

**For further information please see full document on the Internal Review Support documentation online. The information below was taken from the New South Wales Ombudsman document – Investigating Complaints – A Manual for Investigators (June 2004)**

**Extracts taken from the New South Wales Ombudsman document  
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It is important to be sensitive to the impact that a complaint may have on each person who is the subject of that complaint. Before approaching each person who is the subject of the complaint, an investigator should be satisfied that the allegations are not spurious. Where it can be established that the allegations are false and the subject of the allegations is unaware of the allegations then there is often little to be gained from alerting the person.

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

### **Obtaining oral evidence**

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

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

Preparation is an essential element of interviewing. The planning of an interview, with a clear idea of what it is that the interview is intended to achieve, will enable the interviewer to set the agenda for the interview. A common investigative error is failing to interview all available witnesses. If all witnesses are not interviewed, an investigator fails in his or her fundamental obligation to ascertain all the relevant facts pertaining to a complaint. Subject to certain exceptions, the person the subject of a complaint should generally be interviewed last.

Consideration must be given to the timing and location of the interview. An appropriate environment for an interview enhances the quality of evidence that an interviewer can elicit

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from their witness. Privacy is a major psychological factor which contributes to the success of an interview. The interview setting should be free from internal and external distractions. Interviews must be conducted fairly, reasonably and in an impartial manner. The approach adopted by an investigator in an interview situation will to a large extent be tailored to suit the particular witness. Most witnesses should be handled with a 'soft' approach, but where an interviewer encounters a difficult or uncooperative witnesses they will need to do some 'hard interviewing'.

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

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

An investigator must be very careful about offering any benefit, concession or other inducement in return for a witness statement. Inducements can only be made by an investigator where he or she has a discretion to make such an offer, and there is no other legal prohibition. In no circumstances should an investigator offer a witness indemnity from criminal prosecution in return for their cooperation or an undertaking that their evidence will not be used against them. Only the Attorney General is entitled to grant such an indemnity or undertaking. Face-to-face interviewing is the primary method of receiving evidence from witnesses. Alternatives to face-to-face interviewing include telephone interviews and written requests for information. These methods may be appropriate in limited circumstances, but should be used sparingly.

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

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

Witnesses should generally be permitted the presence of a third party during an interview. Having a person of their choice present can make the witness feel more comfortable and this will make the interview easier to conduct.

An investigator must ensure that any third party permitted to be present:

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

### **Securing documentary evidence**

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

### **Recording and storing information obtained during an investigation**

A central investigation file must be maintained by an investigator. The file should be a complete record of the investigation, documenting every step, including all discussions, phone calls, interviews, decisions and conclusions made during the course of the investigation.

The file must be securely stored to prevent unauthorised access, damage or alteration, and to maintain confidentiality alteration, and to maintain confidentiality

### **Granting access to documents related to the investigation**

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

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

### **Managing complainants**

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

- managing the complainant's expectations to ensure that they are based on a realistic understanding of what the investigation can achieve.

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- ensuring the complainant's confidentiality and explaining to the complainant the importance of confidentiality generally.
- providing him or her with support and information.
- providing him or her with feedback by advising at regular intervals of the progress of the investigation, and
- informing the complainant of the outcome of the investigation or other action.

**Practical tip** Every complaint should be made in writing or reduced to writing and verified by the complainant (where the complainant is identified). Since even a slight change of wording can significantly affect the emphasis or seriousness of a complaint, having the complaint in written form will avoid any later dispute about the nature of the complaint.

### **Managing each person who is the subject of the complaint**

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

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### **Managing other witnesses**

It is important not to overlook the needs of witnesses other than the complainant or each person who is the subject of the complaint. Proper support must be offered to these witnesses to reduce any trauma that they might experience as a consequence of their involvement in the investigation process. Where relevant, support should be offered as a matter of best practice and, where applicable, to discharge an agency's occupational health and safety obligations. It is vital to impress on all witnesses the requirements of confidentiality. To minimise the potential for information about the investigation to spread, no witness should be told any more about the investigation than is strictly necessary to obtain the required information.

