevant policies permit self-initiated investigations.

Conducting preliminary enquiries during an initial assessment

The decision to proceed, or not to proceed, with an investigation often requires some preliminary enquiries to ascertain whether there is sufficient material to properly investigate a matter.

It is preferable that such enquiries are conducted discreetly, without alerting any relevant persons or areas within the agency.

Preliminary enquiries that agencies may consider include:

- obtaining further information from the source(s) of the allegations
- reviewing the emails or telephone records of any employees involved, subject to internal authorisation and compliance with the NSW *Workplace Surveillance Act 2005*
- reviewing relevant policies and procedures
- reviewing relevant documentation, such as records relating to a procurement or recruitment decision, contracts or audit reports
- conducting open source searches (for example, Australian Securities and Investments Commission (ASIC), Australian business numbers (ABN), property registers and social media)
- reviewing CCTV footage and building access/egress records, again, subject to compliance with the NSW *Workplace Surveillance Act 2005*
- reviewing timesheets and other personnel records
- reviewing previous similar allegations the agency has received and what action, if any, was taken.

In many ways, preliminary enquiries are indistinguishable from the early evidence-gathering phases of a typical investigation and, in practice, dividing a matter into "preliminary enquiries" and "investigation" can be somewhat artificial. However, it is often appropriate to conduct preliminary enquiries to determine whether a more formal investigation is warranted.

Determining whether to commence an investigation

Agencies are not required to investigate every complaint, red flag or suspicious matter. A formal investigation is just one method for identifying facts and agencies do not have unlimited investigative resources. The Commission therefore recommends some form of assessment or triage process based on the following questions.

Is there a legal requirement to investigate?

In some cases, it may be mandatory for the agency to commence an investigation. For example, under s 53 and s 54 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), the Commission can require an agency to investigate and provide a report.

Are the facts already established?

In some cases, the preliminary enquiries establish the necessary facts that substantiate the allegations (or not) without the need for further investigation. While procedural fairness obligations should not be ignored, there may be no need to investigate what has already been established.

Do viable lines of enquiry exist?

Specificity of the complaint

A complaint that is vague and does not detail the alleged conduct will be difficult, if not impossible, to investigate. The difficulty will be compounded if no alleged wrongdoer is identified.

It is manifestly clear there is no merit to the allegation

An investigation may not be justified if the allegation is fantastical, incomprehensible or completely implausible; noting, however, that many instances of misconduct are less than probable but still plausible.

[4] Where a red flag is identified by a technology-driven analytical process, it is recommended that an actual person review this to ensure it is not a "false positive" and does warrant further action.

The agency lacks the necessary investigative powers

Even with a meaningful complaint, the agency may simply lack the investigative powers required to pursue the available lines of enquiry. This may require the agency to engage the necessary expertise to undertake an investigation or refer the matter to an appropriate body.

The agency previously dealt with the same allegation

If the agency has previously investigated a substantially similar allegation, it is not worthwhile re-investigating the same matter unless circumstances have changed or new information is available – especially if disciplinary measures have already been finalised.

The age of the matter

If a considerable period of time has lapsed since particular matters occurred, this may have a significant impact on whether an investigator can conduct a fair and efficient investigation. For instance, witnesses may no longer be available to speak to, documents may have been destroyed, memories may have faded, and so forth. If an extensive period of time has lapsed, and evidence is no longer available or recoverable, it may be imprudent to commence an investigation, especially if the matter is minor.

No available leads

In some cases, perhaps after completing preliminary enquiries, there may be insufficient investigative leads to pursue. This might occur if a key witness is not available, relevant records do not exist or the matter hinges solely on one person's word against another.

Is the conduct serious or systemic?

Seriousness

The more serious the allegation, the more likely it is that an investigation is warranted. In particular, matters involving potential criminality or disciplinary action, substantial financial loss, harm to human safety or adverse impact on public trust in the agency are likely to require investigation. In addition, conduct that could be deliberate or planned is more serious than conduct that is indicative of incompetence or an honest mistake.

Systemic

If the matter points to the possibility of widespread or repeated misconduct, or a vulnerability that could be exploited by others, an investigation is more likely to be warranted. For instance, alleged overclaiming of overtime entitlements could be a systemic problem based on preliminary analysis of claim data or an understanding of weaknesses in controls.

What happens if a complaint is withdrawn?

Occasionally, a complainant will ask for their allegations to be withdrawn or modified. There could be a variety of reasons for this. For example, the complainant might realise they have made a mistake, might fear reprisal action, may have been coerced or might distrust the complaint-handler. If possible, the agency should try to determine the complainant's reasons.

If a complaint asks for their complaint to be withdrawn, the agency is not compelled to cease any investigative action. Although the complainant may feel a sense of ownership over the matter, it is usually for the agency to decide whether to investigate. In particular, agencies should be cautious about stopping investigations into serious allegations or allegations that, on their face, seem to have substance. In addition, alleged action by a person to coerce a complainant to withdraw their matter may itself constitute misconduct and warrant investigation.

Can the complainant be protected and do they consent to being identified?

If an agency is managing a public interest disclosure, it may only disclose information that identifies the complainant in limited circumstances.[5] For example, the complainant consents in writing to the disclosure of their identity, if the investigating agency is of the opinion the disclosure of the identifying information is necessary to investigate the matter effectively, or it is otherwise in the public interest to do so. An agency may elect not to commence an investigation in circumstances where:

- a complainant does not consent to the disclosure of their identity
- the complainant perceives they will suffer detrimental action
- it is anticipated the disclosure of the complainant's identity is required to deal effectively with the matter
- the matter is not regarded as sufficiently serious or systemic.

[5] At the time of writing this publication, the *Public Interest Disclosure Act 1994* was in force. However, that Act is planned to be updated and replaced. The most up to date version of the legislation should be consulted.

Does the matter relate to the performance of the agency's functions?

Provided it does not affect the work they do or the reputation of the agency, what people choose to do in their own time, away from their work and their workplace, is usually a matter for them. It is usually not appropriate for an employer to investigate allegations of misconduct outside the work environment.

In some cases, it may be appropriate to enquire into out-of-work conduct. The conduct may have implications for the workplace (for example, constant alcohol use leading to low productivity at work) or the type of workplace may mean an employee's general character is central to their performance (for example, a public official who enforces the law is compromised in their work if they are seen to be breaking this law in their private lives).

What about out-of-work conduct?

The GSE Act says that misconduct "may relate to an incident or conduct that happened while the employee was not on duty or before his or her employment" (s 69(1)). However, there still needs to be a connection to the workplace duties and responsibilities of the alleged wrongdoer.

A public official's use of social media is also a matter that, increasingly, can lead to complaints and internal investigations. This includes social media comments about work-related matters as well as other commentary that might nonetheless be incompatible with the values and policies of the agency; especially if the person can be readily identified as a public official. To avoid uncertainty, agencies should have a social media policy that sets clear standards of conduct and the types of breaches that could be subject to investigation.

Finally, the increasing prevalence of working from home, working remotely and the use of personal electronic devices for work may create uncertainty about an agency's right to conduct an investigation. Agencies may need to obtain legal advice on a case-by-case basis but in general terms, an agency can commence an investigation into any work-related conduct, regardless of the employee's location. However, an agency is unlikely to have the power to enter an employee's home to collect evidence or require an employee to surrender a device that is not owned by the agency.

Alternatives to an investigation

Based on the questions above, an agency may decide against commencing an investigation. However, there are a number of alternatives that should be considered and which may be preferable to taking no action. These are set out in the table below.

Table 1: Alternatives to commencing an investigation

Employee development
• Coaching, mentoring, support, advice and regular feedback
• Training or re-training, professional learning or induction
Supervision
• Mediation
• Counselling
• Increased supervision, observation, reviewing documentation and work products
• Performance improvement plans and strategies
• Issuing of a direction and written expectations
Work routines
• Changes in shifts or duties
• Rotation
• Transfer
Organisational action
• Addressing a complaint by providing an explanation but otherwise no further action
• Staff and management consultation, open discussion, problem solving and feedback
• Amendment to policy and procedure
• Referral of matter
• Risk assessment and changes to internal controls
• Management, peer or third party review
• Audit

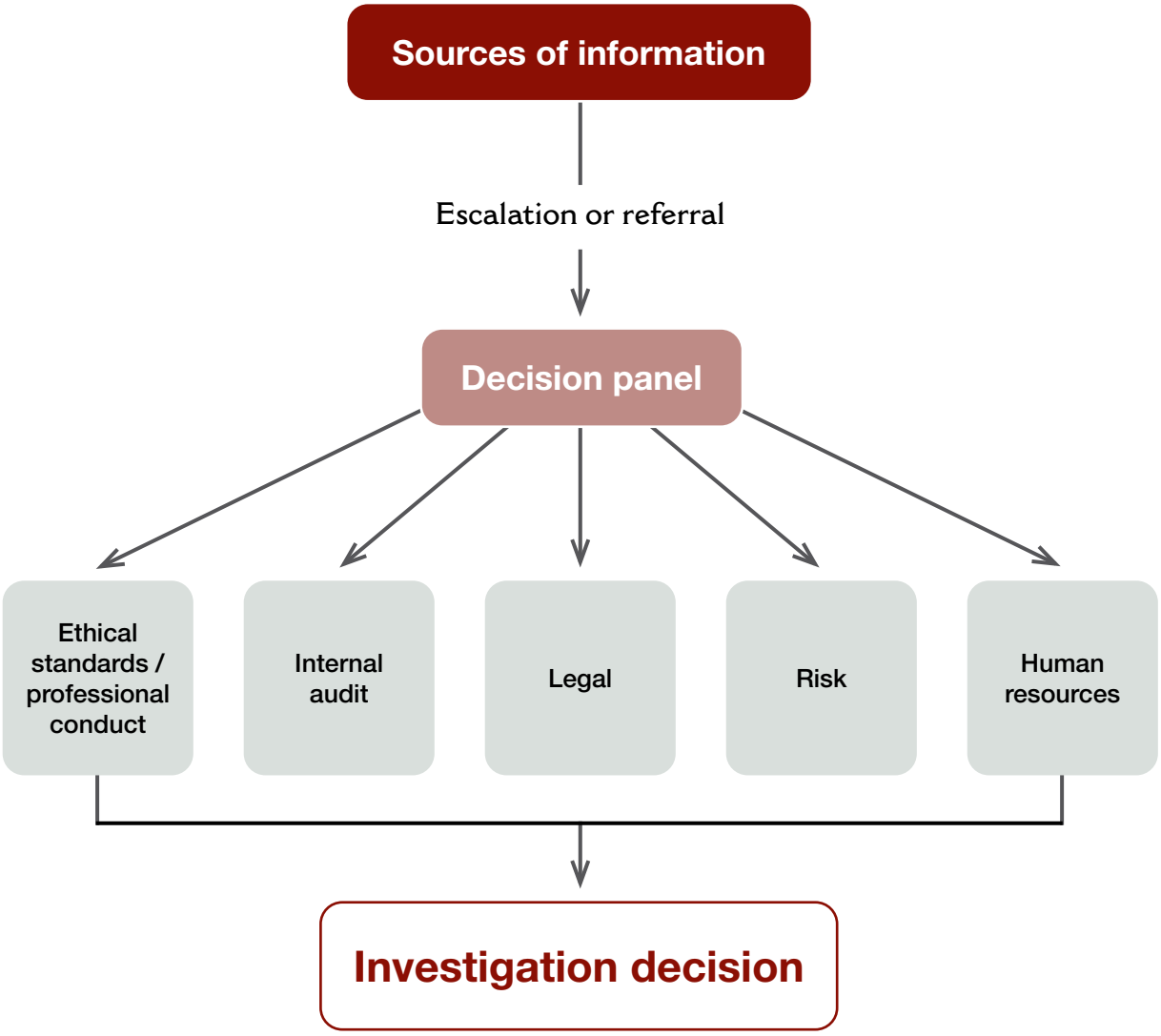
Records should be kept of how each matter is resolved, including any non-investigative action. Such records may be important if similar allegations are raised in the future.

Who decides whether to investigate?

Since an investigation is just one way to address potential misconduct, there may be merit in forming a small committee to determine how incoming matters are handled. This could involve, for example, senior staff working in units such as internal audit, legal, human resources, risk and professional standards (see figure 1).[6] For large agencies that deal with a regular flow of complaints, this might be a standing committee. Small agencies, or agencies that receive few matters, might form the committee on a case-by-case basis.

In addition, a multidisciplinary committee is more likely to have access to the information required to determine the best course of action.

Figure 1: Possible structure of an investigation decision committee



[6] Mechanisms should be in place to disclose and manage any conflicts of interest that a committee member might hold. For instance, if a complaint relates to their own work unit.

A complaint will often contain a mixture of allegations that differ in their seriousness or suitability for investigation. For example, a complaint could include a handful of allegations of serious misconduct that warrant investigation, along with other concerns that are better characterised as interpersonal grievances or minor policy breaches. In these situations, the committee can play an important role in determining which individual allegations ought to be investigated and coordinating an overall response to the complaint.

Case study 1: Prioritising key allegations

An agency receives an email from an employee complaining about the conduct of a middle manager. On close reading, the email makes out five distinct allegations about the middle manager:

1. He is lazy and often misses deadlines.
2. In the last three months, he misused his agency-issued credit card to purchase personal items that were delivered to his home.
3. At a recent work-function, he was affected by alcohol and made inappropriate sexual remarks to a female subordinate, Ms A. This was witnessed by Mr B and Ms C.
4. He dishonestly took credit for a successful project that was completed three years ago.
5. He generally has a bad attitude and is disliked by most of his colleagues.

The agency has a misconduct committee comprising the heads of human resources, legal and internal audit. They meet and decide to commence preliminary investigative enquiries into allegations 2 and 3, which are more serious and contain some specific details that can be pursued.

Allegations 1, 4 and 5 are also documented and the committee decides to refer these matters to the human resources team, with instructions to take no action until allegations 2 and 3 have been resolved.

Deciding not to conduct an investigation

After an initial assessment of a matter and relevant preliminary enquiries, a decision may be made that an investigation not be conducted. It is important that this is documented, including the process that was applied, any advice provided to the decision-maker(s), and the reasons for electing not to proceed.

The decision not to carry out an investigation should be confidentially communicated to the complainant or other information source.[7] Depending on the circumstances, it may also be necessary to advise others. The subject may be required to be notified of this decision, depending on the requirements of any applicable legislation, employment agreement/award and the agency's policies and procedures. The subject's supervisor may also need to be advised. When advising third parties of the decision, be mindful of any limitations on the disclosure of information, such as under public interest disclosure legislation and privacy laws.

Notifying others

Depending on the nature of the allegations, agencies may need to notify other organisations of a matter and whether or not the agency intends to commence its own investigation.

Notifying the Commission

Under s 11 of the ICAC Act, the principal officer of an agency has a duty to report any matter that the officer suspects on reasonable grounds concerns or may concern corruption. One reason why agencies should notify the Commission before taking any overt action (such as notifying the subject) is that the Commission may already be conducting an investigation or may wish to use its covert investigative powers to progress the matter. The reporting obligation also helps to ensure that evidence can be preserved for any possible Commission investigation.

NSW Police Force

The Commission recommends that the NSW Police Force ("the police") be notified of any matter that could involve criminal conduct. In NSW, the failure to notify the police or other appropriate authority of a serious indictable offence may itself amount to an offence.[8]

The agency should advise the police if it intends to conduct an internal investigation but should cooperate with any requests made by the police about an alternative course of action.

Just because a matter is reported to the police it does not necessarily mean it is being actively investigated. In practice, the police (like the Commission) prioritise the most serious and time-sensitive matters. So, unless advised otherwise by the police, agencies may commence their own internal investigations into conduct that might be criminal in nature. Generally, an agency does not need to

[7] Under public interest disclosure legislation, agencies are required to notify the discloser of the proposed action to be taken.

[8] See s 316 of the *Crimes Act 1900*.

wait for any potential criminal prosecution to be finalised before taking necessary disciplinary action.

Audit Office of NSW

The Audit Office of NSW is responsible for auditing the financial statements of most NSW public sector agencies. These audits include procedures to detect possible fraud, error and misstatement. Where an agency has suffered a loss or potential loss that may affect the accuracy of its financial statements, it should advise Audit Office staff managing the financial audit. As part of an audit, agency staff may be asked about known instances of fraud or corruption or associated control deficiencies. Within the limits of any confidentiality obligations, auditors should be provided with accurate information.

Other enforcement or regulatory agencies

Investigators should bear in mind that criminal conduct is not limited to offences in the *Crimes Act 1900*. Offences are also found in a wide range of legislation and the common law. There may be cases where it would be appropriate to report suspected criminal conduct to other state or Commonwealth law enforcement bodies.

Matters involving potential harm to children, workplace health and safety incidents, cyber security breaches, privacy breaches and environmental damage, among other issues, might need to be referred to specialist regulators.

Insurer

An agency may have insurance that covers losses arising from the conduct of staff or counterparties. The terms of the insurance coverage may require timely notification of any potential claim. Therefore, an agency receiving allegations suggesting it has suffered loss from fraud, dishonesty or unauthorised actions should contact its insurer to seek advice. Investigation and legal expenses may also be recoverable under an agency's insurance policy.

Effective complaint-handling and internal reporting systems

Since most investigations commence with some form of complaint, it is essential that agencies have effective complaint-handling and reporting systems in place.[9]

An agency's systems should capture, categorise and track allegations until their finalisation. Chapter 4 deals with the importance of recordkeeping for an investigation but it is also important to keep a record of decisions made in relation to matters that do not proceed to investigation in line with *State Records Act 1998* obligations. Among other things, this information may become useful if allegations are made about the same staff or similar issues in the future.

Agencies should refer to the NSW Ombudsman for comprehensive guidelines and templates relating to the handling of public interest disclosures and other forms of complaint. In particular, if the allegation is sourced from a public interest disclosure, information that identifies or tends to identify the discloser can only be released in limited circumstances set out in the public interest disclosure legislation.

[9] The NSW Ombudsman has a number of complaint-handling resources for agencies. See www.ombo.nsw.gov.au .

Chapter 3: Planning the investigation

Investigations are more effective if both the investigator and the agency undertake some planning activities, including preparation of an overarching investigation plan. This chapter sets out some guidance about these activities.

Immediate steps

Sometimes an agency will receive allegations requiring an immediate or short-term response. That is, there are certain steps that can or should be taken before preparing a detailed investigation plan.

Immediate

If necessary, an agency should take immediate steps:

- if the alleged conduct could entail current or imminent danger to human health and safety, or the environment
- to prevent imminent financial losses arising from misconduct (for example, freezing an account, to stop a false invoice from being paid or a contract from being signed)
- to address serious breaches of IT security or other controls that could be allowing financial losses or data breaches
- if there is adequate specificity in the complaint, to quarantine, capture and collate digital, documentary and other physical evidence
- if the alleged conduct could involve serious criminal conduct that is in progress or about to happen, the police should be advised immediately and it should be ascertained if the police would prefer the agency not to take any further action until such time as the police have considered what action they should take
- if the alleged conduct involves ongoing seriousness or systemic corrupt conduct, the Commission should be advised immediately.

