Statement of Tracey Harris

I, Tracey Harris of c/- Level 25, 240 Queen Street, Brisbane in the State of Queensland do solemnly and sincerely declare that:

BACKGROUND

1. Prior to the amalgamation of the three racing bodies in July 2010 I was the CFO and Company Secretary of Harness Racing Queensland Limited (**HRQ**). I commenced at HRQ on 1 November 2005.

2. Subsequent to the amalgamation I was employed as Finance Manager of Racing Queensland Limited (**RLQ**) during the period 1 July 2010 until November 2010. I reported to Adam Carter.

3. Unless otherwise stated, the matters set out below are based on my observations and involvement in matters during the course of my employment with HRQ and RQL.

CONTRACT MANAGEMENT AND FINANCIAL ACCOUNTABILITY (paragraph 3(a) of the Terms of Reference)

4. In relation to the procurement, contract management and financial accountability policies:

    a. I am aware that HRQ had such policies and that they were reviewed by the Racing Department (Office of Racing);

    b. I am not aware of any instances where HRQ did not comply with such policies and to the best of my knowledge they were complied with at all times; and

    c. I understand that the other codes would have had similar policies and that they would have been reviewed by the Office of Racing, but cannot comment on this further.

5. In relation to measures which were used to ensure contracts were awarded delivering value for money:

    a. At HRQ I recall that the relevant policy required that a capital purchase approval form be completed which required an economic evaluation including business model;

    b. I am not aware of any instances where HRQ did not comply with this policy and to the best of my knowledge it was complied with at all times; and

    c. I cannot comment at RQL as I was not involved in contract negotiation.

6. In relation to whether the policies, processes, guidelines and measures were adhered to, I cannot comment for RQL as I have not seen the relevant policies.

Tracey Harris

Witness

MANAGEMENT (paragraph 3(b) of the Terms of Reference) and CORPORATE GOVERNANCE (paragraph 3(c) of the Terms of Reference)

7. Prior to corporatisation of the Racing bodies the Office of Racing co-ordinated for all Board members and members of the executive team a training seminar on corporate governance presented by Mr Dunphy which I attended.

8. I have produced to the Racing Commission of Inquiry seminar material that I have retained for such training. Attachment **"TH-1"** to this statement is a copy of that material, which is primarily taken from training delivered by Barry Dunphy from Clayton Utz on 30 August 2006.

9. The seminar included extensive training for all board members and members of the executive management team in relation to the Code of Conduct. There were discussions about conflicts of interest and the training focused on the separation of the executive/management and the Board.

10. At HRQ there was a distinct separation between the Board members and the management team. No Board member actively participated in the day to day running of HRQ. The management team on a monthly basis provided a formal report to the Board at which time questions were addressed and action items would be tabled. Otherwise, the management team was left to implement the Board's decisions.

11. At RQL, I observed that the position was different. For example:

    a. Mr Bentley had an unofficial office sitting between Shara Murray (Reid) and Malcolm Tuttle and would attend the office on a regular basis. In my experience working as a CFO for other companies, I found this to be an unusual practise for a Chairman;

    b. Mr Tuttle never came into my office to give me instructions, but Mr Bentley did on a number of occasions. In my experience working as a CFO for other companies I found this unusual because Mr Tuttle was the CEO;

    c. It was commonplace that Mr Bentley's approval would be sought even in relation to small issues such as general finance matters. For example, if I ran something past Mr Carter he would often send the matter to Mr Bentley to "okay" it;

    d. I observed that many decisions were not made independent of Mr Bentley. I was often told to do something by Mr Carter because "Bob said" or "Bob said to do it this way";

    e. Mr Bentley would speak to me directly about matters concerning the operations of RQL. On one occasion, in a meeting with Mr Bentley he informed me that an employee, Damien Raedler, was going to lose his job. On another occasion Mr Bentley came into my office to talk about

developments at Albion Park and Logan. On that occasion he drew plans for me to look at.

12. I was aware that under the Code of Conduct decisions were to be made by RQL in the interests of all codes of racing. During my employment with RQL I felt that some of the decisions made by RQL were not in the best interests of the industry as a whole. For example:

    a. Mr Bentley made statements after the amalgamation that the harness and greyhound racing codes had been suffering losses;

    b. However, decisions were made by RQL that reduced the revenue streams that the harness and greyhound racing codes had previously relied upon. For example, decisions were made to defer the obligation of certain wagering operators to pay race information fees;

13. I have addressed the consideration of race information fees in more detail below.

QUEENSLAND RACE PRODUCT CO LIMITED AND TATTSBETT LIMITED (paragraph 3(F) of the Terms of Reference)

14. At HRQ I had been involved in race information meetings with Government and had good knowledge of the issues involved. HRQ had gone through the approvals process with wagering operators and we had made provision in our accounts on the expectation of receipt of revenue from race fees.

15. From my time at HRQ I was also aware that the Queensland control bodies received revenue from Tattsbet Limited (**Tatts**) pursuant to the Product and Program Agreement (**PPA**) and that these funds were divided amongst the codes pursuant to the Intercode Agreement.

16. Post amalgamation, a review was undertaken of the approach to race information fees. This review was conducted primarily by Mr Carter and myself. It involved numerous meetings between Mr Carter, Mr Bentley and myself. I cannot recall specifically if Mr Tuttle was involved in any meetings.

17. The review was undertaken because issues had arisen, such as the Betfair litigation in NSW, and the situation was changing.

18. I was aware that RQL, specifically Shara Murray and Adam Carter were involved in negotiations with wagering bodies such at Betfair and Sportingbet. I was not involved in these negotiations directly.

19. However, the negotiations were relevant to the review that was being undertaken by Mr Carter and myself because we had to identify and review potential fee models which could be applied to specific wagering operators and examine the impact those fees would have on RQL's revenue stream. This involved considering issues such as whether fees should be charged on a gross wagering revenue basis and the percentage to be charged.

Tracey Harris

Witness

20. The Tatts fees under the PPA were taken into consideration in the financial modelling that we prepared as RQL was guaranteed that revenue for the term of the agreement only. Further, as part of the modelling prepared by Mr Carter and myself, we were looking at the longer term, and in particular how the application of race fees to specific wagering bodies could affect any future agreement with Tatts after the termination of the PPA. We needed to ensure that the racing industry in Queensland had a stable revenue stream leading up to and after the conclusion of the PPA in 2014.

21. The modelling and its basis was discussed at meetings with Mr Carter and Mr Bentley. During these meetings Mr Bentley would give Mr Carter and I direction on the approach to the review, and in particular the course RQL was to take in relation to:

    a. Matters for the modelling that Mr Carter and I were undertaking such as the variables to be included, such as whether to consider a gross wagering approach to calculating race fees;

    b. The approach to be taken in dealings with wagering operators such as Sportingbet. Specifically, I recall reviewing an agreement in relation to Sportingbet which I had agreed with Mr Carter. I was then told by Mr Carter that Mr Bentley wanted it changed and was not provided with any reasons.

22. At a board meeting of RQL that I attended after the amalgamation an update on race information fees was presented to the board.

23. I recall that during this presentation, Mr Bentley declared a conflict and excused himself from the meeting.

24. A number of days after the board meeting myself and Mr Carter were asked to meet with Mr Bentley and Tony Hanmer. In preparation for this meeting I was asked to present an update on race information fees including modelling addressing the various variables and scenarios such as the effect of the basis of charging and the percentage to be charged.

25. After this meeting I questioned Mr Carter about the appropriateness of Mr Bentley's involvement in race information discussions as I knew that Mr Bentley was a member of the Board of Tatts. I told Mr Carter that at HRQ, Kevin Seymour had always removed himself and had nothing to do with race information fees as he was also a member of the Board of Tatts.

TERMINATION OF MY EMPLOYMENT

26. I was consulted by the executive management team, in particular by Paul Brennan and Jamie Orchard. I was also consulted by Mr Bentley as set out above.

27. At RQL, I led a forensic review of Redcliffe Harness Racing Club under the instruction of Jamie Orchard and Mr Bentley. As a result of that audit, findings were identified. I reported my findings to Mr Orchard and he reported them to the Chair of the Redcliffe Harness Racing Club, Kerry Ebert. I believe that the Chair

was not happy with the findings and the club was unable to operate for a period of time.

28. It was my understanding that Mr Ebert had met with Mr Orchard and said that there had been inequity in the distribution of the incentive scheme in HRQ prior to the amalgamation on 30 June 2010.

29. Following the report, I was asked to meet with Mr Orchard for an informal catch-up. When I attended this meeting Mr Bentley was also present. My recollection was that the meeting went along the lines of the following:

    a. Both Mr Orchard and Mr Bentley asked me questions about Mike Godber's involvement in the payment of the incentive scheme money to Albion Park;

    b. I was also asked questions about the involvement of Mr Seymour and Bob Lette in the incentive scheme. I was asked to provide my opinion about transactions and events that had occurred;

    c. I told them that all of the information was in board minutes and other documentation. I refused to provide my opinion about whether I believed Mr Seymour or Mr Lette had been involved in discussions and made agreements with other parties as I had no knowledge of these events;

    d. Mr Bentley advised me that that I was to state that Mr Seymour and Mr Lette had been involved in the decision making regarding monies that were paid to Albion Park;

    e. I told Mr Bentley that I did not feel that these allegations, which formed part of industry gossip, were supported and I was not willing to comment on them;

    f. Mr Bentley became quite upset that I would not support his position and answer his questions about Mr Seymour and Mr Lette; and

    g. Mr Orchard told me that the matter would be referred to the CMC, and that if this occurred RQL would be responsible for undertaking the review and I would be forced to answer questions about this subject.

30. In November 2010 I resigned from my position with RQL.

Tracey Harris

Witness

I make this statement conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1867* (Qld).

Dated: 18 **September 2013**

Signed and declared by Tracey Harris at Brisbane in the State of Queensland this 18 day of September 2013

Before me:

M. E. Tills

Signature of person before whom the declaration is made

Signature of declarant

MAXINE EDITH TILLS / SOLICITOR

Full name and qualification of person before whom the declaration is made

Corporate Governance

Barry Dunphy, Partner, Clayton Utz

Corporate Governance

Index

Corporate Governance Training

Barry Dunphy
Partner

30 August 2006

Overview

- Overview and accountabilities
- Queensland Racing Limited - new corporate and regulatory framework
- Hot topics in Corporate Governance
  - Role and Duties of Board Members
  - Case study
  - Potential media interest and reputation risks
- Natural Justice
- The role of the Crime and Misconduct Commission ("CMC")

Queensland Racing Limited

- 1 July 2006 Queensland Racing Limited replaced the Thoroughbred Racing Board to become the Control Body for the thoroughbred code of racing in Queensland

Control Bodies

- Queensland Racing Limited:
  - is the control body (and therefore regulator) for the thoroughbred code of racing in Queensland; and
  - must apply the income and property of the company solely towards the promotion of the objects of the Company
- Queensland Racing Limited is both the regulator of thoroughbred code of racing in Queensland as well as the administrator and promoter of the industry.
- Greyhound Racing Authority and the Queensland Harness Racing Board have the same tension as a regulator that also has relevant commercial interests

What Is Corporate Governance?

- Wide definition
- Fundamental elements

Key Issues - Recent Corporate Collapses

- Fundamental ethical breakdowns
- The performance of directors
- The performance of auditors
- Lack of transparency in reporting
- Markets kept uninformed as to the true position of the corporations

The External Accountability Regimes Which Apply to the Public Sector

- Role of the Auditor General
- Scrutiny through parliamentary processes
- Establishment of administrative law regimes
- Establishment of "corruption watchdogs"
- Other complaint or review processes
- Review and scrutiny by the media

ANAO

- Key principles
- Leadership
- Management environment
- Risk management
- Monitoring
- Accountability

Queensland Auditor General's Recommendations

- Management structure and operations
- Management standards
- Control, monitoring and reporting
- External accountability
- Risk management

Queensland Auditor General Audit Report No. 1 of 2001-2002

- Review of:
  - Management structure and operations
  - Management standards
  - Control, monitoring and reporting
  - Risk Management
  - The Self-Assessment Program on Corporate Governance for Departments

Queensland Auditor General Audit Report No. 2 of 2002-2003

- Review of Government Owned Corporations
- Review of Local Government
- The Self-Assessment Program on Corporate Governance for Local Government

Roles of Board Members / Officers

- Separation of Roles of Board Members/Officers
  - Board
  - Chief Executive Officer
  - Chair
  - Secretary
  - Key Corporate Governance issue is to avoid "role confusion"

Role of Board Members

- The focus should be:
  - strategic view
  - addressing the "big picture" issues
  - being pro-active
  - being responsive
  - not being caught up in minor operational / managerial issues

Directors Duties

- Directors of companies have duties, both under Statute and at Common Law

Statute - *Corporations Act 2001 (Cth)* ("Corporations Act")

- Div. 1 of Ch. 2D of the Corporations Act deals with directors' general duties, including
  - acting in 'good faith', for a 'proper purpose' and in the 'best interests of', a company (s 181 of the Corporations Act); and

Directors Duties

- not abusing a corporate position or information for personal gain / to cause detriment (ss.182 and 183 of the Corporations Act).

- Div. 2 of Ch. 2D of the Corporations Act prescribes with the appropriate conduct of company directors when they maintain a 'personal interest' in company business:
  - If a company director becomes aware that he or she may be have a 'material personal interest' in company business, then they should:

Directors Duties

- as soon as practicable after discovering the interest;
- at a meeting of the company directors;
- inform other directors of the nature and extent of the interest and the way in which it relates to the affairs of the company

Common Law Duties

- Modern statutory duties under the Corporations Act have their origin in Common Law doctrines
- These doctrines are not replaced by the Corporations Act, but run parallel with the duties contained in the Corporations Act
- Corporate constitutions add another regulatory layer see the Constitution of Queensland Racing Limited

Common Law Duties

- Directors common law duties include:
  - The fiduciary duty to the body corporate
  - the duty to act honestly and exercise powers for their proper purpose
  - Duty to act in good faith
  - Duty to exercise diligence, care and skill
  - Duty of confidentiality
  - Duty to avoid conflict of interest
  - Duty to avoid conflict of duty and duty

Fiduciary Duty to the Body Corporate

- A fiduciary duty is a duty to act in good faith and to exercise powers in the best interests of the Body Corporate

Duty to Act Honestly and Exercise Powers for Their Proper Purpose

- Board Members must:
  - act open and honestly
  - ensure that they do not use information acquired because of their position as a Board Member, to gain an advantage for themselves, or for any other person
- See s.182 of the Corporations Act

Duty to Act in Good Faith

- Board Members must act bona fide in the interests of the Body Corporate and not in their own interests
- Because Board Members are in a position of trust, their actions and standards of behaviour are required to be exemplary
- See s. 181 of the Corporations Act

Duty to Exercise Diligence, Care and Skill

- For example, Board Members should:
  - take reasonable steps to inform themselves about the affairs of the Body Corporate and the circumstances and environment within which it operates
  - obtain sufficient information and advice and exercise an active discretion at all times so as to make conscientious and informed decisions
- See s.180 of the Corporations Act

Duty of Confidentiality

- Duty of Confidentiality
  - A Board Member owes a duty not to disclose or misuse confidential information
  - A Board Member must not:
    - use or divulge information which is not public knowledge and which has been communicated to them in their capacity as a Board Member, in circumstances where there is an obligation of confidentiality
    - make improper use of information acquired because of their role as a Board Member to benefit any person or cause detriment to the Body Corporate

Duty of Confidentiality cont

- compile records or information of the Body Corporate for the Board Member's own private use

- This duty can be particularly relevant and contentious for persons who are members of more than one Board. Such Board Members may have to clearly define what "hat" they are wearing when decisions are made

Duty to Avoid Conflict of Interest

- Board Members must avoid actual or potential conflicts of interest arising between their duties as a member of the Board and their personal interests or duties to others

Conflicts of Interest

- What is a conflict of interest?
- Practical examples
  - Board Member being on another Board where there could be a conflict of duty and duty
  - Disclosure of personal interests
  - Duty to the corporate entity
- Resolution Strategies

Duty to Avoid Conflict of Duty and Duty

- Where a person is a member of more than one Board they will owe a fiduciary duty to each Body Corporate
- This means that if a conflict arises between the interests owed to one Body Corporate and the interest owed to the second Body Corporate, a conflict of duty will arise
- This conflict of duty must be managed so as to avoid the improper pursuit or preferring of the interests of one Body Corporate at the expense of the other

Duty to Avoid Conflict of Duty and Duty cont

- As a member of one Board, a Board Member must not exercise his or her powers for the benefit or gain of a second Body Corporate, without clearly disclosing the second Body Corporate's interest and without obtaining consent from the Board of the first Body Corporate.

Multiple directorships Conflict of Interest and Duty - Case Study

- MDs are a common feature of the Australian corporate landscape
  - In 1995, 19% of directors of Australia's largest listed companies held two or more directorships (Australian Centre for Corporate Law and Securities Regulation)
- Prevalence of MDs means directors will often have a 'conflicts', regarding how they should act
- Problem recognised by Australian law, which does not penalise the existence of a conflict, only the pursuit of one

CLAYTON UTZ

Multiple directorships

- Two Common Law duties commonly a problem for MDs:
  1. Duty to avoid conflict of interest
     - A director must not allow his or her personal interests to conflict with the clear fiduciary duty that the director owes to the company, that is to act in the company's best interests
  2. Duty to avoid conflict of duty and duty
     - The director of a Company A, who is also the director of Company B, owes a fiduciary duty to both companies and therefore must not use information or power to benefit one company, to the other's detriment
- If a Board has a director who is also a director of another Board - the director and the Boards must carefully manage the situation

Multiple Directorships

- In managing these circumstances:
  - Generally, the law is not opposed to a person holding MDs
  - Therefore, nothing immediately wrong with these circumstances
  - Key in these circumstances is that while the conflicts do not need to be erased as they can be adequately managed.

Multiple Directorships

- A potential conflict of interest could be managed if, before acting on a matter relevant to the potential conflict:
  - The director discloses the conflict to either of the Boards; and
  - Having made that disclosure, the director refrained from participating in deliberations (unless the Board resolved otherwise)

Multiple Directorships

- A potential conflict of duties could be managed if, before acting on a matter relevant to the conflict:
  - the Director discloses the other company's interest to the first Board; and
  - Before exercising powers for the benefit or gain of the other company, the director obtained the consent of the first company's Board
- Such an approach will provide that the conflicts would be adequately 'managed' and therefore not cause breach of any statutory or common law

What is Natural Justice?

- Two limbs to the duty to provide natural justice:
  - A person whose rights, interests or legitimate expectations could be affected by a decision should be given a right to be heard – The Hearing Rule
  - The applicant is entitled to an impartial hearing (that is, the decision-maker is not biased) – The Bias Rule

the process you follow

10 Rules of Natural Justice in Decision-making

1. Natural Justice always applies
2. Natural Justice is a continuing duty
3. Reasonable notice must be provided
4. A breach by the briefing officer may lead to a breach by the decision maker
5. The hearing rule applies to adverse material

10 Rules of Natural Justice in Decision-making

6. The hearing rule applies to confidential material
7. Use expertise or experience carefully
8. Care should be taken in relation to public statements to avoid claims of bias
9. Natural Justice does not apply to preliminary decisions or evaluative material
10. The consequences can be serious

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Natural Justice Case Study - Mrs Jones

- Hypothetical Case Study
  - On 7 July, 2004, Mrs Jones wore high heeled open toed shoes while parading her horse
  - This was in contravention of dress and safety standards imposed by the control body and Mrs Jones was asked by Stewards to accompany them to the Stewards room to discuss the matter
  - Mrs Jones subsequently alleged that the officials were unprofessional and not following 'due process'. The officials accused Mrs Jones of being abusive when she met with the Stewards.

Natural Justice Case Study - Mrs Jones

- The Control Body then sent Mrs Jones a letter, informing her that a written complaint had been received in relation to the incident and that she would be required to attend an inquiry into the affair
- Mrs Jones objected, complaining that she had not received a copy of the complaint letter, as required by Natural Justice
- The Control Body subsequently provided the letter of complaint but Mrs Jones did not attend the inquiry
- The Control Body did not, in any of its correspondence, identify what parts of the complaint formed the basis of the charge against Mrs Jones

Natural Justice Case Study – Mrs Jones

- The Control Body disqualified Mrs Jones from racing for failing to attend the inquiry
- Issues for consideration
  - A right to be heard must be accompanied by a right to know the case to be met (*Kanda v Government of Malaya* [1962] AC 322 at 337)
  - Mrs Jones had a right to know, specifically, why she was required to attend the Stewards' inquiry
  - Non attendance at a hearing where natural justice has not been provided cannot be justified

** Martin

Natural Justice Case Study – Mrs Jones

- Was Mrs Jones being investigated for the dress code and safety violation or for her allegedly abusive behaviour?
- This was not revealed by the letters of either the Control Body or the complainant
- As such, the Control Body's initial failure to afford Natural Justice was not 'cured' by providing Mrs Jones with the second letter
- Mrs Jones was not afforded procedural fairness

if already do overturn

Natural Justice Case Study - Cessnock case

- Case Study: *Cessnock v Greyhound [2006] NSWSC 759*
  - Greyhound Racing NSW ("GRNSW") was the State industry 'control body'
  - The plaintiff was the owner of a showground at Cessnock where greyhound races had been run for many years
  - Within its tasks, GRNSW had to allocate race dates - done according to revenue generated by the TAB
  - 2005 - GRNSW low on funds
  - 14 March, 2006, GRNSW decided to cut costs by limiting race dates (as opposed to reducing prizes)

Natural Justice Case Study - Cessnock case

- GRNSW reviewed the status quo - determining that only one venue in the Hunter region would be allocated race dates
- plaintiff missed out - challenging the decision on the basis that GRNSW had not afforded it procedural fairness
- plaintiff's case was that although GRNSW had issued a 'show cause' notice, which it responded to, this did not provide adequate opportunity to address the Board **before** the decision was made
- Justice Hulme agreed with plaintiff that 1-2 weeks notice was not an adequate time-frame to prepare representations

Natural Justice Case Study - Cessnock case

- Factors influencing His Honour's conclusion included:
  - the **seriousness of the decision** (ie. the fact that it concerned plaintiff's very livelihood)
  - the **length of time** for which GRNSW was aware of the possibility that industry participants would have to be reduced (there was evidence that GRNSW knew of this possibility as early as June, 2005)

Natural Justice Case Study - Cessnock case

- These findings led his Honour to conclude that:

  "In no sense could the opportunity which the Plaintiff had of advancing reasons why the Defendant should depart from decisions previously made (and... publicly announced) be equated with what natural justice entitled it to, viz. the opportunity of, inter alia, making representations prior to the Defendant making a decision in the first place"

Lessons for Regulators from Natural Justice Case Studies

- When investigating or penalising individuals, regulators should ensure that those persons are fully informed of the case against them; and
- If regulators are to make decisions which are substantially adverse to individuals, those persons need adequate warning of the impending decision, to prepare opposing representations

Corporate Governance Case Study - AWB Affair

- **What was it?**
  - October 2005 - UN commissioned Volker Report into suspected rorting of Iraqi Oil for Food Programme reveals AWB as single biggest contributor of kick-backs to Saddam Hussein's regime
  - Discovered Australia's wheat exporter had paid Iraqi officials over $300M in bribes, to win lucrative wheat contracts
  - November 2005 - Cole Commission constituted by Howard government to conclude on whether any Australian company breached state, territory or federal laws (The Commission is to report it's findings in September, 2006)

Corporate Governance Case Study - AWB Affair

- **Who is the AWB?**
  - Exclusive manager and marketer of all Australian bulk wheat exports ('single desk')
  - One of Australia's biggest agricultural enterprises (in top 100 publicly listed companies)
  - Markets wheat into more than 50 countries - worth more than $5 Billion annually
  - 1939 - 1999: was a statutory authority
  - 1999: privatised under the Howard administration

AWB Affair - How did it happen?

- 1990 - After Gulf War 1, UN imposes economic sanctions against Iraq
- Oil for Food Programme commences in 1995 to allow for the purchase of food during economic sanctions
  - Iraqis sell oil for basic necessities through UN-monitored accounts in the US
- Bread a food 'staple' of Iraq - durable qualities make Australian produce reputable but evidence that international market was catching up

AWB Affair - How did it happen?