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### **Avoiding common investigation pitfalls**

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

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

### **Retrieving an investigation when things go wrong**

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

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

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

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

### **Recognising and avoiding a conflict of interests**

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

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

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

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

It is not always easy to identify a conflict of interests, particularly where the conflict has potential to result in bias. Although the investigation must be conducted impartially, it is not



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realistic to expect that the investigator will be someone totally independent and having no prior connection with the person under investigation.

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

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

***Practical tip***

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

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

**Establishing the framework for the investigation**

**Obtaining authorisation to commence an investigation**

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

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

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

In other circumstances all that may be required is authorisation from a relevant manager. Presumably this issue has been addressed in each agency either in the formal mechanisms established to deal with various types of complaints or grievances raised by members of the

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public or staff, or in relevant delegations of authority. Where this issue is in doubt, the matter should be referred to the CEO for a decision.

### **Drawing up terms of reference for an investigation**

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

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

Setting the terms of reference requires the key issues arising out of the complaint to be clarified. In drafting the terms of reference for an investigation the findings that might logically or conceivably be reached by the investigation should be considered, though pre-judgment should be avoided in doing so. This exercise is useful to ensure that appropriate recommendations based on the findings are not precluded. For instance, a complaint might concern specific conduct, which upon investigation might be shown to be in accordance with a policy, but that policy might be an unreasonable one. The terms of reference should be sufficiently broad to permit the investigator to make findings about the policy as well as the conduct.

In other cases, it might be appropriate for the terms of reference to be framed in such a manner as to require the investigator to make recommendations not only about the action that should be taken in relation to the conduct the subject of the complaint, but also about what, if any, redress should be provided for anyone who has suffered detriment as a result of the conduct.

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

### **Understanding the importance of planning**

The key to every good investigation is planning. Planning is essential to ensure that:

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

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

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

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

### **Developing an investigation plan**

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

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

**Practical tip** More investigations suffer in terms of quality because of poor investigative planning than for any other single reason. A good investigation starts with careful planning and preparation, a clear understanding of the parameters of the investigation, and with proper authority. Care and attention spent in getting it right at the outset will avoid considerable difficulties later on.

### **Applying the rules of procedural fairness**

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

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

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

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

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

For an investigator, procedural fairness serves a number of related functions:

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

### **Understanding what procedural fairness means**

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

The courts emphasise the need for flexibility in the application of the rules of procedural fairness, depending on the circumstances of each individual case. Depending on the circumstances which apply, procedural fairness requires an investigator to:

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

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

The reason that the substance of all allegations and grounds for adverse comment should be put to the person whose rights, interests or legitimate expectations are affected is that this allows that person the opportunity:

- to deny the allegations
- to call evidence to rebut the allegations
- to explain the allegations or present an innocent explanation, and/or
- to provide mitigating circumstances.

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

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

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

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

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

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

The actual investigation is one stage of the decision-making process. The preparation of an investigation report containing findings based on the investigation and possibly recommendations is a further stage in the decision-making process. Finally, a determination is made on the basis of the investigation report.

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

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

- If, on the face of it, a complaint does not disclose a case to answer, it will be appropriate to wait until a fact finding inquiry has determined that there may indeed be a case to answer before the person the subject of that complaint is informed about the allegations (in cases where the complaint is baseless and is not pursued this will save the person suffering unnecessary stress).
- In circumstances where a complaint alleges wrongdoing, but the identity of the alleged wrongdoer(s) is unknown, no-one should be notified of the allegations in that complaint unless and until they are a clear suspect.

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- If the person who is the subject of the complaint is to be interviewed, it is appropriate to delay informing him or her of the substance of the allegations until the interview if it appears that evidence could be tampered with or witnesses approached. An investigator should be circumspect about informing the person where there is a risk that:
  - documents may be destroyed
  - records may be modified
  - post-dated records may be produced
  - collusion will take place, particularly where more than one person is involved
  - a vital witness is in a position to be pressured or influenced (for example, a subordinate of the person under investigation).
- In other cases a person may be informed of the allegations prior to being interviewed.
- In rare circumstances (such as where the matter has been or is to be referred to ICAC, DoCS or the police), it may not be appropriate to provide any information to the person the subject of the allegations.