Consideration should be given to whether these steps can be taken without alerting the subject of the investigation.

First 1-2 days

In addition to any immediate responses, an agency should consider the following steps in the first one or two days following identification of a matter that needs to be investigated:

- contact relevant authorities (such as the Commission) especially if mandatory reporting requirements apply
- identify and, if possible, secure any evidence that is at risk of destruction (for example, CCTV footage that could be overwritten or electronic records that could be permanently deleted)
- appoint an investigator or investigation team and assign other relevant roles
- if possible, hold a more formal discussion with the complainant and obtain any evidence that they can provide (it is difficult to plan the investigation without a thorough understanding of the complaint)
- determine who else might be aware of the complaint (including the subject) or the alleged conduct and, if necessary, take steps to keep the matter confidential
- assess the risk of reprisal action against the complainant or any other person.

Powers

Internal investigators should be aware of, and not exceed, their powers. As part of better practice investigation planning, individual investigators should be informed about the scope of their powers, which are typically found in:

- applicable legislation and regulations (such as the *Workplace Surveillance Act 2005*, Government Sector Employment (General) Rules 2014 and procedures provided for under the *Model Code of Conduct for Local Councils in NSW*)
- codes of conduct (such as the aforementioned code), policies, procedures or directives
- industrial agreement, awards or employment contracts
- internal audit charters.

Investigators should also be aware that their powers may be circumscribed in some way. For example, some data might only be accessible with the permission of the agency head or upon providing notice.

Employees are likely to have both contractual and common law obligations to cooperate with reasonable enquiries made by an investigator acting on behalf of their employer. Failure to cooperate could justify disciplinary action.[10]

The NSW Ombudsman has stated:[11]

> *The common law obligation of fidelity on employees implies a duty that the employee will act in good faith and, as such, will assist the employer by supplying information known to the employee that concerns the business and operation of the employer's business.*

and

> *Public officials must comply with the lawful and reasonable directions and instructions of their employer which relate to matters of employment. This is a basic principle of good public administration, and a fundamental requirement of their employment relationship.*

Investigations and privacy legislation

In NSW, the *Privacy and Personal Information Protection Act 1998* ("the PPIP Act") places limitations on how personal information can be collected and used. Part 2, Division 3 of the PPIP Act sets out exemptions relating to investigative activity.

In particular, s 24(6) sets out exemptions for agencies "investigating or otherwise handling a complaint or other matter that could be referred or made to an investigative agency, or that has been referred from or made by an investigative agency" and s 25 permits exemptions that are otherwise permitted or reasonably contemplated under law.

One such law is the GSE Act and associated Government Sector Employment (General) Rules 2014, which describe procedures for dealing with alleged misconduct.

Consequently, legitimate investigations are unlikely to be limited by any privacy concerns. That said, and as set out in chapter 1, investigators should act professionally at all times and be mindful that their job involves handling information that is personal and confidential.

[10] However, it is possible that an employee will assert that cooperation with an internal investigation would violate the privilege against self-incrimination. Where such a privilege is claimed, the agency should obtain legal advice.

[11] *Good conduct and administrative practice – Guidelines for state and local government* (third edition), NSW Ombudsman, March 2017, pp. 2 and 45.

The Commission's experience is that most people (at least those who are not the subject of the investigation) are happy to cooperate with legitimate efforts to investigate alleged wrongdoing in the workplace. Therefore, it is usually not necessary to invoke any formal powers.

Roles and responsibilities

Apart from the obvious step of appointing a person or team to carry out the investigation, there are some other roles that might need to be assigned.

First, while investigators should have a degree of independence to gather evidence and make findings, it is normal for an investigation to be overseen by a senior manager, who is likely also to be the designated owner of the agency's investigative function. This manager could approve key stages of the investigation or receive regular updates on progress. This manager may also be responsible for liaison with external authorities.

Alternatively, this case oversight role could be performed by a small committee (such as the one shown in figure 1 on page 13).

Secondly, it may be desirable to appoint an officer to liaise with the complainant and provide them with any necessary information about the investigation. This could be the investigator but might also be a different officer.

Thirdly, if an external investigator has been engaged, the agency may need to appoint an officer to administer the engagement and assist with evidence gathering.

Fourthly, the investigator's final report may need to be considered by managers tasked with determining any appropriate disciplinary or legal action. These managers should not have been identified as either a potential witness or a person about whom an adverse comment could be made. In some cases, it may be appropriate to suspend an employee while the investigation is under way. These managers should be identified and briefed as required.

Finally, someone should be tasked with reporting summarised information about completed investigations to senior management, the audit and risk committee or external authorities. The agency's relevant database of complaints also needs to be maintained.

Working with key information holders

Investigators typically require access to numerous internal sources of data, including payroll, personnel files, accounts payable and finance information, email records, call charge records and building access and egress records.

It can be time consuming and inefficient if investigators have to negotiate access to relevant information each time a new investigation commences. Better practice is for authorised investigators to have standing arrangements with business units such as human resources, IT, finance, security, and so forth, to facilitate the prompt acquisition of evidence in a discreet manner if necessary.

This could be facilitated via an agency investigation policy or internal memoranda of understanding.

Appointing an external investigator

Larger agencies often have an existing employee or team whose job it is to conduct internal investigations. But agencies without an established investigation function may need to appoint an employee on a case-by-case basis or engage an external specialist.

An external investigator should obviously be considered if an agency lacks in-house capability but some related reasons include the following:

- the subject of the investigation is a very senior member of staff
- in-house investigators or other key personnel have a conflict of interest
- external scrutiny (including media attention) suggests the need for a high level of independence
- the investigation might require preparation of a criminal brief of evidence or lead to litigation
- the investigation requires the application of computer forensic technologies (see chapter 4 for more detail).

Based on similar rationale, an agency may need to consider the need for an external expert witness.

Tips for engaging an external investigator

In the NSW public sector, investigation services can be procured from the Performance Management and Service Scheme (known as SCM0005).

Under the NSW *Commercial Agents and Private Inquiry Agents Act 2004*, all external investigators must be licensed.[12] Agencies are encouraged to obtain proof of a current investigator's licence and note any conditions.

Keep the following in mind when working with external investigators:

- the letter of engagement or contract should be consistent with the scope of the investigation and allegations (described in more detail below)
- the letter of engagement and related documentation (for example, email correspondence with the investigator and purchase orders or invoices relating to the engagement) might itself need to be kept confidential (for example, it may be inappropriate if anyone with access to the finance system could locate a purchase order describing the nature of the confidential investigation)
- an external investigator will usually need assistance from an employee of the agency to obtain evidence, arrange interviews and identify relevant policies and procedures. While this assistance could be treated as a purely administrative task, it may be efficient to conduct the investigation on a "co-source" basis, whereby the investigative tasks are shared between internal and external personnel
- in practice, once engaged, an external investigator will assist with the planning steps described in this chapter, such as developing the investigation plan. However, as with any procurement activity, the agency remains responsible for ensuring the engagement is properly scoped.

[12] Obtaining a NSW investigation licence requires a Certificate III qualification in Investigative Services. Although employees of NSW public sector agencies do not require a licence, persons who regularly conduct investigations should consider completing that certificate or similar training.

Developing an investigation plan

Each investigation should proceed in accordance with a documented plan. An investigation plan is the foundation of the investigation. It will define what, why and when activities are undertaken. Its primary purpose is to keep the investigation focused.

The look and style of the plan is matter of preference. It should, however, be a dynamic document that is reviewed and updated as new information is identified and/or limitations are discovered.

At the same time, a plan can allow the agency's relevant management to review and endorse the approach to the investigation. Keeping in mind the sensitivity of most internal investigations, both the agency and the investigator stand to benefit from this approach. Knowing that the investigator will be proceeding in an appropriate fashion gives the executive more confidence. The investigator, in turn, has the comfort of knowing that their planned course of action has executive approval.

What should be included in an investigation plan?

Some topics that can be usefully addressed in an investigation plan include:

- administrative details
- summary of the known facts
- investigation scope, including the allegations
- list of relevant persons
- case theory
- relevant policies and standards
- intended investigation activities
- key dates
- risk management
- complainant management
- resources.

Each of these topics are expanded on below.

Administrative details

These details may include roles and responsibilities of investigation team members, relevant file numbers, security protocols and classification of the investigation (for example, whether it is a public interest disclosure).

Summary of the known facts

This usually includes:

- how the information came to the agency's attention
- the information provided by the complainant or source, including relevant dates
- any instructions or guidance provided by the case manager
- details and results of any preliminary enquiries.

Investigation scope and allegations

The scope defines the nature of the investigation that is to take place. For the agency, this ensures that the sensitive process of an internal investigation is appropriately confined and controlled. For the investigator, this helps to ensure a clear understanding of the investigation and authority to conduct it.

It is often helpful to draft an overall statement that describes the scope of the investigation. For example:

> *To investigate the circumstances surrounding the allocation of overtime in Department X for the period 1 January 2018 to date.*

It is also essential that the allegations are particularised during the planning phase of an investigation. Properly formulated allegations form the basis of an investigator's planning, evidence gathering and written findings.

Properly formulated allegations set the scope of an investigation and help to avoid unintentional scope creep. They will also assist in providing procedural fairness to the subject of the investigation.

As noted in chapter 2, investigations can arise from a source of information other than a complaint. In such cases, the agency or investigator should still particularise allegations to help frame the investigation.

For example, if a routine data analysis report suggested that items of a personal nature had been purchased using an agency credit card, it might be reasonable to commence an investigation even without a complaint. In this situation the investigation plan could articulate an allegation along the following lines:

> *It is alleged that the credit card assigned to Officer A was used to inappropriately purchase personal goods and services from 2018 to the current time, in breach of Agency Z's procurement policy.*

Where possible, allegations should be specific and detailed, clear and written in plain English. If the complainant is available, it may be possible to obtain enough information about the who, what, where and when, and sometimes the how and why of the matter. However, sometimes an investigation needs to proceed with only a general allegation.[13]

Allegations can fall within a spectrum of being general or specific, such as:

> • *staff in Department A are engaged in timesheet fraud* (general)
>
> • *over the months of March and April, Officer X submitted false timesheets, claiming approximately 50 hours that were not worked* (specific).

Complainants generally do not itemise a clear, cogent set of allegations that can be used verbatim as the basis for an investigation. A confrontational or emotionally charged allegation can obscure the core issues, create a perception of bias, and is unlikely to elicit the best evidence or response.

Consequently, it is general practice for the agency or investigator to formulate and particularise the allegations that become the basis for the investigation.

Where possible, it is good practice to:

- avoid using the name of the complainant or any witness when framing the allegations (among other things, this makes it easier to protect the identity of the complainant)[14]
- ask the complainant to check and validate the accuracy of drafted allegations
- consider which laws, regulations, policies or procedures may have been breached (this can be incorporated into the wording of the allegation itself or otherwise reflected in the investigation plan).

There may also be value in listing the elements or issues that should be investigated in order to substantiate or not substantiate each allegation.

For example, consider an allegation that a public official (Officer P) improperly awarded a contract to a company (Company Q) owned by their close friend (Person R), while concealing the friendship.

[13] As noted in chapter 2, agencies may decide not to commence an allegation if the allegation is too vague or there are no viable investigative leads.

[14] In some cases, such as bullying and harassment complaints, it is not practical to avoid using the name of the complainant or victim.

To properly substantiate the allegation, the investigator would need to establish that:

1. Officer P and Person R had a friendship at the relevant time.
2. Any friendship was concealed.
3. Company Q was owned by Person R at the relevant time and Officer P knew this.
4. Officer P awarded a contract to Company Q (or at least had a role in awarding the contract).
5. Any conduct by Officer P was improper (including by reference to the law or the agency's policies and procedures and Officer P's knowledge of them).

It is good practice to update allegations to reflect any further particulars obtained during the evidence gathering process. This is discussed in more detailed in chapter 4.

Dealing with multiple allegations

Some complaints contain dozens of distinct allegations or make many allegations of similar conduct; for example, "50 alleged instances of forging a manager's signature".

To complete the investigation in an efficient and timely manner, it is reasonable to prioritise those allegations that are most serious, most plausible or have the best investigative leads.

The investigation plan should, however, reflect *all* allegations but also document the basis for prioritising some over others.

Factors that allow, encourage or cause misconduct

While the main purpose of an investigation is to substantiate or not substantiate the allegations, it is usually desirable for the investigation to identify any control weaknesses that may have contributed to the conduct under investigation. This includes the design and operation of controls.

These are discussed in more detail in chapter 5 but can also be reflected in the scope. It is unlikely these factors will be known at the start of the investigation but they can be added as the plan is updated.

List of relevant persons

It is good practice to maintain a list of all persons involved in the investigation. This should include the complainant (if any), witnesses, subject of the investigation and any person who can provide evidence.

The list should separately identify any person who could be adversely affected by the investigation ("affected persons"). The subject of the investigation is always an affected person but any other person who could be the subject of criticism in the investigation report, should also be identified as an affected person.

Case theory

Some investigators like to formulate a case theory, which is their educated conception of the likely facts of the case. This can include the likely motivation of the subject and how the alleged wrongdoing could have been carried out.

The investigation plan can include the investigator's case theory. However, it is important that this not be treated as the only possible explanation of the events under investigation. The case theory can and should be amended as evidence is gathered and analysed.

Relevant policies and standards

The investigation plan should document the laws,[15] regulations, codes, policies, procedures, contracts, and so forth, that might have been breached. Ideally, these should be tied to each allegation.

An investigator should also understand the legitimate exemptions described in these documents and whether they could apply. That is, the subject of the investigation might have sought and obtained an exemption that permits the conduct that has been alleged to be wrong. For example, an employee accused of improper absenteeism might have an approved flexible work agreement that permits them to work shorter hours.

Intended investigation activities

The investigation plan should set out the proposed activities that are intended to obtain relevant evidence. Ideally, these planned activities should relate to the allegations. These activities are explained in more detail in chapters 4 and 5 but in the planning phase the immediate focus should not be on substantiating or not substantiating the allegations. Instead, the investigator should think broadly about all possible sources of evidence that might be relevant. This includes evidence from within or outside of the agency.

In the investigation plan, it may be useful to break down the sources into:

[15] Generally speaking, internal investigators are not expected to have detailed knowledge of the physical and fault elements of criminal offences, or the available legal defences. Where this is required, legal advice should be obtained. However, the NSW Judicial Commission website at www.judcom.nsw.gov.au provides useful reference material.

- documents or things that should exist or that might be obtained, which could be separated into open and closed sources
- information from people that might have witnessed events, created documents or handled things
- other sources, such as site inspections or observation of activities.

The plan should also consider the logical sequence in which evidence should be gathered.

Key dates

The investigation plan should include key dates such as:

- when the complainant or person making a public interest disclosure should be informed of the progress or outcome of the investigation
- timelines set by law enforcement agencies, organisations such as the Commission or the agency's insurer
- any timeframes established by relevant industrial awards, workplace agreements or agency policies and procedures.

Risk management

An investigation plan could include a section that documents any identified risks and proposed risk treatments. Risks that often arise in an investigation include:

- potential reprisal action against the complainant or witnesses
- inability to communicate with a complainant who is anonymous
- destruction of evidence
- resignation or absence of the subject or key witness
- unfair damage to the reputation of the subject
- premature disclosure of information about the investigation to the subject or parties such as the media
- foregone opportunities to collect evidence covertly
- impact of the investigation on mental health
- potential legal action
- disruption to the agency's operational activities.

Complainant management

As noted above, the potential for reprisal action against a complainant could be addressed in the risk management section of an investigation plan. However, the plan might also warrant a section that deals specifically with the management and protection of the complainant(s).

Resources

The plan could list the personnel required to complete the investigation. It could also identify resource requirements such as a discreet interview room, interpreter services, digital voice recorders, legal or human resources advice, computer forensics capability, travel and accommodation.

When is the subject notified?

In order to satisfy the hearing rule (see chapter 1), the subject must be informed of the allegations which, in practice, also means notifying them that they are under investigation. In addition to satisfying procedural fairness obligations, an agency's notification requirements may also be set out in legislation, workplace agreements/awards or policy.

To ensure that future investigative opportunities are not lost, the Commission recommends that, prior to notifying the subject of the allegations, agencies should be satisfied that:

- sources of relevant evidence have been identified and secured; in particular, evidence that could be tampered with or destroyed
- plans are in place to protect complainant and witnesses from acts of reprisal
- notification will not hinder the investigative work of the police or another authority, such as the Commission.

Notification under the GSE Act

In NSW, Rule 38 of the Government Sector Employment (General) Rules 2014 states that if, after making an initial assessment of allegations about misconduct, the employer decides to "proceed with the matter", which can include by commencing an investigation, the subject of the allegations is to be advised:

a. of the details of the allegation of misconduct, and

b. of the action that may be taken under section 69 (4) of the Act against the employee.

Suspension and alternative working arrangements

In some situations, suspending a subject or a group of subjects may be an appropriate risk management strategy. These include where:

- an assessment identifies significant risks to the workplace and investigation, such as the destruction of evidence, harassment or victimisation of suspected complainants or continuation of the alleged conduct
- it is considered that the potential risk cannot be feasibly managed in any other way through other interim work arrangements
- the subjects are in breach of existing directions put in place to manage risks.

The power to suspend an employee may be contained in legislation, such as s 70 of the GSE Act, which allows suspension of employees subject to a disciplinary investigation or who are charged with a serious offence. Powers to suspend employees may also stem from internal policies or workplace agreements.

Some additional considerations

Suspension should not be regarded as a penalty or disciplinary sanction, but a protective measure while the investigation is being undertaken.

Consistent with procedural fairness, the subject should be informed of the reasons for a decision to suspend or placement in an alternative working arrangement. An attempt can be made to institute these arrangements with the agreement of the subject and to convey that the temporary arrangements do not indicate any pre-judgment of the outcome of the investigation.

A suspension should not be indefinite. An employee's suspension should be reviewed at reasonable intervals (for example, every 30 days) and be brought to an end:

- if risks can otherwise be appropriately managed
- if the risk to the workplace or investigation no longer exists
- if the agency no longer believes the subject has engaged in misconduct
- when a sanction is imposed.

Premier's Memorandum M1994-35 – Suspension of Public Employees from Duty[16]

This procedural guideline provides criteria for decision-making and review points for the decision to suspend public employees.

Chief executives or their delegates may suspend an employee without pay before criminal or disciplinary charges have been finalised, only in exceptional circumstances. Agencies are to give priority to the option of placing employees facing criminal charges or disciplinary proceedings on alternative duties or duties at another location.

In all suspension cases, the decision should be reviewed at least every 30 days or when new information relevant to the risk management strategy in place comes to light.

When making a decision about whether to suspend an employee, the following factors are to be considered:

- nature of the allegations
- nature and location of the current duties
- public interest
- efficient operation of the agency
- maintenance of good order and discipline.