- To secure market, AWB pays bribes to 'front' Jordanian trucking company - money subsequently provided to Saddam Hussein's regime.
- 2003 - Oil for Food Programme ends - documents evidencing transactions under the programme emerge - suspicions of corruption
- US Federal Reserve Chairman Paul Volker appointed by UN to investigate allegations
- Main Finding: AWB single biggest contributor of kick-backs

AWB Affair - Governance Lessons

- Scandal a source of many corporate governance lessons for other Australian companies / regulators

1. Importance of a balanced board

- Upon privatisation in 1999, the Howard Government wanted to ensure that growers, not investors, had control of the AWB
- Ownership in company was divided
- Class A shareholders
  - wheat growers
  - could elect majority of company's board

AWB Affair - Governance Lessons

- could not derive dividends
- Class B shareholders
  - ordinary investors
  - could elect minority of board (2 from 11 Non-exec. D's)
  - could derive dividends
- Advocated as a compromise between corporate governance principles and agricultural socialism
- Criticised as a 'Frankenstein structure' and a 'disaster waiting to happen' (S. Easterbrook, Corporate Governance International)

AWB Affair - Governance Lessons

- Problem - Financial owners of AWB (ordinary investors) not in control of the company as board dominated by growers
- Created a culture of doing 'whatever it takes' to maximise wheat sales at the expense of longer-term corporate priorities, such as social responsibility (which can effect share price)
- Culture led to oversights which allowed AWB's management to become involved with corruption in Iraq

AWB Affair - Governance Lessons

- Oversights not picked up by handicapped regulator

"[The AWB Board] is not a Board that looks after investors interests primarily. It is a Board that is controlled by people who are interested in maximising their own revenues. They compete to pander to the interests of growers to get on the Board. ***This is not a normal structure. When you interfere with the normal, tried and tested model, you increase the risks of things going wrong."***

(S Easterbrook, Corporate Governance International)

AWB Affair - Governance Lessons

2. Need for a strong regulator

- Effective regulator an essential pre-requisite for good corporate governance
- The AWB's regulator, the Wheat Export Authority ("WEA") was weakened by inherent conflicts of interest
  - Five member council established under constituent Act
  - 2 Members appointed by Grains Council (Grower-affiliated body)

AWB Affair - Governance Lessons

- 1 member appointed from Gov. dept.
- Conflicts prevented WEA from being a strong, independent regulator as members had same interests and accountabilities as AWB Board members
- Questions that may have prevented the scandal were never asked

AWB Affair - Governance Lessons

3. Avoid Captured Auditors

- Corporate 'capture' - where regulators get too familiar and friendly with industry
- With auditors, 'capture' best avoided by rotating firms regularly
- AWB used Ernst & Young however did not rotate auditing firms

AWB Affair - Governance Lessons

3. Establishing the right culture and focus

- The AWB Board did not encourage a corporate culture which encouraged ethics and accountability - more focused on maximising wheat sales
- As a result, corrupt behaviours were able to infiltrate the organisation and were not identified
- The AWB emphasised a 'strong performance culture', which rewarded a short-term focus on wheat sales

AWB Affair - Governance Lessons

- This resulted in the social responsibilities of the company being ignored to the detriment of company reputation and goodwill (relevant to share price)
- Arguable that narrow focus was not necessary - Australian wheat performing well in international markets

Potential Media Interest & Reputation Risks

- Always a risk given the specific regulatory role
- Roles under State Legislation gives rise to this issue

Conclusions

- There is no real difference between the duties imposed on members of private Government Boards and members of private and public Company Boards
- We are seeing the rise and rise of corporate governance as a key issue in both public and private sectors
- The pace of change is rapid
- The standards are rising

Conclusions (cont)

- Those involved in the management of corporations will need to be across these developments
- Regulators are likely to be very active
- Depending on the response from the business community there is the spectre of further government/regulatory impositions

Functions of the CMC

In respect of misconduct, the functions of the CMC are to:

- Raise the standards of integrity and conduct in the public sector; and
- Ensure that any complaint about misconduct in the public sector is dealt with appropriately.

Process of CMC

The CMC generally will undertake the following processes:

- Receive and assess complaints of official misconduct;
- Often the CMC will refer a complaint back to the relevant agency to investigate; and
- Will itself investigate some complaints.

Control Bodies - Crime and Misconduct Act (CM Act)

- The Key concept is that of a "unit of public administration"
- All Control Bodies are deemed to be a unit of public administration
  - Section 59 Racing Act 2002 is the authority for this conclusion

What is Official Misconduct

- Official Misconduct is 'Conduct' in the performance of an officer's duties that could lead to:
  - A successful criminal prosecution; or
  - A disciplinary breach where there would be reasonable grounds for terminating the person's services
- 'Conduct' in respect of a person who holds an appointment (in a unit of public administration), includes conduct, a conspiracy or attempt to engage in conduct, that involves:

What is Official Misconduct (cont)

- Performance or exercise of powers in a way that is not honest or impartial;
- A breach of trust; or
- Misuse of information, for their own benefit or for the benefit of another.

Reporting Obligation

- Section 38 of the CM Act Imposes legal obligations on a 'public official' to notify the CMC if they suspect that official misconduct may have occurred
- The term "public official" means in this context the Chief Executive Officer of the unit of public administration

Suggested Responsibilities - Control Bodies

- Appoint a liaison officer - to attend CMC forums and workshops
- Develop guidelines for dealing with suspected official misconduct
- Carry out risk-management/system review for compliance weaknesses
- Report to the CMC any suspicion of official misconduct

Suggested Responsibilities (cont)

- Have policies and procedures for dealing with "official misconduct" complaints;
- Seek advice from the CMC if uncertain about whether a matter should be referred to the CMC;
- Be aware of the CMC publication titled "Facing the Facts". This is a guidebook which sets out the suggested method for dealing with suspected official misconduct in Queensland public sector agencies.

Corporate governance – liability issues arising out of directors responsibilities

Barry Dunphy, Partner, Clayton Utz

Andrew Hay, Partner, Clayton Utz

1. Introduction

Corporate governance has again been put under the spotlight in Australia and the United States with the spectacular failure of a number of well known listed companies – HIH Insurance Limited, Harris Scarfe Limited, Enron Inc, Xerox Corporation and WorldCom Inc.

In Australia, not since the late 1980's and 1990's have we seen such a focus on corporate governance issues. In the 1980 – 1990s, there was an ongoing process of corporate law reform, improvement of corporate governance practices and the enhancement of the accountability of corporate directors and mangers as a result of the bursting of the 1980's bubble.

With the recent corporate collapses enforcement action is now being taken against some of the directors and officers of the collapsed companies. In Australia, we have seen the recent disqualification of FAI and HIH director, Rodney Adler, and HIH director, Raymond Williams, for periods of 20 years and 10 years respectively, in addition to the imposition of substantial penalties.

This phenomenon is not unique. The corporate collapses in the 1980s and early 1990s included such companies as TriContinental, the Pyramid Building Society, Estate Mortgage, Rothwells Limited, the Nugan Hand Bank and the Trustees Executors and Agency Company Limited.

As regards the recent corporate collapses, the immediate questions on corporate lips have been "How could this be happening again?" "Could this happen to our company?" and "What is the health of corporate governance within our company?"

2. What is Corporate Governance?

There is no universally accepted definition of corporate governance[1]. However, the topic of corporate governance has been debated and widely considered over the past decade[2].

Perhaps the most extensively used definition of corporate governance indicates that it is primarily concerned with the "system and process by which companies are directed and controlled" with the single overriding objective of all publicly listed companies being "its preservation and the greatest practical enhancement over time of their shareholders investment". For corporations the corporate governance system will involve the entire network of formal and informal relations and interaction between the board, management, shareholders, auditors, and other interested parties. These relations and interactions will determine how controls are exercised within a company and how risks and returns from corporate activities are determined.

As such, corporate governance systems can be as diverse as the companies that make up our economy. The establishment of an effective corporate governance framework in any organisation requires more than mere compliance with a number of elements identified as appropriate processes to be followed and developed. Establishing a truly effective corporate governance framework requires an understanding of the principles

underpinning the systems as well as the development and application of appropriate procedures taking into account the size, complexity of operation and structural basis of the organisation in question. This is not a case of "one size will fit all".

A primary goal of existing corporations laws is to promote honest and efficient markets and informed investment decisions through full and fair disclosure. Transparency in financial reporting plays a fundamental role in making our markets the most efficient, liquid and resilient in the world. Transparency enables investors, creditors and the market to evaluate an entity, helps investors make better decisions and increases confidence in the fairness of the market. Therefore, it is critical from a corporate governance perspective that all public companies provide an understandable, comprehensive and reliable portrayal of their financial condition and performance.

At the international level, much work has also been done in relation to corporate governance issues. The most definitive work was finalised in May 1999 by the OECD, which published its "OECD Principles of Corporate Governance"[3]. This was the product of a Taskforce comprising the 29 member governments of the OECD, the European Commission, the World Bank, the IMF and other international organisations.

The OECD principles dealt with five main areas:

- Protection of the rights of shareholders – this was recognised as the pillar of any effective corporate governance system. Shareholders should be able to participate in the fundamental decisions concerning the company;
- Equitable treatment of shareholders – corporate governance frameworks should ensure equitable treatment of all shareholders, including minority and foreign shareholders. Personal material interests of the board and management in matters affecting the company should be disclosed;
- Stakeholders – it was in the long-term self-interest of companies to encourage active participation in the governance process by employees, creditors, long-term suppliers and customers. The legal rights of such stakeholders should be respected by corporations;
- Strong disclosure regime and transparency – transparency is a key element to effective corporate governance. Timely and accurate information should be disclosed on matters such as the company's financial and operating results, its objectives, major share ownership and voting rights, board and key executives remuneration, material foreseeable risks factors in relation to the company and governance structures and policies. This information should be prepared and audited to a high standard, in accordance with codes of ethics for auditors; and
- The Board – the board should be the main mechanism for the effective monitoring of management and for providing strategic guidance to a company. The board has a duty to act fairly towards shareholders and other stakeholders and to ensure compliance with applicable laws. Directors should exercise objective judgment on company matters independently of management.

There are many other bodies and entities that have set out their own corporate governance principles. The main pillars of those principles will include, to some extent, the matters touched on above[4].

Properly implementing a robust corporate governance system goes beyond merely documenting compliance with applicable legal or other requirements. Good corporate governance requires that the fundamental principles become part of the strategy and daily dynamics of a corporation.

3. Recent Case Studies

A key theme that is emerging from the collapses of HIH Insurance Limited, Harris Scarfe Limited , Enron Inc., Xerox Corporation and WorldCom Inc. is the extent to which directors, senior management or even auditors may have failed to pay due regard to proper corporate governance practices. Conflicts of interest seem to have prevailed over the

proper and independent consideration of relevant issues to the detriment of the company, the shareholders and other interested stakeholders.

We will now look at five recent case studies.

3.1. Enron Inc.

Enron was based in Houston, Texas and was the seventh biggest company in United States in terms of revenue. Enron described itself as a provider of products and services related to natural gas, electricity and communications to wholesale and retail customers.

It is now emerging that the company used complex partnerships to keep approximately $570m in debt off its books so that it could continue to obtain cash and credit to run its trading business.

It is alleged that since 1997 the company overstated its profits by $569m. Enron booked significant profits in its accounts while hiding losses in off-balance sheet entities, such as limited liability partnerships. Enron had over 3000 subsidiaries. It invested or lent some US$5.4 billion to a number of companies or entities in which it had interests and which were then kept off Enron's balance sheet. Off balance sheet concealment of debt was a mechanism that helped to avoid the impact of corporate disclosure laws. Enron succeeded for a time in concealing over a billion dollars of debt in over 100 off-balance sheet special purpose entities, such as limited liability partnerships, thereby avoiding the need to present consolidated accounts given that the special purpose entities were not wholly owned subsidiaries or were not controlled by Enron.

The heart of the Enron problem was the issue of transparency and adequate disclosure.

In Enron, three of the six audit committee members personally owned shares worth more than US$7.5m. The value of such shares would have fallen dramatically if the audit committee had forced management to disclose the true financial state of Enron and the high risks involved in the large number of off balance sheet partnerships. The board of Enron were all well qualified but were apparently unable to decipher the tangled web of off-balance sheet deals that effectively hid Enron's debt and inflated its earnings.

Issues have also been raised about the fact that Enron's auditors charged substantial audit fees ($25m in 2000) and undertook substantial non-audit work ($27m in 2000) with an expectation of growing fees to some $100m. The Enron auditors had cleared the overstatement of Enron's profits by $569m over a four year period.

Enron filed for protection from creditors and is the biggest bankruptcy in United States history. Enron's stock was worth more than $80 per share in January 2001 and was worth less than a dollar per share in December 2001.

Some of the key questions that came out of the Enron case are:

- What was the source of its initial success and what caused its collapse?
- Did Enron break any criminal laws or deceive investors by holding back information about its financial problems?
- Why were Enron employees barred from selling the Enron shares relating to their retirement and pension plans?
- Why did analysts continue to recommend Enron stock to investors?
- What, if anything, could the United States Government have done to prevent Enron's collapse and to provide greater protection to its employees and shareholders?

All of these questions raise fundamental issues about Enron's corporate governance framework.

3.2. Xerox Corporation

From at least 1997 through to 2000, Xerox Corporation ("Xerox") appears to have pursued a scheme, directed and approved by its senior management, to disguise its true operating performance by using undisclosed accounting manoeuvres. The effect of these actions was to accelerate the recognition of equipment revenue by over $3 billion and increase earnings by approximately $1.5 billion. Xerox portrayed itself as a business that was meeting its competitive challenges and increasing its earnings every quarter. Many of the accounting actions taken by Xerox now appear to have violated the established standards of general accepted accounting principles (GAAP). All of these changes should have been disclosed to investors in a timely fashion because they involved significant departures from Xerox's past accounting practices.

In the face of intense market competition and a financial market demanding stellar earnings performance, Xerox grew progressively dependent on these accounting actions to close the gap between its actual operating and financial results and the numbers it wished to achieve, and did report, to the investing public. Xerox knowingly increased earnings by accelerating the recognition of revenues due, overstated the interest income from tax refunds, disguised loans as asset sales and otherwise varied its accounting practices in violation of GAAP.

The most significant and persuasive of the accounting actions was to pull forward and immediately recognise revenue from leases of Xerox equipment which normally would have been recognised in future years. As a result, Xerox portrayed its business and growth as being far more robust in the period 1997 to 1999.

3.3. WorldCom Inc.

WorldCom Inc. ("WorldCom") is a major global communications provider operating in more than 65 countries. WorldCom provides data transmission and internet services for businesses and through its MCI unit provides telecommunication services for businesses and consumers.

As the United States economy cooled in 2001 WorldCom's earnings and profit similarly declined, making it difficult for the company to keep its earnings in line with the expectations of market analysts. Starting in 2001, it appears that WorldCom engaged in an accounting scheme to manipulate its earnings and thereby support WorldCom's stock price.

A major operating expense of WorldCom was its "line" costs. In general, "line" costs represented fees that WorldCom paid to third party telecommunication network providers for the right to access the relevant networks. Under GAAP, these fees had to be expensed and could not be capitalised. Nevertheless, beginning in the first quarter of 2001, WorldCom senior management directed the transfer of line costs to WorldCom's capital accounts in amounts sufficient to keep WorldCom's earnings in line with the projected expectations. Thus, it seems that WorldCom materially understated its expenses and materially overstated its earnings.

Action was brought against WorldCom by the US Securities and Exchange Commission (SEC) for defrauding investors. It was alleged that WorldCom disguised its true operating performance by materially overstating its income before tax and other minority interests by approximately $3.055 billion in 2001 and $797 million in the first quarter of 2002. The SEC action alleged that WorldCom improperly transferred costs to its capital accounts and as such, falsely portrayed itself as a profitable business during 2001 and the first quarter of 2002. The transfer of costs to its capital accounts violated established GAAP standards and was not disclosed to investors in a timely fashion.

Some of the other interesting matters that came out of the WorldCom case are:

- WorldCom appears to have laid the blame for the alleged fraud on its former chief financial controller, Scott Sullivan, and the former comptroller, David Myers. It has been reported that WorldCom's external auditor, were

not told about the line cost transfers nor did the Chief Financial Officer ("CFO") consult with the company's auditors regarding the accounting treatment of these line cost transfers.

- It has been acknowledged that Scott Sullivan never told WorldCom's auditors about the questionable bookkeeping. Whilst auditors are required to provide an independent check on management and boards on behalf of shareholders, fraudulent management can frustrate this occurring. In Australia, auditors have a legal obligation to make all necessary enquiries to ensure that the financial activities of the company have been accurately recorded in the profit and loss statement and that the current financial position is accurately reflected in the balance sheet. The role of the auditors in the WorldCom collapse may be an interesting issue to watch.

- Subsequent to the announcement by WorldCom on 25 June 2002 that it had overstated its earnings for the financial year 2001 and first quarter of 2002 there was a significant decrease in the WorldCom share price and a significant decrease in its credit rating for long-term debt. These events resulted in a complete loss of investor confidence which then significantly affected its ability to raise capital. As a result of the 25 June 2002 announcement notices of default and termination notices were sent to WorldCom by its lenders under several facilities. WorldCom then filed for restructuring under Chapter 11 of the US Code.

On one level WorldCom can be viewed as another example of a high profile public company desperately trying to meet institutional expectations. Failure to meet such projections are unmercifully punished by the market. This has led some commentators to suggest that some of the blame should be accepted by market analysts who have pushed for unrealistically high profit forecasts. Such expectations put pressure on companies to strive to achieve these financial goals or face the market's brutal reckoning.

3.4. HIH Insurance Limited

HIH Insurance Limited (HIH) together with its group companies was the second largest general insurance company in Australia. It consisted of 217 subsidiaries with operations in a number of countries. The last published accounts for the HIH Group showed that as at 30 June 2000 it had net assets of approximately $940 million. The HIH Group collapsed on 15 March 2001 when provisional liquidators were appointed to the main companies of the group. The liquidators have now estimated the HIH Group deficiency at between $3.6 billion and $5.3 billion. A Royal Commission was established to provide a report on the collapse and is currently examining what caused HIH to collapse.

Former HIH director, Rodney Adler, HIH Chief Executive Officer, Ray Williams, and former HIH Chief Financial Officer Dominic Fodera have been sued by ASIC in the Supreme Court of New South Wales. ASIC was successful with Mr Justice Santow finding that all their officers had breached their duties under the Corporations Act. Rodney Adler was found to have breached his director's duties under section 180 – duty of care and diligence, section 181 – duty to exercise good faith, section 182 – duty not to improperly use position and section 183 – duty not to improperly use information. Ray Williams was found to have breached sections 180 and 182 and Dominic Fodera was found to have breached section 180. The breaches related to a payment of $10m by an HIH subsidiary, HIH Casualty and General Insurance Ltd to a company of which Rodney Adler was a director.

In addition, the Court found that the payment of the $10m to a related party breached the related party provisions, and the provisions of the Corporations Act 2001 dealing with providing financial assistance in the purchase of its parent's shares.

3.5. Harris Scarfe Limited

Harris Scarfe Limited was a discount department store chain with a 150 year history in the retail sector. Its collapse in April 2001 occurred after revelations of serious financial irregularities over a six year period. The Harris Scarfe accounts for December 31 2000 showed net assets of $108m. The correct figure was close to $60m. Inventories

were shown as $97m. The true figure was between $75m and $78m. Trade creditors were shown as $64m but they were closer to $90m. Operating cash flows for the half year to December 31 2000 were reported as $5.5m but were thought to be negative.

By its own admission, the Harris Scarfe board lost track of the group's stock position. Discrepancies were discovered in the company's stock position in March 2001 and the auditors were asked to investigate the deterioration of the company's net asset position. The auditors advised the board that the irregularities had been occurring for up to six years. Neither the board nor the auditors picked up on the irregularities during the prior six years. The board announced that it was totally unaware of the irregularities and had acted in good faith on financial information provided to it by senior management. The end result was that the board appointed voluntary administrators to the company in April 2001.

3.6. Case Study Conclusions

The above case studies highlight several issues that go to the heart of corporate governance principles and frameworks. One can see evidence of company boards that have been inattentive, unethical management actions and questionable audit processes that appear to have left shareholders and creditors in the dark.

4. Reactions

Not surprisingly many directors are not sleeping easily at present. The above examples show that even if a director is satisfied with the way they have conducted themselves, there can be broader effects and liabilities.

The role of the board and the duties placed on its directors make up one part of the broader context of corporate governance. In the court's opinion "the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company"[5]. Cases in Australia and United States have described and confirmed what is required of a director[6]:

- A director should acquire at least a rudimentary understanding of the business of the company. That is, the director must become familiar with the fundamentals of the business in which the company is engaged;
- Directors are under a continuing obligation to keep informed about the activities of the company;
- Directors are not required to undertake inspection of the management and day to day activities of the company but rather a general monitoring of corporate affairs and policies of the company – a director should attend board meetings regularly;
- Directors are not required to audit corporate books but they should maintain familiarity with the financial status of the company and regularly review its financial statements;
- A director may be appointed to a company because of his or her special expertise in an area of the company's business. However, this does not relieve the director of the duty to pay attention to the company's affairs that might reasonably be expected to attract inquiry, even outside the area of the director's expertise.

In this context, directors may rely on management, auditors and other properly qualified persons to obtain financial and other information regarding the company. However, a director must be prudent and careful of any circumstances that might make it unreasonable for him or her to rely on the information supplied by such other persons.

Further, as a result of community concerns in relation to these recent corporate collapses, there is no doubt that shareholders will begin and in many cases continue, to demand even greater accountability from directors for the performance of their companies.

In light of such scrutiny and accountability, directors now need to conduct a thorough due diligence of their company's decision-making process. They should ensure that they are given all relevant information and more importantly, if they have doubts or concerns over issues, that such issues are fully investigated and resolved so that they do not come back to haunt them in the future.

Reactions from Legislators and Regulators have also been swift.

4.1. United States Reaction

The impact of the Enron case has already led to increased investor scepticism about corporate financial reporting and the Securities and Exchange Commission (SEC), the New York Stock Exchange and NASDAQ have come up with new rules requiring greater reporting and disclosure of accounting practices by companies and a mandatory and detailed corporate governance regime.

The collapses also prompted the Treasury Department to lead a review of US federal regulations governing retirement investment plans and other pension programs. The review will explore whether companies should have to notify investors when their finances decline significantly.

Some of the new rules and reforms include:

- more current disclosure, including "real time" disclosure of unquestionably material information or operations of the company, disclosure of all material off-balance sheet transactions and disclosure of all material correcting adjustments by company auditors;
- disclosure of significant trend data or more evaluative data;
- financial statements that are clearer and made informative for investors;
- disclosure of the accounting principles that are most critical to the company's financial status and that involve complex or subjective decisions by management;
- company's periodic reports are to be signed off by the company's Chief Executive Officer (CEO) and CFO and the CEO and CFO are to certify that they have read the report, that the information in the report is true in all respects as at the last day of the period covered by the report and that the report contains all information about the company of which he or she is aware that they believe would be important to a reasonable investor;
- independent directors must comprise a majority of the board with independent directors to convene regular meetings without management members being present;
- disclosure of directors' share trades within 2 business days;
- disclosure required of the existence or non-existence of code of ethics for senior financial officers;
- a regulatory environment that continues to encourage public companies and the auditors of their financial statements to seek the advice of the SEC staff on new or unusual accounting questions;
- more involvement by audit committees with the management and the company's auditors regarding the hiring, firing and application of auditors and the accounting principles used by the company. The Chair of the audit committee must have accounting or financial management experience and the audit committee must be composed of independent outside directors;
- auditor independence – non-audit services restricted, rotation of audit partner (but not entire firm) every five years and the prohibition of improper influence by corporate personnel on the conduct of the audit;
- Independent Auditor Oversight Board created by SEC to regulate public company auditors and audits; and
- analysts not to express views or recommendations when they do not have an adequate data foundation or when confused by company presentations.

On 25 July 2002, the US Congress also enacted the Sarbanes-Oxley Act of 2002. This landmark legislation deals with the accounting and corporate governance reforms set out above and is the most wide ranging securities legislation enacted in the US since the 1930s. The legislation applies to all public companies, domestic and foreign, that have registered or file reports under the Securities Exchange Act of 1934. The reforms seek generally to upgrade company disclosure, strengthen corporate governance requirements, expand insider accountability, heighten auditor independence, increase auditor oversight and broaden sanctions for wrongdoing.

4.2. ASX Reaction

The ASX has convened a Corporate Governance Council. The ASX's Corporate Governance Council after their first meeting on 15 August 2002 announced a number of recommendations, including that:

- companies should voluntarily and fully disclose the existence and conditions of all share and options schemes currently in operation together with details of performance hurdles;
- the establishment of audit committees with a majority of independent directors, an independent chairman, no management representatives as members and that they should operate under a charter. The charter should set out key responsibilities, accountabilities, and entitlements of the audit committee including responsibility for proposing the appointment of external auditors which should be reviewed annually;
- a full analysis of the total fees paid to external auditors including a breakdown of fees for non-audit activities;
- disclosure of when the audit firm was last appointed and the dates of rotation of the audit engagement partners; and
- disclosure of the measures in place to ensure provision of equal access to material information through the Continuous Disclosure regime.

4.3. Commonwealth Government Reaction

The Howard Government has announced[7] and commenced a number of initiatives for further reform. These include:

- Audit Independence – Professor Ian Ramsay was appointed to review auditor independence in Australia. Professor Ramsay's report has been handed down and is likely to invoke some major reforms in the audit area which will be included in the CLERP 9 reforms. One aspect which the Government will explore is that as a matter of good corporate governance, audit committees must become more actively involved in the whole audit process and not just the final output. This will include the engagement arrangements for the auditors, independence issues, and issues regarding non-audit work provided by the audit firm to the company;
- better resourcing and training of independent directors;
- reviewing the ability of shareholders to requisition a meeting;
- use of technology to interact with shareholders;
- analyst independence, the implications of non-independent recommendations on the integrity of markets and providing fair and objective advice to investors; and
- the claw-back of director bonuses.

The Government has also announced the introduction of CLERP 9 which will address the issues raised in the Ramsay Report on auditor independence together with a number of other issues on financial disclosure, conflicts of interest in

financial product advice, encouraging investors to become more active in companies they invest in and the simplification of notices of meetings.

5. Practical Solutions

One of the difficulties in dealing with corporate governance principles is that it is quite easy in the abstract to analyse and discuss such principles. However, it is far more difficult to develop practical strategies to ensure that these principles are effectively embedded as part of a company's day to day operations.

In this context, within the public sector, we have seen the Auditors General in the past five years, develop a considerable body of material which attempts to address this issue. The focus by the Auditors General has been on the corporate governance practices of both Government corporations and core Departments.

In this connection, the work of the Australian National Audit Office[8] and the Queensland Auditor General[9] have been particularly useful as they have both attempted to develop checklists and questionnaires which would allow Government Corporations and Departments to assess their standards of corporate governance.

Clearly, individual factors will be relevant in developing a final corporate governance evaluation framework for a particular corporation. By way of example, Government corporations operating under the *Government Owned Corporations Act 1993* in Queensland would have additional reporting and accountability requirements.

However, it is clear that modern thinking on corporate governance issues highlights the following essential elements being:

- the establishment of clear lines of responsibility;
- the development of a Code of Ethical Behaviour which is binding on management and staff and which is communicated to stakeholders;
- the establishment of sound risk management frameworks which can provide confidence to stakeholders; and
- the incorporation of monitoring and review mechanisms at the strategic, operational and project levels.

6. Conclusions

In light of the above we would offer the following conclusions.