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

However, the Ombudsman recommends that this right to be informed of the substance of any proposed adverse comment be afforded prior to presenting the investigation report to the final decision-maker. Because of the general expansion of the notion of procedural fairness and the range of interests protected, this should be done as a matter of best practice.

If an investigation report contains any adverse comment about someone, that person should be made aware of the substance of the grounds for all proposed adverse comments to be made against him or her. If this information has been put to the person the subject of complaint during the interview process it is not necessary to do this before finalising the report and handing it over to management or making it public. However, if the person has only been informed of certain of the grounds, he or she must be made aware of the other grounds being relied on. Similarly, if the grounds for adverse comment have changed significantly since the interview, then these must be communicated to the person prior to finalising the report.

### **What the person must be told**

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

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

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

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

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

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

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

### **Gathering Evidence**

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

In an investigation the main evidentiary sources available are:

- oral evidence (recollections)
- documentary evidence (records)
- expert evidence (technical advice), and
- site inspection.

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The relative importance of each of these information sources will vary according to the nature of complaint. In most investigations into the conduct of individuals the predominant types of evidence are the oral evidence of witnesses and documentary evidence. In some cases, however, forensic and/or expert evidence may need to be obtained.

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

### **Hearsay evidence**

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

It is important to note that the rule against hearsay applies only where the rules of evidence apply. Nevertheless, in all situations investigators should make every effort to track down and get direct evidence.

### **Opinion evidence**

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

### **Obtaining Oral Evidence**

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

It takes skill to keep an interview focused and to draw out all of the relevant information. The manner in which an interview is conducted can significantly impact on both the extent and the quality of information obtained. Different witnesses will respond in different ways to



**For further information please see full document on the Internal Review Support documentation online. The information below was taken from the New South Wales Ombudsman document – Investigating Complaints – A Manual for Investigators (June 2004)**

particular forms and styles of questioning. The degree of cooperation that can be expected from witnesses will vary. Whereas some witnesses will be forthcoming in their responses, others will be more reticent, and others will actively seek to withhold information. Some witnesses may feel confident giving their evidence, some may feel intimidated and require support. Each situation will call for its own approach.

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

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

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

## **Adopting Good Interview Techniques**

### **Objective and key criteria for effective interviewing**

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

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

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

- dealing with emotional, hostile or resistant witnesses
- dealing with irrelevancies
- keeping the interview on track, and
- dealing with disruptions.

For further information please see full document on the Internal Review Support documentation online. The information below was taken from the New South Wales Ombudsman document – Investigating Complaints – A Manual for Investigators (June 2004)

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

#### **Introduction**

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

#### **Recitation of uncontentious, agreed events**

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

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

**Specific questions** - Clear up ambiguities or address facts in issue that have not been covered.

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

**Adoption of the interview** Whatever means is being used to record the interview, the witness should be asked to adopt the record of it. When investigators are interviewing the person who is the subject of the complaint, the person should be allowed to respond to allegations and factual matters uncovered during the investigation. The allegations may need to be paraphrased to protect the identity of a protected complainant. *Source: Internal Investigations, ICAC, 1997.*

#### **Deciding who should be interviewed**

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

#### **Determining the order of interviews**

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

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

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

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

**Practical tip** Witnesses should ordinarily be contacted at their place of work to attend an interview. In determining the most appropriate way of contacting potential witnesses, investigators should have reference to:

- established protocols
- any special need to protect the confidentiality of the witness
- the privacy of staff
- any special, cultural, gender or other factors
- the risk of interception of the communication. *Source: Investigations Procedures Manual, Audit Directorate, Department of Education and Training (draft).*

### **Choosing an interview setting**

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

An investigator should have control over the setting in which the interview is to take place. If neutral territory is unavailable, the location of the interview can affect the dynamic of the interview. Some witnesses may feel more comfortable withholding information if they are in

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their own space. On the other hand, an investigator may wish to make some witnesses feel as much at ease as possible.