Other options

Where employees are suspended on pay, it is important to remember that public money is being expended on wages without any work being performed. Agencies may therefore wish to consider other viable and effective alternatives that protect the workplace and the investigation such as:

- placing the employee in an alternative location undertaking the same role or different duties
- changing reporting lines
- requesting the employee to work from home.

[16] See https://arp.nsw.gov.au/m1994-35-suspension-public-employees-duty .

Chapter 4: Gathering evidence

As noted in chapter 1, it is important that investigators gather both inculpatory and exculpatory evidence. Investigators must therefore keep an open mind and avoid confirmation bias. That is, investigators must gather and weigh evidence, even if it does not fit with their preconceived hypothesis of the events in question.

An investigator is responsible for collecting relevant information, weighing the sufficiency and quality of evidence, and establishing facts leading to the resolution of the investigation.

Investigating is a constant process of exploration, leading to the making of findings and recommendations. The core value of a good investigation process is a commitment to being objective and comprehensive in a timely manner. An investigator should seek to:

- obtain all relevant information from the best sources as expeditiously as possible
- consider all possible explanations for the information, favourable or unfavourable, to each person against whom allegations have been made.

Once an investigator has collected documents and conducted interviews, they should review the information to ensure sufficient evidence has been gathered. If not, additional enquiries may be required.

Evidence is usually obtained from the following sources:

- documentary evidence, which includes physical and electronic information
- inspections of sites and physical objects
- oral evidence from witnesses
- evidence from the subject of the investigation
- experts (if required).

These are explained in more detail below.

Documentary evidence

Almost all workplace investigations involve gathering "documents", which is defined in the *Evidence Act 1995* as:

> *(a) anything on which there is writing; or*
>
> *(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or*
>
> *(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or*
>
> *(d) a map, plan, drawing or photograph.*

Some common documents that might be relevant to factfinding investigations include but are not limited to:

- **standards**, such as legislation, policies, procedures, codes, templates, guidelines, directions, awards, delegations, and position descriptions
- **communications**, such as email, chats, SMS, letters, handwritten notes, meeting minutes, diary appointments, and call charge records
- **records establishing movement and activity**, such as logbooks, building and carpark access and egress records, GPS or smartphone data, timesheets, CCTV footage, and photographs
- **business and financial**, such as business cases, purchase orders, receipts, invoices, contracts, bank statements, financial reports, credit card statements, expense reimbursements, insurance certificates, vendor master file requests, payroll and personnel data, asset management registers, and warehousing data

- **operational files**, such as files and data relating to the core work of the agency, which can include policy, strategy, projects, customer service, regulation, and other public goods and services
- **risk and audit**, such as risk assessments, risk registers, internal audit reports, reviews by external consultants, probity reviews, audit and risk committee reports, and workplace safety reports
- **corporate databases**, such as other relevant entries from any corporate databases or enterprise resource planning (ERP) systems, including data showing access to information
- **integrity records**, such as conflict of interest registers, registers of personal interests or associations, gifts and benefits registers, confidentiality undertakings, and training records
- **open source searches**, such as ASIC and ABN data
- **other searches**, such as property registers, social media and general internet searches.

Investigators must be able to demonstrate how each document was obtained and its source. For simple matters, this might entail creating a table listing the description, source and date obtained for each piece of documentary evidence. More complex matters may require creating unique identifiers for each piece of evidence, which link to a detailed description of the provenance of the document.

It is also good practice for an investigator to:

- provide a written acknowledgement or receipt of documents to the person who provided them
- never work with original documents; instead, make copies to flag, highlight and write on, and another from which to make other copies

Warning about obtaining audio recordings

Pursuant to the *Surveillance Devices Act 2007*, audio recordings of conversations can only be made in limited circumstances. In particular, recordings made without the consent of the persons involved could be illegal and should not be used in an internal investigation.

If a complainant or witness provides an audio recording of a conversation, the investigator should ask about why and how the conversation was recorded and the details of the conversation.

Legal advice should be obtained if there is any doubt about the legality of the recording. If the recording, or the act of making the recording, could involve a criminal offence, the police should be alerted and/or legal advice obtained.

- keep original documents in a secure location and keep a written log showing when this evidence is removed from storage and by whom.

Electronic documents

Agencies and investigators should be aware of the volatility, alterability and destructible nature of electronically stored information (ESI). Without a proper understanding of the way data is stored, how it can be safely accessed and the means for its copy or extraction, there is a real risk that evidence is altered, becomes inaccessible or is permanently destroyed.

Take a risk management approach

Public sector agencies generally do not have the expertise and equipment required to extract ESI without taking any risks. There are three key rules for agencies and investigators in taking a risk management approach to collecting ESI:

1. **Understand the data**. Agencies will invariably rely on IT assistance to provide advice about where data may be stored, the platform on which it is stored and the architecture of that information. These factors have implications for whether information can be accessed, viewed and obtained without alerting the subject of an investigation and whether that access has the potential to alter the evidence.
2. **Minimise the tampering effect of access to evidence**. Accessing, viewing and collecting information can all have a potential tampering effect that alters the evidence obtained. Metadata can be compromised. The "hash value" or unique fingerprint of a file may be changed. Where possible, always preserve a copy of the original data for use. Those handling electronic evidence should document any potential changes and document what processes were undertaken and why. This is important to establish the continuity of evidence.
3. **Know when to seek expert assistance**. Where there is a lack of relevant skill or expertise within an agency, a forensic IT specialist may need to be engaged. Specialist technical experts can make exact copies of computer hard drives to enable an investigator to analyse information without the original computer. A forensic IT specialist should also have a thorough understanding about how electronic devices and information should be handled; for example from mobile devices such as telephones, wearables and laptops.

Emails

Email records are a vital source of information for many investigations. They can be delivered by different technological platforms and can be stored on local computer hardware, exchange servers located onsite or offsite, or in the cloud. IT assistance is likely to be needed to view or access emails, especially if it is an advantage not to alert the subject.

Be aware that the search capabilities and indexing functions of some email applications can be unreliable. The risk is that some emails may not be discovered. Furthermore, scanned PDF documents and images attached to email may not be searchable until they have undergone optical character recognition.

"Journaling" technology now exists allowing authorised users to view and filter email documents through an e-discovery or forensic function. If an agency or its external investigator does not have access to this type of technology, it may have no option other than reviewing email records within the native application, such as Microsoft Outlook.

What is metadata?

Metadata is simply data about information, or data about data. In an investigative context, metadata typically describes the properties of a document that can provide insight into its source, history and format. Examples of specific document properties that can assist an investigator include:

- time and date of creation or amendment
- creator or author of the document
- who has viewed or printed the document
- file name
- file size
- type of file
- IP address of a relevant computer
- location on a computer network where the document was created and stored
- access rights to the document
- GPS location of a photograph.

Investigators should be aware that the search capabilities within Outlook and similar applications may not be as effective as those in specialised e-discovery or forensic software. Any review using the native application should be performed on a separate computer, network isolated (that is, no active internet connection). This will help to minimise any alerts being accidentally sent and limit any potential malware present from spreading to the wider network.

Investigators should avoid directly accessing a staff member's email inbox and other email records. It is better to separately capture email records and review them in a secure read-only IT environment so the records or their properties cannot be altered. Investigators should also take care if examining email records that have not yet been opened by the intended recipient. Doing so might:

- unnecessarily alert the subject that their emails are being monitored
- cause the investigator to draw an incorrect inference
- interfere with the normal operations of the agency

- breach the conditions of the agency's IT and workplace surveillance policies.

Mobile telephones

Smartphones are increasingly becoming an important source of data for workplace investigations. The following list provides useful points to consider when evidence is required from a work-issued mobile telephone. Keep in mind, however, that it is likely that specialist software and forensics expertise is required to extract much of the data contained on telephones.

- An agency's relevant policies should make it clear that work-issued mobile telephones, and any content stored on the phone, is the property of the agency. The policy should set out a clear right to inspect and monitor data on the telephone. In addition, staff using work-issued mobiles should be obliged to supply all relevant access codes when requested.
- Makers of smartphones typically provide a facility for data to be backed up and restored (for example, if the phone is lost). Agencies should ensure they have access to this back-up data, which can be used in an investigation.
- If the handset needs to be examined, obtain the passcode or access key from the user as well as passcodes for any relevant applications on the telephone and test them. Keep a record of this information.
- Assuming the agency does not have access to advanced computer forensic software, ask the user to access the telephone and open any relevant applications (such as SMS, chat or photos). The investigator can then take photos of the telephone's contents, using their own telephone or camera. If the user's consent is obtained, this whole process can be recorded by video or audio in their presence. This might allow the investigator to ask questions as the examination proceeds (for example, "Did you take this photo?" or "Who sent you this SMS?").
- If the telephone is to be seized after obtaining the required passwords or keys, ensure the device is put in flight mode, turn off Wi-Fi and blue-tooth connections and immediately obtain the necessary information or data.[17] If an investigator does not have the required passcodes/ passwords for the device, then do not turn the device off and keep the telephone powered, otherwise there is potential for loss of access. If there is an inability to extract the data from the telephone for some time, and the correct passcodes to access the device are known, then an investigator can consider powering the device off to minimise any data loss of deleted records, which may not have already been cleaned up by "garbage collection routines". Do not remove the SIM card, as it may render the telephone inaccessible and there is the potential for data loss.

[17] The device can also be placed in a "Faraday bag", which prevents signals from being sent by, or to, the device.

Laptops

As with mobile telephones, obtain from the subject the login details, including the password and the BitLocker encryption recovery key if applicable. Without this, information may be encrypted and unable to be accessed.

USB/thumb drives

Care should be taken to view and access USB data, not only due to the potential for Malware, but also for the potential for a USB to make changes to a computer on which it is viewed, and vice versa. To mitigate against this, an agency's IT function may have write-blocker technology that prevents alterations of data and systems from external sources to existing computers and networks.

Wearables

Smartwatches, fitness trackers and other wearables may contain GPS or waypoint information that could be used in an investigation. Often wearables are paired with telephones or other mobile devices so that information can be extracted from that device rather than the product itself.

Analysing documents

Obviously, an investigator will be able to glean certain information just by reading or reviewing a document. However, in order to gain a full understanding of a document and determine whether it is authentic and can be relied on, an investigator should consider the questions in table 2 (see page 28). The more questions that an investigator can answer, the more reliable a document is likely to be.

While investigators should exhibit a degree of scepticism about the evidence they gather, it is usually not practical to challenge the authenticity of every document. Documents such as organisation charts, policies and procedures, legislation, public documents or various system-produced records (for example, bank statements, credit card statements, call charge records, payslips, and purchase order numbers) are often not in dispute and can be relied on.

Table 2: Discovering the meaning and history of a document

- Why was it created or amended?
- Where did it come from?
- How did it get there and where was it before?
- Through whose hands has it passed?
- Who created or amended it? When?
- Is it a final version or draft? What are the differences between versions?
- By whom was it intended to be read, viewed or listened to?
- What was the intended recipient likely to understand by it?
- What associated documents exist which create more context (for example, attachments to an email, other emails making up a chain or correspondence, appendices to a report)?

See also the description of metadata earlier in this chapter.

False or misleading documents

When investigating alleged misconduct, an investigator may encounter documents intended to convey false or misleading information. Often, this involves a real document that contains some false information (for example, an authentic invoice from a valid supplier that shows inflated hours). In other situations, the document may be entirely fictitious (for example, the whole invoice is a fake document).

Answering the questions in the table above may identify false or misleading documents. The tips in the following list may also help to determine if a document is not authentic:

- the document's metadata is inconsistent with its purported authorship or date
- "factual" information in the document cannot be independently verified or is inconsistent with independent sources (for example, bank account details, contact details, qualifications, and authorisations)
- the document has not been saved to any authorised document management system
- there is no explanation for key amendments to the document or differences between drafts
- the document contains spelling mistakes, mathematical errors, content covered with correction fluid, inauthentic letterhead, or an ABN with the wrong number of figures
- there is no record of how the document was sent or received (especially if it purports to have passed between the agency and an external party)
- printed or photocopied versions of the document are inconsistent with electronic versions
- the document does not form part of a logical sequence or chronology (for example, a referee's report that is obtained months after the relevant employee was hired)
- the content and format of the document is inconsistent with standard templates or forms.

Persons engaged in misconduct may also destroy, delete or fail to keep relevant records. Investigators should be suspicious if they cannot locate documents that would normally be expected to be on file. For example, a:

- recruitment file with no interview notes
- multimillion-dollar purchase with no approvals
- procurement with no quotes or purchase order
- CCTV camera database with missing footage.

Document examination

Ultimately, it is up to an investigator to determine whether a document is authentic or reliable. Sometimes, however, an expert may be required. Using scientific techniques, document examiners may be able to provide evidence about:

- who signed a document (handwriting analysis)

- when a document was created (paper and ink analysis)
- what alterations may have been made to a document
- when and where a document was printed.

Conducting surveillance

Surveillance of employees can be conducted overtly by camera, email, GPS/tracking, internet use, access and audit logs. Workplace surveillance is a source of useful information but it must conducted in accordance with agency policies, procedures and the law.[18]

Agencies will usually require employees to understand and agree to information and communication technology policies for the monitoring and storage of emails. These policies generally state that the agency has the authority to access and review their employees' email communications.

Overt surveillance

The *Workplace Surveillance Act 2005* contains requirements for overt surveillance. Overt surveillance is permitted as long as written notice is given to employees of the use of surveillance 14 days before it takes place, and the notice must indicate (s 10):

- the kind of surveillance to be carried out (camera, computer or tracking)
- how the surveillance will be carried out
- when surveillance will start
- whether the surveillance will be continuous or intermittent
- whether the surveillance will be for a specified limited period or ongoing.

There are specific additional requirements for camera, computer and tracking surveillance:

- camera: the cameras or their casings are clearly visible, and signs are posted at the entrance clearly notifying people that they might be under surveillance (s 11)
- computer: surveillance is carried out in accordance with policy and the employee has been notified in advance of that policy in a way that it is reasonable to assume that the employee is aware of and understands the policy (s 12)
- tracking: there is a notice clearly visible on the vehicle or other thing indicating that the vehicle or thing is the subject of tracking surveillance (s 13).

Provided these legal requirements are met, investigators can make use of relevant documents and data.

Covert surveillance

The following covert surveillance activities are generally prohibited:

- using technology to monitor an employee's movements or communications by moving images or sound unless approval is obtained from a magistrate and the conduct investigated concerns "unlawful activity"[19]
- installing, using or maintaining listening devices to record conversations unless conducted with the consent of participants or for law enforcement purposes[20]
- installing, using or maintaining optical surveillance devices when the employee is not at work or in spaces where work is not being conducted.[21]

A distinction should be drawn between staff "observing" an employee and covert surveillance. The former may be a source of useful information. Peers, supervisors, and other employees may have direct information of instances of misconduct if they are alert to the behaviours of others.

Interception of communications

In addition to restrictions imposed on the surveillance of employees, there are restrictions on the interception of communications under the Commonwealth *Telecommunications (Interception and Access) Act 1979* ("the TIA Act"). The TIA Act prohibits the interception of private telecommunications without the knowledge of the recipient unless a warrant is first obtained. Only certain agencies are able to apply for a warrant and the circumstances in which an application may be made are strictly limited by the TIA Act.

Searches in the workplace

Searches may be appropriate where there is a reasonable suspicion that a subject or another employee has access to, or is in possession of, relevant information or objects that

[18] See *Workplace Surveillance Act 2005* and the *Surveillance Devices Act 2007*.

[19] Part 4 of the *Workplace Surveillance Act 2005*.

[20] Section 7 of the *Surveillance Devices Act 2007*.

[21] Section 3 and s 8 of the *Surveillance Devices Act 2007* and s 10 and s 11 of the *Workplace Surveillance Act 2005*.

cannot be protected or obtained by other means, such as a simple request. Prior to conducting a search, approval should be sought from an authorised officer of the agency.

Search of an agency's property

An investigator should generally be able to search and obtain items from locations or property belonging to the agency. This includes the agency's offices, vehicles, computers and bins.

In considering whether, and how searches are to be carried out, an investigator may balance the risk of reputational damage to the subject with the need to obtain or protect property or information.

Consider the timing of the search and aim to minimise the level of disruption. The following list contains recommendations on how to conduct the search:

- obtain the necessary agency permissions to search, seize documents and objects and to take a recording of the search
- plan the search, ensuring keys to relevant drawers, desks and containers are on hand prior to commencement (if the keys are not available, prior approval to force access/entry should be obtained from an authorised officer)
- ensure that searches are not conducted alone. It is good practice to have another person present who can record the search or observe the way it is conducted. Permission should be obtained from each person present if the search is to be recorded
- it is preferable to have the occupant or user of the search environment (it may be the subject person) present, as it is highly likely that personal items will be located. Clearly explain the purpose of the search, ask them to remain while the search is conducted, and ask them to assist to locate relevant items
- have the recovery of all items recorded and logged during the search. Make a record of the persons present at the search. If recording the search, introduce everyone present, state the time and date, and explain the purpose of the search.

Search of an employee's property

An investigator should seek legal advice before conducting any search involving an employee's property.

An agency's property may be co-mingled with an employee's belongings. For example, an employee's personal belongings may be kept in an agency vehicle, office locker, locked drawers or laptop bag that also contains the agency's property. Agency-owned items may also be contained in an employee's personal property, such as documents in a personal carry bag or records of work communication on a personal device.

An agency can investigate any work-related activity, regardless of its location. However, an agency does not have a general right to conduct a search of an employee's property or belongings.

To avoid ambiguity, agencies should have a policy that permits searches of agency-owned vehicles, cupboards and drawers that may contain personal items.

When asked, an employee may consent to a search of their personal property. However, in the absence of a lawful and reasonable basis, a right under contract, or policy to search an employee's property, an agency is at risk of an action for trespass. In any case, an investigator should not seize an employee's personal belongings because doing so could be viewed as an act of larceny (stealing).

If an employee is working from home, or using a personal device to conduct work, the agency will have limited search powers. Consequently, an agency's IT system should be set up to capture all electronic records, regardless of an employee's location.

Search of an employee's person

An agency does not have the power to conduct a search of an employee's person without their consent. This includes searches of a person's clothing or body or items on the body such as handbags, wallets or pockets. A request to search, when made, should be reasonable. The consent should not be coerced. It is good practice that consent, when given, is witnessed by a person other than the investigator and that records are made of the process followed.

Without an employee's consent and sufficient justification of the search, there is a risk that the employee will take action for trespass, wrongful confinement or assault.

Site inspections and physical items

A site inspection may assist an investigator to see or hear things relevant to the case, assess the distance from one location to another, or examine the spread and layout of plant, equipment and potential witnesses.

An investigator should take contemporaneous notes and photographs of inspections that can be referred to or evaluated at a later date.

The inspection of physical items may assist if the look, weight and feel of an item is at issue. Some examples of

physical items that an investigator may inspect include safes, vehicles, plant and equipment, displaced goods, whiteboards or signage.

Things obtained should be appropriately handled, registered and secured to ensure the integrity of the object and chain of custody is preserved. It is good practice for the investigator to acknowledge the receipt of items taken.