Corporate governance is likely to remain as the number one priority for both private and public corporations. The recent events both in Australia and overseas have indicated that the pace of regulatory change is likely to be rapid. In this connection, the responses in both the United States and Australia indicate that there is high level policy support within Government to deal with any perceived systemic corporate governance weaknesses.

As part of the reform process, we can be sure that the standards expected of our corporations and their Boards and senior managers will also rise. It will be important for all company officers to be across, in detail, the relevant regulatory changes.

To date, it appears that the Australian response has been to look to the business community to assist in the development of appropriate corporate governance standards and guidelines. However, one can be sure, that if these changes are not effective that further Government regulatory impositions will swiftly follow.

[1] The Hon. Joe Hockey, Minister for Financial Services and Regulation in a speech to the Australian Shareholders Association on 16 August 2001 described the subject of corporate governance as "huge and varied. Good corporate governance can mean different things to different people, but essentially it is an extended partnership between a company's board of directors and a range of other groups – its shareholders, its management, its employees, the regulators, the markets and the community. The aim of good corporate governance is achieving the best outcome for the corporation and the shareholders as a whole. It is a tension driven by open and frank communication".

[2] Report of the Committee on Corporate Governance chaired by Sir Ronald Hampel (Hampel Report) and Report of the Committee on the Financial Aspects of Corporate Governance chaired by Sir Adrian Cadbury (Cadbury Report) in the UK

[3] see www.oecd.org and an article by Stilpon Nestor, the head of OECD's Corporate Affairs Division in Company Director Volume 17 No1 February 2001.

[4] For example see Australian Shareholders' Association website – www.asa.asn.au/PrinciplesCorpGov.asp and The Annual Reports of Publicly Listed Companies.

[5] Daniels t/as Deloitte Haskins & Sells –v- AWA Ltd (1995) 16 ACSR 607, 664

[6] Daniels t/as Deloitte Haskins & Sells –v- AWA Ltd (1995) 16 ACSR 607, Pollock J of the Supreme Court of New Jersey in Francis –v-United Jersey Bank (1981) 432 A 2d 814; Re Property Force Consultants Pty Ltd (1995) 13 ACLC 1051; "Directors' Duties in Australia: Recent Developments and Enforcement Issues" by Ian Ramsay, 1999 Company, Financial and Insolvency Law Review 260.

[7] The Hon. Joe Hockey Minister for Financial Services and Regulation, speech to the Australian Shareholders' Association on 16 August 2001

[8] Australian National Audit Office "Applying Principles and Practice of Corporate Governance in Budget Funded Agencies" and Australian National Audit Office "Principles and Better Practices – Corporate Governance in Commonwealth Authorities and Companies" – Discussion Paper, 1999

[9] Queensland Audit Office "Auditor-General of Queensland Report No 7 1998-1999 Corporate Governance, Beyond Compliance a Review of Certain Government Departments", 4 June 1999 and Queensland Audit Office "Auditor-General's Report No 1 2001-2002

5.1.3 REVIEW OF GOVERNANCE AND RISK MANAGEMENT AT GOVERNMENT OWNED CORPORATIONS

Background

As part of microeconomic reform initiatives in Queensland, the corporatisation of Government Owned Entities was commenced in the early 1990s. The March 1992 Queensland Government White Paper on Corporatisation in Queensland stated that the intent was to place Government Owned Entities as far as practicable on a commercial basis in a competitive environment with the aim of providing incentive, enhancing efficiency, improving economic performance and improving public accountability. Currently, a total of 22 statutory and company Government Owned Corporations (GOCs) operate in Queensland.

Company GOCs are subject to the *Government Owned Corporations Act 1993* (GOC Act), the *Corporations Act 2001* and sections of the *Financial Administration and Audit Act 1977* as identified in the GOC Act. Statutory GOCs are subject to the *Government Owned Corporations Act 1993* and sections of the *Financial Administration and Audit Act 1977* as identified in the GOC Act.

An Office of Government Owned Corporations (OGOC) was established as part of Queensland Treasury in May 2000 to provide advice to the Treasurer in his capacity as a Shareholding Minister to all 22 GOCs and to other Shareholding Ministers on request. Other functions performed by OGOC include —

- administrative and monitoring duties associated with the GOC Act;
- facilitating recruitment and selection of directors;
- director inductions and ongoing training;
- briefing new Shareholding Ministers;
- monitoring the dividend process as set out in the Government Owned Corporations Act; and
- monitoring and reviewing statements of corporate intent, corporate plans and quarterly reports.

Audit Process

The audit was conducted using QAO's governance and risk management self-assessment program developed for departments which was modified as appropriate. The departmental self-assessment program is available electronically on the QAO website. QAO reviewed the governance practices established within the GOCs and did not examine the relationship between the GOCs and the Government.

The following GOCs were selected for review —

- ENERGEX Limited (Company GOC) — the review was restricted to the Holding Company and did not cover the whole Energex Group; and
- Port of Brisbane Corporation (Statutory GOC).

Overall Audit Conclusion

QAO noted that the GOCs reviewed were well advanced in the implementation of appropriate governance and risk management systems and practices. In addition, these GOCs demonstrated a comprehensive understanding of better practice in relation to governance and risk management with a number of noteworthy practices identified in the areas of planning, management standards, monitoring and reporting.

Each GOC reviewed was provided with a detailed report in relation to their governance and risk management practices and the responses from the Chief Executive Officers to the individual reports and audit recommendations have been positive.

It was originally my intention to examine the issues arising from the review of ENERGEX Limited and Port of Brisbane Corporation across a sample of the remaining GOCs to ascertain their prevalence across the wider GOC sector. The findings from the in-depth review of the selected GOCs indicate that the better practice and business improvement opportunities noted have application across the wider GOC sector and at this stage it is not my intention to extend the review. The better practice findings and business improvement opportunities recommended by QAO for consideration by the GOC sector are outlined in the body of this Report Item.

Audit Findings – Governance

Management Structure and Operations (Refer Section 5.1.4 for Audit Framework)

QAO noted that the boards of the GOCs reviewed had established sub-committees to assist in the governance of the corporation. Generally the committees reflected the nature of the corporation and the requirements of the board. In addition, the GOCs have executive committees established to assist the Chief Executive Officer (CEO) in the management of the corporation.

Boards and Committees – Terms of Reference

QAO noted that while the terms of reference for most of the board sub-committees at the GOCs reviewed were comprehensive this was not consistent across all committees. QAO considers that the terms of reference of committees should include —

- the name of the committee and the requirements for membership;
- purpose, scope and role of the committee (strategic, operational, assurance etc);
- reporting requirements to and from the committee;
- the operating procedures for the committee especially what constitutes a quorum;
- a process for at least annually evaluating the performance of the committee and reviewing its terms of reference; and
- the selection process and expected duties for the committee's secretary.

QAO considers that the effectiveness of a board's operations, induction processes and self-evaluation are enhanced by the development of a Board Handbook setting out its powers and functions, GOC accountabilities, and relationship to the CEO, management and Shareholding Ministers. QAO noted that the GOCs reviewed were in the process of developing board handbooks which codify the board's responsibilities and its relationships.

In addition, QAO considers that the overall co-ordination of board and executive committees is enhanced by maintaining a record of committees which would assist in minimising duplication of committee functions and identify synergies.

Boards and Committees – Inductions and Ongoing Training

QAO noted at the GOCs reviewed that new members of boards and sub-committees received induction information in relation to the corporations' business and their respective roles. In addition, ongoing training was provided to maintain and develop appropriate skills and experience.

QAO also noted that these induction processes were not uniformly applied to executive committees and that this is in part due to the perception that all members of these committees tend to be senior executives with the necessary knowledge and experience. QAO considers that it is essential for new members of committees to understand the role and responsibilities of the committee to which they have been appointed and its role in the governance of the corporation. This induction process need not be extensive and in most circumstances meetings with the chairperson to outline committee functions and expectations of members would be appropriate. At these meetings new members should be provided with copies of the terms of reference for the committee and recent committee minutes and associated documentation.

Boards and Committees – Effective Meetings and Quality Records

QAO noted at the GOCs reviewed that the meeting papers for the boards and audit committees were of a high standard with clear agendas circulated with sufficient time for consultation prior to meetings. Action items were clearly indicated and assigned using the three "Ws" of what, who and when. Action item lists were maintained and reviewed at each meeting. Board and audit committee minutes were appropriately signed by their respective chairperson. In addition, the meeting papers of executive committees were generally of a high standard.

QAO's review of meeting deliberations across the boards and committees indicated that the supporting information provided for meetings was timely and sufficiently detailed which facilitated an effective meeting process.

Boards and Committees – Self-Evaluation

QAO noted that the GOCs reviewed had not established formal self-evaluation processes for all boards and committees to assess their continued effectiveness. A self-evaluation process enables boards and committees to determine whether their objectives as detailed in their terms of reference are being met in a cost-effective manner.

Audit Recommendation 1

GOCs, in relation to boards and committees, should —

- **review existing terms of reference and standardise operational procedures;**
- **develop a Board Handbook to facilitate board operations and induction and self-evaluation processes;**
- **develop and implement appropriate, induction processes for new members in relation to their board or committee function;**
- **establish and maintain a register of committees and their functions; and**
- **develop and implement appropriate, formal self-evaluation processes.**

Management Standards (Refer Section 5.1.4 for Audit Framework)

QAO noted that the GOCs reviewed had developed co-ordinated management systems that clearly outline roles, responsibilities and delegations across all of their operations. These systems translate the corporate objectives throughout the organisation, and serve as vehicles for reviewing employee, organisational and operational compliance and performance, and are subject to regular internal and external audit review. In addition, these management systems are accessible on each corporation's intranet and where procedures are paper-based they are subject to appropriate document control procedures to ensure currency. QAO also noted that position descriptions were appropriately linked to the procedures/processes outlined in these management systems.

QAO noted that the GOCs reviewed had in place well documented induction procedures/processes for new employees and contractors, as well as monitoring systems to ensure all new starters are appropriately inducted. New employees receive corporate and work area inductions, and contractors are provided with site-specific inductions.

Codes of Conduct

QAO noted that the GOCs reviewed had in place codes of conduct that reflected the better practice principles outlined in the *Public Sector Ethics Act 1994* (QAO acknowledges that this Act does not apply to GOCs) and cover issues such as —

- respect for the law and system of government;
- respect for persons;
- integrity including conflicts of interest;
- diligence; and
- economy and efficiency.

QAO considers that codes of conduct are enhanced by the incorporation of examples and scenarios to assist in ethical decision-making. In addition, QAO considers that the operations of boards are enhanced by the development of specific codes of conduct for directors addressing matters such as potential conflicts of interest and confidentiality.

Audit Recommendation 2

GOCs, in relation to their codes of conduct, should —

- provide more guidance such as examples and scenarios to assist in ethical decision-making; and
- develop specific codes of conduct for boards that address matters such as potential conflicts of interest and confidentiality.

Control, Monitoring and Reporting (Refer Section 5.1.4 for Audit Framework)

Internal Reporting

QAO noted that the GOCs reviewed have implemented comprehensive internal reporting frameworks to support the monitoring and review functions of their boards and committees. QAO observed that the reports were concise, clear and contained a comprehensive coverage of financial and non-financial performance information against key targets with explanations for variances. These reports also contained appropriate compliance information.

QAO also noted that the GOCs reviewed had developed and implemented comprehensive policies setting out procedures, responsibilities and monitoring mechanisms that promote open communication. As part of this system, decisions made by boards, committees and management are distributed to the relevant employees on a timely basis with follow-up procedures in place to ensure that the necessary action is undertaken.

Internal Audit

At the GOCs reviewed, QAO noted that the internal audit function was primarily delivered by external service providers. QAO also noted that the internal audit functions operated under appropriate charters and annual audit plans, and were subject to regular, comprehensive performance reviews. In addition, the internal audit activities appropriately covered financial and operational aspects, including information systems.

Audit Committees

QAO noted that the audit committees established at the GOCs reviewed operated under comprehensive charters with systems that provide for appropriate oversight in relation to the resourcing, planning and operation of the internal audit function. In addition, QAO noted that reports to the committees adequately addressed issues associated with the control environment including the status of the implementation of internal and external audit recommendations.

Audit Recommendation 3

GOC boards and committees should regularly review their information needs (quality, quantity and timeliness) to ensure that the information they receive is appropriate for the effective discharge of their governance responsibilities.

External Accountability (Refer Section 5.1.4 for Audit Framework)

Under the GOC Act, GOCs are required to develop Statements of Corporate Intent (SCI) for approval by the Shareholding Ministers which outline the GOCs financial and non-financial performance targets for the financial year in line with the corporate plan. SCIs are a key strategic monitoring mechanism for Shareholding Ministers. The SCI also outlines the quarterly reporting requirements between the GOC and the Shareholding Ministers. QAO noted at the GOCs reviewed that the quarterly reporting to the Shareholding Ministers was timely, and contained a balance of financial and operational performance information in accordance with their SCI.

QAO noted that the 2000-01 annual reports for the GOCs reviewed included a number of better practice elements in relation to governance disclosure and financial and non-financial information and were tabled within the prescribed timeframe. QAO also noted that the GOCs reviewed provide separate external reports on environmental management with one GOC providing sustainability reports on their internet site.

In addition, the GOCs reviewed had systems in place to manage the annual financial statement preparation process and this included oversight by their audit committees.

Audit Recommendation 4

GOCs, in relation to external reporting, should regularly assess the information needs of their stakeholders to ensure that these needs continue to be met by the GOCs public disclosures.

Audit Findings

Risk Management (Refer Section 5.1.4 for Audit Framework)

QAO noted that the GOCs reviewed had systems in place to facilitate the identification, analysis, assessment, treatment, monitoring and review of risks. QAO also noted that risk management had been incorporated as part of the corporations' strategic and business planning processes and that a variety of techniques such as scenario planning were utilised in the development of long-term strategies. In addition, the corporations reviewed had developed processes and assigned responsibilities for identifying and evaluating business opportunities as an integral part of their risk management systems. One of the GOCs reviewed has recently implemented changes to its risk management and compliance practices to further enhance management of these areas across the whole organisation.

At the GOCs reviewed, employees' awareness of risk management issues was facilitated through a number of mechanisms —

- induction programs, especially work-site specific inductions;
- training on the co-ordinated management system, including specifically targeted training in relation to risk;
- position descriptions outlining responsibilities and accountabilities;
- performance planning and review processes; and
- appointment of a risk management facilitator or equivalent position.

QAO noted that the boards at the GOCs reviewed receive a balance of management and independent assurance regarding risk from several sources as follows —

- audit committee with regard to the oversight of financial and operational risk areas;
- results of risk based internal and external audit reviews;
- management reports on due diligence, compliance and performance; and
- internal and external reviews of the corporation's co-ordinated management system using various national and international standards.

QAO observed that the GOCs reviewed had in place comprehensive disaster recovery and business continuity plans appropriate to their operations.

Audit Recommendation 5

GOCs, in relation to the implementation of an effective risk management system, should ensure that —

- **the risk management system is integrated and aligned with corporate and operational objectives;**
- **the board and senior management's position on risk is clearly communicated throughout the organisation;**
- **there is a common risk management terminology across the organisation;**
- **risk management is undertaken as part of normal business practice and not as a separate task at set times; and**
- **information systems for reporting on risk are integrated to enable aggregation and reporting at a corporation level.**

5.1.4 AUDIT FRAMEWORK

In this overall framework Section of the Report the generic term 'governing body' is used where necessary to indicate a 'Council' or a 'Board' and the term 'organisation' to indicate a local government or a government owned corporation.

Governance Audit Framework

The framework utilised by QAO to assess the standard of governance practices at the local governments and government owned corporations reviewed is as follows —

ORGANISATIONAL FRAMEWORK

- Management Structure -
- Management Standards -

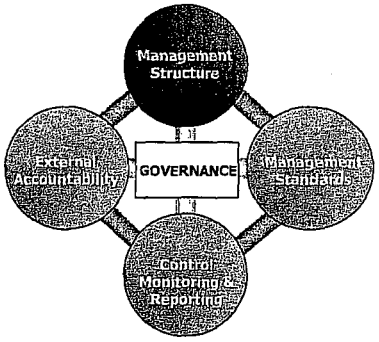
ACCOUNTABILITY FRAMEWORK

- Control, Monitoring and Reporting -
- External Accountability -

Management structure and management standards provide a framework through which the governing body, assisted by the chief executive officer, provides leadership and direction for the organisation. Control, monitoring and reporting provide the control environment through which the governing bodies and chief executive officers can be assured that their organisation will achieve its goals and objectives. The accountability framework also embodies external accountability mechanisms which provide Parliament with assurance that governing bodies and chief executive officers are leading and managing their organisations efficiently, effectively and economically.

Management Structure and Operations

Governing bodies are key decision-making and monitoring groups and are supported in this role by committees. Chief executive officers also may establish committees to assist them in their management responsibilities. Clarity of roles and responsibilities with matching authority for these bodies and committees is provided through clear terms of reference. An appropriate self-evaluation process promotes adherence to these terms of reference and the continuing effective performance of these bodies and committees. Effective meetings and the quality of meeting records are also key accountability indicators for governing bodies and committees.

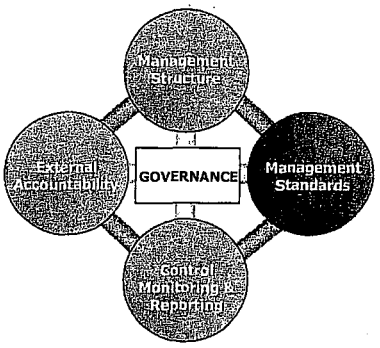


The formalisation of expectations and the provision of standard induction documentation to members of governing bodies and committees assists in promoting clarity of understanding of roles, responsibilities and authority, provides consistent information to each new member and forms a foundation for self-evaluation processes. Ongoing training is directed at maintaining and/or developing appropriate knowledge and skills as necessary.

In reviewing governing bodies and committees, QAO examined the following elements —

- terms of reference;
- inductions and ongoing training;
- effective meetings and quality records; and
- self-evaluation processes.

Management Standards



Policies, delegations and codes of conduct are the primary means by which governing bodies and senior management assign roles, responsibilities and authorities. Organisational charts, position descriptions and performance planning and review processes provide support by defining clear roles and expectations with regard to compliance and performance.

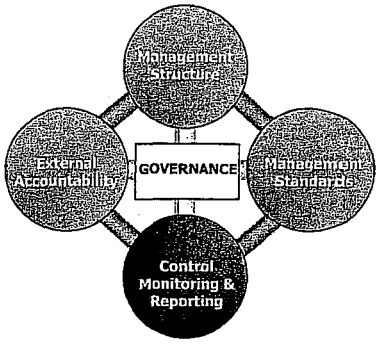
The assignment of clear responsibilities, authorities and accountabilities in line with an organisation's goals and objectives as established in the strategic plan is a key governance function and is implemented through the following instruments —

- policies established at various levels which advise and direct employees in relation to the governing body and management's expectations;
- delegations which provide the necessary authority and are matched to responsibility;
- codes of conduct which define the behavioural standards expected of employees; and
- organisational charts, position descriptions and performance planning and review processes.

An effective information system is focused on ensuring that current and relevant versions of these instruments are readily available to all employees.

In addition, an effective control environment requires the development and maintenance of a risk management culture within an organisation. This is a governing body and senior management responsibility and requires active support through a co-ordinated system of policies, delegations and training. These issues are further examined under 'Risk Management Audit Framework'.

Control, Monitoring and Reporting



Control, monitoring and reporting are key components of the accountability framework through which governing bodies and senior management can ensure —

- compliance with laws, policies, procedures and codes of conduct; and
- that performance is measured against the corporate and operational plans.

The monitoring and review of organisational activities is a critical role performed by governing bodies and all levels of management. In performing these roles, governing bodies and senior managers are supported by internal reporting systems, internal audit and various committees.

Governing bodies and committees require timely, relevant and reliable information for sound decision-making and for effective oversight of the local government or government owned corporation's operations. It is their responsibility to ensure that they receive information that satisfies their decision-making and governance responsibilities.

Effective communication also requires that decisions by governing bodies and senior management be transmitted to the relevant members of the local government or government owned corporation in a timely, relevant and reliable manner.

Examination of these internal accountability elements occurred under the following headings —

- internal reporting;
- internal audit; and
- audit committee.

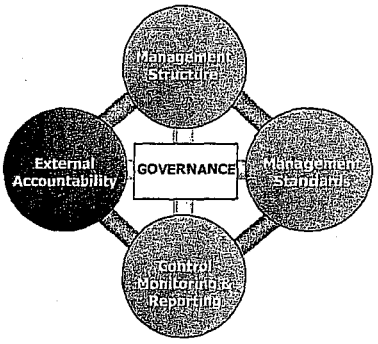
Independent Assurance and Management Assurance

Internal audit through its internal control, monitoring and review function has an important role in facilitating effective governance. The independence of internal audit, its reporting role to the audit committee and the governing body and its separation from day-to-day operations are important concepts.

Audit committees exist as independent assurance mechanisms for governing bodies by providing a quality review function as to the effectiveness of the organisation's financial management and control structures. This is achieved through the provision of advice on audit and audit-related matters and through its monitoring and review of the operations of the internal audit function.

External Accountability

As part of the accountability process, external reporting structures provide transparency through the annual reporting of each local government or government owned corporation's stewardship and performance, including the audit and certification of the respective organisation's financial statements by the Auditor-General. Parliamentary committees such as the Public Accounts Committee and Estimates Committees also form an important part of the public sector accountability and monitoring framework. All of the above mechanisms provide key stakeholders with assurance that governing bodies and chief executive officers are managing their local government or government owned corporation economically, efficiently and effectively. Key stakeholders for local governments include constituents, the Parliament and the responsible Minister and for government owned corporations encompass constituents, the Parliament and the Shareholding Ministers.



Risk Management Audit Framework

The framework utilised by QAO to assess the standard of risk management practices at the local governments and government owned corporations reviewed is as follows —

RISK MANAGEMENT STANDARDS

- Risk Management Support -
- Risk Management Policy -

MANAGE, MONITOR & REVIEW RISKS

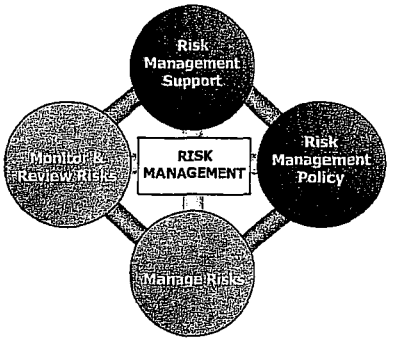
- Management of Risks (at the organisational level and at the division, project and team level) -
- Monitoring & Review of Risks

Risk management is the process by which the risks and opportunities in relation to an organisation achieving its objectives at all levels are professionally managed by identification, analysis, assessment, treatment, monitoring and review. The control environment is developed from the risk management process, that is, the identification and mitigation of risks and the identification and exploitation of opportunities. Risk management is therefore a key component of effective governance.

The concept of risk management has expanded from its origin in the insurance industry to cover all of an organisation's business activities. Risk itself comprises a continuum, but an organisation's risk profile may be appreciated by assessing risks under the headings hazard risk, uncertainty risk (unexpected results) and opportunity risk. Risk management therefore has become a results-based concept with a focus on opportunities as well as exposures.

Governing body and senior management support assists in the development of an understanding amongst all employees that the identification of risks, and the development and implementation of internal control systems and other strategies to manage those risks, are the responsibility of all members of the organisation. This together with the risk management policy is a key leadership mechanism.

Risk Management Support



The establishment of a risk management culture within an organisation is the responsibility of the governing body and senior management and is facilitated by the —

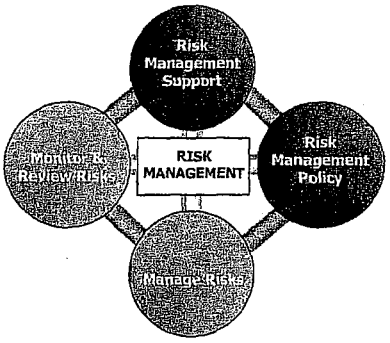
- establishment of a risk management committee function;
- appointment of a risk management co-ordinator;
- development and distribution of a risk management policy; and
- provision of appropriate training.

The risk management co-ordinator's role does not remove the responsibility from all staff to manage risks, ie the co-ordinator's role is to act as a facilitator and not as the organisation's risk manager.

Risk Management Policy

A risk management policy is the formal mechanism by which the governing body and senior management clearly communicates —

- its support for the risk management process; and
- the expected roles and responsibilities of all members of the organisation in the identification and management of risks.

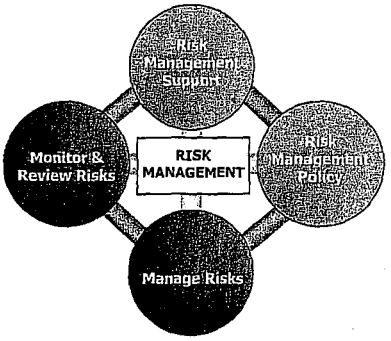


Manage, Monitor and Review Risks

Risk management through its processes of identification, analysis, assessment, treatment, monitoring and review is the tool for developing cost effective controls.

Risk management not only provides strategies for the treatment of risks which might impede an organisation in the pursuit of its objectives, but also provides the flexibility for the organisation to respond to unexpected risks and to take advantage of opportunities.

The risk management process takes place within the framework of the organisation's strategic, operational and risk management contexts.



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Regulatory risks

Minimising misconduct risks in agencies with regulatory functions

Gary Adams, Sharon Hayes and Stuart Weierter

Introduction

Commission investigations have repeatedly shown that agencies with regulatory functions — for example, those that issue drivers licences, car registrations and liquor licences, or those involved in certain industries such as the child-care industry or racing — are particularly vulnerable to corruption and misconduct, especially where a high degree of discretion is combined with close relationships with the industry or individual being regulated.