Special considerations apply when interviewing whistleblowers or children.

### **Conducting an interview**

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

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

***Practical tip* Wherever an investigation requires interviews, investigators should:**

- Prepare set questions or lines of inquiry in advance to be used as a checklist to ensure all relevant issues are covered. However, these need not be rigidly adhered to, and investigators should respond to evidence as it emerges in the interview.
  - Avoid assumptions; if in doubt, ask further questions.
  - Be familiar, and comply, with any relevant legislation or approved procedures.
  - Ensure all relevant witnesses are interviewed.
  - Remain focused on asking questions and obtaining factual evidence.
  - Resist any temptation to enter into discussion or argument with the person being interviewed.
  - Gather all relevant information, not just information that supports the complaint.
- Source: Noonan, J., 'Disciplinary investigations - where they go wrong', a paper presented at the National Investigation Symposium, October 1998.*

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

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

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

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

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

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

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

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

## **Questioning**

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

Questions form part of the listening process. Appropriate questions can maximise the confidence of the witness that they are being listened to. The types of questioning techniques

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that an appropriately skilled interviewer might use include: open, closed, strategic, hypothetical, provocative or assertive.

### ***Open questions***

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

### ***Closed questions***

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

### ***Strategic questions***

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

### ***Hypothetical questions***

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

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

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

**Practical tip**

**Keys to effective questioning**

- Remember that the purpose of an interview is to obtain answers to six categories of question - *who? what? when? where? how? and why?* (The answers to the latter two questions are important in terms of correcting policy or implementing new procedures).
- Avoid narrow or closed questions, especially during the early parts of an interview. Such questions should be reserved for clarifying aspects of the evidence presented.
- Avoid leading questions.

**Practical tip**

**Commencing an interview**

Evidence is more likely to be forthcoming from a witness who is relaxed and at ease. In advance of the interview, consider whether an interpreter will be necessary and, where appropriate, arrange for an interpreter to be present. To help create a comfortable environment for the witness, an investigator should start by setting the scene by doing the following:

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

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

The two alternatives to face-to-face interviewing are telephone interviews and written responses. Face-to-face interviews have a number of distinct advantages. They:

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

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

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

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

### **Using Interpreters**

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

The imperative to use an interpreter increases according to the likelihood of the evidence being used in future proceedings. This will reduce the opportunities for a witness to subsequently retract their statement on the basis that they had not properly understood the questions. Wherever the substance of an interview may be used or considered as evidence of



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any sort, or is to be relied upon in any legal sense, and an interpreter is viewed as necessary to communicate with the interviewee, then only an accredited interpreter should be used. These trained and accredited interpreters are then able to give evidence as to the substance of the interview as they are regarded as legally qualified to interpret.

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

### **Tape Recording an Interview**

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

#### ***Practical tip***

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

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

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

### **Making records of interview**

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

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

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**Practical tip**

**To take a record of interview:**

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

- opening questions
- story questions which let the person tell their own story uninterrupted, using prompts such as 'what happened next?'
- Clarifying questions which might challenge the story based on facts or documents you have obtained. *Source: Investigations Procedures Manual, Audit Directorate, Department of Education and Training (draft).*

**Witness statement.**

In essence, the witness statement captures in written form the relevant parts of the witness's oral evidence. Statements should be prepared immediately. It is not appropriate or acceptable for a few notes to be taken at the time, with lengthy notes being prepared several days later. A separate statement should be prepared by every witness to a single event. Joint statements must not be used. To avoid collusion by witnesses, do not show one person's statement to a second witness.