Expert evidence

An investigator may need the services of a professional expert, such as a forensic IT or computer specialist, document examiner, accountant, valuer or engineer.

An investigator should ensure the expert is suitably qualified and experienced, so as to give confidence that their advice can be relied on.

Any expert statement should specify the training, study or experience that make the person an expert.[22] This will be useful if the evidence is contested in future formal proceedings.

The primary concerns with expert evidence relate to:

- bias or partiality in favour of organisations engaging them, or conversely, "shopping" for an expert who will give the advice that its client wants to receive
- the difficulty in assessing expert evidence because of an investigator's own lack of training or experience in the specialised area of knowledge
- the excessive influence that experts may exert by nature of their superior knowledge of subject areas.

To mitigate against these risks, investigators can ask the relevant expert witness to:

- disclose facts or assumptions or qualifications on which the opinion is based
- consider material facts which could detract from or alter their conclusions
- make it clear when a particular question or issue falls outside their expertise
- provide the necessary criteria for testing the accuracy and validity of their conclusions and identify their reasoning process
- ensure that the advice or opinion is wholly or substantially based on the expert's training, study or experience.

An investigator can assess the reliability of the opinion by reviewing whether any assumptions are justifiable or if the opinion is based on flawed or incomplete data. If possible, investigators can also assess the validity of methods by which the data was obtained and whether the expert's methods followed established practice in the field.

Updating allegations

As an investigation unfolds, the investigator may identify material that points to potential wrongdoing not covered by the existing allegations. Alternatively, the complainant, witnesses or other individuals may come forward with new allegations.

Since it is important for internal investigations to be properly authorised and planned, new or amended allegations should be approved by the person or body responsible for authorising investigations. This is especially important if a new subject has been identified or the new allegations are more serious in nature. If approved, the new allegations should be reflected in the investigation plan (see chapter 3). This approach helps to avoid unnecessary investigation creep and cost and avoids any suggestion that the investigator has gone on an unauthorised "fishing expedition". Of course, any new or revised allegations would need to be put to the subject before any adverse finding can be made.

Case study 2: Adding a new allegation

Investigator A has been tasked with investigating an allegation that a manager of a government agency dishonestly awarded purchase orders to Company X; a company that is operated by the manager's husband.

During the course of the investigation, Investigator A identifies email messages indicating that the manager also approved the payment of Company X invoices for goods that may not have been delivered. This is a new line of enquiry that does not fit within the existing allegation.

As a result, Investigator A drafts a proposed revision to the investigation plan, reflecting a new allegation. The date and basis for this change to the plan is also documented and Investigator A's supervisor approves the change.

[22] See s 79 of the *Evidence Act 1995*.

Managing and interviewing complainants and witnesses

Preliminary considerations

Witness interviews are a key means by which the investigator can both obtain and provide information.

The aim of an interview is to obtain a full, accurate and reliable account. To be full and accurate, information should be as complete as possible without omissions or distortions. To be reliable, the information must have been given truthfully, accurately and be able to withstand scrutiny.

All participants to an investigation have a right to expect they will be listened to and receive fair treatment. By establishing a degree of trust with an interviewee, an investigator is more likely to be given a full and accurate account.

It is preferable to conduct interviews face-to-face. When this is not possible, alternatives such as telephone or videoconference interviews and written requests for information can be utilised (for example, where evidence is needed urgently, the witness is located far away or to clarify a small detail). Written requests for information may be suitable for external witnesses. However, there are risks, such as delays, collusion or loss of confidentiality if the investigator does not have adequate control over the interview setting.

Most witnesses are willing to cooperate if asked. However, some may have concerns about reprisal action (especially if they are expected to give evidence against the interests of a colleague or manager), how they will be perceived by other colleagues or how their evidence will be used by the investigator.

For those occasions when an employee is reluctant to participate in an interview, agencies should have a policy that requires reasonable cooperation with an authorised investigation. The policy could include information about an interviewee's rights and obligations, consent to be recorded and expectations about maintaining confidentiality. It could also make clear that cooperation is important to a fair and proper process and encourage employees to provide any relevant evidence to the investigation.

Often, it may not be clear why a witness is reluctant to cooperate with an investigation. A skilled investigator should be able to determine the core concerns of the witness and negotiate an acceptable way to obtain the evidence, preferably without having to invoke any policy that compels cooperation.

An investigator should never promise a complainant or witness that their evidence will be kept confidential or kept from the subject of the investigation. A better practice is to advise the interviewee that reasonable attempts will be made to protect their identity if procedural fairness allows and that the agency will protect them from reprisal. If an investigator or agency has a particular concern that information tending to identify a witness could cause reprisal or harm, they could elect not to rely on that evidence if there are alternative sources or take steps to anonymise the witness. This would need to be balanced against the seriousness of the allegations.

Most investigations involve interviewing people in the following order:

- the complainant
- witnesses who are likely and available to provide credible, relevant and significant evidence
- any other witnesses
- the subject(s) of the investigation.[23]

An investigator may not be able to interview every potential witness but the investigation plan should document all potential interviewees and the evidence they might be able to provide. An investigator should document attempts to reach the witness, such as the date and time of the telephone call, the number called, and any emails sent.

The PEACE investigative interviewing framework

The PEACE framework[24] originated from a review of police interview practices by the UK Home Office. The review was instigated after a number of miscarriages of justice in the UK resulting from inappropriate interrogation of suspects. PEACE, developed in the 1990s, is an ethical and effective framework for investigative interviewing of victims, witnesses and suspects. It is aimed at collecting truthful information for informed decision-making and just action-taking. The framework has been adopted to varying extents in a number of jurisdictions, including Australia, and is accepted by the Commission as a framework with significant utility for misconduct investigations.

[23] Since all relevant information needs to be put to the subject(s), it makes sense to hold their interview after all evidence has been gathered and analysed. However, there is no strict rule about the order of interviews and there may be pragmatic or tactical reasons for bringing forward the interview of the subject. For example, the subject might indicate a willingness to make certain admissions or might be about to resign.

[24] See www.app.college.police.uk/app-content/investigations/investigative-interviewing/

PEACE is a mnemonic for the five stages of interviewing:

- planning and preparation
- engage and explain
- account
- closure
- evaluation.

Each of these stages is explained in detail below. Appendix 2 of this report contains an interview plan template informed by, and adapted from, the PEACE framework.

What can a witness be told?

The information disclosed to a witness should be tailored to the circumstances of the investigation. Maximising cooperation should be balanced against the risk of disclosing too much information. Where appropriate, an investigator may wish to advise or request the following:

- a description of what the investigation is about
- the name of the investigator/interviewer and information about the impartiality of their role
- a general description of the investigation process, emphasising steps that will be taken to ensure fairness
- the agency's policy in relation to the presence and role of an observer or support person
- expectations of the agency in relation to cooperation, truthfulness and confidentiality and the fair treatment of other persons involved in the investigation
- the production of any documents in the possession of the witness that may assist the investigation. The witness should, however, not be encouraged to conduct their own evidence-gathering procedures that might compromise the investigation
- legislation and policies applicable to potential reprisal action against complainants and witnesses and what to do if reprisal action occurs
- a contact point for any procedural questions
- information about any employee assistance program.

Planning and preparation

Preparation is essential to ensure that the interview is comprehensive, focused and efficient.

Interview plans

The investigator needs to have reviewed all the existing evidence and have anticipated all issues that the witness can relevantly comment on (see appendix 2 for an interview plan checklist).

It is also crucial that the investigator understands what evidence is relevant to substantiate or refute the allegations and set questions, lines of enquiry or topics in advance. This can be used as a checklist to ensure all relevant issues are covered and provide the basis for the interview structure and questioning.

Location and timing

The interview environment enhances the quality of evidence elicited. Privacy is a major factor contributing to psychological safety and success of an interview. If necessary, interviews should be conducted away from the workplace, in a private location and at a time that will not arouse suspicion. If possible, choose a time that minimises inconvenience to the person and the agency.

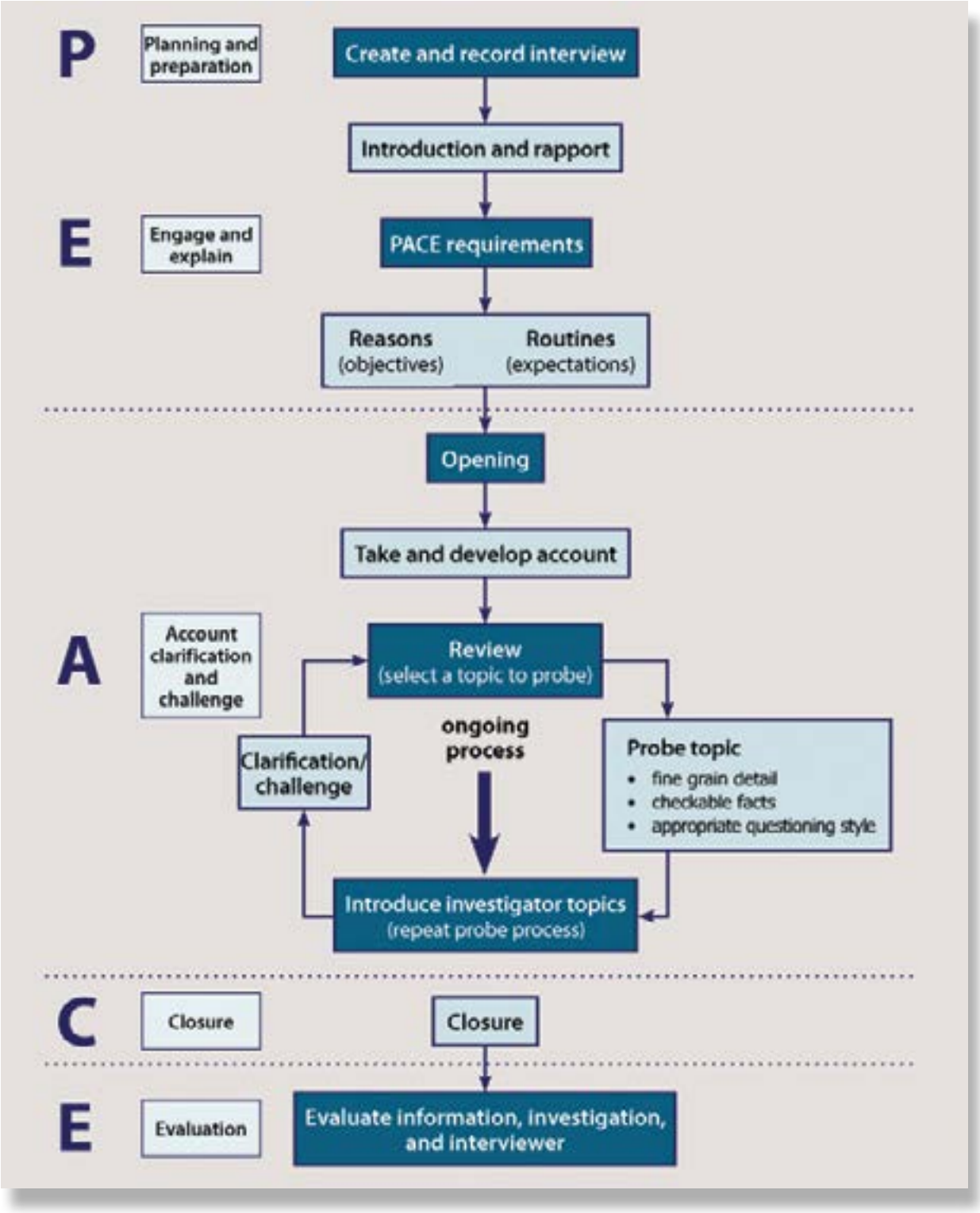
For practical reasons, the investigator may have to conduct a number of interviews in close succession. Therefore, the investigator should anticipate the need to move from one interview to the next without additional time to plan. In addition, the investigator might need to take steps to prevent different interviewees from crossing paths before or after their interview.

Recording the information provided

It is important for interviews to be documented in some way. There are three principal ways oral evidence can be recorded:

1. making an audio recording of the interview, which, if necessary, can be transcribed
2. obtaining a signed witness statement that addresses the relevant information obtained during the interview
3. making detailed interview notes.

Figure 2: PEACE model[25]



[25] See www.app.college.police.uk/app-content/investigations/investigative-interviewing/.
PACE is the acronym of the UK's *Police and Criminal Evidence Act 1984*, which sets requirements for investigative interviewing not applicable for misconduct investigations in NSW.

The key advantages of audio recording an interview are that it:

- creates an accurate account of the interviewee's precise words, which can be transcribed[26]
- if transcribed, can be checked by the interviewee and any errors or omissions addressed
- means, if necessary, the transcript can be easily adopted as sworn evidence, which can be used in court, by appending it to a statement
- reduces the chance that the evidence will be misinterpreted or misquoted by the investigator
- allows the investigator to engage with the interviewee instead of taking notes, which can be time-consuming.

However, even if these advantages are explained, some interviewees might be nervous about being audio recorded. For instance, they might be worried about providing inaccurate information or not trust that the recording will be stored securely. The investigator can provide assurances about these issues but, ultimately, the interview must not be audio recorded without the consent of all persons present.[27]

In order to avoid any unexpected surprise, the interviewee should be given advance notice of the intention to audio record the interview. This should assist both the interviewee and interviewer to prepare. Once the audio recording device is switched on, the investigator should also recapture the consent of the interviewee and other persons present.

If consent is not obtained, or the investigator elects not to make an audio recording of the interview, detailed notes should be taken or a draft statement can be typed during the interview (see page 40 for more information about statements). In this case, it is advisable that an additional person be present at the interview to take detailed notes. The witness can be asked to repeat key important points that need to be taken down verbatim.

If possible, an interviewee should be asked to read the investigator's interview notes and sign or signify that they are correct.

The interviewee may ask for a copy of the recording, transcript, statement or notes relating to their interview. Agreeing to such a request may jeopardise the confidentiality of the investigation and, if possible, these items should only be provided at the end of the investigation. However, there are no uniform practices in this area and the investigator can make a judgment call, especially if is assists in securing the cooperation of the interviewee.

Similarly, an interviewee may also insist on audio recording an interview on their own device or taking their own notes. An investigator should be wary of this, but may agree subject to an undertaking by the interviewee that any recording or notes be kept confidential.

Engage and explain (introduction and rapport)

During this phase of an interview, the investigator seeks to establish trust by demonstrating competence and a willingness to listen. The investigator may:

- thank the interviewee for attending
- explain the purpose of the interview, the investigation process, emphasising impartiality and the investigator's role in that process
- outline the interview structure (this may aid with the flow of information and an understanding of what information is being sought)
- confirm the role of an observer or support person (if any)
- explain procedures relating to potential reprisal action against complainants and witnesses
- cue the witness to report in detail.

While building rapport is important, an investigator should avoid over-identifying with the interests of the complainant. In particular, the investigator may feel sympathy if the complainant appears to be the victim of serious misconduct. While investigators are not expected to be devoid of all emotion, their primary task is to make accurate findings, not seek redress for the victim.

Formalities

Some or all of the following can be put on the record at the commencement of the interview:

- the interviewee's consent to audio recording the interview
- time, date and location of the interview
- brief details of the matter being investigated

[26] To make any transcript easier to understand, the investigator should describe the documents being shown to or discussed by the witness. For example, "I am about to show you an email sent to you by [person x] on [time/date], titled [##]" or "I am about to show you an email marked as exhibit number [##]".

[27] Section 7 of the *Surveillance Devices Act 2007*.

- details of the interviewee's name, date of birth, contact details and occupation
- details of any other persons present
- recitation of uncontentious, agreed events, where applicable with the interviewee's confirmation that this is what happened (for example, events that occurred before the interview, such as receipt of a notification to participate in an interview) and a summary of discussions held in the introductory stage of the interview.

Account (questioning, clarifying and challenging)

There are no absolute rules for what questions should be put to a witness. However, it is usual to commence interviews with open questions or questions that encourage free recall and then move to clarifying or specific questioning.

Open questioning

To capture as closely as possible the interviewee's own account, the investigator should use broad, open-ended questions and listen. Let the interviewee provide their information. Do not interrupt unless necessary to draw the interviewee back to relevance. Questions beginning with, "Tell me about…", "Explain…", "What happened?", "How?" and "Why?" can draw out expansive responses.

Most complainants or witnesses will be comfortable discussing events chronologically. But to obtain information in a coherent manner, it may be necessary to proceed by topic area or allegation. Any documents shown during the interview should be prepared accordingly.

While pre-interview preparation is essential, the investigator should explore topics that arise unexpectedly during the interview. It is important to listen carefully because even a brief reference to an unknown piece of evidence could be crucial.

If required, the investigator should confirm the interviewee's evidence has been understood. However, the investigator should avoid remarks suggesting they agree with what an interviewee is saying or hold sympathy for the interviewee's views.

Clarifying

Free recall is often followed up by further open-ended questions to obtain more information before moving to direct or closed questions to obtain specific answers. Specific questioning is useful to clear up ambiguities or to address facts in issue that have not yet been covered. The investigator should ask for clarification if they do not understand the information being provided.

An investigator should take time to ensure all the issues listed in an investigation plan, gaps in the interviewee's narrative, important issues, ambiguities and possible inconsistencies are addressed. The investigator should obtain or arrange to obtain any documentary evidence in the interviewee's possession and ask where further evidence may be obtained.

Leading questions may usefully and appropriately be used to efficiently record information on matters that are not in issue (for example, "Do you agree that the time is now approximately 10.25 am?").

Questions that seek conjecture, guesswork or fabricated answers should be avoided. However, in order to maintain progress, the interviewee can be asked to assume certain facts that they cannot personally verify. For example, "I want you to assume that this email was read by Person X" or "Can I ask you to assume that Person X's manager was not in the office that day".

Challenging

Interviews should be approached with an investigative mindset as a complete and reliable account may not always be easy to obtain. This means an investigator should be prepared to challenge accounts, particularly of issues that are relevant and material.

Investigators are not bound to accept the first answer given to a line of questioning. Investigators may be persistent, particularly if there is a reasonable belief the interviewee is confused, not telling the truth or that further information could be provided.

Accounts obtained should also be tested against what the interviewer already knows or what can be reasonably established.

Where a response is inadequate, or the investigator wishes to test the evidence given, questions can be reframed or the interviewee may be asked to recall events a second or third time, possibly in a different chronological order, or answers can be sought in a different manner (for example, a sketch or map). The investigator can seek an explanation from the interviewee regarding any inconsistencies in the evidence.

Questions should aim at comprehensive coverage of the material. Investigators are expected to drive at the truth of the matter, and should therefore be prepared to:

- ask unpleasant, uncomfortable or difficult questions to test credibility or reliability of evidence (it means probing the answers given to questions by appropriate supplementary questions)
- take control of the interview process from difficult interviewees who may be evasive,

unfocused, irrational or who may question an investigator's authority.

An investigator should not offer a witness any benefit, concession or other inducement in return for their evidence unless there is clear authority and rationale for doing so. In no circumstances should an investigator offer a witness an indemnity from criminal prosecution. An investigator should also avoid making any statement that causes a witness to believe that they will obtain any privilege, concession or immunity from official action.