This paper identifies different types of regulators, their methods of enforcement and the misconduct risks they face. Using data generated by the Commission and other agencies, we identify some major areas of misconduct risk for regulators, and various strategies to minimise such risks.

What is regulation?

The Organisation for Economic Cooperation and Development (1997) defines regulation as 'the diverse set of instruments by which governments set requirements on enterprises and citizens'. Regulatory functions exist to:

- allocate rights — e.g. rights to water
- certify or licence a product, person, or place — e.g. taxi licensing
- identify an organisation as a certain type — e.g. sporting clubs and unions
- register professionals and non-professionals — e.g. medical practitioners
- set industry standards — e.g. child care industry
- provide 'protective' social policy — e.g. gaming and prostitution
- collect taxes, fees or other revenue — e.g. rates and ambulance levies.

Trends in regulation

State regulation is increasingly being used to control social institutions. Underlying this trend is the movement by western democracies away from state-run bureaucracies to privatised 'service providers' (Braithwaite 2000). These privatised service providers are controlled by government, supposedly at arm's length, through licensing and regulation.

The expansion of the private security industry is an example of this trend. During the 1980s and 1990s the gap between police numbers and private security personnel widened significantly, in favour of security (Prenzler & Sarre 1998). Self-regulation of the security industry tended to be passive and civil action against security providers for breaches of contract or duties was expensive and risky for complainants (Sarre 1998). To remedy this situation, licensing procedures were introduced into Queensland in the early 1990s. The *Security Providers Act 1993* specifies licensing requirements and provides for state inspectors to monitor contraventions.

Styles of regulation

Even though regulation of the sort applied in Australia is used by other western democracies, regulatory style or practice differs by country. In comparing Australia with the United States, it appears that the US is characterised by a

Regulators often represent the public face of public sector organisations, and so it is crucial that their conduct is lawful and that it meets public, not private, interests.

more legal-adversarial style of regulation. This equates to stricter standards, more vigilant investigation and more punitive enforcement, including harsher penalties. Japan and Great Britain, in contrast, have typically maintained more benign forms of regulatory practice than either Australia or the US (Grabosky & Braithwaite 1986).

The risks in performing regulatory functions

In 1999 the Commission surveyed public sector departments and found that all agencies exercised some degree of regulatory responsibility. In all, 96 areas of risk were identified. Of these, 11 were staff-related, 37 were related to the business conducted or the interaction between agency and private businesses, 15 arose from agency policies, 27 arose from systems/procedures, and 17 were information-related.

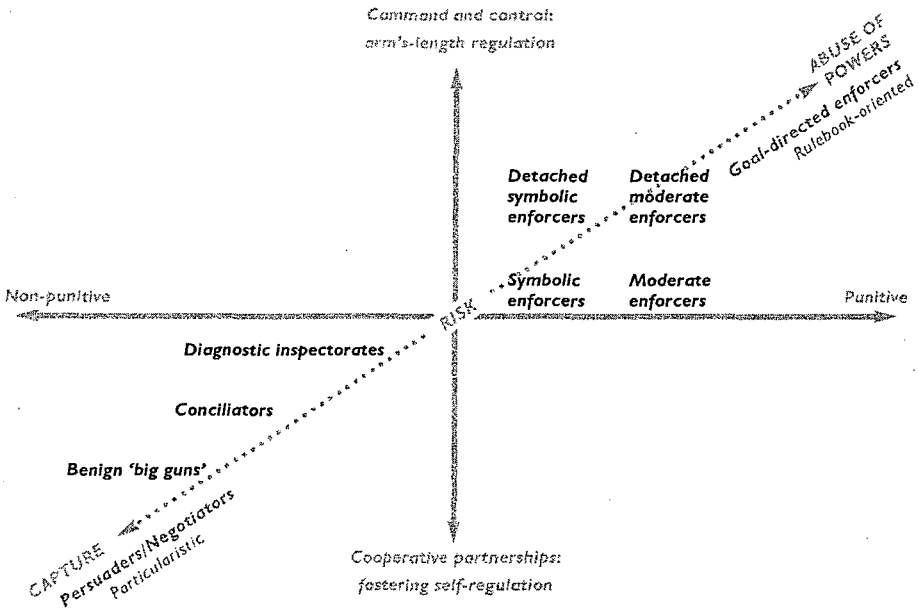
Eleven agencies were identified as having increased risk of misconduct because they were exposed in more than one area. Agencies regulating transport, for example, often engage in cash transactions and deal with sensitive information, frequently under limited supervision. Additionally, many casual employees have access to sensitive information.

Types of regulation in Australia

In the only comprehensive study of Australian regulatory practice, Grabosky and Braithwaite (1986) interviewed the executives of 111 Commonwealth, State, and Local Government agencies. Their model grouped each of the agencies according to the nature of the industry being regulated, statutory powers available to the agency, and typical enforcement practices. In Figure 1, we have adapted their model to show both typology and misconduct risk.

Figure 1 gives a graphical representation of regulatory types. Agencies are located on the graph according to the extent to which they make use of punitive enforcement methods and the degree of detached regulatory control they exercise. As the figure illustrates, regulatory agencies in Queensland generally occupy only two quadrants of the graph, exemplifying two broad kinds of enforcement. Within these two categories, agencies group into several subcategories along a continuum of goal-directedness. The dotted line that cuts across the second and fourth quadrants depicts this continuum and labels the two extremes as 'persuaders/negotiators' and 'goal-directed, rulebook-oriented enforcers'.

Figure 1: A typology of regulatory agencies showing associated risk of misconduct



Source: Adapted from Grabosky & Braithwaite 1986, Figure 2, p. 228. The labels used by Grabosky & Braithwaite have been changed in the top-right quadrant to reflect a more accurate representation of the agencies to which they refer. Specifically, we have replaced 'token' with 'symbolic' and 'nominal' with 'moderate' because we feel that the former labels give the (inaccurate) impression that those agencies do not exercise their powers. We have also changed the X axis label from a continuum of 'non-enforcer — enforcer' to 'non-punitive — punitive'. It is clear that all regulatory agencies enforce in some way — it is how punitive they are in enforcing that reflects their position on this axis. The risk continuum is our own addition to the model.

At the furthest corner of the lower left quadrant, the graph reveals the non-punitive partnership style of regulation, which fosters self-regulation of industry through consultation and negotiation. The Residential Tenancy Authority, for example, favours mediation and negotiation to resolve disputes, fostering self-regulation of landlords. Their approach is quite specific, processing each case on its merits with the aim of achieving all-round compliance in a non-punitive fashion.

The top-right quadrant portrays the goal-directed, rulebook-oriented type of regulation, which focuses on applying regulatory force at arm's length to maintain control of industry or individuals. Driver licensing would be a good example of this stronger regulatory style.

It should be noted, however, that these types may be influenced by a third dimension based on external conditions. This dimension is discussed in depth later in this paper. The following section offers an explanatory breakdown of the two general types of regulation: persuaders/negotiators and goal-directed, rulebook-oriented enforcers.

1. Persuaders/negotiators

Persuaders/negotiators, as the name suggests, aim to develop cooperative partnerships with industry (to a greater or lesser extent). They steer away from using their considerable powers to enforce regulations, preferring to foster self-regulation through conciliation, consultation or other non-punitive means.

This group can be further divided into *conciliators*, *diagnostic inspectorates* and *benign 'big guns'*.

Conciliators

The first group uses conciliation or mediation to resolve disputes between competing parties. Conciliators are particularly evident in industrial relations and land use, but also operate in areas of tenancy, discrimination, health rights, fishing and resource management.

Diagnostic inspectorates

Diagnostic inspectorates promote industry self-regulation, while providing technical assistance on a professional basis. A diagnostic inspectorate, for example, may use a 'blitz' to expose common workplace health and safety risks and then work with industry to develop suitable codes of practice. Others may operate in the areas of pest control, public health, or food.

Benign 'big guns'

These agencies regulate what are predominantly 'state government' functions. For example, agencies in the education sector may develop and approve education programs, issue senior certificates, determine scoring systems, and monitor assessments. Others may operate in the areas of competition policy, the building industry, finance or economics. They are considered benign because their regulatory style is, to quote Grabosky and Braithwaite, 'regulation by raised eyebrows', indicating that while they may have extraordinary powers of punitive enforcement, they use those powers only as a last resort (if at all). These regulators prefer to use their considerable clout to obtain compliance by partnering with industry to promote self-regulation.

2. Goal-directed, rulebook-oriented enforcers

Overall, regulatory agencies in this country demonstrate fairly low levels of punitive enforcement (Grabosky & Braithwaite 1986). Even those agencies that follow the rulebook-oriented approach tend not to use their extensive powers to their fullest extent. Grabosky and Braithwaite describe these enforcers as 'token' or 'modest', depending on the strength of imposed sanctions. However, these terms appear confusing when used to illustrate punitive enforcement, and have been adapted to reflect a more descriptive terminology.

Many, but not all, have licensing or accrediting responsibilities and are required to respond to violations of legislated licensing and accrediting criteria.

Symbolic punitive enforcers

Symbolic enforcers are more likely to pursue regulatory violations than are the previously mentioned conciliating bodies. However, their enforcement options and disciplinary actions may be relatively few. Some professional disciplinary committees, do not have the power to dismiss or disqualify members. For example, the Medical Board of Queensland may:

> refer matter[s] to a Disciplinary Committee of the Board, or deal with the issue as a full Board. The Board may only deal with a disciplinary matter itself where the likely sanction to be imposed is to provide advice, caution or reprimand, or enter into an undertaking with the practitioner. (Medical Board 2002)[1]

Thus, active pursuit coupled with few options for punitive enforcement means, in effect, that the regulatory strength of these agencies is largely symbolic.

Moderately punitive enforcers

These bodies undertake more prosecutions and generate greater penalties than symbolic regulators — using licence suspension, shutting down production, injunctions and adverse publicity to a significant extent. These agencies work closely with their particular industry, as in, for example, the racing and sex industries.

Detached punitive enforcers

These are symbolic or moderately punitive agencies that operate more at arm's length from industry. A good example would be those units of Queensland Health that provide very strict guidelines for regulating the health industry and police them rigorously wherever possible.

Misconduct risks in regulation

The ICAC's *Report on Investigation into Driver Licensing* (1990) identified a culture of corruption as the root cause of misconduct. Corrupt practices and the associated misconduct flourished quite easily because:

- most of the clients of these agencies were either individuals or small, private businesses
- the regulatory functions were but a small section of a larger organisation
- those responsible for regulation were given a good deal of responsibility and discretion.

Conditions for misconduct in the regulatory process

Misconduct is more likely to occur when an official exercising power misuses discretion in situations where accountability and transparency are absent, ineffective or avoided. Agencies

When a degree of discretion is combined with a close relationships with the industry or individuals being regulated, there is a very real danger of corruption and misconduct.

are also at higher risk of misconduct where officials or individual work units have sole responsibility for providing a service.

Discretion is the freedom conferred on officials allowing them to interpret regulations. Accountability and transparency of decision-making indicate the extent to which information is shared and control is maintained within an organisation. These catalysts are magnified when pay salaries for officials are low (Rijckeghem & Weder, 1997).

The likelihood of misconduct

There are certain misconduct risks unique to regulatory agencies that are related to the manner in which regulations are enforced and the nature of the relationship between the agency and the regulated body.

Grabosky and Braithwaite (1986) suggest that misconduct is most likely to arise in agencies that enforce by administering penalties, and which also have a close relationship with those they regulate. Serious misconduct related to the regulatory function seldom occurs in non-punitive enforcement agencies. With punitive enforcement there arises both the opportunity and the motivation associated with attempts to corrupt a public official or for an official to abuse their power, especially when encountered in isolated or rural communities.

Close ties to industry, on the other hand, where regulators provide technical assistance and negotiate compliance with those they regulate, leads to a danger of favouritism or selective non-enforcement. This risk, known as regulatory capture, is described in further detail below.

Some licensing bodies have the power to withhold services, but they do not (usually) punish. In such cases the motivation to

1 The Medical Board may, however, refer a matter to a tribunal, which can, and often does, administer strong sanctions against offenders.

corrupt a public official, or to 'justify' the official engaging in serious misconduct, is dependent on the degree to which services offered by these agencies are exclusive or present a means to secure further advantage. Dog registration, for example, is easily available and there is no major benefit to be gained by making a false registration. Dog registration creates negligible exclusivity for the owner and pecuniary and other advantages in registering a dog are small. By contrast, obtaining a driving licence requires certain skills and knowledge not possessed by everyone and generates opportunities (creating some exclusivity). Car registration, by increasing resale values and affording the owner certain protections, offers pecuniary advantage. Other examples include taxi licensing, prostitution licensing and liquor licensing.

Table 1: Level of misconduct risk by regulatory style

Type of risk	Regulatory style				
	Moderately punitive enforcers	**Symbolic punitive enforcers**	**Conciliators**	**Diagnostic inspectorates**	**Benign big guns**
Conflict of interest	High	Med–High	Low–Med	Low–Med	Low–Med
Regulatory capture	Med	Med	Med	Med	Med
Misuse of information	High	Med–High	Low	Low	Low
Abuse of enforcement powers	High	High	Low	Low	Low
Lesser oversight in rural/isolated area	High	High	Med	Med	Med

Source: These ratings are based on perceptions gained from a review of the current literature and are therefore not conclusive. The categories used are based on assessment guides in the Australian and New Zealand Standard on Risk Management AS/NZS 4360:1999 (Standards Australia, 1999). To date no empirical research has been conducted to establish actual risk. Further research may therefore reveal different ratings to those in our table.

The following risks, summarised in Table 1, are those most commonly experienced by public sector agencies in general, but even more so in regulatory agencies.

It should be noted that, where individual risk categories are low, a combination of two or more risk factors may lead to very serious outcomes. Level of risk is, therefore, not necessarily a true indication of the individual hurt that may be experienced when risk becomes reality.

Conflict of interest

Clearly, depending on the services offered by a regulatory body, misconduct may be manifested in various ways. A conflict of interest arises when personal affairs conflict with an official's public responsibilities. The conflict may be actual or perceived. It could, for instance, be a conflict of interest where a regulator's pest inspector is required to inspect their brother-in-law's cattle property. The ability of the pest inspector to carry out their official duties impartially may, in this circumstance, be severely compromised.

Regulatory capture

This occurs when officials inappropriately identify with the interests of a client or industry (ICAC 1999). For example, a liquor licensing inspector could, after years of contact with people in the industry, begin to favour the wishes of the industry rather than public interest. Alternatively, the inspector may be biased toward a single firm or company, motivated by a 'white knight' kind of sympathy.[2] In such cases the regulator may fail to enforce because, for example, they believe the firm is struggling and the management team are 'nice folk' who ought to be protected.

Misuse of official information

The risk of 'improper use of information' may arise where regulators routinely have access to confidential and sensitive information in the course of their duties. Misuse of information may occur, for example, when a developer, through their personal relationship with a building inspector, obtains official information regarding the future rezoning of a piece of land.

The use of unacceptable compliance methods

Unacceptable compliance methods involve regulators employing questionable practices to encourage client conformity. Complaints to the CMC have referred to, for example, misrepresentation, assault, seeking improper payments or benefits, and issuing fines inappropriately.

Regulatory agencies in rural or isolated areas

Potentially, risks are high when an independent agent is appointed to carry out regulatory functions for another body. In country towns there may be an agency that oversees several regulatory functions (in Queensland it is the Queensland Government Agent Program [QGAP]). These agencies have powers to collect cash and issue various licences. Isolation and the benefits to a potential complainant of 'staying quiet' may make it difficult to expose misconduct or corrupt practices.

Similar concerns arise with officers performing duties in remote areas on government-owned land, parks and reserves. Officers, for example, have authority to regulate access and may collect fees or issue fines. These activities may pose problems for members of the public who cannot easily verify an official's claims about authority, documentation, practices or responsibility.

Misconduct risks for persuaders/negotiators

Conciliators

The risk of serious misconduct and corruption with conciliators is varied. Conciliation is a public matter, and decisions are public knowledge. Controls are, to a certain extent, built into the conciliation process. Added to this, members of conciliation tribunals tend to be relatively well rewarded, thus decreasing the motivation to engage in serious misconduct or corrupt activities.

However, anecdotal evidence suggests that controls are not always effective, especially where, as is often the case, mediators are drawn from the industry itself. This may lead to bias and conflicts of interest that remain largely unscrutinised.

2 The term 'white knight' in relation to regulators was coined by external commentator Doretti deGraaff.

Diagnostic inspectorates

Because the inspectors working for these bodies have quite a lot of latitude, and work closely with industry, there is the potential that they might be 'captured' by the interests of the industry. That these inspectors are usually promoters of self-regulation does, however, reduce the chance that there will be conflicts of interest. Of greatest concern is that inspectors might promote self-regulation that inappropriately favours industry.

Benign 'big guns'

These agencies also work closely with those they regulate and are, therefore, exposed to risk of capture. The fostering of self-regulation in this instance may lead to increased risk of overlooking violations, especially where they are hidden within broader functions.

Misconduct risks for goal-directed, rulebook-oriented enforcers

Symbolic punitive enforcers

These bodies, because they work closely with industry and are punitive in their enforcement strategies, are open to risks of serious misconduct. For example, an investigation by the ICAC into the work of an environmental inspector of the Environmental Protection Agency found examples of misconduct and corruption. At various times excessive autonomy, regulatory capture, conflicts of interest, and the improper use of confidential information have constituted or contributed to misconduct.

Moderately punitive enforcers

As moderate enforcers are generally proactive in their enforcement strategies, misconduct risks are moderately high. Powerful oversighting bodies may, however, balance out these risks. Appeals against decisions of Queensland's Liquor Licensing Division are heard by the Liquor Appeals Tribunal at no cost to the appellant — a constraining influence.

Other risk factors

Non-professional licensing

The licensing function is susceptible to misconduct because of the high degree of contact that officers have with the public and the advantages to successful applicants. Furthermore, applications are very often decided by an individual officer.

Professional licensing

Employees of these regulatory bodies are usually well-paid professionals. Professional codes of practice along with relatively high levels of remuneration reduce the motivation to engage in misconduct. However, because these employees are professionals associated with the industry they are regulating, regulatory capture is a potential risk.

Regulators having multiple types of responsibility

Some bodies can be identified under more than one category. For instance, Queensland's Liquor Licensing Division both licenses and enforces. Although the responsibilities of licensing and enforcing are divided between separate internal units, risk of collegial favours occurring is high. Mistakes made in approving a licence by the licensing unit might, for example, be covered up by the investigations unit if licensing breaches are uncovered. This would amount to an 'internal' conflict of interest.

Preventing misconduct and corruption

What may help prevent misconduct and corruption is not an array of new strategies but the deliberate and integrated application of existing measures that are part of good corporate governance.

Prevention strategies for regulators

1. Modified work practices

The gaming, racing, liquor, and prostitution industries were identified as moderately punitive enforcers, which gives them a risk rating of medium-high to high in each of the risk categories. Work practices that allow misconduct and corruption to flourish unchecked are an important contributor to this risk. Altering work practices is a major undertaking, but it is a necessary step if misconduct and corruption risks are high and their impact is severe.

The CMC has identified working alone as a major risk in gaming and liquor regulation (see also ICAC 1998). Gaming and liquor licensors have shared clients of long standing, with many pubs and clubs running poker machines. It is important, therefore, that work practices counter the development of inappropriate relationships.

Specific actions may include:

- consistent and comprehensive recording of work activities
- random checks by supervisors
- staff rotation policies
- obtaining independent feedback from industry.

Establishing these types of work practices would be particularly important in rural communities, where inappropriate relationships potentially could be a big problem.

Altering work practices may also be applicable to agencies including those involved in environmental protection and local government regulation — where inspectors may be exposed to the same industry players over long periods.

2. Increased staff awareness

The ICAC (2001) found that half the surveyed employees were aware their agency had a gifts and benefits policy or a gifts register. A quarter were aware they could make disclosures about alleged misconduct in writing, and about 10 per cent were aware they could make disclosures anonymously.

CMC experience suggests that ignorance of what constitutes unacceptable conduct, policy, and processes increases the chance of engaging in questionable activity or failing to report it. Training in ethics and ethical decision-making can increase staff awareness. Information sessions and adjustments to management priorities similarly raise appreciation of critical issues.

3. Enhanced auditing practices

A culture of misconduct may be exposed by a combination of information gained from internal control systems and, in certain cases, intelligence work. This may be especially worthwhile in licensing bodies and local councils. Similarly, when a code of conduct is limited to a small section of a larger agency or not adjusted to accommodate a specialist work group, subversion of the code is easier to conceal.[3] This is especially so when regulators in an agency are physically separate or have high levels of autonomy.

3 Experience suggests organisations that exist only to regulate are likely to be under greater scrutiny, both internally and externally, than organisations where regulation is only part of their business.

Recent investigations by the CMC relating to the 'rebirthing' of motor vehicles revealed that regulators may be tempted into acting inappropriately under such conditions.

Preventive measures include establishing independent quality inspection teams, as was done with the NSW Department of Gaming and Racing after an investigation by the ICAC. When inspectors work independently with high degrees of autonomy, an independent team monitoring decisions could both prevent and reveal wrongdoing. In organisations where risks of misconduct and corruption are not as high, or where the risks are limited, then audit strategies may be less formalised.

4. Specifying staff requirements

A confidentiality clause in employment contracts could improve awareness of confidentiality requirements. Responsiveness is also increased where employees are required to complete a statement of interest. Binding employees to disclose material interests and other potential conflicts of interest encourages them to critically examine their business dealings in light of their public responsibilities. Effectiveness would be improved if these statements were randomly audited to ensure they were accurate and current. Transparent and effective processes for the evaluation of disclosures and the application of remedies are also necessary.

5. Targeted controls in rural and remote areas

Rural areas require special attention, if only because of the practicalities of implementing misconduct prevention measures. Where the regulatory function is remote, written materials have often been the sole means for communicating advice. Hard copy material should not, however, be the sole means of delivering prevention support. There should also be some targeted communication with the remote agent to discuss problems and provide feedback and suggestions for putting prevention strategies in place. Spot audits, timetabled audits and electronic inspections may complement such measures. Client surveys, computer-based training, electronic supervisor support and the use of exception reporting techniques are also useful.

Future strategies

An integrated prevention strategy should be adopted to prevent or expose misconduct. Research conducted by the CMC and other bodies has shown the following measures are effective if used within an integrated framework:

- modifying work practices
- increasing staff awareness of codes of conduct
- enhancing audit processes
- specifying staff requirements in employment contracts and conditions of employment
- training staff in workplace ethics
- increasing skills in ethical decision-making
- using new technology to share information, oversee and support staff and clients
- using management reports to review and monitor work volumes and identify exceptions
- finding new ways to monitor staff conduct and performance

These strategies would be suitable for agencies depending upon their type of regulation, and corruption risks.

Conclusion

The seriousness of misconduct and corruption risks varies according to such factors as whether staff are based in rural or metropolitan regions, the agency's style of enforcement, the level of staff contact with clients, the use of power and decision-making, and the perceived significance of the benefits provided by the regulator.

Reducing misconduct risks does not, however, require agencies to adopt a raft of new initiatives and policies. Agencies have the capacity to reduce their risks by simply making adjustments to existing controls and by instituting the kind of integrated prevention strategies outlined in this paper. Such efforts should foster an aspirational and ethical workplace culture.

References

Braithwaite, J. 2000, 'The new regulatory states and the transformation of criminology', *British Journal of Criminology*, 40, 222–238.

Grabosky, P. & Braithwaite, J. 1986, *Of Manners Gentle: Enforcement strategies of Australian business regulatory agencies*, Oxford University Press, Melbourne.

ICAC — see Independent Commission Against Corruption.

Independent Commission Against Corruption 1998, *Investigation into the conduct of a senior inspector with the Department of Gaming and Racing.*

—— 1999, *Strategies for Preventing Corruption in Government Regulatory Functions.*

—— 2001, *Corruption resistance strategies — researching risks in local government.*

Medical Board of Australia 2002, Procedures for Complaints, available at <http://www.medicalboard.qld.gov.au/files/complaint_intro.html>.

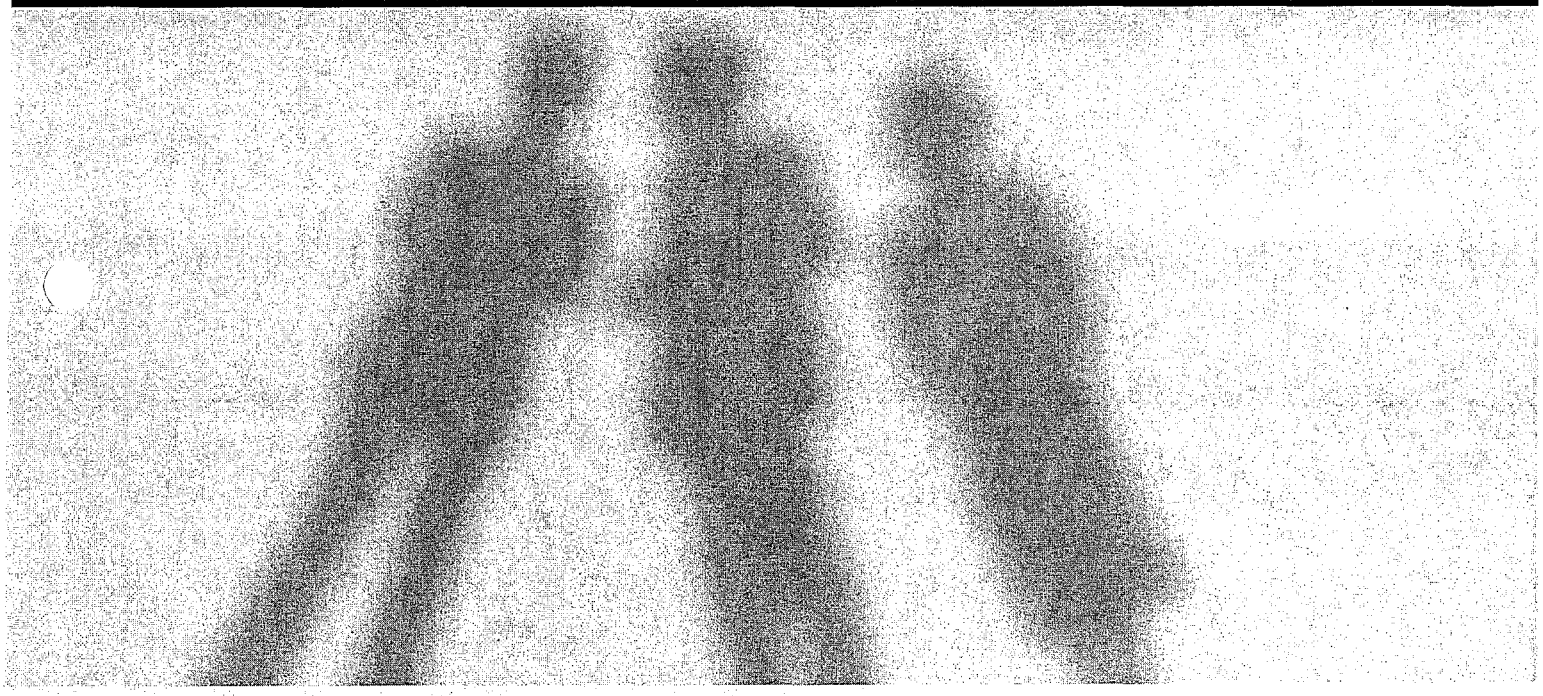
Organisation for Economic Cooperation and Development 1997, *The OECD Report on Regulatory Reform: Synthesis*, available at: <http://www.oecd.org/pdf/M00007000/M00007872.pdf>.