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

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

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- In preparing a witness statement the first person 'I' should be used, and the third person 'she/he'.
- If a witness is offering an opinion such as 'I believe she was angry', the witness should be asked the basis for that opinion if it is not otherwise volunteered and the witness statement should set out the basis for that opinion before stating the opinion eg: *'After I said that to her, she banged the table with her fist, raised her voice and said 'They have betrayed me'. She also began pacing around the room and punched a hole in the wall. In my opinion, she appeared to be quite angry.'*
- Don't translate oral evidence obtained during an interview into a witness statement using vocabulary that the witness never uses or simply doesn't understand: translating the witness' own words into 'official jargon' or deleting or replacing 'politically incorrect' text may give a misleading impression of the genuineness of the statement.
- Annex to the statement a copy of any document referred to by the witness in the statement.
- Ask the witness to read the statement before he/she signs it: getting the witness to read the statement aloud is one way to ensure that the witness actually understands the statement and agrees with it.
- Ideally, the pages of the statement should be numbered, the witness should initial all pages and the witness should also fully sign on the last page immediately below the last section of text (this guards against the interviewer later adding additional text).
- If the witness refuses to sign the statement the investigator should make a clear file note that he or she went through the statement with the witness and offered him or her a copy and the reason given by the witness for refusing to sign should be noted.
- If after the witness signs the statement, the witness wants to alter the statement or add something to it, get the witness to do another statement rather than amending the first statement: if in the second statement the witness contradicts something in the first statement ensure that the reasons for this contradiction are explained in the second statement.
- All notes connected with the interview should be carefully preserved.

**Practical tip**

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

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

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

### Addressing requests for the presence of third parties

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

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

- It should be made clear to the third party that his or her role is simply to observe, and not to take part in the discussion or interview:
- make sure that the third party understands his or her role is not to advocate for the witness during the interview (this is particularly important in relation to union representatives or lawyers)
- make it clear to them that they are there to be a witness for the person being interviewed and to provide him or her with support and that they are not there to give evidence themselves or to question any evidence that may be put to the witness.
- If the third party is a person likely to be called or asked to give evidence, then they should not be allowed to be present during the interview of another witness.
- The issue of confidentiality must be addressed with both the witness and any third party: the aim should be to ensure that the confidentiality of the process is maintained and, where the intervention of third parties may put this in jeopardy, action should be taken to prevent this happening. The issue of confidentiality must be balanced against the legitimate right of witnesses to have a support person of their choosing present during their interview .
- it should be made crystal clear to both the witness and the third party that they should not talk about the contents of the interview. An undertaking should be sought from the third party that they will respect the confidentiality of the issues discussed during the interview with the witness.
- if the third party will not or is unable to provide such an undertaking they should not be allowed to be present during the interview.

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

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

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**Practical tip** In relation to documents relevant to an investigation:

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

### Storing Information Obtained during an Investigation

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

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

All documents should be stored in a manner that maintains their original condition. Do not staple, fold, excessively handle or in any way mutilate the documents. Place documents in a resealable bag or envelope with an identifying label on the bag, not on the document. Avoid storing documents in plastic bags because they sweat and could become damaged. Confidentiality requirements demand that strict security should surround the conduct of any investigation into a complaint, particularly those relating to the conduct of an individual.

**Practical tip** As an investigator it is crucial that a paper trail of your actions in an investigation is created. This will serve as a protection at a later stage if the methodology or conclusions become the subject of a complaint to an outside agency.

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

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

### Managing expectations

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

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

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

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

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

### **Providing feedback**

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

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

#### **Ensuring confidentiality**

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

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

**For further information please see full document on the Internal Review Support documentation online. The information below was taken from the New South Wales Ombudsman document – Investigating Complaints – A Manual for Investigators (June 2004)**

### **Fact finding inquiries**

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

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

### **Procedural fairness**

In an investigation, where the person the subject of the allegations and/or any witnesses are to be questioned, the person who is the subject of that complaint has the right to be informed as to the substance of the allegations in all but the most exceptional circumstances. If an investigation is to proceed through to a report to some person or body other than the investigator, the person who is the subject of the complaint has the right to be informed as to the substance of any adverse comment to be made in respect of them. They should be given a reasonable opportunity to put their case, either orally or in writing, to the person carrying out the investigation.

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