Productive questions and behaviours

Productive questions and behaviours are useful to elicit information. They are recognised as part of the toolkit of techniques that can be usefully employed within the PEACE framework. They include:

- open questions, which encourage long answers that result in more information
- probing and clarifying questions (that is, the what, where, when, why, who, and how come?)
- echo probing, where the last few words of the witness or subject are repeated by the interviewer to link to further probing questions (for example, "You were given approval?")
- summarising, where an interviewer checks their understanding and accuracy of what has been said with the interviewee
- short and concise questions
- relevant questions
- singular (one question or one point at a time)
- asking for sketches or diagrams
- presenting appropriate documents, visual aids or aides memoire (for example, maps and images) to elicit further information
- using simple, unambiguous and jargon-free vocabulary
- active listening
- calmness when confronted by anger, hostility, aggression or resistance.

Unproductive questions and behaviours

Unproductive questions and behaviours are those that are confusing or inappropriate. They are unlikely to elicit the best information from the interviewee, often requiring follow up clarification questions, and risk distorting responses. Avoid questions and behaviours such as:

- leading questions that assume or suggest the answer (for example, "You were drunk, right?")
- multiple questions that can lead to selective answering and difficulty matching the response with the question (for example, "How did you get access, what did you do when you did and when did you first decide to override the payment details?")
- judgmental questions (for example, "Is that your response?! Are you serious?")
- negative (for example, "You don't know this company do you?")
- double negative (for example, "You don't know that the business was not included in the tender, do you?")
- forced choice (for example, "Did you lie or cheat to be included?")
- accusatory (for example, "We have received complaints; why would the complainant lie?")
- sarcastic or ironic (for example, "Do I look like I'm gullible?")
- tag questions (for example, "You did see the incident, didn't you?")
- overlapping talk and interruptions
- telling the interviewee that information has been received from another source[28]
- giving praise for having said something in particular
- negative consequences, such as criticism of the interviewee that their answer is "wrong" or inadequate
- not allowing the interviewee time to understand the question, think what they know about the matter, formulate their answer and deliver it.

Section 41 of the *Evidence Act 1995* provides some further guidance on the types of questions that may be inappropriate to ask, particularly to vulnerable complainants or witnesses. Vulnerabilities could arise as a result of mental, intellectual or physical disability, and in relation to culture, ethnicity, level of education and language ability. Investigators should ensure that their questions are not:

[28] If a document needs to be shown to an interviewee, usually there is no need to divulge how it was obtained or from whom.

- misleading or confusing
- unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive
- put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate
- based on a stereotype (for example, based on gender, race, culture, ethnicity and age or mental, intellectual or physical disability).

At the same time, the investigator should, if necessary, challenge the veracity or consistency of any statement made by an interviewee. Where relevant, the investigator should be prepared to seek personal information from the interviewee. For example, investigations into alleged conflicts of interest will usually require exploration of the subject's finances, relationships or other interest that could give rise to the conflict.

Reliability and credibility

Be mindful of the fallibility of human observation and memory. An interview should not, primarily, be a memory test. Even a witness who is trying to be truthful can provide an inaccurate account. Where appropriate, as a memory aid, it can be helpful to provide a witness a document or email correspondence that they were a party to, or uncontested background material. It can also assist a witness to be asked to walk an investigator through prior events to trigger recollection about an incident in question.

An investigator can then draw out other contextual material that will allow for a more accurate assessment of the reliability of the account.

When a witness gives evidence of their observations, the investigator might also have to ask about the relevant circumstances, such as:

- "How far away were the relevant incidents?"
- "If the observation was made at night, what was the lighting like?"
- "Over what period of time was the observation made?"
- "Was it fleeting or over an extended period of time?"
- "Did the witness have prior knowledge of the people present?".

Some witnesses will give an intentionally false account, while other witnesses will give accurate evidence about some things and false evidence about others. They may even omit information they know to be relevant. The following list contains important issues to consider when dealing with a witness who may not be telling the truth.

- There is a need to obtain accounts from all relevant witnesses. An investigator should not refrain from taking a witness' account just because they think it could be untruthful. It is important that the investigation is demonstrably comprehensive and that decision-makers have access to the accounts provided by all relevant witnesses.
- A common way of assessing whether a witness is truthful is to compare their account with other available evidence. To allow this comparison, it is important that the investigator gather different versions of key events and that any discrepancies are explored. However, the investigator should avoid leading the interviewee with questions like "Your colleague, Person X, told me that her manager used the agency credit card to purchase personal items. Is that true?". A better question is "Can you tell me anything about how the manager used the agency's credit card?".
- Alternatively, where a witness' evidence is strikingly similar to various other witnesses – for instance when identical or near identical language is used – it may suggest collusion.
- There can be strategic benefits gained from drawing out the false aspects of an interviewee's account. Such an approach can draw the interviewee into an untenable situation, where the false nature of their account is obvious. When placed in this situation, some witnesses will review their approach and provide truthful evidence. In other situations, an interviewee will tailor the information they provide to the evidence they *think* the investigator has collected. Consequently, an investigator can potentially uncover a dishonest witness by revealing relevant evidence:
  - one piece at a time, or selectively
  - in an unpredictable manner
  - after the witness has provided an initial version of events.
- Experienced investigators will observe a witness' body language and speech patterns to assess their credibility. However, for most internal investigations, there is little to be gained from attempting to interpret these cues. Investigative findings must be based on evidence, not the investigator's instinct that the interviewee is dishonest.

How to interview an uncooperative witness

An investigator may encounter a difficult or uncooperative witness. If the witness is an employee,[29] any failure to respond to questions or refusal to hand over documents can amount to a failure to comply with a lawful direction, which may have been referenced in a notice of interview. The witness may face potential disciplinary action if they fail to cooperate with the investigation.

In this case, the investigator should ask why the witness is unwilling to answer questions or a specific question. This can generate discussion that leads to cooperation. In some cases, the witness might fear reprisal action if they participate in an investigation into a colleague, so the interviewer should be able to arrange any necessary protection.

If all else fails, the investigator can assess how the absence of information affects the investigation and obtain information from other sources, where possible.

Closure

An investigator's final questions are usually directed at seeking any other information that the interviewee thinks is important and not already covered in the interview, and to confirm the integrity of the interview. At suitable points in the interview, the investigator should also offer any secondary interviewer an opportunity to ask any questions. Some helpful closing questions include:

- "Is there anything else that you think I should know?"
- "Is there anyone else who I should speak to?"
- "Is there anything else that you would like to say?"
- "Are there any documents or anything else that you think I should look at?".

Safeguarding the interview

Conventionally, interviews close with some adoption questions to safeguard that evidence has been given freely, such as:

- "Have the answers been given freely without threat, promise or inducement?"
- "Has any threat, promise or inducement been held out to you to give these answers?"
- "Do you have any complaints about how we have conducted the interview?".

The interviewee can also be reminded of the need to maintain confidentiality. They should also be thanked for their time and input. The investigator may wish to provide the interviewee a limited timeframe to provide more information.

Evaluation

In this last stage, the investigator should review whether the aims and objectives for the interview were achieved as well as practical considerations, such as having the interview transcribed or converted to a statement. The investigator may have to consider what further evidence needs to be obtained or any lines of enquiry that need to be closed or pursued.

The overall investigation plan and case theory can also be reviewed in light of the information obtained.

Observers, support persons and advocates

Under an agency's policy, a contract of employment or an industrial instrument, an interviewee may be entitled to have an observer or support person present at the interview.

Can an advocate be present?

Some agencies have policies that disallow the presence of an advocate, such as a union representative or lawyer, during an interview. In the absence of such a policy, there is generally no problem if an interviewee wants an advocate to be present; as long as the ground rules of the interview are understood and followed.

For example, any advocate should understand that:

- they cannot ask questions without the consent of the investigator
- they cannot respond to questions on behalf of the interviewee
- the interviewee is required to comply with agency policy
- the investigation should be kept confidential.

[29] It is often necessary to interview people who are not employees (for example, suppliers, customers and former employees). An investigator acting for the agency will obviously have little or no power to require cooperation from such a witness. However, this should not prevent an investigator from asking and most people are happy to assist if they have confidence in the process and understand that the information they provide could advance the public interest. In any case, contractual agreements with key parties, should establish a process for dealing with allegations of wrongdoing.

A support person can be a safeguard against perceived unfair practices. They can also provide emotional support and reassurance, observe proceedings and act as an adviser.

An observer or support person can be another employee, a friend or family member. It is good practice to ask the interviewee to provide the details of any support person prior to the interview, so that the investigator can assess any potential conflicts. It would be reasonable for an investigator not to permit the following persons to be an observer or a support person:

- co-workers who might otherwise be involved in the matter
- a manager, whose presence may hamper the provision of full and frank information (a manager might also have a conflict between their role as support person and their role to supervise the interviewee, or they may be responsible for control failures that have contributed to the conduct under investigation)
- minors, as it is not appropriate for persons with limited legal capacity to be involved in disciplinary matters that may have legal ramifications
- a person who is unavailable and would contribute to an unreasonable delay in the progress of the investigation
- a person who has previously been disruptive and/or failed to comply with the reasonable requests of the interviewer to, for example, maintain confidentiality.

In addition, if an interpreter is required, they should preferably be engaged by the investigator and not be the support person of, or otherwise associated with, the interviewee.

To ensure the support person does not interfere with the investigation, they should:

- understand their role and what they may or may not say
- have not agreed to assist any other witness in the investigation, especially if it is important to avoid collusion between witnesses (an exception may be a union representative, who may represent a number of witnesses)
- not be a potential witness
- undertake to respect the confidentiality of the interview and discussions in the interview.

Why would an internal expert be interviewed?

The investigator may need to obtain evidence from a subject-matter expert within the agency. Although they cannot give evidence about the specifics of the alleged conduct, internal subject matter experts can be used to provide oral evidence about matters, such as:

- how relevant policies and procedures operate and when they commenced
- how a complex system or database works
- the plausibility of information provided by the complainant, witnesses or the subject.

Internal experts can also produce and explain relevant data, such as training records, payroll information and procurement/finance information.

With these types of interviewees, there may be less need to begin the interview with a series of open questions. Depending on the circumstances, it may be convenient to move directly to the specific information required.

Statements

Statements are often useful and can be sought when information is expected to be admitted as evidence in court. But, even if the matter is unlikely to involve court proceedings, written statements have a number of advantages, including the following:

- by providing the witness with an opportunity to carefully consider the words, phrases and impressions conveyed in their interview, thereby "locking in" their evidence
- accounts of events and observations can be given more weight if they are in the form of a signed statement – compared with, for example, a passing comment during an interview
- compared with an interview, a statement can set out evidence in a more logical form
- since memories can fade, a statement can be used to refresh the witness' memory at a later point in time.

Taking statements also carries some risks; for example, it can be time-consuming, witnesses can dilute their information, they can seek material changes that might raise concerns about credibility, or there may be delays in a witness signing their statement.

The form of a statement varies according to the circumstances in which it is taken. An agency may have a standard form for disciplinary or administrative purposes. If the statement could be used for the conduct of criminal proceedings, it should be prepared in a form that complies with the requirements of the *Criminal Procedure Act 1986*.[30,31]

In accordance with s 283B of the *Criminal Procedure Act 1986* and clause 9I of the Criminal Procedure Regulation 2017, a statement should contain the following:

> *This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true.*

Statements must also specify the age of the person making the statement.

Here are some guidelines for drafting statements:

- the first person, "I…", should be used, and the statement should be in the words of the person making the statement (there is generally no need to improve a witness' manner of speaking or grammar)
- identify the person's name, their position, occupation, date, place and, if necessary, the reason the statement is being made
- irrelevant information[32] should be excluded from the statement and the information should be set out in some logical order, such as chronologically
- if the person quotes a conversation, recount it exactly in direct speech (for example, "I said, '[exact words]', and then she said '[exact words]'"
- if the person cannot recall the precise words used a conversation, the recount can be stated as "X said words to the effect of…"
- if the person is unsure about something or does not have a precise memory of events, the statement can include appropriate qualifiers. For example:
  - "To the best of my recollection…"
  - "I was only present for part of the conversation, however…".

  Conversely, the statement can reflect that the person is certain about something. For example:
  - "I am sure that the conversation took place at lunchtime on Tuesday"
  - "I have no doubt that…"
- refer to documents or things provided by or shown to the person and attach copies to the statement (the statement may say, "Attached is Annexure A being [name of document/thing] shown/produced to/by [the person]")
- the person should read the statement before signing it and every page should be signed (if a person refuses to sign their drafted statement, a clear file note should be made by the interviewer explaining the circumstances)
- strike-out any blank spaces at the end of the statement to avoid the possibility of additions being made.

If a witness wishes to alter a statement after signing the original, they should prepare another statement that explains any contradictions from the first one.

Obtaining evidence from the subject of an investigation

Before approaching each person who is the subject of the investigation, an investigator should be satisfied that the allegations have foundation.

Interviewing subjects usually occurs after gathering and analysing all other evidence including interviews of complainants and witnesses. This puts the investigator in the best position to plan the interview of the subject. An investigator should be sensitive to the impact that a complaint may have on the subject.

Notification

It is important to give a subject reasonable notice of their interview. Reasonable notice will be dependent on the nature, seriousness or complexity of the investigation, and the potential disciplinary or legal implications. Sufficient notice will also ensure that the subject has sufficient time

[30] A guide and checklist for statements in civil proceedings can be found at: www.lawaccess.nsw.gov.au/Pages/representing/lawassist_readingwritinghome_wysk/lawassist_statements_checklist.aspx

[31] If evidence of the person is to be used in civil legal proceedings, it may be appropriate to have it set in affidavit form, which can be sworn before a justice of the peace or a solicitor. Seek legal advice if court proceedings are anticipated or if the investigator is inexperienced in drafting sworn statements.

[32] If the investigator is in doubt about whether information is relevant or admissible, it should be included. If necessary, irrelevant or inadmissible evidence can be excluded at a later time.

Oaths, affirmations, affidavits, statements and statutory declarations

All must be administered or witnessed by authorised persons as specified in NSW under the *Oaths Act 1900*.

Oaths and affirmations are solemn promises to tell the truth. Oaths are generally sworn by persons who have a belief in God or some form of religious belief before a deity. Whereas non-religious persons can opt to make a solemn promise by affirmation. The legal effect of swearing an oath or making an affirmation is the same; that is, committing themselves to telling the truth. Oaths or affirmations are usually made immediately before giving oral evidence in court or a tribunal. A person who lies under oath or affirmation before a court or tribunal can be charged with an offence of perjury.

Affidavits are written statements that a person (the deponent) confirms to be true by swearing an oath or making an affirmation before a person who is authorised by law to witness the affidavit. It is a form of evidence used in court or tribunal proceedings and usually serves to set out a person's own account of relevant events in numbered paragraphs. As it is a legal promise to tell the truth, being untruthful can amount to perjury and is an offence.

Witness statements are simply signed; unlike an affidavit, which is sworn by its maker. When a witness is sworn in court proceedings, they can be asked whether the content of their witness statement is true and correct. If the witness confirms the truth of their statement, the witness statements can be tendered into evidence in court proceedings. A false statement can amount to perjury.

A statutory declaration is a legally recognised written statement that a person promises is truthful. A statutory declaration is used where sworn evidence is not required, such as applications to obtain a right or a benefit (for example, an application for a mortgage with a bank or in support of carer's leave). It is not intended for use in court proceedings. Unlike an affidavit, a statutory declaration is not made on oath or affirmation, but a false statement in a statutory declaration is still a criminal offence and may result in a fine or imprisonment. As it adds formality and accountability to what is being claimed, a statutory declaration can give confidence to those relying on its content.

to prepare, adequately respond to questions and present their position. Any request by the subject for additional time to prepare should be considered.

In some circumstances, it may be appropriate to give a subject some documents to read beforehand, especially if the matter is old and the documents are not sensitive. An investigator may need to refer to any applicable legislation, award or policy that addresses what information is required to be provided to a subject of an investigation.

Special arrangements should be made to provide assistance (such as a qualified interpreter) for people with communication difficulties. As with witnesses, subjects should be permitted to have an observer present.

As a general rule, it is not necessary to inform the subject of the source of the allegations.

In addition to the items listed on page 33, a notice to a subject can include the following information, conditional on any requirements under an applicable award or policy:

- the nature and purpose of the interview
- the names and titles of the officers conducting the interview
- the particularised allegations, which should make it clear that the interviewee is the subject of the investigation (it is improper to allow the subject to believe otherwise)
- advice that the interview will provide the subject an opportunity to give their version of relevant events and respond to the allegations (the subject should also be invited to bring any documents to the interview)
- the subject's right to raise any special needs (for example, a signing or language interpreter)
- the possible disciplinary outcomes of the investigation
- a copy or link to the agency's disciplinary and investigation guidelines, which might include information about cooperation.

Interview preparation

The preparatory steps for witness interviews outlined on page 33 will be relevant to the interview of subjects. In addition, the planning of interviews for subjects will require:

- learning about the subject (for example, from their personnel file, work history and any previous disciplinary action)

What if a subject is absent?

A subject may refuse to be interviewed for a variety of reasons such as illness,[33] leave, under legal advice or resignation. Of course, another reason is that the allegations have some substance and the subject wants to avoid accountability and disciplinary action.

While it is normal for an investigator to be suspicious about a failure to cooperate, no adverse inferences should be drawn directly from the subject's refusal to be interviewed. However, if the subject declines to provide their version of the events, the investigator will be forced to make findings based on the remaining, available evidence.

An investigator should try to determine the reasons for refusal and seek to negotiate a pragmatic way to obtain the subject's evidence. As noted in chapter 3, refusal to be interviewed could be a breach of duty and result in disciplinary action.

If the subject cannot or will not be interviewed, the investigation can still proceed. The subject can be given a chance to respond to the allegations by means other than a face-to-face interview (for example, the allegations, relevant evidence and questions could be sent to them by email).

- a thorough understanding of the issues to be covered (this covers the broad information or questions that deal with the elements of the allegation and the information that an investigator expects the subject to confirm, refute or comment on)
- identifying outstanding evidentiary gaps
- knowledge of any exculpatory evidence
- ensuring all key evidence will be put to the subject and sufficient time given for their review and response
- reassessing relevant risks, which could be set out in the investigation plan.

Conducting interviews with subjects

There are a number of additional considerations that need to be made when interviewing the subject of an investigation. These generally relate to measures to ensure the subject is given a fair opportunity to present their version of relevant events in circumstances where they may be adversely affected by the findings of the investigation. This means that, at some point in the interview, the allegations need to be put to the subject in plain terms, so as to elicit their version of events.

Additionally, investigators will often employ a different strategy when interviewing the subject. Investigators may wish to utilise more clarification or specific questions, pay more attention to incomplete or misleading responses and be prepared to challenge a subject's responses.