Prenzler, T. & R. Sarre 1998, 'Regulating private security in Australia', Trends and Issues in Crime and Criminal Justice, 98, Australian Institute of Criminology.

Rijckeghem, C. & Weder, B. 1997, 'Corruption and the rate of temptation: Do low wages in the civil service cause corruption?' International Monetary Fund Working Paper, 97/73.

Sarre, R. 1998, 'Accountability and the private sector', *Security Journal*, 10, 97–102.

Managing **Conflicts of Interest** in the Public Sector



Guidelines

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Crime and Misconduct Commission
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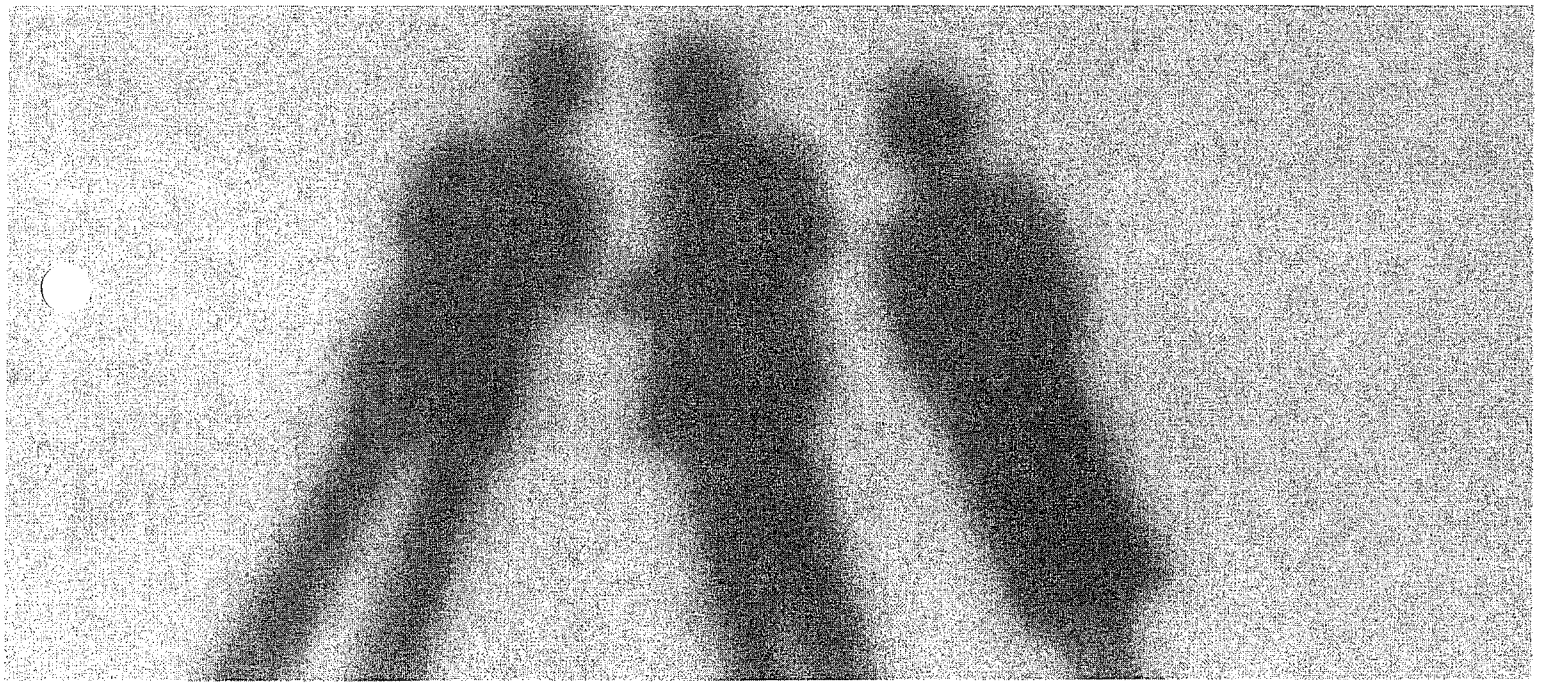
Managing **Conflicts of Interest** in the Public Sector



Guidelines

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION

CRIME AND MISCONDUCT COMMISSION
QUEENSLAND

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CONTACTING THE ICAC

ICAC:	Level 21, 133 Castlereagh Street Sydney NSW 2000
Post:	GPO Box 500, Sydney NSW 2001
DX:	557 Sydney
Phone:	02 8281 5999
Toll free:	1800 463 909
TTY:	02 8281 5773
Facsimile:	02 9264 5364
Website:	www.icac.nsw.gov.au
Email:	icac@icac.nsw.gov.au
Business hours:	Monday - Friday 9am - 5pm

CONTACTING THE CRIME AND MISCONDUCT COMMISSION

CMC:	Level 3, 140 Creek St, Brisbane Qld 4000
Post:	GPO Box 3123, Brisbane, Qld 4001
Phone:	07 3360 6060
Facsimile:	07 3360 6333
Toll Free:	(outside Brisbane) 1800 061 611
Website:	www.cmc.qld.gov.au
E-mail:	mailbox@cmc.qld.gov.au

Foreword

The community has a right to expect that all public officials will perform their duties in a fair and unbiased way, and that the decisions they make are not affected by self-interest, private affiliations, or the likelihood of personal gain or loss.

Community confidence in the integrity of public officials and public sector processes is also fundamental to the rule of law, one key principle of which is that every citizen is equal before the law and should receive fair and impartial treatment.

For these compelling reasons, it is crucial that public officials and public sector organisations protect the public interest by ensuring that private interests that conflict with it are identified and managed effectively.

They must also publicise and promote the work they do to identify and manage conflicts of interest, to guard against the damaging perception that public officials or organisations are being compromised by undeclared or unmanaged conflicts of interest.

A high proportion of the matters referred to the Crime and Misconduct Commission (CMC) and the Independent Commission Against Corruption (ICAC) concern actual, perceived or potential conflicts of interest.

This guide and the accompanying Toolkit have been produced jointly by the CMC and the ICAC to help public sector organisations develop and implement a conflicts of interest policy that is customised to their specific needs and risks, and to help individual public officials identify, manage and monitor any conflict of interest that they may have.

The guide and Toolkit are intended to be practical and sensible.

We recognise that public officials are also individuals with their own private interests. Consequently, there will be times when their private interests will be in actual, perceived or potential conflict with their public duty to put the public interest first.

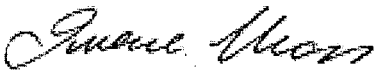
These resources are based on the understanding that conflicts of interest do occur in the normal course of public officials' work, and that identifying and disclosing such conflicts is an integral part of public official duties.

In our experience, problems arise when conflicts of interest are not dealt with openly and effectively. The catalyst for many cases of serious corruption and misconduct is an undisclosed or unmanaged conflict of interest.

These resources are intended to help public sector organisations create a workplace culture that encourages and supports the identification and disclosure of conflicts of interest and to help organisations establish a comprehensive framework for managing conflicts of interest effectively.

The integrity of individual officials within government and the existence of sound policies and procedures to guide the management of conflicts of interest are vital to ensuring a public sector that is not only free of corruption, but is perceived to be free of corruption.

Brendan Butler SC, Chairperson
Crime and Misconduct Commission
Queensland



Irene Moss AO, Commissioner
Independent Commission Against Corruption
New South Wales

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Contributors to an initial Forum held in Sydney in June 2003, which explored the need for guidelines and practical tools for dealing with conflicts of interest as well as suggestions for a potential framework, included Janos Bertok, Public Governance Directorate, Organisation for Economic Cooperation and Development (OECD) and several senior representatives of Public Sector Commissions, Ombudsman's Offices, and anti-corruption agencies from various Australian states, the Commonwealth and New Zealand.

The development of these publications occurred as a result of the commitment, dedication, innovation, and perseverance of a series of ICAC and CMC staff, including Alexandra Mills, Rod Marsh, Sue Bolton, Seckin Cetin, Peter Richardson, Jane Coulter, Andrew Marsden, Lynn Atkinson and Grant Poulton from ICAC and Narelle George, John Boyd, and Michelle Clarke from the CMC.

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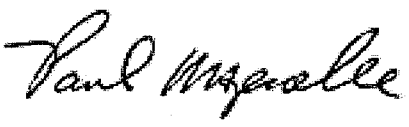
Linda Waugh, Executive Director
Corruption Prevention Education and Research
Independent Commission Against Corruption
New South Wales



Dr Paul Mazerolle, Director
Research and Prevention
Crime and Misconduct Commission
Queensland

Contents

Introduction

This guide and the accompanying Toolkit have been produced to assist public sector organisations in Queensland and New South Wales to develop and implement effective policies and procedures for managing conflicts of interest.

This guide[1] defines conflicts of interest and related terms and concepts; outlines the principles that should govern management of conflicts of interest; and provides guidelines for public sector organisations to follow when developing their conflicts of interest policies and procedures.

The Toolkit provides a range of tools to assist public sector organisations to both develop and implement an effective conflicts of interest policy that is customised to their organisation. The tools include checklists and templates to assist organisations on a step-by-step basis. The guide and accompanying Toolkit are intended to help government organisations:

- develop an effective conflicts of interest policy that fosters public confidence in the integrity of public officials and public decision making
- create a practical framework of principles, strategies and tools for managing conflicts of interest, and for ensuring its ongoing relevance in a continuously evolving environment
- promote a public sector culture where conflicts of interest are properly identified and resolved or managed in a clear, transparent, accountable and timely way
- support partnerships between the public sector and the business and not-for-profit sectors in accordance with clear public standards defining the parties' responsibilities for integrity.

The guide and Toolkit do not prescribe a single, rigid approach for managing all conflicts of interest. The decision on how to manage particular conflicts of interest is ultimately a matter for the organisation and employee concerned, and a range of options may be available.

A 'conflict of interest' involves a conflict between a public official's duty to serve the public interest, and the public official's private interests.

[1] The guide has been based on the principles in the *OECD Guidelines for Managing Conflict of Interest in the Public Sector*, released by the Organisation for Economic Co-operation and Development (OECD) in June 2003.

Why managing conflicts of interest is important

The community expects that public officials will perform their duties in a fair and impartial way, putting the public interest first at all times.

The integrity of public officials and public sector processes is also fundamental to the rule of law, one key principle of which is that every citizen is equal before the law and should receive fair and impartial treatment.

While conflicts of interest should be avoided wherever possible, conflicts often happen without anyone being at fault. Conflicts of interest can – if not identified, disclosed and managed effectively – cause public officials to put private interests above the public interest; thereby compromising their work and creating a catalyst for serious misconduct and corruption.

Conflicts of interest are not wrong in themselves – public officials are also private individuals and there will be occasions when their private interests come into conflict with their duty to put the public interest first at all times – but such conflicts must be disclosed and effectively managed.

Public sector organisations must also ensure that conflicts of interest are seen to be managed in a transparent and accountable manner. The perception that conflicts of interest are not being managed properly can undermine confidence in the integrity of public officials and public sector organisations.

The scope of actual, perceived or potential conflicts of interest is arguably greater than in the past, as public–private sector partnerships and complex inter–agency relationships become increasingly common.

In this context, public sector organisations need to recognise that conflicts of interest will occur in the course of public officials' work, and must work to create a workplace culture that encourages and supports the identification and declaration of conflicts of interest.

They must work to dispel the misconception that a conflict of interest is wrong in itself and should therefore be kept quiet or hidden.

However, once a private interest has *in fact* compromised the proper performance of a public official's duties – i.e. a conflict of interest has been improperly acted on or has influenced actions or decision making – this conduct is more appropriately regarded as an instance of misconduct, abuse of office or even corruption.

Managing conflicts of interest properly brings a range of benefits for public sector organisations.

First and foremost, opportunities for corruption or improper conduct are reduced.

Second, effective policies and procedures for identifying, disclosing and managing conflicts of interest mean that unfounded accusations of bias can be dealt with more easily and efficiently.

Third, the organisation can demonstrate its commitment to good governance by addressing an issue that is commonly associated with corruption and misconduct.

A transparent system that is observed by everyone in an organisation as a matter of course will also demonstrate to members of the public and others who deal with the organisation that its proper role is performed in a way that is fair and unaffected by improper considerations.

Failure to identify, declare and manage a conflict of interest is where serious corruption often begins and this is why managing conflicts of interest is such an important corruption prevention strategy.

Conflicts of interest cannot always be avoided or prohibited. Unavoidable conflicts of interest need to be identified, disclosed and effectively managed.

Defining the key concepts

Public officials and organisations must have a clear understanding of what constitutes a conflict of interest in order to manage such conflicts effectively.

This section discusses and defines the key concepts and terms associated with conflicts of interest.

PRIVATE INTERESTS

An 'interest' in this context means anything that can have an impact on an individual or group. The term 'private interests' includes not only the personal, professional or business interests that each of us has, but also the personal, professional or business interests of the individuals or groups we associate with. This might include relatives, friends or even rivals and enemies. Whether we wish to see them benefit or be disadvantaged, we have a private interest in relation to such people.

Private interests, then, are those interests that can bring benefit or disadvantage to us as individuals, or to others whom we may wish to benefit or disadvantage.

Many conflicts of interest management policies divide private interests into two types: pecuniary and non-pecuniary.

Pecuniary interests (known as 'material personal interests' in some jurisdictions) involve an actual or potential financial gain or loss.

Money does not need to change hands for an interest to be pecuniary. People have a pecuniary interest if they (or a relative or other close associate) own property, hold shares, have a position in a company bidding for government work, or receive benefits (such as concessions, discounts, gifts or hospitality) from a particular source.

Statutory provisions exist for declaring and managing pecuniary interests in many areas of the public sector.

Non-pecuniary interests do not have a financial component. They may arise from personal or family relationships, or involvement in sporting, social or cultural activities. They include any tendency toward favour or prejudice resulting from friendship, animosity, or other personal involvement with another person or group.

But private interests are not limited to pecuniary interests or to interests that can bring direct personal gain or help avoid personal loss. They also include many social and professional activities and interests. For example, a public official might be a member of a club, or have personal affiliations or associations with individuals or groups, including family and friends. Any of these relationships could be the source of interests that could conflict with the public interest in a particular situation.

Moreover, we all have our own personal opinions, prejudices and attitudes, which we are expected to set aside when performing our official duties. However, if personal values are likely to impact on the proper performance of public duty, then these can also lead to a conflict of interest.

Enmity as well as friendship can give rise to an actual or perceived conflict of interest.

NSW Ombudsman 2003 *Conflict of Interests fact sheet No 3* July 2003

PUBLIC DUTY

All public sector officials have a duty to always put the public interest above their own personal or private interests when carrying out their official duties.

It is important to note that this principle applies to anyone engaged to deliver government programs and services, whether for remuneration or not. Such persons include employees of commonwealth, state and local governments, members of boards and committees, councillors, academic and non-academic staff of public universities, casual and contract staff, as well as consultants and volunteers.

The public interest can be defined as the interest of the community as a whole. It is *not* the sum of individual interests nor the interest of a particular group, but the collective interest of the entire community.

Determining the public interest in a particular situation can be complex, even problematic, but on a practical, day-to-day level public officials can best fulfil their public duty to put the public interest first by:

- carrying out their prescribed official duties fully and effectively
- carrying out their official duties within established ethical standards and frameworks
- identifying any actual, perceived or potential conflicts of interest that they have and ensuring these are managed effectively.

Formal ethical frameworks have been established for most Australian public sector employees, including those in the NSW and Queensland public sectors. In Queensland, the *Public Sector Ethics Act* 1994 outlines the following five ethics principles for public officials:

- Respect for the law and the system of government
- Respect for persons
- Integrity
- Diligence
- Economy and efficiency[2]

The model code of conduct for the NSW public sector identifies five general principles that "all public sector employees need to follow":

- Responsibility to the government of the day
- Respect for people
- Integrity and public interest
- Responsive service
- Economy and efficiency[3]

These two frameworks express principles and values found in many comparable jurisdictions to explain the meaning of public duty. Underpinning these principles and values is the concept that public employees are obliged to always put the public interest before any private interest they may have. As a result, public sector employees are expected to:

- restrict the extent to which a private interest could compromise, or be seen to compromise, their impartiality when carrying out their official duties
- abstain from involvement in official decisions and actions which could be compromised by their private interests and affiliations
- avoid private action in which they could be seen to have an improper advantage from inside information they might have access to because of their official duties
- not use their official position or government resources for private gain
- ensure that there can be no perception that they have received an improper benefit that may influence the performance of their official duties

[2] *Public Sector Ethics Act* 1994 (Qld)

[3] Premier's Department 1997 *Model Code of Conduct for NSW public agencies: policy and guidelines*

- not take improper advantage of their official position or privileged information gained in that position when seeking employment outside the public sector.

Recognising and managing conflicts of interest helps public employees perform their official duties in the public interest. Consequently, it is crucial for people to be able to distinguish between their public and private roles. To achieve this, public sector organisations must ensure that their employees understand both the limits and obligations of their proper roles and the ethical obligations that apply to them.

The public duty of a public sector employee is to always act in the public interest by performing their proper role according to the accepted public sector ethical framework.

CONFLICTS OF INTEREST

The Organisation for Economic Cooperation and Development (OECD) has undertaken extensive work on conflicts of interest and has developed the following simple and practical definition:

> *A 'conflict of interest' involves a conflict between the public duty and private interests of a public official, in which the public official has private ... interests which could improperly influence the performance of their official duties and responsibilities.*[4]

A conflict of interest can arise from avoiding personal losses as well as gaining personal advantage – whether financial or otherwise.

Conflicts of interest can be actual, perceived or potential.

- An **actual conflict of interest** involves a direct conflict between a public official's current duties and responsibilities and existing private interests.
- A **perceived** or **apparent conflict of interest** can exist where it could be perceived, or appears, that a public official's private interests could improperly influence the performance of their duties – whether or not this is in fact the case.
- A **potential conflict of interest** arises where a public official has private interests that could conflict with their official duties in the future.

For more detail on the differences between these types of conflicts of interest, refer to the accompanying Toolkit.

Understanding and defining the differences between actual, perceived or apparent and potential conflicts of interest assists in identifying when a conflict exists and determining which type of management approach may be the most appropriate.

It is important to recognise that a poorly-managed *perceived* or *apparent* conflict of interest can be just as damaging as a poorly-managed *actual* conflict of interest. The critical factor is that public officials must not only behave ethically, they must also be seen to behave ethically.

There is nothing unusual or necessarily wrong in having a conflict of interest. How it is dealt with is the important thing.

[4] OECD guidelines, 2003, para 10.

CONFLICTING DUTIES – ANOTHER TYPE OF CONFLICT

So far this guide has referred to situations where there could be conflict between an official's proper role, which reflects the public interest, and another personal role that is characterised by a private interest of some kind. There are two other situations that public sector organisations should be aware of when they are establishing a framework for managing conflicts.

The first situation is where a public official has multiple roles and could be said to wear two hats. In addition to their principal job, an individual may find that part of that job involves taking on another public sector or community-based role as well. A common example is when a position in a major government department includes being a member of the board of a statutory authority that the department has some responsibility for.

Where individuals have more than one official role it may be difficult to keep the roles separate. The result can be poor performance of one of the roles, at best, and unlawful or improper decision making at worst.

The risk of the duties of these positions conflicting is more likely where a public sector employee has two roles in organisations with a competitive relationship, or where one has a regulatory or review role in relation to the other. Good corporate governance processes in public organisations usually address this issue by segregating functions and areas of work from each other. Nevertheless, conflicts between the duties of these roles can arise, particularly in small communities where staff numbers are limited or where there is a lack of competition. The conflicts in these circumstances are not always recognised because no private interest is involved or apparent. This situation is usually described as one of **competing interests** or a **conflict of duty**.

The second situation, which often arises from a public official having multiple roles, is the problem of officials acquiring confidential information in the course of their proper role that could be useful in relation to their work in another role.

The corruption risk in this situation is that the public sector employee may be tempted to use the information improperly, to give advantage to the second public organisation, or create bias against or prejudicial treatment of another group or person.

These situations should be considered at the same time as conflicts of interest because the underlying principles for managing them are the same. As for conflicts of interest, the principle that all public decisions must be impartial and based on the merits of the situation without regard to improper considerations still applies. Many of the mechanisms for managing conflicts of interest can also be used to manage these situations.

The primary goal of systems to manage conflicts of interest is to ensure that decisions are made – and are seen to be made – on proper grounds, for legitimate reasons and without bias.

Identifying a conflict of interest

It is not always easy to decide when private interests and public duty are, or might be, in conflict with each other. The key test is whether an individual public official could be influenced, or appear to be influenced, by a private interest in carrying out their public duty.

This is an objective test – when applied it should focus on the official role and the private relationships and interests of the person concerned, and whether a reasonable disinterested person would think these relationships and interests could conceivably conflict or appear to conflict with the person's public role.

Balancing public duty and private interest

A conflict between public duty and private interest is not always avoidable, as public officials are also private citizens with private interests. Additionally there are other circumstances where conflicts of interest cannot be reasonably avoided. For example, where a person's involvement is essential to a matter, or where there is a policy of affirmative action, or where local preference rules apply.

When a conflict of interest arises there are a number of different management options that can be adopted to deal with the conflict and these options are presented in the Toolkit.

The challenge facing public sector organisations is to develop conflicts of interest policies and management strategies that strike a balance between the public and private interests of employees. Getting the balance right means being able to identify risks and choose appropriate management strategies whilst satisfying probity requirements of the public sector.

An approach that is too strict or attempts to corral private interests too tightly may impinge upon the rights of the individual, or prove unworkable. There is also the risk that overly strict provisions will discourage employees from disclosing conflicts of interest, or deter people from working in the public sector.

Four guiding principles

This guide draws on four principles that should guide and underpin the development of systems, policies and procedures to manage conflicts of interest. The principles reflect values that already exist in most public sector ethics frameworks.

1. PROTECT THE PUBLIC INTEREST

Serving the public interest is central to the public duty of public sector employees. Ensuring that the public interest is not compromised should be the overriding objective of any conflicts of interest management strategy.

Public officials should only make decisions and provide advice based on relevant law and policy. In doing so, they should act within the limits of their proper roles, and focus on the merits of each case without regard for private interests, personal attitudes or opinions. In particular, decisions that apply policy to individual cases should be impartial and not prejudiced by religious, professional, party–political, ethnic, family, or other personal preferences, alignments, or enmity.

In order to meet their public duty obligations, public officials must not only act within the law but must also apply broader public service values such as impartiality, integrity and serving the public interest.

2. SUPPORT TRANSPARENCY AND ACCOUNTABILITY

Conflicts of interest must be seen to be managed fairly and effectively. To achieve this, the processes for identifying, disclosing and managing conflicts of interest must be transparent – that is, the processes should be open to scrutiny and help maintain accountability.

Strategies such as the registration of interests, and the removal of officials from tasks or duties that involve a conflict of interest are useful in this context. Disclosure of private interests or affiliations that could compromise, or be seen to compromise, the unbiased performance of an official's work is the first step towards the effective management of the conflict.

By taking a consistent and open approach to resolving or managing conflicts, organisations will encourage staff to follow policy and procedures. If members of the public, stakeholders, partner agencies and client groups are aware of the organisation's policies and procedures for managing conflicts of interest they can be more confident that the organisation and its employees will not act prejudicially or improperly.

3. PROMOTE INDIVIDUAL RESPONSIBILITY AND PERSONAL EXAMPLE

Resolving or managing conflicts of interest in favour of the public interest demonstrates the integrity and professionalism of individuals as well as organisations.

Managing conflicts involves input from all levels of an organisation. The management of an organisation is responsible for establishing systems and policies. Because private interests are usually known only to individuals, it is equally important for employees to take responsibility for identifying and acknowledging their own conflicts of interest.

All public employees are individually responsible for arranging their private affairs as far as reasonably possible to prevent conflicts of interest arising. Managers have an additional role in setting an example to their staff by demonstrating commitment to established policies and procedures.

4. BUILD A SUPPORTIVE ORGANISATIONAL CULTURE

Public sector managers are also responsible for providing and implementing a policy environment that helps and encourages effective decision making when conflicts of interest arise.

Organisations can provide, implement and promote management policies, processes, and practices that create and sustain a culture of integrity by:

- assisting staff with guidance and training to promote understanding of the established rules and practices, and their application to the working environment
- encouraging open communication and dialogue so that staff are comfortable disclosing and discussing conflicts of interest in the workplace
- protecting information about disclosed conflicts of interest from misuse by others
- including staff in any development or change in organisational policies and procedures, to encourage ownership and adherence.

