7 Conducting an investigation

Types of evidence

Your job as investigator is to collect the evidence available and assess it impartially.

Evidence relevant to the complaint can be:

- direct evidence — what a person actually said, did or perceived through any of their five senses
- circumstantial evidence — evidence from which facts may be inferred (some degree of probability of being true can be concluded from it)
- indirect evidence — when a witness starts telling you what other people said they had seen or done (see "Hearsay evidence" below). Sometimes indirect evidence may be all you can find, so assess it by asking yourself: "What is the likelihood of the evidence being reliable?"

Sources of evidence

In an investigation, the main sources of evidence are:

- oral evidence (personal recollections)
- documentary evidence (both electronic and hard copy records)
- things that might have been used or created
- expert evidence (technical advice)
- evidence from a site inspection.

While the oral evidence of witnesses and documentary evidence are the most common sources, the relative importance of each source will vary according to the nature of the complaint. For example, if you are investigating financial misconduct, documentary evidence such as accounting records could become very important, and you may also need to obtain expert evidence.

All evidence collected should be reliable and relevant to the aims of your investigation. You should avoid being diverted by extraneous information. To ensure that the investigation remains focused, refer constantly to your investigation plan to remind yourself that the purpose of obtaining information is to establish proofs or resolve the facts at issue.

It is often useful to look at what happened before and after the conduct in question. For example, you might look at other transactions that occurred around the time of a transaction of interest and try to find similarities or differences, and determine whether there is a pattern of behaviour.

Forensic evidence

Depending on the nature of the allegations and the evidence you obtain during an investigation, that evidence may become "forensic" evidence at a later stage, meaning evidence used in, or connected with, a court of law or a tribunal.

If you are conducting an investigation, it is likely that your CEO has chosen this course of action because the allegations are sufficiently serious that, if substantiated, they would mean the subject officer's dismissal or prosecution. Therefore the likelihood of evidence being or becoming forensic in nature is high, and you need to take considerable care in the way you obtain and record the evidence.

Perhaps the most important consequence of forensic evidence is the application of the rules of evidence, as discussed in the following section. Disputes about evidence are heard in courts every single day of a hearing or trial. Therefore, non-lawyers who are responsible for an investigation of such allegations may need to get professional legal advice.

Rules of evidence and standards of proof

Regardless of whether a complaint ultimately becomes the subject of legal proceedings, you should be familiar with the rules of evidence because they are based on principles that can assist your investigation by directing you to the best evidence.

For any evidence, the most fundamental consideration is relevance. There must be some logical connection between the evidence and the facts at issue. The test of relevance is equally applicable to investigations as to court proceedings. However, where the rules of evidence apply, even evidence that is relevant may be inadmissible in proceedings. Two of the more important rules of exclusionary evidence are hearsay evidence and opinion evidence.

Hearsay evidence

Hearsay evidence is "evidence based on what has been reported to a witness by others, rather than what he or she has heard himself or herself". For example, a witness who says, "Bill told me that he saw Mary take the money" is giving hearsay evidence.

Hearsay evidence is generally inadmissible, but you should not totally discount it. The rule against hearsay applies only where the rules of evidence apply, but in an investigation, it can be a useful source of leads to other relevant witnesses. The importance of the rule against hearsay is that it alerts you to the need to go to the source itself, rather than relying on what others say. Put another way, hearsay evidence carries less weight than direct evidence; whenever the primary source is available, you should use it in preference to hearsay evidence. If this is not possible (e.g. because the source of the direct evidence refuses to be interviewed) then your report should record this.

There are a number of exceptions to the rule against hearsay, including statements made by alleged wrongdoers where they admit their wrongdoing. This is based on the assumption that people don't tend to make damaging confessions against their self-interest, therefore, any damaging confession is inherently likely to be true. If Bill from the earlier example said to you as investigator: "Mary told me that she took the money", this would carry some weight.

Opinion evidence

A witness's opinions about a person, or about what happened or should have happened, are irrelevant to your enquiry. Therefore, as a general rule, witnesses should be steered away from expressions of opinion about something or someone, unless the witness is an expert who has been asked to provide an expert opinion. Get the person to describe in detail what they actually perceived with their senses (i.e. saw, heard, felt, tasted or smelt).

As with hearsay evidence, there are exceptions to the general rule: opinion evidence may be admissible if it is based on what a person saw, heard or otherwise perceived, and it is necessary to convey an adequate understanding of the witness's perception (e.g. "He looked upset to me"). Similarly, where witnesses have acquired considerable practical knowledge about something through life experience, they may be able to express an opinion about it even if they are not an expert.

Standards of proof

In disciplinary investigations, the civil standard of proof applies — that is, the allegations must be proved on the balance of probabilities. This is a lower standard of proof than that required in criminal matters, where allegations must be proved beyond reasonable doubt.

Due to the different standard of proof and different evidence that may be relied on, an acquittal in criminal proceedings will not necessarily mean that disciplinary proceedings are prevented or should be discontinued.