Investigators must, of course, be open to the possibility that the subject of the investigation has not engaged in the alleged conduct. Such a person has an obvious interest in working with the investigator to arrive at a finding that none of the allegations have been substantiated. However, a subject in this situation could still be nervous, angry, forgetful, distrustful of the investigation process and worried about the possibility of an adverse finding. The investigator should be careful about misinterpreting these emotions.

On occasion, the subject will cooperate fully and readily make full admissions. But investigators should anticipate the subject could be evasive, seek to minimise their involvement in the matter, omit key information from their answers, feign forgetfulness, dissemble or just lie (see "reliability and credibility" on page 38).

The subject may also prepare for the interview by devising a false or misleading version of events that they plan to rely on. However, it often takes considerable mental effort for the subject to create a version of events that:

- is plausible
- portrays themselves in a positive light
- fits with the evidence that the subject assumes has been collected
- holds up under sustained questioning.

What if the subject fails to mention exculpatory evidence?

For a variety of reasons, the subject might neglect to provide information that tends to show that the allegations are not substantiated (that is, exculpatory evidence) or other information that advances their interests.

In an internal investigation, the subject should not be penalised if they fail to mention this information. The investigator must still consider this evidence and preferably provide the subject with an opportunity to comment on it during the interview.

[33] If an interviewee is ill, the investigator should consider asking for a medical certificate or other proof of incapacity.

The interviewer can take advantage of this by looking for opportunities to draw out inconsistencies and falsehoods. When confronted with the implausibility of their version of events, some subjects may make admissions. But, if not, the investigator is entitled to draw adverse inferences if it can be shown the subject's evidence is untruthful, fanciful or implausible.

The general advice given earlier in this publication – that an investigator should refrain from unnecessarily imparting confidential information in the course of an interview – needs to be qualified for interviews with a subject. An investigator has an obligation to allow a subject to respond to every matter that potentially has adverse implications, which may mean putting matters to the subject that would otherwise be kept confidential.

The privilege against self-incrimination

Employees generally have a duty to cooperate with properly authorised internal investigations. However, the subject of the investigation may decline to cooperate by claiming a privilege against self-incrimination (sometimes known as "the right to silence").

In *Griffin v Pantzer* [2004] FCAFC 113, the Federal Court of Australia described the privilege against self-incrimination in the following terms:

> *The privilege is that a person is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime … The consequence of the recognition by the High Court that the privilege is one deeply rooted in the law as a fundamental right is that it is not merely a rule of evidence available in judicial proceedings, it is available generally, even in a non-curial context, as the foundation of an entitlement not to answer a question or produce a document.*

Citing *Sorby v Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 at 288-289] the Federal Court also stated:

> *However, the mere fact that a witness swears that he or she believes that an answer will incriminate him or her is not sufficient. A court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there are reasonable grounds to apprehend danger to the witness where he or she is being compelled to answer.*

That is, an employee may not be compelled to answer questions or produce documents by an investigator if they legitimately claim privilege against self-incrimination.

For procedural fairness reasons, even if a subject chooses to remain silent, investigators should still put the allegations and any relevant evidence to them.

Admissions

Admissions are representations or statements made by a person adverse to their interests. An example of this might be a full confession or admissions to an element of an allegation (for example, a concession by an alleged fraudster that they were under significant financial stress). Admissions can have high probative value because of the logical assumption that a person would not normally make a representation adverse to their own interests if it were not true.

An admission, however, cannot be relied on if made under duress, coercion or extracted by trickery. To ensure fairness, admissions should:

- not result from threats, aggression or misleading conduct by the investigator (for example, by saying that a failure to confess will result in termination or a referral to the police)
- not be sought by lies or fabricated evidence
- not be procured in exchange for an unauthorised promise of leniency
- be properly recorded and witnessed
- wherever possible, be corroborated by other evidence.

Investigators should also carefully analyse the words used by the subject when making an admission. In particular, if the subject has only admitted to certain elements of the allegation, or qualified their statement in some way, the investigator should not interpret that as a full admission to the allegation.

The adoption questions listed on page 39 should also be asked.

At the end of an interview

After interviewing the subject (or any other person) it is often useful for the investigator to ask some follow up questions or clarify things said in the interview. For example, it might be necessary to test the subject's version of events against other detailed evidence, or additional evidence might need to be put to the subject to ensure procedural fairness.

It might be convenient to complete these follow-up enquiries by telephone, videoconference or email, but in

some cases, the subject may need to be re-interviewed in person. In addition, it is good practice to give the subject some time after the interview to provide additional information or make written submissions.

What is a criminal caution?

The vast majority of workplace investigations do not result in a criminal prosecution and, as a general rule, internal investigators are not expected to adopt the same procedures as the police.

However, in those situations where the subject of an investigation makes admissions about criminality, those admissions generally cannot be used in court unless a criminal caution has been issued.

Under s 139 of the *Evidence Act 1995*,[34] if an investigator has formed a belief that there is sufficient evidence to establish the subject has committed an offence, a criminal caution should be issued if any admissions are to be used in court.

The caution can be framed as:

> "I am going to ask you some questions. You do not have to say anything or do anything unless you wish to. Anything you say or do will be recorded and may be given in evidence. Do you understand this?".

If cautioned, some subjects may decide not to say anything further, which is likely to hamper the rest of the planned interview. Investigators should weigh this against the likelihood of any admission ever being relied on in court. As noted above, this is rare for most workplace investigations.

Investigative tools

Investigative work will always rely on the judgment and skill of the investigator. But there are now many technology-based tools and applications that can assist to:

- identify red flags
- plan investigations
- profile individuals and organisations
- gather, organise and analyse electronic evidence
- transcribe interviews
- gather open source intelligence from various databases, archived internet pages and social media platforms.

Many such tools are free and can be easily found on the internet. Many enterprise software products and electronic finance platforms also come with built-in analytical tools that can assist investigators. Some products also promise enhancements based on artificial intelligence and machine learning.

For complex matters, it is helpful if investigators have tools that allow electronic evidence to be searched efficiently.[35] This usually entails utilising optical character recognition software to ensure that all documents can be searched.

In terms of more traditional tools, investigators should consider using:

- a chronology or sequence of key events, which is often important when making factual findings and assessing causality (it is helpful if the chronology references the source of each observation; that is, the "register of evidence" mentioned in this list)
- association or link charts to depict whether and how different entities are related
- organisation charts, flow charts or process diagrams to show how operations are structured and how they function
- diagrams that highlight unusual transactions or events
- a register of evidence obtained during the investigation, which can show:
  - the source of each piece of evidence
  - the date it was received or returned
  - the location where physical evidence is stored or the document number or file location of electronic evidence
  - which allegations or topics the evidence relates to
  - whether or not the evidence is relevant (including whether it is exculpatory).

[34] An internal investigator will fall within the definition of an "investigating official" for the purposes of the *Evidence Act 1995*.

[35] Such technology is often referred to as "e-discovery" or "electronic discovery".

Chapter 5: Analysis and reporting

At the end of the evidence-gathering phase of an investigation, there is often a vast amount of information to analyse and weigh in order to make findings and recommendations.

The main purpose of an investigation report is to put the decision-maker in the best position to decide what action to take. Obviously, the investigator's findings can have significant personal consequences for the affected persons and the agency itself. In a clear and organised manner, the report should bring together how the findings and recommendations were reached and how all key investigative principles, such as procedural fairness and confidentiality, were met.

Factual analysis

An investigation that drives at the truth of the matter will result in the collection of evidence that can be relied on for factual determinations to be made.

The evidence collected in a workplace investigation is not subject to the requirements of the *Evidence Act 1995*. Investigators do not have to worry about whether evidence would be admissible in court. However, each piece of evidence needs to be considered in terms of its relevance (of which, there are two types: direct evidence and circumstantial evidence) and weight.

In terms of relevance, for example, how does this piece of evidence, if accepted, impact on the factual issues for determination? The evidence relied on should be directed and confined to matters that form the substance of the investigation and have some bearing on the issues investigated.[36]

In terms of weight, the degree to which an investigator relies on information will depend on an assessment of, among other things, whether it is corroborated by other evidence (including expert witness evidence) or the authenticity and accuracy of information obtained. The more reliable a piece of evidence, the more weight an investigator can place on it.

Direct evidence

Direct evidence is evidence based on a witness' personal knowledge of a fact in issue. It is evidence the witness perceives through their senses. An example of this is where a witness sees and hears the subject engaging in some aspect of the alleged misconduct. Direct evidence can also be footage or a recording of a particular incident.

Direct evidence is not necessarily reliable. For example, a witness might make an honest mistake when identifying someone as the wrongdoer or might mishear what the alleged wrongdoer said. In addition, memories can fade over time, especially if there was nothing particularly remarkable about the relevant events that would have prompted a witness to form a clear memory in the first place.

Direct evidence is any evidence that can show that something occurred without the need to make inferences or assumptions to reach a conclusion. In contrast, circumstantial evidence is indirect and the investigator needs to draw inferences in order to arrive at a factual finding. Circumstantial evidence is not necessarily less reliable than direct evidence and can still be given considerable weight. A strong case can still be made with little or no direct evidence. But the accuracy of the findings will rely on the investigator's ability to draw the correct inferences from the evidence.

[36] Bellew, G, Arthur, JK, Boas, G, Chifflet, P, & Vickovich, I 2019, *Australian uniform evidence law: principles and context*, LexisNexis Butterworths, Chatswood, NSW at page 221 citing the ALRC at [641]

Circumstantial evidence – chain versus cable

It can be useful for an investigator to think of the facts in their case as "links in a chain" or "strands in a cable".[37]

Consider, for example, an investigation into alleged improper absenteeism from work during a particular week. Assume the investigator is able to establish one of the following key facts:

1. The subject of the allegation was absent from work during the relevant week, but was on annual leave, which had been properly approved by their manager.
2. The subject of the allegation had written permission from their manager to work from home during the relevant week.

Fact 1 is like a link in a chain. Once the investigator has established that the subject of the allegation had a valid, approved reason for being away from the office, the allegation has effectively been refuted. Metaphorically, a link in the chain holding up the allegation has been broken and there is little point in undertaking further investigative steps.

Fact 2 is like a strand in a cable. The investigator has identified a key fact that establishes a plausible, valid reason for the subject being absent from the workplace. However, the allegation has not yet been refuted. It is possible that the subject performed their duties properly while working from home. But, it is also possible that they did not.

Instead of working at home, they may have gone on holidays, watched television all day or worked on an unauthorised second job. With this key fact, the investigator has cut through some of the strands in the metaphorical cable holding up the allegation, but the case has not yet fallen away, and further enquiries will be necessary. As observed by Dixon J of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 368:

> *…circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation.*

Types of circumstantial evidence

There are many ways of making linkages (or inferences) to demonstrate circumstantial connections.

Circumstantial evidence can reveal the relationships between subjects, the environment, timeframes and their actions. These relationships can sometimes demonstrate that a subject had a combination of intent, motive, opportunity or know how. These are meaningful features in a disciplinary matter.

Circumstantial evidence of *intent* can sometimes be obtained if it shows how the subject planned relevant events, and how they sought to avoid detection or dispose of any inculpatory evidence after the event. For example, consider an investigation into alleged timesheet fraud, where the investigator identifies the following text in an email.

> *… claimed hours last week – Monday to Thursday as John Smith 1800-2200 16hrs, Monday as Michael Jordan 1200-1900 7hrs, Wednesday as Muhammad Ali, Mary Jane, Peter Parker, Jo Jang, Jean Grey 40hrs in total. Please provide more names to use!*

Although the email text might not quite speak for itself, it provides circumstantial evidence of the subject's plans to use false names as part of a claim for payment.

[37] The metaphor is drawn from commentary on circumstantial evidence, at section 2-500 of the NSW Judicial Commission *Criminal Trial Courts Bench Book*. See www.judcom.nsw.gov.au/publications/benchbks/criminal/circumstantial_evidence.html

Evidence of a relationship, conflict, disgruntlement, debt or addiction can also help an investigator to establish a plausible *motive* for alleged misconduct. Similarly, the investigator might be able to show how the subject (or their associates) stood to gain or lose from a particular decision.

Circumstantial evidence of *opportunity* can be illustrated by showing the subject had:

- autonomy or a lack of supervision
- access to databases or IT systems
- financial delegation or decision-making authority
- been appointed as a member of a relevant committee
- possession of an agency credit card or purchasing card
- influence over a subordinate.

The subject's technical skills or *know how* might also be relevant. For example, a sophisticated manipulation of financial statements probably could not be carried out by someone who does not have accounting skills.

These circumstantial connections can create the essential links to reach conclusions about the subject and the allegation. Of course, if an investigator cannot make these circumstantial connections, they are more likely to be in a position to conclude that the allegation is not substantiated.

Key lessons from the rules of evidence

The rules of evidence are extensive and complex, contained in both case law and legislation, such as the *Evidence Act 1995*.[38] These rules are strictly applied in court proceedings but there is no requirement for internal investigators to follow them. Despite this, it is helpful for investigators to have an understanding of the fundamentals of the rules of evidence. In particular, this assists investigators to assess what weight, if any, to give to the evidence they have collected.

Relevance

Relevance is the threshold and essential requirement for all information relied on to make findings. Investigators should consider relevant evidence and disregard irrelevant evidence. This might seem like an unnecessary statement to make because it is obvious. However, investigators often obtain information that should be set aside because it has no logical bearing on the allegations.

This includes making judgments based on stereotypes. For example, in the vast majority of cases, the subject's gender, sexuality, ethnicity or religious beliefs will be irrelevant.

Hearsay

Evidence from a witness who did not directly experience an event is hearsay. The most important lesson from hearsay's complicated set of rules is to obtain information from the person who can give a firsthand account of events. That is, evidence should be sought from persons who directly saw, heard or experienced the incident in question, rather than from a secondary recipient of the information.

While second-hand information can provide an investigator with valuable leads, the issue with hearsay is that, if an investigator does not seek evidence from the primary witness who can give a first-hand account, the reasonableness or accuracy of the information cannot be easily tested. Further, communication that is heard and then relayed via another party can be easily misinterpreted.

Where primary witnesses cannot be identified or are not available despite best efforts, an investigator should try to supplement hearsay information with corroborative evidence.

Opinion evidence

The opinion rule is derived from the general principle that witnesses can give relevant evidence based on their direct observations rather than their personal conclusions or inferences.

In practice, there is sometimes an unclear distinction between opinion and fact, and often the account of a witness will include their conclusions and mental impressions.

For example, if a witness tells an investigator, "Last Friday I saw Gayle having an after-work drink with our main supplier. They must be in an improper relationship", the investigator can place weight on the witness seeing Gayle last Friday. This is a direct observation. However, the statement about an improper relationship is just the witness' opinion and should not be given any weight. The investigator must carry out further procedures before making any finding about an improper relationship.

[38] These two resources by the Australian Law Reform Commission can provide a more comprehensive understanding about the rules of evidence:

- *Evidence*, (Interim) Report No 26 (1985) at www.alrc.gov.au/publication/evidence-interim-alrc-report-26/
- *Uniform Evidence Law*, Report No 102 (2006) at www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/

Tendency evidence

Tendency evidence is information about past conduct that is logically connected and relied on to infer that the subject is more likely to have engaged in the alleged conduct. Examples of tendency may be information that demonstrates:

- a pattern of conduct
- a modus operandi
- similarity of previous acts, behaviours or circumstances.

Additional examples of tendency may include previous behaviour demonstrating animosity to an individual, methods of exploiting power or opportunistic use of discretion. Tendency may assist to demonstrate that a complainant's account is not as bizarre or implausible as it might initially seem.

The concern with tendency evidence is that it could be improperly used in a prejudicial way. The number of persons who share the tendency may be underestimated. Tendency evidence may be given disproportionate weight or used improperly by tempting an investigator to prejudge a matter based on previous behaviour. Put in plain terms, a person's past conduct is not necessarily a reliable predictor of future conduct.[39]

Finding tendency is not sufficient to substantiate an allegation; rather, it can be used to consider whether it is more likely that the subject engaged in the alleged conduct. The elements of the allegation will still need to be proven to the appropriate standard.

Coincidence evidence

Coincidence evidence (otherwise known as similar fact evidence) is information that is asserted to be connected through similarities that points to a common cause or person. The use of coincidence evidence is to assert the improbability that something is a coincidence.

Investigators can also draw inferences from similarities between complaints that are unlikely to be a coincidence. For example, an investigator might interview multiple staff, who describe separate examples of behaviour by the subject, similar to the alleged conduct. The investigator can place weight on these similarities but should be satisfied that they do not arise from collusion or concoction; that is, the respective version of events must be independent of each other.

Case study 3: understanding coincidence evidence

An investigation is being conducted into alleged favourable treatment of a supplier, Company A, by staff at Agency Z. The investigator obtains evidence showing that:

- over a two-year period, Company A submitted quotations for work on 35 occasions and was awarded work on 20 of those occasions
- on each of the 20 occasions when Company A was engaged, the approving officer at Agency Z was Officer X (on the 15 occasions when Company A was not engaged, someone other than Officer X was the approving officer)
- on each of the 20 occasions when Company A was engaged, its quotation was received last and was the cheapest by between $100 and $200.

Given the peculiarity of the facts, it would be an unlikely coincidence if Company A's success in winning work at Agency Z was unconnected with Officer X. Although additional evidence should be sought (such as evidence of Officer X providing confidential information to Company A), the investigator is entitled to place weight on the evidence obtained in the facts above.

Character evidence

Similar to tendency evidence, information about the good or bad character of a subject leads an investigator to reason in terms of propensity. The key lesson of character evidence is to treat such information with caution, given the psychological research which finds that character is often dependent on and influenced by many situational factors. That is, many individuals engage in conduct that appears to be "out of character".

Evidence of good character may create a "halo effect", giving the subject too much benefit of the doubt. Conversely, an investigator should be careful about prejudging a subject who has a poor reputation. Workplace investigators should therefore avoid making adverse findings that turn on character evidence. That is, findings must be based on facts, not the investigator's assessment of character or personality.

[39] Research by the Australian Law Reform Commission (*Evidence*, (Interim) Report No 26 (1985) at p. 451) indicates that past conduct may be a reliable predictor of present or future behaviour only in situations that are substantially and relevantly similar.

Corroboration

Any type of evidence that tends to support the meaning, validity or truthfulness of another piece of evidence will have greater weight. A common type of corroboration is to determine whether the account of a witness is consistent with the version of events provided by the complainant and other witnesses. Similarly, it is good investigative practice to corroborate oral evidence by comparison with contemporaneous documents.

It is important for investigators not just to be satisfied with the minimum amount of evidence, but to seek out evidence from multiple sources, and to verify facts. For example, if an employee was allegedly recruited on the basis of a résumé containing false work experience, the investigator should seek to corroborate the complaint by:

- contacting the organisations where the employee purports to have worked
- obtaining the relevant recruitment file
- interviewing the officers on the relevant recruitment panel
- interviewing other persons with knowledge of the employee's work history
- examining social media and open source information.

The key lesson is that an investigator should seek to corroborate information before making findings of fact.