The purpose of systems to manage conflicts of interest is to maintain the integrity of official policy and administrative decisions, and support public confidence in government. Individual public sector organisations can help to achieve this outcome by developing:

- specific standards for promoting integrity set in codes of conduct and elsewhere
- processes for identifying risk and dealing with emerging conflicts of interest
- appropriate external and internal accountability mechanisms
- management approaches (including sanctions) that aim to ensure that public officials take personal responsibility for complying with both the letter and the spirit of such standards.

Conflicts of interest may be discovered and still have an impact after an individual has left an organisation.

Guidelines for managing conflicts of interest

FRAMEWORK

No single set of guidelines can address every conceivable situation because conflicts of interest arise in many different ways. The elements of this guide have been chosen for their broad applicability, their effectiveness and their proven utility across all parts of the public sector.

In some cases, organisations will be required by legislation to manage conflicts of interest in a particular way. Legislation generally provides a minimum standard while the recommendations here and in the Toolkit provide examples of best practice.

The information in this section is generic and can be applied to individual agencies regardless of the legislative or regulatory requirements that bind them. Many of the models and suggestions in this guide go beyond most legislative provisions for managing conflicts of interest.

When putting the guidelines into practice, it is important to recognise that in many instances, there is likely to be more than one way to effectively manage a conflict of interest. The choice of models should be informed by the operating environment, legislative requirements and any other available options.

There are seven basic steps for developing and implementing a comprehensive conflicts of interest policy which will allow the organisation to manage conflicts of interest before problems arise.

1. **Identify** the different types of conflicts of interest that typically arise in the organisation.
2. **Develop** an appropriate conflicts of interest policy, management strategies and responses.
3. **Educate** staff, managers and the senior executive and publish the conflicts of interest policy across the organisation.
4. **Lead** the organisation through example.
5. **Communicate** the organisation's commitment to its policy and procedures for managing conflicts of interest to stakeholders, including contractors, clients, sponsors and the community.
6. **Enforce** the policy.
7. **Review** the policy regularly.

In the following section, each of these steps is explained in detail. The tools to implement them are provided in the Toolkit.

1 IDENTIFY THE DIFFERENT AREAS OF RISK FOR CONFLICTS OF INTEREST

The first step in developing an effective organisational approach to conflicts of interest is to identify the areas of risk, and describe the kinds of conflicts of interest that are likely to occur. Most organisations have a cluster of issues that are likely to arise from the particular functions they perform. These issues should form the basis for the design of a conflicts of interest policy and accompanying management strategies.

Effective management of conflicts of interest is predicated on an organisation being able to identify specific conflicts of interest when they occur. Ideally, the aim is to be able to minimise the occurrence of *actual* or *perceived* conflicts of interest by identifying and managing them while they remain *potential* conflicts. Clearly identifying at-risk functions and the positions or organisational areas that perform them is the first step in managing the risk that conflicts of interest present.

Staff participation in this process of identification is important. Not only will staff involvement ensure better coverage of relevant conflicts of interest risks, but staff are more likely to feel they own the policy and contribute to its effective implementation if they have played a part in its development. Examples of how staff might be encouraged to participate can be found in the accompanying Toolkit.

Some examples of private interests that could create pecuniary and non-pecuniary conflicts of interest include:

- financial and economic interests (such as debts or assets)
- family or private businesses
- affiliations with for-profit and not-for-profit organisations
- affiliations with political, trade union or professional organisations and other personal interests
- involvement in secondary employment that potentially conflicts with an official's public duties
- undertakings and relationships (such as obligations to professional, community, ethnic, family, or religious groups in a personal or professional capacity, or relationships to people living in the same household)
- enmity towards, or competition with, another person or group

Areas of work or organisational functions that create a high risk for potential conflicts of interest include (but are not limited to):

- interacting regularly with the private sector
- contracting and procurement
- inspecting, regulating or monitoring of standards, businesses, equipment or premises
- issuing qualifications or licences
- providing a service where demand exceeds supply
- allocating grants of public funds
- issuing, or reviewing the issue of, fines or other sanctions
- providing subsidies, financial assistance, concessions or other relief to those in need
- making determinations or handing down judgement about individuals or disputes
- having discretion concerning planning or development applications
- carrying out regulatory tests and procedures
- making appointments to positions.

Functions that are subject to close public or media scrutiny should also receive specific attention.

The process of identifying risk areas should be consistent with the definitions, principles and essential requirements of the legislation and regulations that apply to the organisation and its employees.

2 DEVELOP APPROPRIATE STRATEGIES AND RESPONSES

Once likely risk areas have been identified, strategies and practices can be developed to manage the variety of conflicts of interest that staff may face. Effective management depends on staff and managers being aware of an organisation's approach to conflicts of interest and their responsibilities within it.

Rules about what is expected of staff and management should distinguish between individual responsibilities and the responsibilities of the organisation, and ensure that staff and managers are able to:

- recognise all actual, perceived and potential conflicts of interest as they arise
- disclose conflicts of interest and clearly document the strategies implemented to manage them
- monitor the effectiveness of strategies chosen to manage identified conflicts of interest.

To help organisations meet these responsibilities, a model management approach with practical examples is provided in the accompanying Toolkit.

3 EDUCATE STAFF AND SENIOR MANAGERS

The effective implementation of a conflicts of interest policy will require the ongoing education of *all* members of the organisation, from contract workers, volunteers and external agents, to senior managers and board members.

All employees should have access to policies and other information that will help them to identify and disclose a conflict of interest. Managers need to know how to manage conflicts of interest effectively to help maintain the organisation's functional integrity.

Conflicts of interest education should be included in organisational induction programs, and be part of on-going education for staff and management.

As a first step, education programs should ensure all employees understand the concept of a conflict of interest. An education program is also a useful place to point out the specific conflicts of interest and high-risk areas identified in the first phase of developing the organisation's conflicts of interest policy, as well as any differences in the way the policy applies to staff (i.e. depending on their seniority, roles and functions).

Training materials can give clear and realistic descriptions of the circumstances and relationships that can lead to conflicts of interest, and focus on practical examples of ways to resolve them. This is particularly important in rapidly-changing grey areas such as private-sector sponsorships, privatisation and deregulation programs, relations with non-government organisations, political activity, public-private partnerships, and the interchange of personnel between the public and private sectors.

Broad corporate awareness and reinforcement of the potential for conflicts of interest to arise, and appropriate strategies for their management, will assist in ensuring compliance. Such awareness and reinforcement will also help anticipate at-risk areas where further prevention work may be necessary.

Private sector partner organisations and contractors should also be made aware of the organisation's approach to managing conflicts of interest where relevant. They may also benefit from training to encourage their compliance and support for organisational policies.

4 LEAD BY EXAMPLE

All public officials are expected to manage their private interests in a way that preserves public confidence in their own integrity and that of their organisation. However, effective implementation of a conflicts of interest strategy requires thought, effort and commitment from the top.

Managers will need to demonstrate leadership commitment to the organisation's conflicts of interest policy by modelling compliance and appropriate behaviour. This top-down approach relies on managers actively supporting the policy and associated procedures – not only by word and deed, but also by being clearly and unambiguously seen to do so by staff. Mere lip service to a narrow interpretation of an organisation's conflicts of interest policy is not generally sufficient to encourage public confidence in the integrity of an organisation or its staff.

Managers should also encourage their staff to disclose conflicts of interest and be prepared to exercise judgement to help staff resolve or manage a conflict of interest by:

- considering carefully whether a reasonable person who is in possession of the relevant facts would be likely to think that the organisation's or individual's integrity was at risk from an unresolved conflict of interest
- weighing the interests of the organisation, the individual, and the public interest when determining the most appropriate solution to resolve or manage the conflict of interest
- considering and weighing other factors, which may include the level and type of position held by the staff member concerned, and the nature of the conflict of interest.

Managers have the power to influence staff in how the conflicts of interest policy is implemented and how well the procedures are followed. If ethical management of conflicts of interest is considered a priority by senior management, then others in the organisation will follow this lead.

5 COMMUNICATE WITH STAKEHOLDERS

The range of stakeholders in this context is broad and includes the general community. As this document emphasises, the *perception* that a conflict of interest is not being managed properly can be very damaging – regardless of how well it is in fact being managed. This is one reason why public sector organisations should communicate their commitment to their policies and procedures for managing conflicts of interest to all their stakeholders, including the general community.

Public sector organisations that have significant interactions with the private sector or the not-for-profit sector should identify the conflicts of interest that might arise. Safeguards can then be developed to prevent confidential information, authority or influence gained through such involvement from being improperly used.

It is important for public organisations to inform the people they deal with about their conflicts of interest policies and the potential consequences of non-compliance – such as the termination of a contract, or criminal prosecution for corruption. Many public sector organisations have statements of business ethics that they use to communicate their ethical and accountability obligations to their business partners and contractors.

Two-way communication with the private and not-for-profit sectors can also help to keep conflicts of interest strategies relevant and effective. Client, stakeholder and partner organisations can play a role in developing conflicts of interest management strategies in several ways, for example by:

- being involved in jointly reviewing high-risk areas – such as the handling of privileged or commercial-in-confidence information – in order to identify and develop appropriate preventative mechanisms to protect both sides in a potential conflict
- providing feedback on a draft conflicts of interest policy
- developing and maintaining up-to-date mechanisms for identifying and resolving real or potential conflicts of interest. This step is essential when involving representatives from other sectors in the work of the organisation – or conversely, when members of the organisation are involved in the activities of such bodies.

Involving partners and other stakeholders in the design of new integrity measures to identify or negotiate mutually acceptable solutions, helps ensure that proposed standards reflect actual public expectations, and encourages cooperation in the implementation process.

Above all, in creating partnerships for integrity, it is vital that the organisation ensures that, whatever the proposed activity or involvement with other bodies, decision-making procedures at all stages can be audited for integrity and transparency, and can be justified.

6 ENFORCE THE POLICY

It is clear that both individuals and organisations have responsibilities for implementing a conflicts of interest policy.

Individuals are responsible for supporting the policy both by their own compliance and by encouraging others' compliance – particularly those they supervise. The management of an organisation is responsible for properly enforcing the policy and the effectiveness of its related procedures.

Once the policy is in place – i.e. fully implemented with all employees made aware of the policy requirements and their personal responsibilities – it is essential to strictly enforce this policy. Moreover, it must be seen by all to be enforced. To help achieve this, consequences for non-compliance, which are proportional to the seriousness of the offence, should also be clearly set out and employees made aware of these.

Non-compliance might range from a simple failure to register a relevant private interest as required, to refusal to resolve or properly manage a conflict of interest of which the employee is aware.

Depending upon the seriousness of the breach and the relevant legal and industrial relations frameworks, such sanctions may range from being at minimum a disciplinary matter, to sanctions for abuse of office or prosecution for corruption. All sanctions must be enforceable.

To complement sanctions for policy breaches, effective forms of redress can be provided through positive management. For example, such measures could include retrospective cancellation of affected decisions and tainted contracts, and exclusion of beneficiaries from future processes. These forms of redress can be very effective in discouraging those who may seek to benefit, directly or indirectly, from such breaches.

Breaches of policy can be detected through monitoring mechanisms established for this purpose. These mechanisms will include management and internal controls as well as external oversight functions, such as independent auditors or an ombudsman. Organisations should ensure that these mechanisms and functions work together to detect and discourage non-compliance with required standards.

Effective complaint mechanisms for dealing with allegations of non-compliance should also be developed, together with clear rules and procedures for reporting violations, and sanctions for those who abuse the complaints mechanism. To encourage reporting, the organisation should ensure that those wishing to make a disclosure in accordance with correct procedures can feel confident that they will be protected by the organisation against reprisal.

7 REVIEW THE POLICY

As with all organisational policies and procedures, it is essential that a formal process is established for regularly monitoring and evaluating the effectiveness of the conflicts of interest policy.

A review should be capable of revealing how effective the policy is in terms of compliance and outcome. This can only be effective if managers and staff are consulted about their experiences in using the policy and its procedures.

The policy and associated procedures will need to be updated, adjusted or rewritten as necessary, to keep pace with a continuously evolving environment and to ensure that they remain relevant and effective in dealing with current and anticipated conflicts of interest.

This periodic system assessment should include reviewing at-risk areas within the organisation, and its activities, for potential conflicts. At the same time the organisation needs to review current assumptions and preventive measures, and to identify new measures, which deal with emerging conflicts of interest. For example, the impact of new technology (such as internet trading) may require procedures to effectively record an individual's regularly changing pecuniary interests.

For this reason, involving staff and other interested parties in the review process can substantially contribute to the improvement of the policy and existing procedures. As users, their opinion and experience in dealing with the day-to-day implementation of the conflicts of interest policy can bring a practical aspect into the process, and help build a common understanding of the organisation's requirements.

Where appropriate, it is also useful to draw upon others' experiences of risk, such as those of clients and partner organisations. Apart from tapping into a broader set of experiences, this strategy also indicates the organisation's continuing commitment to the process of risk management and safeguarding its integrity.

An important final step in the review process is to ensure all staff receive up-to-date information about any changes to the policy or procedures, to help them understand any new principles and rules, and improve their practical decision-making skills. Support mechanisms should also be provided to help managers review and improve their skills in identifying, resolving and managing conflicts, and providing sound advice on this issue to their staff.

RESPONSIBILITIES

Organisations

The role of the organisation is to identify major areas of activity where conflicts of interest may occur, and take the action necessary to establish policies and procedures for managing conflicts when they arise. The CEO and Senior Executives and, in some instances, governing Boards are the appropriate people to take organisational action.

Essentially, an organisation's responsibilities in this area are to:

- provide a clear and realistic description of what circumstances and relationships are likely to lead to conflicts of interest for those in the organisation
- ensure staff and managers know what is required of them in relation to identifying and declaring conflicts of interest (when, in what situations, how etc.)
- develop formal procedures to allow staff and managers to disclose their interests in a transparent manner
- provide staff and managers with relevant and effective strategies to manage conflicts of interest appropriately
- develop appropriate procedures for managing conflicts of interest.

Managers and supervisors

Managers and supervisors have a role as organisational leaders in implementing and giving effect to the policies developed by the organisation on a day-to-day basis. They are also in a position to demonstrate how a conflicts of interest policy should operate by setting an example when their own conflicts arise.

Individual public officials

Individuals make up the organisation and, regardless of their level, each person has a responsibility to follow organisational policy and procedural requirements established to manage conflicts of interest. Employees and managers alike are also responsible for monitoring their own interests and the possibility that such interests may conflict with their public duty.

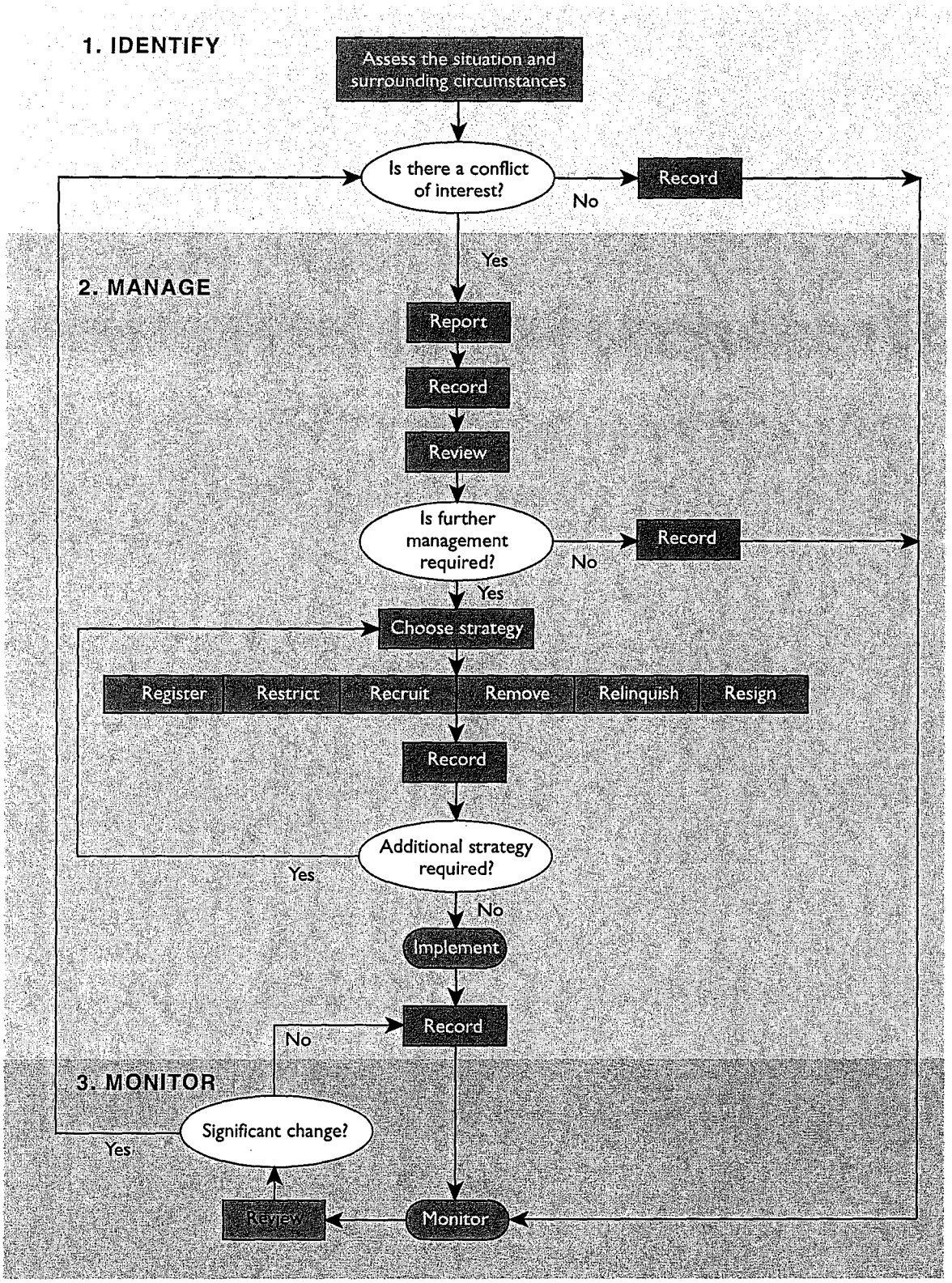
Individual public officials must:

- be aware of potential conflicts of interest that might affect them
- avoid where possible any obvious conflicts that they encounter
- promptly identify and disclose any actual or potential conflicts of interest that might affect (or might be perceived to affect) the proper performance of their work.

MODEL DECISION-MAKING FLOWCHART

The following flowchart illustrates the steps that should be taken in deciding how to deal with conflicts of interest. There are three major stages in the process – identify, manage and monitor. In application each stage should flow seamlessly to the next. The flowchart can be incorporated into policy documents and used as a model management framework to guide individual decision making.

The model is expanded on in the Toolkit that accompanies this guide.


1. IDENTIFY
Assess the situation and surrounding circumstances
Is there a conflict of interest?
No
Record
Yes
2. MANAGE
Report
Record
Review
Is further management required?
No
Record
Yes
Choose strategy
Register
Restrict
Recruit
Remove
Relinquish
Resign
Record
Additional strategy required?
Yes
No
Implement
Record
No
3. MONITOR
Significant change?
Yes
Review
Monitor

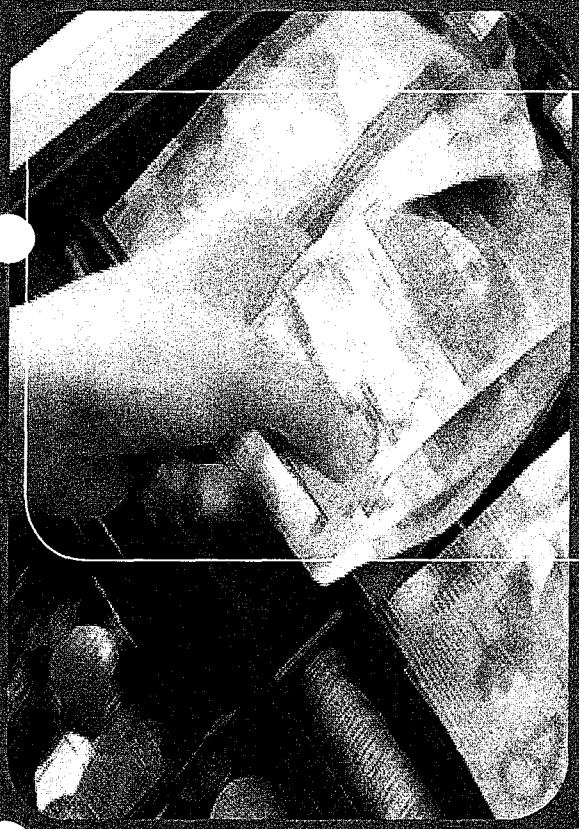
THE TOOLKIT

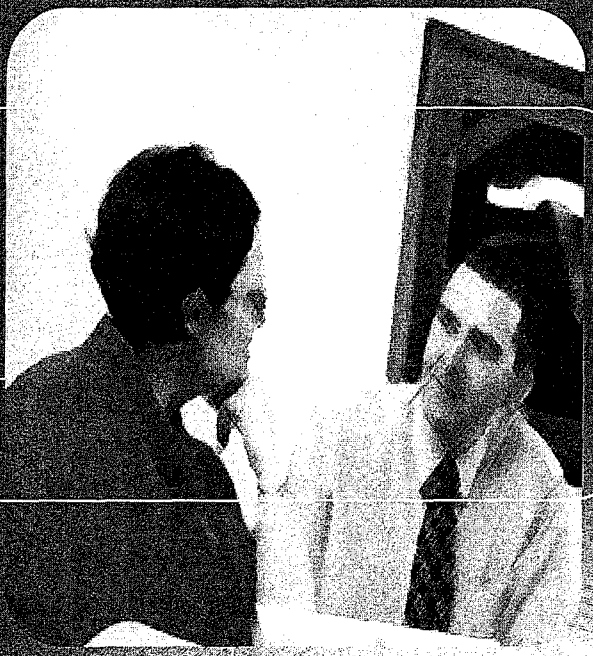
This guide provides the overarching principles, guidelines and a management model that should underpin the development and implementation of an effective approach for the management of conflicts of interest.

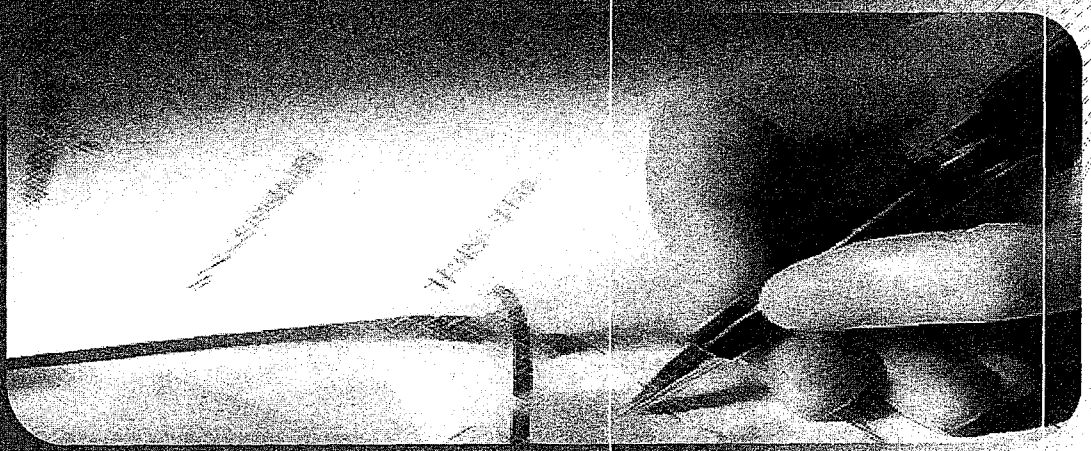
The Toolkit moves to the next level by providing tools to practically develop and implement an effective conflicts of interest policy. The tools have generic application – they can assist any organisation on a step-by-step basis to develop and implement a policy that is specific and customised to that organisation, and can assist any public official in identifying, managing and monitoring any conflict of interest that may arise.