For a case to be proved on the balance of probabilities, the evidence must establish that it is more probable than not that the alleged conduct occurred.

The strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the:

- relevance of the evidence to the allegations
- seriousness of the allegations
- inherent likelihood (or improbability) of a particular thing occurring, and
- gravity of the consequences flowing from a particular finding.

This is known as the "Briginshaw test" (*Briginshaw v Briginshaw* (1938) 60 CLR 336).

For example, where disciplinary action will have serious consequences for the subject officer, a decision-maker may be less likely to rely on hearsay evidence about key issues in dispute, or statements from witnesses who have not been sworn and their evidence tested regarding key issues in dispute, than if the case involved a minor disciplinary breach.

It is the strength of the evidence necessary to establish a fact or facts — particularly key facts in dispute — and not the standard of proof that may vary according to the seriousness of the allegations and the outcome.

Documents

If it has not been done before notifying the CCC to preserve evidence (see chapter 2), you should secure any relevant documentary evidence — all relevant files, diaries, flash drives and the like — as a priority. If this is done, anyone with a personal interest in distorting the outcome of the investigation will be prevented from destroying or removing them.

This should also prevent the file being amended by the addition of retrospectively concocted documents. Any documentary material that is produced after the file has been taken into your possession or control should be regarded with suspicion.

You should record the time and date when you took possession of documents, as well as the place from which you took the documents, how you took possession, and how the documents are stored. This can be important if accusations are made at a later stage that you mishandled documents, or allowed them to be mishandled, during the course of the investigation.

You should always take original documents rather than accept photocopies. Useful information is often written in pencil in the margins of documents or appears on Post-it notes. By taking the originals, you will have access to this extra information.

Having taken possession of the originals, you should have them photocopied (including copies of notes or Post-its) and then use the photocopies during the course of the investigation to avoid marking or damaging the originals. The original documents should be kept secure.

Where appropriate, verify the authenticity of the documents with the person indicated as being the author.

Whenever you take documents, provide a receipt or other record of this, together with your contact details in case anyone needs to access the documents. If the documents relate to ongoing everyday issues for the agency, you will need to give either a complete copy, or a copy of the pages relating to the current period, to the person who held them. In some cases the item (e.g. a sign-on book) can be removed if a new one is made available.

Digital evidence

More and more, the documentary evidence you need is likely to be in digital form (e.g. letters, purchase orders, emails) stored on computers, CDs or flash drives, and evidence can also be available on mobile devices. Although the basic rules for gathering evidence apply, you need to take extra care with digital evidence to ensure that:

- you have the appropriate authority to search and, if necessary, seize any electronic equipment that might contain evidence
- you do not inadvertently alter the evidence (e.g. through keystrokes or mouse clicks)
- you maintain an audit trail of all actions you take in connection with the equipment (e.g. the condition in which you found the equipment, disconnecting the equipment).

You should obtain forensic computing advice before you take any action in relation to digital evidence, and anyone accessing original data held on a computer or storage media should be competent to do so, and to give evidence explaining the relevance and implications of their actions. If this expertise is not available within your UPA, then you may need to seek external advice.

Expert evidence

An investigation may be assisted by the use of professional experts such as accountants, valuers or engineers. Experts are commonly required for advice on:

- medical, psychiatric or psychological illnesses
- accounting or financial matters
- points of law
- documents and handwriting
- computer or machine functioning
- scientific analysis of documents or other things.

Document examiners and handwriting experts

Depending on the nature of the investigation, you may require the services of a document examiner or handwriting expert, for example, to establish when documents came into existence, whether they are forged and, if they are, the identity of the forger.

If such an expert is required, the person should be contacted as soon as possible for guidance and assistance about the proper storage and dispatch of the documents (see “Obtaining professional help” below).

Generally, when handwriting on a particular document is at issue, the identity of the author may be established by:

- the author giving evidence to the effect that they wrote it
- evidence from a person who has knowledge of the author’s handwriting from long acquaintance with it
- evidence from a person who saw the document being written
- evidence from an expert in the field of handwriting comparison who has formed the opinion that the writing is, or is not, that of a particular person.

Obtaining professional help

There is no foolproof formula for selecting an expert. If you do not have the expertise within your UPA, you can:

- ask internal and external contacts who may have required the use of such an expert previously, and may be able to attest to their abilities
- contact a professional association which may be able to provide the names of highly recommended members
- contact the relevant department of a university or TAFE, where relatively affordable and independent expertise may be available among the faculty
- use internet listings or the telephone book, although there is a risk if you are unable to check the credentials of an expert sourced this way.

An expert's report should contain details of:

- their area of expertise
- their qualifications in relation to this area of expertise
- what information was given to them on which to base an opinion
- what their expert opinion is in relation to the evidence.

Site inspections

Where visual information or the physical context is important in terms of the allegation or an understanding of the issues, you may have to make a site inspection. When inspecting a site:

- be clear about why you are doing so (e.g. to confirm lines of sight)
- arrange an appointment time (preferably for the time of day when the original event took place) and explain the purpose
- take photographs, detailed notes and draw diagrams
- make best use of the time by also taking the opportunity to interview witnesses where this is appropriate
- be discreet about the site inspection to minimise the knowledge of outside parties
- take care not to be drawn into too much informality with parties working at the site
- store any site photographs, diagrams, drawings or other evidence in the secure file.