Standard of proof

In misconduct matters, for an allegation to be substantiated, it will need to be proved to a particular level of satisfaction: the civil standard of proof, which is the balance of probabilities.[40] This is a lower burden than the "beyond reasonable doubt" standard used in criminal matters, but all findings must still be based on evidence. The investigator should ask themselves, "Is it more likely than not that the fact or facts existed at the relevant time?", and "Did a thing more than likely happen in a certain way?". Importantly, the investigator needs to reach a feeling of actual persuasion in order to make a factual finding.

The balance of probabilities does not have to be applied to an allegation as a whole right from the start; an investigator can break a scenario down into small areas of proof. For example, consider an investigation into an allegation that a member of a tender assessment panel (the subject) acted inappropriately by providing confidential information to a tenderer about its competitors. The investigation may progress by determining whether the subject:

- was in fact on the tender assessment panel
- had access to confidential information
- had a personal or professional relationship with the tenderer in question
- had disclosed any form of conflict of interest.

Ultimately, as small parts of the question or allegation are substantiated (on the balance of probabilities), the investigation will build to a final decision that, again, on the balance of probabilities, the subject acted appropriately or not.

Investigators must base everything on evidence. This might seem obvious but even small matters that an investigator could be tempted to assume should be verified. In the previous example, the tender documents should be checked to show the subject was on the panel. The investigator should not assume this because it appears to be common knowledge.

The "*Briginshaw* principle" is a term that is often used in investigations into alleged misconduct. It should be applied in findings or decisions made in administrative decision-making. The principle is, simply, the more serious the allegation and outcomes, the stronger the evidence or proof must be. A key passage from the judgment states:

> *…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. 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 to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

State of mind issues

When investigating alleged misconduct, an investigator will often have to determine whether the subject's actions are intentional, or the product of error or negligence. To make this determination, the investigator will need evidence that allows inferences to be drawn about the subject's state of mind. Sometimes the investigator will be able to obtain clear evidence that the subject has planned, covered up or benefitted from their conduct, which will likely allow a finding that the conduct was intentional.

[40] Section 140 of the *Evidence Act 1995*.

Similarly, an investigator can potentially draw inferences based on whether the conduct involves "acts of omission" or "acts of commission". For example, if an employee receives a benefit because they failed to submit a sick leave application – that is an omission. The omission might have been intentional but perhaps it was an oversight. But if the employee received the same benefit by submitting a false medical certificate – that is an act of commission. The likelihood that the person accidentally created and submitted a false document is very low and the investigator is much more likely to be able to conclude that the conduct was intentional.

In other cases, the subject may admit knowing their conduct was wrong. But often, the subject's state of mind will be the most difficult element of the alleged conduct to substantiate. In these circumstances, it is acceptable for the investigator to make an adverse finding about the subject's actions (for example, a policy breach) but note that state of mind issues could not be resolved.

Even if an investigator cannot establish the subject's state of mind at the time of the conduct, it may be possible to make a finding that the subject reasonably *ought* to have known their conduct was wrong. This is typically done by:

- demonstrating that relevant policies and procedures had been provided and explained to the subject, or that they had been counselled about similar conduct in the past
- obtaining relevant training records (for example, code of conduct training)
- obtaining evidence that the subject had previously complied with or demonstrated knowledge of, the relevant policy requirements.

While investigators should be prepared to make findings about intent and state of mind based on circumstantial evidence, they should be extremely careful about drawing adverse inferences just because the subject appears to be uncooperative or forgetful. As noted in chapter 4, the subject of an investigation can still have a defensive or emotional reaction to the allegations, even if they have not engaged in any wrongdoing.

Findings

Typically, the evidence collected by the investigator does not speak for itself. The investigator therefore needs to carefully analyse and weigh the evidence and make logical inferences before making factual findings.

Although the guidance in this chapter should assist, in practice, the investigator's ability to draw correct inferences from the evidence is derived from a combination of knowledge, experience, common sense and logical thought processes. Since this is a challenging task, it is often good practice to have draft findings reviewed by a peer or supervisor (see "Commenting on draft investigation reports" on page 56).

To reach a finding to the required standard of proof, the investigator can take several steps:

- consider all the relevant evidence, including any material submitted by the subject in response to the allegations
- disregard mere conjecture and speculation
- consider the quality or weight of the evidence such as reliability, likelihood and corroboration.

An investigator is likely to be reviewing evidence throughout the course of the investigation. One useful approach is to separate the agreed and consistent evidence from evidence that is inconsistent or in conflict. That is, identify the evidence that is in dispute. The investigator can attempt to resolve the inconsistencies or conflicts through collection of additional evidence or, if unable to do so, make findings on the available information. After considering the totality of the evidence, the investigator may discover that evidence previously regarded as weak may appear strong and evidence confidently conveyed by a witness may appear less reliable.

Findings must be based on "logically probative evidence"; that is, evidence that could rationally affect the assessment of the probability of the existence of a fact in issue. Findings must be based on evidence that, when taken as a whole, is persuasive; not merely guess work, suspicion or rumour.

If findings cannot be made because evidence is not available, the investigator should explain why it is not available, where it is, if it exists, and what measures have been taken to obtain the evidence. All evidence, both tending to support the claims or allegations and those that tend to refute it, should be considered and its consideration should be apparent in an investigation report.

Generally, an investigator's findings will be that each allegation is:

- **substantiated** on the balance of probabilities to the investigator's comfortable satisfaction, in accordance with *Briginshaw*, or
- **partially substantiated** – the allegations are partly but not wholly supported by the evidence, or
- **not substantiated**, which can be broken into two categories:
  - there is clear evidence refuting the allegation

- it is *possible* that the subject did engage in the alleged conduct but the investigator has not been able to meet the standard of proof (that is, there is insufficient evidence to substantiate the allegation).

When making a "not substantiated" finding, the users of the report may wish to know which of these categories apply.

As a general rule, investigators should use the terms "substantiated" or "not substantiated" rather than "guilty", "innocent", "proved" or "disproved", which are associated with court proceedings and the criminal burden of proof.

There is a further outcome that is relatively unusual in workplace investigations. This is where the investigator has substantiated the allegations but cannot determine who the wrongdoer is. For example, the investigator might determine that, on the balance of probabilities:

- valuable items stored in a warehouse were stolen rather than misplaced, but cannot identify the thief
- the agency has been victimised by an unknown cybercriminal
- the agency has paid a number of inflated invoices but cannot identify which person working for the supplier is responsible
- a number of potential wrongdoers appear to have colluded when giving their evidence, making it difficult for the investigator to assign responsibility for misconduct.

Findings investigators should avoid

Investigators should not make a finding that a person has committed or is guilty of a criminal offence. Such a finding can only be made by a court. It may be appropriate, however, to make a finding that there is sufficient evidence to warrant referring the matter to the police or another appropriate agency.

Investigators should not make findings of corrupt conduct pursuant to the ICAC Act. However, factual findings of dishonesty, partiality, misuse of information or collusion should be made where there is sufficient evidence. Any reasonable suspicion of corrupt conduct should be reported to the ICAC.

Also note that, in workplace investigations, the civil standard applies even if the allegations refer to potentially criminal conduct or serious misconduct.

Factors that allow, encourage or cause misconduct

Although an investigator's main task is to determine the factual issues arising from the allegations, they are often well placed to make observations about how or why misconduct occurred and how it could be prevented in the future.

Focusing exclusively on individual wrongdoers may be inadequate if an agency's culture, systems or work practices require corrective action to reduce future opportunities for misconduct. Further, addressing systems or organisational issues may be appropriate even where allegations have not been substantiated or findings are inconclusive.

An analysis of contributing factors can involve an investigator asking:[41]

- "Why and how did the misconduct occur?"
- "What control measures, functions, communications or systems failed?"
- "Was there conduct by any other person that allowed, encouraged or caused the subject's misconduct? What changes should be made to reduce the likelihood of future misconduct?"
- "Did any governing laws, practices, procedures or methods of work provide opportunities for the misconduct?"
- "What were the risks at an individual, divisional, organisation or project level? Was risk adequately identified, assessed and mitigated?"
- "How could the misconduct have been detected earlier?"
- "What went right and how did existing controls work to limit or detect misconduct?".

If an investigation has identified factors that have allowed, caused or encouraged misconduct, it does not necessarily follow that the alleged wrongdoer has a valid excuse for their behaviour. Prior to analysing any opportunities for stronger controls, the investigator should have already considered exculpatory evidence, which might include such things as an ambiguously worded policy or unreasonable directions from management.

[41] The Commission has numerous resources to assist agencies to identify factors that allow, encourage or cause corrupt conduct as well as integrity support systems. See www.icac.nsw.gov.au/prevention .

Table 3: Examples of factors that could contribute to misconduct

Organisational factors
• structure, resourcing or KPIs of an agency or business unit
• business units that can escape accountability or conceal information
• inadequate policies and procedures
• inadequate training and awareness-raising
• poorly executed organisational change
• poor staff management practices
• history of tolerating misconduct or policy breaches
• insufficient assurance over the quality of completed work or compliance with policy
Process factors
• poor control over confidential information
• inadequate recordkeeping
• failure to identify and manage risks
• inadequate control over budget and expenditure
• lack of due diligence or project planning
• insufficient segregation of duties
• insufficient consultation or engagement (for example, clients or suppliers are not provided with formal information about how an agency's officers should deal with them)
• poor management of public interest disclosures or other complaints
• inadequate control and governance mechanisms
Individual factors
• poor management of relationships, resulting in undeclared and unmanaged conflicts of interests
• observations about the presence of factors, such as financial pressures, gambling or drug and alcohol misuse[42]

Investigators should consult with relevant officers of an agency as to whether the analysis of contributing factors related to a matter is sound. This is because factors that may have allowed, encouraged or caused the wrongful conduct to occur often involve considerations of deeper organisational, structural and cultural issues beyond what has been obtained through the investigation process.

It should also be noted that a causal analysis does not necessarily need to be addressed during the investigation or included in the investigation report. Such matters can be addressed separately; for example, as part of an internal audit or post-investigation management review. Separating the investigation from the causal analysis review may reduce the cost and timeframes for the investigation. It may also allow a more comprehensive analysis of the agency's systems and controls.

Writing the investigation report

The purpose of the investigation report is to convey whether or not the allegations have been substantiated; thereby, putting the decision-maker in the best position to determine what action to take. Given its ramifications for affected persons and the agency, care is required in writing an investigation report.

[42] While agencies are not responsible for the choices their staff make in their personal lives, observations about individual factors that have contributed to misconduct may be worth noting.

Bear in mind that the draft and final report, as well as working papers, may be subject to outside scrutiny by an accountability body, the police, an industrial relations or fair work commission, or the subject of the investigation. The reports, evidence and working papers could potentially be required as evidence in a future civil or criminal case.

There is no strict requirement for an investigation report to be in a particular format. A sample is provided in appendix 3 but many agencies and professional investigators have their own templates.

By convention, investigation reports begin by explaining how the investigation came about, providing relevant background about the function or task under investigation and perhaps relevant information about the personnel involved.

It is often useful to order the report by allegation. But the investigator can also consider setting out the substance of their report:

- chronologically
- by each subject of the investigation (if there are multiple subjects)
- by common topic area
- from most to least serious allegation.

Once the relevant background information has been provided, investigation reports need to make a logical connection between the allegation and the investigator's finding as to whether the allegation has been substantiated. One suggested way of making this connection is to structure the substance of the report along these lines:

- begin with the particularised allegation
- explain what standard (that is, laws, policies, procedures and contract terms) might be breached if the allegation were substantiated
- describe the evidence collected and investigative procedures performed
- analyse the evidence
- make factual findings, which should include information about any financial losses sustained by the agency or any other party (this may assist the agency to seek compensation or make an insurance claim)
- conclude by making a finding about whether the allegation has been substantiated. Where appropriate, the report can also state whether the standards have been breached (although depending on the wording of the allegation, this might be obvious), and may assist the decision-maker to determine whether the matter should be referred to an external authority
- if in scope, identify factors that allowed, encouraged or caused any substantiated conduct and make relevant recommendations.

In addition, an investigator can consider the following when writing the investigation report:

- Any scope exclusions, evidence not obtained, qualifications and limitations. Since investigators are under a professional obligation to consider all relevant evidence, they should have a degree of freedom to comment on evidence that might not strictly fall within their documented terms of reference.
- The most important consideration in writing an investigation report is that the evidence is presented in a logical and coherent way in order to form the basis for any conclusions. It is important to convey the thought process that led to the investigator's conclusions, such as why one witness' evidence was preferred over another's.
- The report should confirm the fundamental requirements of a properly and fairly conducted investigation were met, including confidentiality, avoidance of conflicts of interest and procedural fairness.
- Include enough context and background such as the agency's functions, internal structure and reporting lines so it can be understood by a third party.
- Be concise but include enough detail to demonstrate the evidence considered and the reasoning process in reaching a finding. Also provide enough detail on causal, operational or technical issues so a decision-maker can decide on appropriate next steps.
- Relevant exculpatory evidence should be included.
- Any key transcripts, statements or documentary information can be attached as an appendix but where possible, care should be taken to protect the identity of the complainant and witnesses.
- The report should be marked "confidential". Depending on the circumstances, it may be appropriate to refer to individuals as "Officer X", "Witness A", or "the complainant" instead of using real names.

Table 4: An example of how to structure an investigation report[43]

Stage	Details to be included in investigation report
Allegation	That Officer X accepted improper gifts and hospitality from a supplier, Company Z.
Standard	The agency code of conduct and gift policy prohibit the receipt of gifts or hospitality valued at more than $50, or given during a procurement process.
Evidence collected and procedures performed	• Training records showing that Officer X had attended code of conduct training, which addressed the gift policy. • Evidence from witnesses who observed gifts being delivered to the agency and placed on Officer X's desk. • Social media content indicating Officer X attended a Melbourne Cup event in the company of staff from Company Z. • Email correspondence between Officer X and a representative of Company Z making reference to the provision of gifts and hospitality. • Mobile telephone call charge records indicating that Officer X was in the location of the Melbourne Cup event. • Documents showing that Officer X was involved in a procurement process in which Company Z was a tenderer. • Documents indicating that the alleged gifts are valued at over $50. • Interview with Officer X, who claims to have paid in full, with his own money, for all gifts and hospitality provided by Company Z. However, he refuses to provide relevant receipts or his credit card statements. • Email from a Company Z representative declining an invitation to participate in an interview but denying any impropriety.
Evidence analysis	This section of the report would analyse and weigh the evidence. In this case it would need to carefully weigh Officer X's claim that he paid for gifts and hospitality with his own money, against the other evidence.
Factual findings	Fact 1: That Officer X was (or was not) aware of the relevant content in the agency's code of conduct and gift policy. Fact 2: That Officer X did (or did not) accept gifts and hospitality from Company Z valued at more than $50. Fact 3: That, at the relevant time, Officer X was (or was not) involved in a procurement process where Company Z was a tenderer.
Conclusion	• The allegation is (or is not) substantiated, or partially substantiated. • The code of conduct and gift policy were (or were not) breached.
Recommendations	• That the agency considers commencing disciplinary action against Officer X (or not).
Control improvements (if in scope)	• Suppliers may not be aware of the agency's gift policy. Recommend an awareness-raising exercise. • The agency's tendering procedures do not prompt staff to disclose gifts and conflicts of interest. Recommend amendments to existing procedures and staff training.

[43] Refer to appendix 3 of this report for a more comprehensive guide.

Commenting on draft investigation reports

A draft of the investigation report is often circulated to agency management or other users of the report for comment prior to finalisation. This is common practice where an external expert has been engaged to conduct the investigation and the agency verifies that the draft report meets the terms of reference. But it can also be useful for inhouse investigators to issue draft reports for comment.

In addition, if procedural fairness requirements have not been met, it may be appropriate to circulate the draft investigation report to the subject and other affected persons. If necessary, confidential information, such as the identity of the complainant, should be redacted.

A review by an agency of a draft investigation report can assist to rectify errors or ambiguity or to improve readability. The review might also allow further investigative procedures to be considered. For instance, a reviewer might suggest an additional witness to be interviewed.

While an agency's management may not agree with the analysis and findings in the report, the investigator should not be *directed* to change the substance of the report. It is acceptable, however, for any suggestions or differences of opinion to be brought to the attention of the investigator for consideration. It is also acceptable for the investigator to be asked to complete procedures that have been omitted or not properly completed.

Ultimately, the findings should be made by the person(s) responsible for collecting and analysing the evidence, not the users of the report. If management or users of the report disagree with the findings, they should be able to express that view.

Chapter 6: Post-investigation actions

At the conclusion of an internal investigation, the head of an agency or their delegate ("the decision-maker") decides whether to accept the investigator's findings and recommendations and determines the appropriate disciplinary, remedial or other action to be taken.

It is important that the decision-maker be independent, which means they should not have been involved in the investigation as either the complainant, a witness or a manager implicated in the conduct or circumstances leading to the conduct.

The decision-maker will usually be responsible for:

- reviewing the investigation report and determining whether to accept the findings in full, in part, or not at all (including whether further clarification or enquiries are needed)
- determining what action, if any, should be taken
- determining what information to release to the complainant, witnesses, management or affected persons
- issuing correspondence to the subject
- referring the matter to external authorities
- seeking specialist advice where required (for example, legal or workplace relations).

The decision-maker should be satisfied that the investigator has made reasonable enquiries and that the key principles outlined in chapter 1 have been followed.

Decision-making

If the decision-maker accepts adverse findings against a subject, a wide variety of disciplinary and non-disciplinary actions (including no action) are available. As noted in chapter 1, this publication is primarily written for agencies investigating allegations against their own staff. However, if dealing with a supplier, the decision-maker may be considering action available under the contract, including termination.

If adverse findings have been made about a former employee, who, for instance, might have resigned before the investigation could be completed, the agency obviously cannot carry out disciplinary action in a practical sense. However, in lieu of this, the former employee's personnel file can still be updated to reflect the adverse findings and reflect the fact that the employee resigned before disciplinary action could be taken. Among other things, this should help to prevent the former employee from securing future employment on the basis of a false job application.[44]

Many NSW public sector agencies are subject to the GSE Act, which prescribes a range of penalties in relation to misconduct. [45] But other legislation or industrial instruments may apply. These, along with the agency's own policies, also typically set out the procedural fairness requirements that must be followed before carrying out disciplinary action.[46]

In the normal course of events, decision-making about possible disciplinary action should not present an opportunity to recontest the findings in the investigation report. This is because all procedural fairness principles should have been adhered to during the investigation process.

[44] See the Commission's publication *Strengthening employment screening practices in the NSW public sector* (February 2018) at www.icac.nsw.gov.au/prevention/corruption-prevention-publications

[45] In s 69 of that Act, note that disciplinary proceedings and action arising from misconduct can still be taken even though the employee has resigned, retired, or otherwise ceased to be an employee.

[46] See, for example, rule 40 of the Government Sector Employment (General) Rules 2014. Most public sector agencies have access to experienced human resources staff or can contact the NSW Public Service Commission for advice.

Nonetheless, decision-makers should consider any submissions made by persons facing disciplinary action.