Facing the facts

A CMC guide for dealing with suspected official misconduct in Queensland public sector agencies





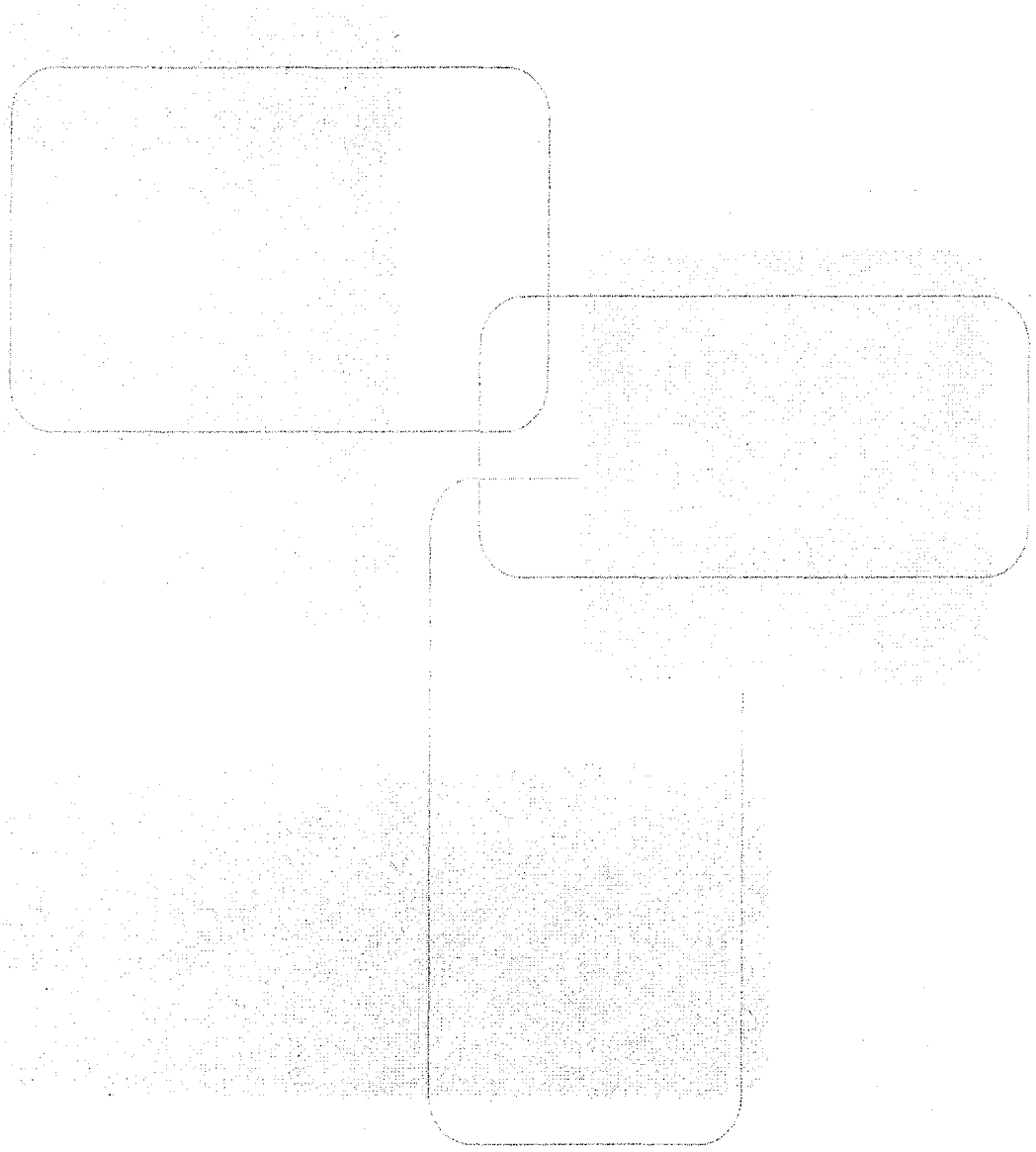


CRIME AND MISCONDUCT COMMISSION

QUEENSLAND

Facing the facts

A CMC guide for dealing with suspected official misconduct in Queensland public sector agencies



CRIME AND MISCONDUCT COMMISSION

QUEENSLAND

CMC Vision:
To be a powerful agent for protecting Queenslanders from major crime and promoting a trustworthy public sector.

CMC Mission:
To combat crime and improve public sector integrity.

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Contents

Part 2

Foreword

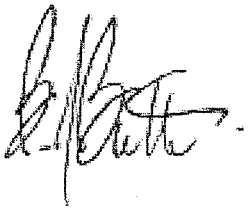
The Crime and Misconduct Commission has a responsibility to improve integrity and reduce misconduct in the Queensland public sector. We are also required to increase the capacity of public sector agencies to deal with and prevent misconduct.

To gain your point of view on how we can best do this, last year we surveyed a wide cross-section of agencies throughout the state. The information gained from that survey is still being processed, but one fact that came out very clearly was that most agencies would appreciate some clear guidelines on how to deal with the official misconduct matters referred to them by the CMC.

In response to that plea, the CMC has produced this guide. It puts into perspective the role of the CMC, explains an agency's obligation to report to us, defines the term 'official misconduct', outlines the various options available to public sector agencies in dealing with their own suspected official misconduct, and, most of all, details the steps involved in conducting a formal investigation to meet the exacting standards of the CMC. The guide finishes with a discussion on how to manage the impact of an investigation in the workplace and how to use the lessons learned in an investigation to prevent future occurrences of the same problem.

In preparing this guide, the CMC owes a debt of gratitude to the New South Wales Ombudsman, who has permitted us to dip into its publication *Investigating complaints: a manual for investigators*, adapting it to the Queensland context. We would also like to acknowledge the help provided by the very useful booklets *Fact finder* and *How to handle the effects of an ICAC investigation: a guide for public sector managers*, produced by the Independent Commission Against Corruption.

This guide is not a one-off document. It will be kept relevant by continuous updates, which will appear on our website at <www.cmc.qld.gov.au>. I recommend it to you, trusting that it will make your job of dealing with misconduct noticeably easier, and that it will strengthen the bond of cooperation between the CMC and public sector agencies.



Brendan Butler SC
Chairperson
Crime and Misconduct Commission

Acknowledgments

The CMC would like to thank the New South Wales Ombudsman for permission to use and adapt to the Queensland context significant portions of its publication, *Investigating complaints: a manual for investigators*.

We also acknowledge the considerable use we made of the booklets *Fact finder* (2002) and *How to handle the effects of an ICAC investigation: a guide for public sector managers* (1999), produced by the Independent Commission Against Corruption.

Finally, we would like to thank the many people who contributed in various ways to the production of this guide: writers, advisers, coordinators, editors, proofreaders and designers. A special acknowledgment is extended to the staff of the CMC's Capacity Development Unit, led by Ms Susan Johnson, who supplied the inspiration, encouragement and dogged determination so necessary to bringing a project of this kind to successful completion.

Introducing these guidelines

to CEOs, managers and investigators in public sector agencies

The Crime and Misconduct Act 2001 (Qld) confirms the obligation on CEOs to report cases of suspected official misconduct to the CMC, but it also emphasises that agencies should, wherever possible, resolve these matters themselves. This approach recognises that CEOs and managers are the ones best placed to deal with the misconduct that occurs within their own agency. At the same time, the CMC continues to investigate serious instances of misconduct when the public interest demands it or an agency is in need of our help.

The response to misconduct will vary from case to case depending upon the nature and seriousness of the alleged misconduct. The investigative response is best for matters at or towards the serious end of the misbehaviour spectrum — that is, an investigation is recommended for cases where the conduct, if proved, could result in dismissal or demotion. At the other end of the spectrum are complaints best dealt with by prompt managerial action.

These guidelines are designed to help CEOs and managers recognise when they need to refer a matter to the CMC and decide the best way of dealing with particular matters. They also give practical advice about conducting an investigation. They should also enable CEOs and managers to better understand the CMC's monitoring role and what we will be looking for when monitoring your agency's response.

The CMC recognises that the last decade has seen significant growth in the corporate governance and accountability demands placed on public sector agencies and we are conscious of not wanting to add to those demands unreasonably. Hence, these guidelines have been written bearing in mind your other management responsibilities and the requirements or views of other agencies such as the Office of Public Service Merit and Equity and Crown Law. At the same time, these guidelines emphasise the important responsibilities and obligations imposed on CEOs and managers by the Crime and Misconduct Act in relation to suspected official misconduct.

Through these eleven modules, CEOs will be reminded of their obligation to report suspected official misconduct to the CMC and their responsibilities in relation to dealing with suspected official misconduct referred to them by the CMC. Investigators will be given practical advice on conducting high-standard investigations in accordance with the requirements of the CMC. And senior managers will receive the sort of guidance they need in dealing with misconduct, including preventing its recurrence, and in managing the impact of an investigation on staff procedures and staff morale.

While developing these guidelines, the CMC has been aware of the need for a consistent and comprehensive approach throughout the public sector. The jurisdiction of the CMC is diverse. It encompasses agencies such as government departments, statutory authorities, boards and committees, and local government councils. As these guidelines have been designed to be used throughout the public sector, they are necessarily generic. They do not provide advice on legislation or rules that might be specific to a particular agency. They do, however, provide practical advice on planning an

investigation, maintaining the integrity of the process and ensuring confidentiality and fairness during the process.

Structure of these guidelines

- Modules 1 to 3 take a close look at the relationship between the CMC and Queensland public sector agencies:
  - *Module 1 What does the CMC do with complaints about your agency?* outlines how the CMC receives, assesses, refers and monitors complaints.
  - *Module 2 A CEO's reporting obligation* explains the statutory obligation on CEOs to report suspected official misconduct to the CMC, and defines the term 'official misconduct'.
  - *Module 3 Managing a matter referred by the CMC* is designed to help CEOs or their delegates decide the best way to deal with matters that have been referred to them by the CMC.
- Modules 4 to 8 deal with investigating official misconduct in accordance with the requirements of the CMC:
  - *Module 4 Responsibilities of the investigator* discusses what is required of an appointed investigator and emphasises the importance of ensuring confidentiality and procedural fairness when investigating a matter.
  - *Module 5 Conducting an investigation* provides detailed guidance on how to conduct a formal investigation.
  - *Module 6 Gathering evidence* explains the nature of evidence and outlines how to go about gathering three of the four types of evidence: documentary evidence, expert expect and evidence from a site inspection.
  - *Module 7 Gathering oral evidence: interviewing* concentrates on the fourth and most difficult form of evidence: oral evidence, or the art of the interview.
  - *Module 8 Troubleshooting* identifies what can go wrong during an investigation and provides advice on dealing with some common problems.
- *Module 9 At the end of the investigation* focuses on the investigation report and on what is involved in closing down an investigation.
- *Module 10 Managing the impact of an investigation* offers advice to managers and supervisors on how to offset any negative impact of an investigation in the workplace.
- *Module 11 Considering prevention opportunities* gives practical advice to agencies to help them take advantage of opportunities to prevent, or at least minimise, workplace misconduct.

Keeping up to date with these guidelines

To ensure these guidelines are as helpful as possible, they will be continuously reviewed and updated. Please consult the CMC's website <*www.cmc.qld.gov.au*> for the most up-to-date version.

Please find at the back of this document a page headed 'Update record', where you can record future updates of these guidelines.

Seeking further help

Unsure whether a matter constitutes official misconduct or whether it should be reported to the CMC?

Contact the Principal Complaints Officer on (07) 3360 6286, or the Receivals and Assessments Unit's Executive Legal Officer on (07) 3360 6287 or the Director, Complaints Services on (07) 3360 6330. Or e-mail <complaints-services@cmc.qld.gov.au>.

Need more information about the CMC's monitoring function?

Contact the Monitoring and Support Unit's Executive Legal Officer: *(07) 3360 6207* or <*complaints-services@cmc.qld.gov.au*>.

Feeling out of your depth and need help with the investigation?

Contact the Monitoring and Support Unit's Executive Legal Officer on (07) 3360 6207 to discuss whether the CMC might investigate the matter itself or contact the Director, Complaints Services on (07) 3360 6207 to discuss whether the CMC will conduct an investigation in cooperation with you. Or you may ask the CMC to review your investigation. Telephone *(07) 3360 6330* or e-mail <*complaints-services@cmc.qld.gov.au*>.

Does the referred matter contain allegations against a very senior executive?

Seek advice from:

- the Director, Complaints Services, on *(07) 3360 6330*, or
- the Assistant Commissioner, Misconduct, on *(07) 3360 6242*, or
- the CMC's Chairperson on (07) 3360 6203.

Or e-mail <*complaints-services@cmc.qld.gov.au*>.

The matter requires an urgent determination?

For an immediate response, contact the Director, Complaints Services: *(07) 3360 6330* or <*complaints-services@cmc.qld.gov.au*>.

Considering suspending the officer who is the subject of the complaint?

To discuss the possible impact of suspension on any future investigation, report immediately to the Director, Complaints Services: *(07) 3360 6330* or <*complaints-services@cmc.qld.gov.au*>.

Do the allegations involve a public-interest disclosure as defined in the *Whistleblowers Protection Act 1994*?

See the CJC publication Exposing corruption: a CJC guide to whistleblowing in Queensland (also available on the CMC's website: <*www.cmc.qld.gov.au*>) and the Office of Public Service Merit and Equity information sheet Managing for a public-interest disclosure: checklist for complying with the *Whistleblowers Protection Act 1994* (available at <*www.opsme.qld.gov.au*>).

Or contact the CMC's Senior Complaints Officer: *(07) 3360 6286* or <*complaints-services@cmc.qld.gov.au*>.

Unsure about how much information you should impart about an investigation?

Seek advice from the CMC's Director, Complaints Services: (07) 3360 6330 or <*complaints-services@cmc.qld.gov.au*>.

Unable to tape-record an interview and need advice about taking written statements?

Contact the CMC's Monitoring and Support Unit: (07) 3360 6128 or <*complaints-services@cmc.qld.gov.au*>.

Receiving media interest?

First refer to your agency's media policy. If necessary, your agency (through your CMC Liaison Officer) may contact the CMC's Monitoring and Support Unit for advice: (07) 3360 6128 or <*complaints-services@cmc.qld.gov.au*>.

In need of misconduct prevention advice as a result of an investigation?

Contact the CMC's Misconduct Prevention Manager: (07) 3360 6158 or <*prevention@cmc.qld.gov.au*>.

Add other contact details here:

What does the CMC do with complaints about your agency?

module 1

A guide for CEOs and managers in public sector agencies

This module explains the CMC's misconduct function. It outlines how the CMC receives, assesses, refers and monitors complaints. The next module will look more closely at the CEO's reporting obligation.

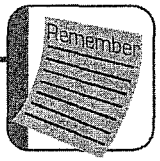
Contents

Module 1

How do complaints come to the attention of the CMC?

Suspected official misconduct (see Module 2 for a definition of 'official misconduct') comes to the attention of the CMC in various ways. It can come in the form of a complaint from a member of the public via letters, faxes, e-mails and telephone calls. It can come as information from whistleblowers, anonymous sources or newspaper articles. It can come from the CMC's own activities or intelligence sources. Many matters come from CEOs of public sector agencies who have a statutory obligation to inform the CMC of any suspected official misconduct occurring in their own agency. (See Module 2 for more details about a CEO's reporting obligation.)

remember



Although, for the sake of simplicity, these guidelines frequently refer to 'complaints', not everything that comes into the CMC is cast in the form of a complaint. Sometimes information is given to us that suggests the possibility of misconduct.

Regardless of how complaints come into the CMC, the Crime and Misconduct Act requires the CMC to refer them to the agency concerned wherever possible.

The remainder of this module looks more closely at the CMC's misconduct role.

What is the misconduct role of the CMC?

Four key principles underpin the CMC's misconduct role (see s. 34 of the Crime and Misconduct Act). They are: cooperation, capacity building, devolution and the public interest.

Cooperation means that the CMC works with public sector agencies wherever it can to prevent and deal with official misconduct.

Capacity building means helping public sector agencies deal with and prevent official misconduct and recognising the need for public sector managers to receive support.

Devolution, which is the key principle underpinning these guidelines, means that action to deal with suspected official misconduct should take place within the agency concerned, subject to the other three principles.

Public interest refers to the CMC's overriding responsibility to promote public confidence in the integrity of public sector agencies and in the way they deal with misconduct. It also means that, when necessary, the CMC will itself investigate matters or even take over agencies' investigations. We will do so only after considering:

- the capacity of, and the resources available to, an agency to deal with the misconduct effectively
- the nature and seriousness of the misconduct, particularly if there is reason to believe that misconduct is prevalent or systemic within an agency, and
- any likely increase in public confidence in having the misconduct dealt with by the CMC directly.

How does the CMC assess matters?

All matters that come into the CMC are assessed carefully and as promptly as circumstances allow.

An assessment committee meets regularly and provides advice to the officer delegated with the authority of the CMC to make an assessment decision. This officer considers the most appropriate way of dealing with each complaint in accordance with the four key principles in the Crime and Misconduct Act (see also above).

During the assessment process all relevant information is gathered from both external and internal sources as promptly as possible to enable the CMC to make the decision about what action is most appropriate for dealing with the complaint. As part of the assessment process, a complaints officer communicates with a representative of the agency (usually a designated CMC Liaison Officer or the CEO) to consult about the capacity of the agency and the agency's view about what action is appropriate, unless that advice has already been provided by the agency in the report of the complaint. If the CMC assessment decision is different from the outcome sought by the agency, the CMC will discuss it with the agency.

Outcomes of the assessment process

The CMC may decide to do one or more of the following (see s. 46 of the Act):

- refer the complaint to the agency to deal with, subject to some form of monitoring by the CMC
- deal with the complaint itself
- deal with the matter in cooperation with the agency
- refer possible criminal activity to the QPS
- refer the complaint to another agency to deal with, or
- take no further action.

Of all the possible outcomes of a CMC assessment, the first-mentioned option – refer the complaint to the agency to deal with – is the focus of these guidelines.

The CMC will notify the agency of its assessment decision.

If an allegation is referred to the agency to deal with, the CMC may also provide:

- recommendations about how to deal with the matter
- investigation advice (if appropriate)
- prevention advice and material (if appropriate).

What about criminal matters?

Many matters that come to the attention of the CMC are capable of being categorised as both official misconduct and a criminal offence (see Module 2 for a definition of official misconduct). This means that a single incident is potentially within the jurisdiction of the CMC, the agency and the Queensland Police Service (QPS), so each agency needs to be aware of the impact of its decisions on the other agencies.

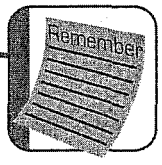
The CMC will often refer a matter that is of a minor criminal nature to the agency to deal with, leaving it up to the agency to decide whether or not to also report the matter to the QPS. Whether or not the agency decides to report the matter to the QPS, the CMC will expect the agency to deal with the disciplinary aspects of the matter.

Sometimes the CMC will refer a matter both to the police and to the agency to deal with – the QPS to deal with the criminal aspects and the agency to deal with disciplinary aspects and any prevention issues.

In cases where the agency is responsible for dealing with some aspects and the QPS with others, you should obtain advice from your legal unit about when the time is appropriate to institute disciplinary proceedings. As there is no hard-and-fast rule about whether disciplinary proceedings should await the outcome of criminal proceedings, you will need to determine this on a case-by-case basis. Your agency should liaise with the QPS to ensure that any proposed disciplinary proceedings do not interfere with the police investigation and vice versa.

Occasionally the CMC will refer a matter involving possible criminal conduct to the QPS without at the same time referring the matter to the agency involved. We may defer our decision about how to deal with the disciplinary aspects of the matter until the outcome of the police investigation because the conduct involved is very serious and may warrant the CMC instituting disciplinary proceedings before the Misconduct Tribunal if the criminal prosecution fails. This is because the standard of proof required for disciplinary proceedings is lower than that required for a criminal prosecution, and other evidence may be admissible before the tribunal. Hence, the fact that the prosecution has failed will not necessarily preclude the institution of disciplinary proceedings.

remember



The CMC does not abandon an agency once a matter has been referred to it for attention. When asked, it will provide help and guidance and, in the interests of ensuring public confidence, it may also monitor how the agency deals with the matter.

How does the CMC monitor matters?

The CMC is empowered to examine how public sector agencies deal with the matters referred to them (s. 48 of the Act).

When the CMC refers a matter to an agency, we may advise the agency that the matter will be the subject of some form of monitoring. For example, on the assessment of a complaint, we may decide to monitor the matter by any of the following means:

- **Close monitoring.** In some cases, the CMC may closely monitor a matter, requiring the agency to report on progress at various stages throughout the investigation. Close monitoring will generally be employed only when it is in the public interest to do so, such as when the allegations:
  - are in the public domain, or
  - are of a serious nature, or
  - relate to a senior officer in the organisation.
- **Review before finalisation.** In other cases, the CMC may review a matter the agency has completed by investigation or other resolution process before the agency implements a decision on what action, if any, it proposes to take. The review will consider:
  - the adequacy, impartiality and transparency of any investigative or other resolution processes
  - the appropriateness of the conclusions and recommendations made as a result of any investigation or other process
  - the appropriateness of any decision that has been made on whether or not to lay disciplinary charges or any other action proposed to be taken
  - where charges are to be laid, the appropriateness of the charges and of the tribunal of fact to hear the charges
  - the appropriateness of any systemic, procedural or preventive recommendations.

  In considering the question of appropriateness, the CMC will not seek to assert a contrary view unless it believes that the basis of the decision or recommendations was unsound or unreasonable. The CMC acknowledges that there may be various legitimate courses of action available to the public official, and its review will look at whether the choice made by the official is transparent, justifiable, accountable and within the range of acceptable options (see Module 3).
- **Review after finalisation.** In yet other cases, the CMC will review the matter after the agency has dealt with it and taken any action or imposed any penalty against the person. The review will consider the same factors as outlined above in relation to a review before finalisation.
- **Outcome advice.** In most matters referred to an agency to deal with, the CMC will simply require the agency to report the outcome.

In addition to monitoring those individual matters identified at the time of referral, the CMC may review any other matter at any time. The complainant and the agency need to be aware that any matter referred to them may be subject to a detailed review, whether or not the CMC indicated an intention to do so at the time of referring the matter to the agency to deal with.

The monitoring function is carried out primarily by the Monitoring and Support Unit within Complaints Services. This unit is headed by an Executive Legal Officer – phone (07) 3360 6128 – and staffed by lawyers, police and other investigators, with the assistance of Research and Prevention Officers.

important

Any matter may be the subject of a review by the CMC at any stage, including as part of an audit of a class or classes of complaints targeted or randomly selected for monitoring.

What if circumstances change?

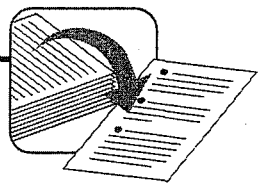
Sometimes circumstances change after an assessment has been made, requiring the CMC and the agency to reconsider their response.

For example, the CMC may receive information that requires it to assume responsibility for dealing with the matter. Or your investigation may reveal more complex or serious matters which require intervention by the CMC or a joint investigative response. Or the CMC may also need to become more involved if the matter becomes politically sensitive or starts to attract media attention. In such cases, you may contact the Director, Complaints Services, to discuss whether the CMC might investigate the matter itself or in cooperation with you (see s. 46[2][f] of the Act). Or you may ask the CMC to review your investigation.

How much should you tell people about a matter?

After it becomes known that a matter has been reported to the CMC, people may approach you wanting information on how it is progressing. You should ensure that anyone with a proper interest in the matter is kept informed on a regular basis, subject to the need to maintain confidentiality (see Module 4). You can ask us about how much information you can give stakeholders pending the decision.

to sum up



Four key principles underpin the CMC's misconduct function: cooperation, capacity building, devolution and the public interest. This means that the CMC is obliged to work with public sector agencies to raise and maintain the integrity of Queensland public institutions; that it must, wherever possible, refer complaints to the agency concerned while ensuring that the agency has the capacity to deal with the matter; and that it must conduct investigations itself if that is in the public interest.

Complaints come to the CMC in various ways, one being through CEOs of public sector agencies. Module 2 explains the CEO's reporting obligation, while Module 3 is designed to help you decide the best way to deal with matters that have been referred to you by the CMC.

A CEO's reporting obligation

A guide for CEOs in public sector agencies

module 2

This module focuses on the CEO's statutory obligation to report suspected official misconduct to the CMC. Reports from CEOs are only one of the ways in which the CMC receives complaints or information about possible official misconduct, but it is important for agencies to thoroughly understand this obligation.

Contents

When should you report a matter to the CMC?

module 2

A matter does not have to be a formal complaint for you to report it to the CMC. For example, the findings of an internal audit report or an issue that arises in the course of resolving a grievance may need to be reported to the CMC.

It is important to remember that, as well as referring complaints, you are obliged to report any information or matter that may *suggest* official misconduct.

When you report a complaint to the CMC, the CMC does not take this to indicate that you have formed a view about the guilt of the officer concerned. The obligation to report is intended to protect the public interest by requiring that the independent overseeing body, the CMC, be advised of all complaints that may involve official misconduct. It also protects the public sector agency from allegations of a cover-up.

Must you believe the allegation before reporting it?

No – the referral threshold for suspected official misconduct is low.

There has been much discussion about what level of suspicion the CEO must have about the conduct. In the past, for example, some agencies conducted inquiries into the complaint to determine whether or not there was any substance to it or to make an assessment about whether the complaint was credible before reporting to the CMC. This is not in accordance with the reporting obligation as set out in the Act.

The Crown Solicitor considered the question 'When does a *suspicion* of official misconduct come into existence?':

> Importantly, the Act does not place any qualification on the suspicion. It does not say, for example, that the public official must suspect on *reasonable grounds* that official misconduct has occurred.
>
> The formation of the suspicion does not require anything in the nature of proof; however, it obviously requires at least a rational basis. A mere allegation of conduct that might be official misconduct may be enough to create suspicion, unless the public official has information, or there is something about the allegation, that shows beyond doubt that it is not correct.
>
> For example, an allegation that a departmental employee had been involved in some serious misconduct on a specific occasion, place and time when the CEO knows that the person was in another place at that time might not give rise to a suspicion if the evidence was sufficiently clear.
>
> On the other hand, the CEO might believe very strongly that the person complained about is of good character and would never do such a thing as was alleged. However, this would not be sufficient, in my opinion, to justify the Chief Executive taking the view that no suspicion existed and that no notification was required.

(Conrad Lohe, Crown Solicitor: 'Managing disciplinary action: responsibilities of Chief Executives', CEO Breakfast Briefing, 10 April 2003)

Similarly, some agencies have thought that the section of the Crime and Misconduct Act that allows them to deal with complaints (s. 44) means that they can deal with suspected official misconduct *before* reporting it to the CMC. This is not the case. Crown Law advice is that the reporting obligation (s. 38) takes precedence and agencies should not start dealing with a matter until it has been referred to them by the CMC.

One of the reasons we require CEOs to report a matter to us before starting inquiries is that the CMC might already have received information about the matter. The reporting obligation also protects CEOs from the accusation of covering up suspected official misconduct.

The exception to this rule is where the reporting obligation of a CEO has been modified by directions issued under section 40 of the Crime and Misconduct Act. For example, the CMC has issued directions to some agencies with a comparatively high volume of complaints to allow them to report certain categories of minor complaint by schedule on a regular basis rather than reporting them individually. The agency can start dealing with those specified matters without awaiting a referral from the CMC.

From the time of a matter coming to your attention you need to be aware of your responsibility to maintain confidentiality (see Module 3). Where necessary, and after consulting with the CMC, you may also need to take discreet steps to preserve evidence (see also Modules 3 and 4).

remember

As well as referring complaints, CEOs are obliged to report any information or matter that may ***suggest*** official misconduct — for example, the findings of an internal audit report or a matter that arises in the course of resolving a grievance.