Escalation of complaint severity

Your CEO will have appointed you as investigator based on your skills to handle the relative seriousness of the complaint. However, during the course of your investigation, you may discover that the allegations you are investigating are more serious than originally assessed, or may involve unanticipated criminal allegations. You should terminate or suspend your investigation and seek advice from your UPA's legal section. If serious criminal offences are detected and you do not discontinue your investigation, there may be a risk of evidence being contaminated, thereby jeopardising any subsequent criminal investigation.

In some cases, you may be required to notify the CCC of this new information, especially if it changes the level of seriousness of the case being investigated. It may become appropriate for the CCC to assume responsibility for the investigation.

Any decision by the CCC to work cooperatively with an agency or assume responsibility for an investigation will be made on a case-by-case basis, within the CCC's legislative obligation to focus on more serious or systemic corrupt conduct.

Difficult or uncooperative people

The degree of cooperation from people will vary — some people will be forthcoming in their responses, some will be more reticent, and others will actively seek to withhold information.

There will be times when you encounter difficult people, for example, interviewees who:

- are obsessive or irrational
- are anxious or aggressive
- are unfocused and continually change the subject
- stay silent or refuse to answer certain questions
- never stop talking, or embroider their answers with unnecessary detail or gossip
- trivialise the issues or attempt to undermine your authority.

Some people may refuse to provide documents relevant to the investigation, or allow you access to systems.

You must control the process, but you must also take great care to sift through each witness's evidence to ensure that you do not miss genuine allegations, admissions or rebuttals.

Resist any temptation to enter into discussion or argument with any person being interviewed; remain calm and professional, and maintain your objectivity.

If a person insists on offering a defence of "I wasn't there, I didn't do it, nobody saw me do it, you can't prove a thing", then you will ultimately have to look elsewhere for evidence to assist the investigation. In administrative proceedings there is no absolute prohibition on drawing adverse inferences from a person's refusal to answer. Statements from relevant people are useful but they are not necessarily essential.

No matter how skilful an investigator you are, you will not always be able to overcome those people who are determined to be uncooperative. However, where a person is not cooperating, you are not necessarily devoid of any recourse.

Despite changes to legislation, Crown Law has previously advised in principle that an employee is under a legal obligation to comply with a lawful direction (as found in relevant codes of conduct issued under the *Public Sector Ethics Act 1994*), and it will be a disciplinary offence for that employee to ignore a direction given under that provision by a person who has the authority to give that direction (see s. 187 of the *Public Service Act 2008*). Consequently, an employee who refuses to answer questions that he or she has been lawfully directed to answer by the CEO or an authorised superior officer may incur disciplinary action.

Depending upon the legislation governing your agency, the common law privilege that a person is not bound to answer any question that might tend to expose him or her to the risk of prosecution or penalty may not be available in the context of internal enquiries associated with disciplinary matters. In any event the CEO or an authorised superior officer may direct a subordinate to answer questions concerning the performance of the subordinate's duties, regardless of the possibility that, in answering the questions, the subordinate officer might tend to incriminate himself or herself. In the event of a refusal to comply, disciplinary action may be taken.

False information

People's personal feelings affect the reliability of the information they are providing. This may happen, to varying degrees, without any intent by the person to lie. However, you must be aware that some interviewees will intentionally supply false information. They may answer some answers truthfully, and lie in response to others.

Recording and storing evidence

The file

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

Store all documents in a way that maintains their original condition. Do not staple, fold, excessively handle or in any way mutilate the documents. Put them in a plastic bag or envelope with an identifying label on the bag, not on the document. Avoid storing documents in sealed plastic bags, because they could be damaged by trapped moisture. Keep any seized electronic equipment away from magnets, heat, moisture and radios.

Confidentiality requirements (see chapter 5) mean that strict security should surround the conduct of any investigation into a complaint, including the storage of evidence. This is particularly important in handling cases based on public interest disclosures.

File notes

It is essential to make notes of all discussions, phone calls and interviews at the time that they take place. Your file notes should:

- be legible
- include relevant dates, times, places and people spoken to
- clearly identify you as the author of the note
- 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.

The running sheet

A valuable practice for investigators is to maintain a “running sheet” or “log” for every investigation. A running sheet is a chronological record of events that have taken place in the investigation, which can be maintained manually on the inside cover of the file or electronically on a computer. At a minimum, running sheets provide a record that can be easily audited for who did what and when. They are particularly useful where:

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

Maintaining running sheets electronically is the recommended method, as it also allows you to link to digital recordings and other documents for easy access.

The importance of preserving a record of information obtained during an investigation is reinforced by the provisions of the *Public Records Act 2002*, which require that:

- each public office make and keep full and accurate records of the activities of the office
- state records be kept under safe custody and proper preservation.