Making disciplinary decisions is subject to a range of administrative law practice and advice that is outside the immediate scope of this publication. However, adverse consequences can arise if established misconduct is not dealt with by proportionate, consistent disciplinary action. For example:

- staff may form the view that wrongdoing is tolerated
- the agency's ability to deter would-be wrongdoers could be diminished
- complainants may be deterred from speaking up in the future
- it may become difficult to recruit and maintain staff who value workplace integrity
- management may not be able to maintain the appropriate ethical tone within the agency.

Using non-disclosure agreements

Sometimes, for pragmatic reasons, an agency and employee who is the subject of adverse findings, will reach a settlement under which the employee agrees to resign in order to avoid formal disciplinary action. On occasion, these settlements include a confidentiality or non-disclosure agreement (NDA).

While there are obvious advantages to securing the "clean exit" of an employee who has engaged in misconduct, systemic risks arise if prospective employers cannot obtain accurate information about a job candidate's work history. Specifically, if knowledge of previous misconduct is not available, the merit selection principle cannot be followed and the relevant individual may go on to engage in further misconduct.

The Commission therefore recommends that agencies think very carefully about signing NDAs that preclude them from providing accurate information to a future employer. In particular, agencies should never sign an NDA that requires them to provide untruthful information about a former employee.

In any case, signing an NDA or similar agreement does not waive all rights. For example, a disclosure under public interest disclosure legislation can be made despite any duty of secrecy or confidentiality. In addition, NDAs do not allow an agency to avoid statutory reporting requirements, including mandatory requirements under s 11 of the ICAC Act.

Recordkeeping and the need-to-know principle

Investigation reports and supporting materials often contain sensitive information about the subject and other persons involved in the investigation. Therefore, at the conclusion of an investigation, materials and records in relation to the investigation should not be placed on an employee's personnel file.

Instead, records relating to an investigation should be placed in a separate secure misconduct file or investigation file.

However, it is desirable for an employee's personnel file to reflect the finalised findings and any disciplinary action taken, as it forms part of their employment history. The personnel and investigation file can be linked for reference purposes. The agency's investigation files should be restricted to those who need access for a proper reason.

As part of the decision-making process, the agency should consider whether any financial losses can be recovered. This includes options such as withholding money from any final payment made to a dismissed employee, making an insurance claim or commencing legal action (which, in turn, could involve an application to freeze assets). While legal action involves risk, it should be considered when the likely benefits exceed the likely costs. Among other things, taking action to recover losses sends a signal to staff that wrongdoing is not tolerated by management.

Communicating findings to complainants, witnesses and management

Key participants involved in the investigation may be advised of the outcome in so far as it relates to them, having regard to the confidentiality rights of others. For example, a manager of an affected business unit may need to know not only of the disciplinary outcome but also any systemic changes that will require implementation.

The amount of information to be provided to the complainant and witnesses usually varies on a case-by-case basis and may be subject to public interest disclosure legislation. In some cases, it will be appropriate to provide a detailed briefing that includes information about the disciplinary action taken. In others, the relevant individuals might only be thanked for their assistance and advised that the investigation has been completed.

Reprisal action after the investigation[47]

If the investigation has substantiated serious allegations of misconduct, the subject may have been dismissed or resigned. But, if the substantiated allegations were less serious in nature, or they were not substantiated at all, the subject will probably still be working at the agency. Alternatively, if the subject has left the agency, their former colleagues may be dissatisfied with the outcome.

This might require the agency to take action to prevent reprisal action against an internal complainant or witness. Among other things, this might entail apprising relevant managers of the outcome of the investigation.

In practice, it is not necessary to provide information about investigation outcomes to officers on the periphery of an investigation; for example, individuals who provided administrative or IT assistance, or were minor witnesses.

If the agency has a relevant committee that oversees the investigative function (see chapter 2), it would normally be briefed on investigation outcomes or could be provided with a copy or extract from the investigation report.

Communicating findings: external notifications and referrals

In general, external notification needs to be made when any action is taken to investigate matters that have been subject of allegations involving the following matters:

- **Risk of significant harm to children and young people**

  The *Children and Young Persons (Care and Protection) Act 1998* provides that any person, who believes on reasonable grounds that a child is at risk of harm, may report this to the secretary of the NSW Department of Communities and Justice (s 24).

- **Any sexual offence, sexual misconduct, committed against, with or in the presence of a child, or any assault, ill treatment or neglect of a child**

  The *Children's Guardian Act 2019* requires heads of agencies to notify the Office of the Children's Guardian of any reportable conduct and reportable allegations, which includes any sexual offence, sexual misconduct, ill-treatment of a child, neglect of a child, assault against a child, the failure to protect or report under the *Crimes Act 1900*, and behaviour that causes significant emotional or psychological harm to a child.

  A relevant agency within the reportable allegations scheme will then be required to investigate the allegation and send the investigation report to the Office of the Children's Guardian to assess.

- **Certain criminal offences, including fraud**

  At the end of an investigation, if findings have been made against a subject that indicate possible criminal conduct, a report should be made to the police (see chapter 2). This is consistent with s 316 of the *Crimes Act 1900*.

- **Corrupt conduct**

  The Commission should be advised where findings are made that are consistent with corrupt conduct as defined in the ICAC Act.

- **Public interest disclosures**

  All public authorities are required to collect and report certain information in relation to their handling of public interest disclosures. This is reported to the NSW Ombudsman every six months.[48]

- **Other government agencies**

  Where the employment of a visiting practitioner of a NSW Health Service is terminated, following a finding of misconduct, the relevant agency should consider notifying any other known government agency where the person is employed to allow that agency to assess and manage any local risks.[49] There may also be legislated requirements to report certain allegations of misconduct to other bodies, such as the NSW Education Standards Authority in relation to employees of the NSW Department of Education.

[47] The NSW Ombudsman's website contains more detailed advice on managing reprisal action against complainants. See www.ombo.nsw.gov.au.

[48] See relevant public interest disclosures legislation.

[49] See NSW Health's *Managing Misconduct*, at www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2018_031.pdf .

Additionally, where an investigation identifies potentially criminal or corrupt activity involving another government agency, the investigating agency should report the matter to the police, the Commission, and to the affected agency (possibly after consulting with police or the Commission).

There is no obligation for agencies to refer matters to professional accreditation bodies. However, there may be circumstances where it is appropriate to do so, particularly if the misconduct impacts on an accreditation body or the accreditation of a subject.

For instance, individuals falsely representing themselves as an accredited medical practitioner, engineer or heavy vehicle licence holder could represent a risk to public health and safety. The public interest would dictate that the relevant accreditation body be notified of the individual's conduct.

As noted above, if the agency is in a position to make an insurance claim, it will need to demonstrate or quantify its losses, which could entail providing a copy of the investigation report and supporting materials to the insurer.

Implementing and monitoring recommendations

It is not always necessary to wait for the finalisation of an investigation before dealing with any systemic or workplace issues. For example, it may be apparent after speaking with witnesses that the agency is at risk because of the absence of appropriate checks and balances. Provided it will not interfere with the investigation, timely corrective action can be taken to rectify control problems.

In any case, if there are agreed enhancements to controls arising from an investigation, they should be allocated and monitored, much like an action arising from an internal audit. While the agency's audit and risk committee is usually not involved in overseeing individual investigations, it may be appropriate for it to monitor implementation of agreed actions.

Similarly, outcomes of the investigation may need to be conveyed to staff with risk management responsibilities. This allows risk registers to be updated to reflect any necessary changes in risk ratings.

For example, an investigation into a bullying and harassment incident might prompt an increase in the rating for the agency's work health and safety-related risks. Furthermore, any agreed control enhancement might need to be documented as planned risk treatments. In the case of corruption or fraud-related misconduct, it is desirable for staff in integrity or corruption prevention roles to be briefed about the outcomes of investigations.

In addition to responding to the outcomes of individual investigations, agencies should consider the need to identify any trends or patterns arising from their investigations (including complaints that might not result in an investigation or adverse findings). This might identify particular locations, conduct types, subject types or other common factors that require attention. This type of analysis can also be reported to the audit and risk committee.

Most agencies see value in demonstrating to staff that alleged misconduct is taken seriously and that valid complaints are properly investigated. For example, if the bullying and harassment incident mentioned above has led to the dismissal of the subject, the agency may wish to provide some relevant information to staff, highlighting the message that bullying behaviour will be addressed.

In some situations, it is common knowledge who has been dismissed and why. The events might even be in the public domain. However, because most public sector agencies do not have a mandate to expose misconduct, timely pro-integrity messages can be prepared without identifying particular individuals.

Investigative performance evaluation

As is the case with all public sector functions, it is good practice for agencies to review their investigative function from time-to-time.

One way is for agencies to incorporate a debriefing at the finalisation of an investigation. This can be used to highlight any investigative procedures that should be improved.

From time-to-time, more comprehensive reviews of an agency's investigation function should be performed and reported to the audit and risk committee, possibly as part of the agency's internal audit program.

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Appendix 1: Investigation plan

Administrative details

1. Date instructions received/investigation commenced.
2. File numbers/locations.
3. Security protocols.
4. Classification of matter.
5. Contacts:
    a. Case manager
    b. Investigation team members
    c. Key information holders (finance, HR, IT, security).

Summary of the known facts

1. How did the information come to the agency's attention?
2. What information was provided by the complainant or source?
3. What preliminary enquiries were made and what were the results?
4. Why is the matter being investigated?
5. Has any immediate action been taken?
6. Instructions from the case manager?

Investigation scope

Describe the scope of the investigation.

Allegations

1. Allegation 1:
    a. Element 1 -
    b. Element 2 -
    c. Element 3 -
    d. Element 4 -
2. Allegation 2:
    a. Element 1 -
    b. Element 2 -
    c. Element 3 -
    d. Element 4 -
3. Allegation 3:
    a. Element 1 -
    b. Element 2 -
    c. Element 3 -
    d. Element 4 –

If required, the scope can contemplate the need to identify any factors that may have allowed, caused or encouraged the conduct under investigation.

Relevant persons

1. Complainant(s).
2. Witnesses.
3. Subject(s) and other affected persons.

4. Key information holders.
5. External agency referral contacts.

If appropriate, list relevant persons by allegation.

Case theory

For each allegation, describe the working case theory or theories and any assumptions.

Relevant policies and standards

Set out the relevant policies and standards.

1. Laws and regulations.
2. Codes, policies and procedures.
3. Employment contracts and awards.
4. Commercial contracts and code of business ethics.

Intended investigation activities

Document the proposed activities for the investigation as a whole or for each allegation (and the planning, analysis and sequence of these activities).

1. Relevant documents, information and things to obtain.
2. Witnesses and experts to interview.
3. Premises or locations to inspect.
4. Surveillance to be carried out.

Key dates

1. Progress update for the complainant or person making a public interest disclosure.
2. Timelines set by law enforcement agencies, oversight bodies or the agency's insurer.
3. Timeframes set by industrial awards, workplace agreements or the agency's policy and procedures.
4. Timelines set by the agency/case manager for key milestones.

Risk management

Based on the agency's risk policy, assess likelihood, consequences and propose management strategies for risks.

1. Potential reprisal action against the complainant or witnesses.
2. Inability to communicate with an anonymous complainant.
3. Alteration or destruction of evidence.
4. Resignation or absence of the subject or key witness.
5. Unfair damage to the reputation of the subject of the investigation.
6. Premature disclosure of information about the investigation to the subject or parties such as the media.
7. Foregone opportunities to collect evidence covertly.
8. Impact of the investigation on mental health.

9. Potential legal action.
10. Disruption to the agency's operational activities.

Complainant management

If not addressed elsewhere in the plan, outline how the complainant will be protected from acts of reprisal.

Resources

Identify resources required to undertake the investigation.

1. Personnel (investigation team, and necessary support from HR, IT and computer forensics, finance and interpreter services).
2. Accesses (databases and premises).
3. Facilities (interview room and storage).
4. Equipment (laptop and audio recorder).
5. Other (travel and accommodation).

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Appendix 2: Interview plan

The interview plan outlined in this template is informed by and adapted from the PEACE framework for internal investigation purposes.

Planning and preparation	Engage and explain	Account	Closure	Evaluation
Draft an interview strategy **Review the investigation** • What key issues, factual proofs, gaps and/or evidence is to be addressed by the interviews? • Who needs to be interviewed and what should ideally be the order of interviews? • Why is a particular interviewee's viewpoint important? • Should the interviewee be interviewed immediately or is it more useful to wait until more information has been obtained from other sources?	**Outline the roles of persons present** **The reason for the interview** **Objectives of the interview** **Routines and expectations** Establish rapport with introductions to be tailored to each investigation/interviewee. Comments along the following lines can be considered: "Thank you for your time today. Please let me know if you want more water or if you want to take any breaks."	**Free recall** Inform the witness you are now starting the main part of the interview. Use open questions, such as: "Tell me about…" "Explain…" "Describe…" "What happened next?". Summarise understanding of what has been said: "Is that a fair summary?" [wait for a response] "Is there anything else you now remember?"	**Ensuring available information is sought** Summarise the interviewee's information and seek confirmation that it captures what happened. Provide a secondary interviewer the opportunity to ask any questions. Check that the interviewee has given all the information they are able or willing to provide. Seek other information that the interviewee thinks is important or not already covered, such as: "Is there anything else that you think I should know?"	**Evaluate the evidence** • What information has been obtained from the interview/s? • How does the account fit in with other available evidence? • Will further action be required (for example, draft statements)? • Will further enquiries need to be made? • Does the interview change the case theory? • Update the investigation plan as required. Reflect on how well the interview was conducted.

Create individual interview plans

- What are the specific objectives of the interview?
- What topics are to be covered?
- Is the plan to be a detailed outline with specific questions or broader with outline of topics and pieces of evidence to be addressed?
- What information can the interviewee provide about the facts at issue?
- What information can be imparted to the interviewee?
- What documents or other evidence should be shown to the interviewee?
- What documents/evidence should the interviewee be asked to provide?

Make practical arrangements

- Contact interviewees about the interview.
- Arrange facilities and equipment.
- Arrange interpreter, accommodate any people with disability, or anticipate cultural sensitivities.
- Invite interviewee to bring observer/support person unrelated to the investigation.

"Here are my details. I've been asked to look into [allegation/complaint]. We've asked you to be here because you may have some useful information about [incident/evidence] and I am interested in what you can tell me about it."

"We will talk about [add topics]. I will also ask you about anything else which may become relevant during the interview so I can be sure we have covered the facts and issues."

"It will be important that you provide as much detail as possible. You can go at your own pace, in your own words. I will try not to interrupt unless we've strayed too far. I will then ask supplementary questions and ask you to comment on things which might not have been covered or that I might not have understood. I'll also take some notes."

"What you have to say is important so report everything you can and try not to leave anything out."

"I will be recording your information. This is so I can be clear on what has been said and that I can focus on what you have to say."

"Feel free to let me know if you don't understand a question, you don't know the answer, or that I've misunderstood what you have said. I don't expect you to guess at answers."

Clarification

Use open questions, but probing and clarifying questions may now be appropriate, such as "What, where, when, why, who, how?".

Obtain a more detailed account or a second account raised in the free recall stage.

Identify and address any issues, evidence or gaps that have not been covered.

Challenge

Identify any inconsistencies or evasiveness between the account in free recall or clarification stage with evidence obtained from the investigation so far. Seek comment about inconsistencies.

Systematically put all key evidence to the subject for each topic area/allegation. Provide sufficient time for review and response.

Ensure all allegations are put to the subject for a response.

"Is there anyone else that I should speak to?"

"Are there any documents or anything else that you think I should look at?"

"Is there anything else that you would like to say?".

Safeguarding the interview

Finalise the interview with adoption questions and thanking the witness. Questions along these lines can be tailored for the investigation/interviewee, as follows.

"Have your answers been given freely without threat, promise or inducement?"

"Do you have any complaints about how we have conducted the interview?"

"As mentioned previously, this matter is still under investigation so it will be important that you do not discuss this interview with anyone and keep anything that has been said confidential."

[Explain any next steps]

"Thank you for your time and effort today. If you remember anything else that might be useful please feel free to contact me."

	Recorded preliminaries "The date is [dd/mm/yy], time is now [hh:mm] and we are located at [place]." "This is an electronic record of interview between [investigator's name] and [interviewee's name]. Also present is [name of secondary investigator and/or observer]." "For the purpose of the recording would everyone present please state their name … Can you confirm that you agree for the interview to be audio recorded ... Thank you." "Can we start with a little bit about you, your position title and best contact details?"			

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Appendix 3: Sample content for an investigation report

1. Executive summary

As an overview of the entire report, the executive summary can present concise details of:

- how the investigation came about
- the nature of the investigation process that took place
- the key evidence that emerged from the investigation
- the factual findings, conclusions and recommendations.

2. Background

- Set out the circumstances that gave rise to the decision to hold an investigation and explain who conducted the investigation.
- Add other relevant background.

3. Scope of the investigation

- Particularise the allegations that were investigated.
- Describe the activities or functions of the agency that are the subject of the investigation.
- Describe the rules, policies and procedures that relate to the function(s) under investigation.
- List the individuals or bodies affected by the investigation (a public official or authority, private company or citizen may be affected by the investigation).
- List the individuals or bodies otherwise involved with the matter being investigated; that is, provide details of potential witnesses and anyone who had supervisory responsibility for the activities or functions being examined (for example, members of a tender committee or supervisors with review functions).

4. Methodology and procedures performed

Outline the investigation process that took place, including:

- the duration of the investigation
- documents and things accessed
- people interviewed
- other evidence that was gathered
- problems or investigation impediments encountered.

Describe any limitations or qualifications (for example, the investigation was confined to a desktop review, complainant was anonymous and could not be contacted, missing records, and relevant witnesses were unavailable).

5. The evidence and its analysis

Describe, analyse and weigh the evidence. The evidence may be arranged in chronological order, based on each allegation, or thematically. In doing so:

- identify the key pieces of evidence that resolved a factual issue and the weight placed on it
- identify where evidence is in conflict and why some evidence should be preferred over other, competing evidence

- explain how the evidence relates to the elements of each allegation and the investigator's thought process.

6. Factual findings and conclusions

Set out the findings of fact, which are usually descriptions of:

- what a person actually did and how they did it, including omissions and failures to act
- when the conduct occurred
- why the conduct occurred
- losses or other impacts on the agency.

Make a conclusion about whether each allegation has been:

- substantiated
- partially substantiated
- not substantiated.

7. Recommendations

In conventional internal investigations, there are generally three types of recommendations made for the readers and users of this report:

- whether the subject(s) should be dealt with in accordance with the agency's disciplinary procedures
- whether a referral should be made to another agency, usually a law enforcement agency, such as the police or the Commission
- whether any other administrative action is applicable.

8. Factors that allow, encourage or cause misconduct

If in scope, describe factors that may have allowed, encouraged or caused the substantiated conduct and any recommended enhancements to policies, procedures, controls, and so forth.

9. Appendices

Attach important evidence or other documents as appendices.

ICAC

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