What is 'official misconduct'?

Official misconduct is any conduct connected with the performance of an officer's duties that is dishonest or lacks impartiality, involves a breach of trust or is a misuse of officially obtained information. The conduct must be a criminal offence or serious enough to justify dismissal. Trying to influence a public officer to act improperly is also classed as official misconduct (see ss. 14 and 15 of the Crime and Misconduct Act).

When considering whether an allegation may involve official misconduct it might be helpful to ask yourself the following questions:

1 Would the conduct, if proven, amount to:
   - a criminal offence *or*
   - a disciplinary breach providing reasonable grounds for dismissal?

2 If so, is the alleged conduct connected to the performance of the officer's duty?

3 If so, might it involve behaviour that was not honest or impartial, a breach of trust, or a misuse of information or material acquired through the officer's position?

In considering the first question, you need to bear in mind that criminal offences are not limited to offences contained in the Criminal Code. They are also found in a wide range of other Acts of Parliament, including the *Local Government Act 1993*, the *Environmental Protection Act 1994*, the *Corrective Services Act 2000*, the *Weapons Act 1990*, the *Liquor Act 1992*, the *Freedom of Information Act 1992*, the *Invasion of Privacy Act 1971* and the *Electoral Act 1992*. In fact any offence other than a regulatory offence (specified in the Regulatory Offences Act) is a criminal offence.

You also need to bear in mind that an allegation that could constitute official misconduct may be about something quite minor, such as a teacher pushing a student or an employee pilfering $10 from the petty-cash tin. These types of conduct fall within the definition of official misconduct because they are allegations of criminal conduct (assault and theft respectively) occurring in the course of the officer's duties. (Note that the theft may also have to be reported to the Queensland Audit Office and the police under the requirements of s. 42[2] of the Financial Management Standard 1997.)

Don't get confused between 'misconduct' and 'official misconduct'

The terms 'misconduct' and 'official misconduct' often cause confusion. Some of the confusion arises from 'misconduct' being defined differently in the *Public Service Act 1996* and the *Crime and Misconduct Act 2001*.

In the Public Service Act, misconduct encompasses any disgraceful or improper conduct relating to an officer's duties *and* any private act by an officer that compromises the officer's public duties.

For all public sector agencies except the QPS, 'misconduct' in the Crime and Misconduct Act equates to 'official misconduct'. It refers only to conduct connected with the performance of an officer's duties – it does not relate to any private misconduct by the officer. The examples below might help you distinguish between 'official misconduct' and 'misconduct'.

Examples of misconduct and official misconduct

Conduct that amounts to misconduct *and* official misconduct:

- a public servant cheating on travel allowances [amounts to official misconduct because it could be a criminal offence and is dishonest]
- a residential-care officer assaulting a client [amounts to official misconduct because assault is a criminal offence and a breach of trust]
- a purchasing officer of a government department accepting 'kickbacks' in the tendering process [amounts to official misconduct because it is a criminal offence and dishonest]
- a teacher assaulting a student who is in the teacher's care [amounts to official misconduct because the conduct in question is a criminal offence and a breach of trust]
- a public servant manipulating a selection panel decision to ensure that a relative gets the job. [amounts to official misconduct because the conduct in question could result in the dismissal of the officer concerned and lacks impartiality]

Conduct that amounts to misconduct but NOT official misconduct:

- a public servant insulting a client or customer [does not amount to official misconduct because it is not serious enough to warrant dismissal]

- a single act of sexual harassment that falls short of a criminal offence [does not amount to official misconduct because a it is not serious enough to warrant dismissal]
- a public servant, whose duties involve dealing with children, abusing children in his or her care while acting as a community youth group leader on weekends. [does not amount to official misconduct because the misconduct, though serious, is not connected with the performance of the officer's official duties]

remember

A couple of simple rules are:

- All official misconduct relates to disgraceful or improper conduct connected to the performance of official duties and therefore all official misconduct is also misconduct as defined in the Public Service Act.
- Misconduct performed in a private capacity will rarely be official misconduct (except in those instances when a public servant, acting in a private capacity, attempts to improperly influence another public official).

The following scenarios have been prepared to help you decide what matters should and should not be reported to the CMC.

scenarios

Accusation of preferential treatment

A telephone complainant who does not give her name (see Module 3 for advice on dealing with anonymous complaints), but who explains that she was an unsuccessful tenderer for a project within your organisation, alleges that a competitor has received preferential treatment in the tendering process. She says she saw the competitor golfing with the purchasing officer from your organisation.

Should you report this to the CMC?
This allegation raises the suspicion of official misconduct because it points to the possibility of corruption in the tendering process involving a breach of trust by a public officer. In the absence of any other knowledge or information, you should report the allegation to the CMC.

Possible misappropriation

An audit discloses that a laptop and printer assigned to a unit within your organisation are missing. Your inquiries reveal that the laptop and printer have been at the manager's home for some months. No approval has been sought or granted.

Should you report this to the CMC?
This allegation raises a suspicion of official misconduct because it suggests that the manager has, without permission, taken property from the workplace to use for private purposes. This involves a breach of trust and could constitute an offence of misappropriation. Therefore, in the absence of any other information, you should report this allegation to the CMC.

Alleged assault

Allegations have been made that a staff member assaulted another staff member at your organisation's Christmas party.

Should you report this to the CMC?

This allegation is one of criminal conduct on the part of the staff member, but on the information provided there is no suggestion that it was related to the performance of the staff member's official duties. Accordingly, on that information alone, the reporting obligation is not activated.

Alleged theft

Allegations have been made that an office manager has stolen funds from a suburban cricket club where he is the treasurer.

Should you report this to the CMC?

These allegations are of conduct that would constitute a criminal offence, but they relate to the conduct of the manager in his private capacity and have no connection with the performance of his duties as a manager of a public sector agency. Therefore they do not constitute allegations of official misconduct and do not need to be reported to the CMC.

The responses to the above scenarios could change with the addition of only one further piece of information. Each case needs to be assessed according to the particular facts. You are invited to contact the CMC for advice.

What is the best way to report suspected official misconduct?

The CMC has produced a referral form that outlines the information that agencies should provide in their report. The form is available on the CMC website, <www.cmc.qld.gov.au>. You do not have to report in this way – you can write a letter instead. But please include the same details in your letter and address it to the Director, Complaints Services.

The form requests the following:

- details of the notifier (reporting officer), the complainant and the person/s complained against, and the outcome that the complainant desires
- a précis of the matter
- notes on the action taken to date, if any
- an assessment of the agency's capacity to deal with the matter
- a suggestion about the most appropriate way to deal with the complaint
- any other relevant details, such as background information, whether or not the complaint has been reported to any other agencies, witnesses, whether an assessment of the complaint is required urgently, and evidentiary matters.

Your agency will not always have all these details, but you should not defer reporting the matter while you conduct further inquiries to get the information. You should, however, provide as much detail as you possess to help the CMC assess the complaint. You should also consider at this stage whether any documentary evidence needs to be preserved or secured. For further advice see Module 6.

If you are unsure about whether a matter may constitute official misconduct or whether it should be reported to the CMC, contact the Principal Complaints Officer on (07) 3360 6286 or the Receivals and Assessments Unit's Executive Legal Officer on (07) 3360 6287.

What about highly sensitive or urgent matters?

For matters that require a CEO or director-general to respond to their minister, or are highly sensitive for political or other reasons, or contain allegations against a very senior executive, you may seek advice from:

- the Director, Complaints Services, on (07) 3360 6330, or
- the Assistant Commissioner, Misconduct, on (07) 3360 6242, or
- the CMC's Chairperson on (07) 3360 6203.

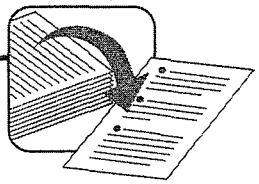
If you have a matter that requires an urgent determination, phone the Director, Complaints Services, directly for an immediate response.

If you are considering suspending the officer who is the subject of the complaint, you should report immediately to the Director, Complaints Services, to discuss the possible impact of suspension on any future investigation.

If the allegation involves a public-interest disclosure as defined under the *Whistleblowers Protection Act 1994*, see the CJC publication *Exposing corruption: a CJC guide to whistleblowing in Queensland* (also available on

the CMC's website: <www.cmc.qld.gov.au>) and the Office of Public Service Merit and Equity information sheet *Managing for a public-interest disclosure: checklist for complying with the Whistleblowers Protection Act 1994* (available at <www.opsme.qld.gov.au>). Or contact the CMC's Senior Complaints Officer on (07) 3360 6371.

12 to sum up



As a CEO of a public sector agency, you have a statutory obligation to report suspected official misconduct to the CMC. You should not report allegations that you know to be untrue (through other information that you already have), but you do not need to believe the allegation before reporting it.

Module 3 is designed to help you decide the best way to deal with matters that have been referred to you by the CMC.

Managing a matter referred by the CMC

A guide for CEOs and managers in public sector agencies

module 3

When the CMC refers a matter to a public sector agency for resolution, the CEO of the agency concerned takes on the responsibility for managing the process, including making the initial decision on how to deal with the matter – subject, of course, to the CMC's monitoring role as outlined in Module 1. The CEO may delegate this responsibility to a senior manager. This module assumes that you have the authority to manage the process for resolving complaints relating to your agency.

Contents

Starting points

Regardless of how you ultimately choose to handle a matter, you must from the outset of receiving it give careful consideration to maintaining confidentiality and preserving evidence.

Maintaining confidentiality

Preserving the confidentiality of the identity of the person making the complaint and the person who is the subject of the complaint, and keeping confidential the *fact* of an investigation, are all important because they minimise the risk of harm to all parties involved and ensure the integrity of any investigation. (See Module 4 for more about ensuring confidentiality during an investigation.)

Despite your best efforts, the fact that a complaint has been made may become known within your workplace or to people outside. It is important for you to manage this by giving careful consideration to what you can tell different stakeholders (complainant, subject officer, whistleblowers and so on). If unsure about what you should impart, seek advice from the CMC's Director, Complaints Services, on (07) 3360 6330. (See also Module 9 'Managing the impact of an investigation' for advice on managing communication in the workplace.)

You may also need to consider whether the person making the complaint is a 'whistleblower' making a public-interest disclosure and therefore subject to the provisions of the *Whistleblowers Protection Act 1994*. Severe penalties apply for breaches of the Act. For detailed information on public-interest disclosures, see the CJC publication *Exposing corruption: a CJC guide to whistleblowing in Queensland* (also available on the CMC's website: <www.cmc.qld.gov.au>) and the Office of Public Service Merit and Equity information sheet *Managing for a public-interest disclosure: checklist for complying with the Whistleblowers Protection Act 1994* (available at <www.opsme.qld.gov.au>). Or contact the CMC's Senior Complaints Officer on (07) 3360 6371.

Preserving evidence

As soon as a matter is referred to you, you must take steps to ensure that all relevant documentary evidence – files, notes, computer disks and so on – is preserved. This is particularly important with matters that are to be investigated.

Before appointing an investigator, you should consider whether or not any potential evidence is at risk of destruction. If so, you should take discreet steps to ensure that the evidence is made secure. (See also Module 6.)

Deciding how to deal with a referred matter

There is usually no single best way of dealing with a matter that has been referred to your agency by the CMC – there may be a range of valid responses. It is crucial to adopt the approach that best suits the character of the particular complaint. The key requirement is that your agency adopts a response proportionate to the nature and seriousness of the matter, and that your decision about how to deal with it can withstand scrutiny.

important

module 3

Not every complaint requires an investigation.

You should not take the view that because a complaint has been referred to your agency by the CMC it automatically requires an investigation. On the other hand, don't assume that because we have referred it to you we do not think it serious.

There are a number of possible options to choose, namely one or more of the following:

- do nothing because the matter is clearly frivolous or vexatious, lacks substance or credibility, or is an unjustifiable use of resources (see s. 44[3] of the Act)
- take a managerial response to the conduct of the officer concerned, such as increased supervision or performance management, guidance or counselling
- take managerial action to improve systems or procedures in the workplace
- take steps to resolve the complainant's concerns, such as by way of informal dispute resolution or more formal mediation processes
- investigate the complaint as the start of a formal disciplinary process against the subject officer.

Just because a complaint has been referred to you, it does not necessarily mean that there is substance to it. Remember, the reporting threshold is simply whether the complaint involved conduct that, if proved, *could* amount to official misconduct. You may need to make some initial inquiries before choosing the best way to deal with the matter. You will need to understand the nature and context of the complaint.

In some cases, the CMC will give a clear indication of what it expects an agency to do. For example, we may decide to closely monitor an investigation in accordance with section 48(1)(c) of the Act. If so, we will

notify the agency that we propose to do this when we refer the matter to the agency. In these cases, the agency should investigate the matter in accordance with the investigation guidelines set out in Modules 4–8.

If the CMC indicates that it will review the matter after finalisation, or that it is seeking outcome advice only, the agency is responsible for determining how to deal with the matter.

Considering whether to take any action

In some cases a complaint may not warrant any action at all. Ask yourself whether it is frivolous or vexatious or if it lacks substance or credibility. (Sometimes, the CMC has sufficient information to reach this conclusion and so will not refer the matter to you in the first place.) You do need to consider the matter carefully before drawing any conclusions.

Some helpful indicators that the complaint may be frivolous or vexatious are:

- the complainant has a history of making false or unsubstantiated complaints
- there is no information to support the allegation in any way
- the allegation is not serious or sensible, and is of such a nature that a reasonable person could not treat it as being bona fide
- the allegation is without any foundation and appears to be designed to harass, annoy or embarrass the subject officer
- the allegation is inherently improbable and there is no information that in any way supports it.

Bear in mind that a complaint that at first glance appears quite incredible may turn out to be true, as in the case study below.

case study

Bizarre allegation turned out to be true

The QPS reported an allegation to the CMC that a serving police officer was 'recruiting' adults and children as undercover police informants. The officer had allegedly been inducing them to provide him with samples of pubic hair and photographs of themselves naked, asserting this was part of the recruitment process.

At first glance, this allegation appeared too preposterous to be true, especially in relation to educated adults. Nonetheless the CMC investigated the matter, assisted by officers from the QPS. The investigation yielded evidence that established the truth of the allegations. The officer was convicted and sentenced to five years' imprisonment.

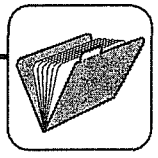
remember

Sometimes what appears to be inherently improbable can nonetheless be true.

Complaints are sometimes expressed in emotive terms or suggest malicious intent. Although a complainant's motive may cloud their judgment and colour the complaint, it should not stop you from considering the substance of the complaint. It is not uncommon for people with an ulterior motive to give accurate information about official misconduct. Careful analysis of such complaints should be made to isolate the basic information sources, which should then be assessed on their merits.

Do not write off a complaint simply because it is made anonymously, or because the complainant later withdraws the complaint. Although it may not be possible to rely on the complainant for evidence in either situation, the allegations should still be tested by other means if it is possible to do so. See the case study below.

case study



Anonymous complaints should not be written off

An anonymous complaint was referred to the CMC that an officer was using intellectual property of an agency to produce reports in a private consulting capacity for other agencies in work time and with work equipment. Allegations were made that senior management were aware of the activities and failed to take any action. The allegation was referred to the agency to investigate. The complaint was substantiated and the officer was formally disciplined.

When might action be an unjustifiable use of resources?

Taking further action can be considered an unjustifiable use of resources when:

- the law or policy alleged to have been breached is no longer in force
- the lapse of time between the alleged misconduct and the making of the complaint reduces the likelihood of productive investigation due to the inability to obtain relevant evidence
- the complaint is repetitious – without any additional grounds and containing no fresh allegations or evidence, it repeats the substance of a previous complaint that has been dealt with
- the complaint is not capable of substantiation in that there could not be any evidence capable of proving the allegations.

For example, allegations that three years ago, before the implementation of asset-control measures, it was common practice for staff to take stationery home for personal use would not be productive to investigate now.

However, although it may be an unjustifiable use of resources to pursue action against an individual officer this should not prevent you from considering what steps you can take to address systemic issues and implement prevention action (see also Module 10).

important

Your first inclination may be not to take any action.

Yet often the investment of resources in the short term can save considerable resources in the longer term. For example, a simple explanation to a complainant may answer their concerns, defuse a situation and stop any escalation of the complaint.

Considering options for further action

Once you have decided to take action, a range of options are available to you. These include **managerial response, mediation** and **investigation.**

Many complaints involve communication problems or misunderstandings that can be resolved by discussion between the parties or with a supervisor. Indeed, the majority of complaints may be able to be resolved at an informal level or through other processes, such as a managerial response or mediation, rather than formal investigation. Your agency may have some other way of handling less serious complaints that has been successful in the past. As long as you can justify your decision, the CMC will not be critical of you or your agency, even though it might have chosen a different method of dealing with the matter.

Obviously, if the CMC refers a matter to you and indicates that it will be closely monitoring how you deal with it (see Module 1), then we will be expecting you to conduct an investigation. On the other hand, if we send a matter to you simply indicating that we want outcome advice, then it is up to you what option you choose.

In terms of assessing your options, the best way to choose your response is to work systematically through a set of questions. Irrespective of who is making the decision, the following questions should be asked:

- **How serious is the complaint?** As the seriousness of the allegation is an important determinant, you must find this out quickly.
- **What is the complainant's objective?** You should find out what the complainant wants to see happen as a result of making the complaint.

Usually complainants have little knowledge of the various responses available, and so these need to be explained in a way that enables them to understand that there may be other options apart from formal investigation that can satisfy their concerns. You can do this face to face or by telephone. Take care not to influence the complainant to accept a 'soft option'.

- **What is the subject officer's complaints history?** Make sure that you check the history of the person being complained about to see if there is a pattern of complaints and, if so, what remedies have already been tried. It may also be useful to consider the complaints history of the unit in which the officer works and that of other officers who have the same supervisor as the subject officer. For example, an allegation of a particular type may be referred to your agency that, in the first instance, you could deal with appropriately other than by investigation. If, however, another allegation of the same type about the same officer is referred to your agency, this time it may be more appropriate to investigate it. See the scenario below.

A subject officer's complaints history

An allegation that an officer has committed time-sheet fraud has been referred to your agency to deal with.

How do you deal with this?
Preliminary inquiries indicate that the officer has made incorrect time-sheet entries. You look at whether the officer has been spoken to about this in the past, and find that this is the first time the problem has occurred. This possibly means that the officer is not familiar with policies and procedures about the time-sheet and has simply filled it out incorrectly. One form of resolution would be to give the officer further guidance and training to ensure that the time sheets are completed correctly.

Six months later, a similar allegation about the subject officer is referred to your agency. Serious time-sheet fraud may have occurred.

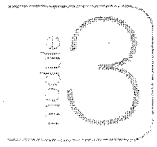
How do you deal with this?
On this occasion an investigation may be warranted because of the nature of the allegation and the subject officer's history.

Managerial response

A **managerial response** in relation to the conduct of an officer may include such action as increased supervision or performance management, guidance or counselling. This type of response suits less serious complaints that relate to the competence or performance of the subject officer. Mediation may be more appropriate for those complaints where the parties may have continuing contact.

A managerial response involves you as manager speaking to the officer about the allegations. You are not required to apportion blame or record detailed information about what happened. It is a flexible process allowing you to tailor a response to fit the offending behaviour. Measures such as further training could be implemented and it could also lead to amendments to work practices and/or policies and procedures. In some cases, it may be too late to do anything about the particular matter, but the right managerial response might improve systems to prevent future occurrences. See Module 10 for more details about this.

Managerial response does not usually involve formal sanctions and so may not be suitable for serious complaints that could result in a demotion or dismissal.



Mediation

Mediation is a process where the parties come together with a trained mediator to discuss the allegations and try to resolve the matter in a mutually satisfactory manner. The mediator does not take sides or decide who is right or wrong. This process may help a complainant explain their viewpoint to the subject officer. One of the outcomes could be to make the subject officer more self-aware and so improve their behaviour. Often an apology to the complainant is all that is sought.

As with a managerial response, mediation does not usually involve formal sanctions and so may not be suitable for serious complaints that could result in a demotion or dismissal.

Investigation

There will be some cases where a full **investigation** of the complaint is the only appropriate response. If the allegation is so serious that, if substantiated, it would mean the subject officer's dismissal, then the matter should be investigated. In the most serious cases, the nature of the allegation alone may dictate that an investigation should proceed. In some other cases, an investigation may only be justified if there are good prospects of the allegation being substantiated and no other method of dealing with the complaint can satisfy the needs of the stakeholders. Sometimes an investigation may be necessary to clear the subject officer and restore their reputation.

From the point of view of the agency and the subject officer, the most serious possible consequence of the complaint is dismissal. Of slightly lesser seriousness is demotion. Because these consequences are so serious, you should take the utmost care to ensure that such matters are investigated fairly and thoroughly. The remainder of this module and Modules 4–8 explain how to conduct an investigation of a matter that could result in an officer's dismissal or demotion, or one that the CMC has advised it intends to review.

Many of the principles outlined in the following modules will also be applicable to investigations of less serious matters. However, the strictness of application of some of the principles will vary according to the nature and seriousness of the allegations. For example, the requirement to tape-record all interviews with witnesses may be relaxed in some less serious matters where notes of the interviews may be all that is necessary. Similarly, in less serious matters it is not necessary to be so strict about the independence of the investigator where it is not practicable to appoint someone from a different work unit. These decisions will need to be made on a case-by-case basis, balancing the nature and seriousness of the allegations with practicalities such as cost.

important

Bear in mind that these guidelines are designed to apply to investigations at the most serious end of the spectrum.

The following scenarios have been prepared to show you the different options available to you.

module 3

scenarios

Resolution through managerial response

An allegation of corruption made to the CMC against your agency by an unsuccessful tenderer has been referred to you to deal with. The complainant has not provided any evidence to support the allegation. However, there is evidence that a departmental officer did not strictly follow departmental policies and procedures, and did not provide information that the tenderer should have received. If the information had been given to the tenderer, it is unlikely that the allegation would have been made. Preliminary inquiries have not found evidence to suggest that any decisions made were corrupt.

How do you deal with this?
Rather than formally disciplining the officer, this may be a case where a managerial response is appropriate. Give the subject officer guidance about the lack of communication and the failure to follow policy and procedures, and perhaps get the officer to undergo further training and education. Also, talk to the complainant and give them all the information they should have received in the first place. Explain to them the policies and procedures that should have been followed, and tell them that you will be speaking with the officer involved and recommending that the officer be further trained.

Resolution through preventive action

A matter has been referred to your agency to deal with. Preliminary inquiries show that it is not official misconduct, but there is evidence of poor decision-making by an officer, which has resulted in an undesirable outcome. It is not possible to undo the undesirable outcome.

How do you deal with this?
The best thing you can do now is to prevent a recurrence of the poor decision-making. The officer, with the assistance of senior staff with expertise in the area and any other relevant staff, could be asked to develop and present a workshop that uses the undesirable outcome as a 'lesson learned' scenario to train current and future staff.

Resolution through mediation

An allegation that a teacher has assaulted a student is referred to your agency to be dealt with. The teacher raises a defence under the Criminal Code. The parents have indicated that they do not want the matter investigated or referred to the police.

How do you deal with this?
This matter could possibly be dealt with by speaking with the parents and explaining the circumstances. Apologies could be offered, if appropriate. Guidance or training could be given to the teacher on how to deal with difficult students.

Resolution through investigation

An allegation has been referred to your agency about a senior manager who, it is claimed, has given an unfair advantage to his wife's company by awarding that company a training contract.

How do you deal with this?
Given the serious nature of the allegation — if proved, it could warrant the senior manager being formally disciplined or dismissed — this is a matter that warrants investigation. It could not be dealt with by managerial response or mediation.

practical tips

for deciding whether to investigate

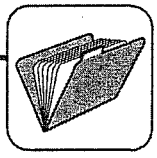
Ask yourself:

- Are the issues raised by the complainant serious (e.g. a person could lose their job or be demoted if the allegations are proven) or trivial?
- What are the monetary amounts or other benefits involved?
- How many staff are alleged to be involved?

- Does the complaint indicate a systemic problem or a serious abuse of power? (An isolated complaint may not appear worth investigating, but a series of complaints relating to the same matter suggests that an investigation is needed to determine whether there is a pattern of conduct or a broader systemic problem.)
- What significance does the complaint have for your agency?
- How long is it since the events that are the subject of complaint took place? (If the events occurred a long time ago, it may be difficult to track witnesses and documents, recollections of events will be less reliable, and evidence may be unavailable.)
- Is there a better mechanism for dealing with the complaint?
- What course of action, if any, has the CMC recommended?
- Would the investigation be an unjustifiable use of resources?

What if the subject officer has since resigned?

There may also be cases where a matter referred to an agency clearly requires an investigation; however, the subject officer has since resigned. That does not necessarily mean that it is the end of the matter. It may be a case where system failures have contributed to the complaint being made. This would be an opportunity for the agency to undertake a review of systems and make improvements to reduce the likelihood of a similar complaint occurring in the future. See the case study below.



case study

Resignation of subject officer

An agency referred a complaint to the CMC alleging that a substantial amount of sexually explicit material was stored on a desktop computer within the agency and that numerous compact disks containing similar explicit material, downloaded from the Internet, had been found at a workstation within the IT section. The workstation concerned was used principally by an officer with responsibility for IT support services who at various times acted as the IT section manager. The officer was also responsible for liaison with external suppliers and for minor software and hardware purchases. The alleged Internet misuse was uncovered while the officer was on leave.

The discovery resulted in an investigation of IT operations associated with the officer in question. The investigation also disclosed discrepancies between purchasing records, asset registers and the results of a physical stocktake of minor hardware items within the IT section. A small number of computer hardware items appeared to be missing. However, these items could not be identified due to inconclusive purchasing records and an absence of accurate asset

register details. The investigation also disclosed e-mail records containing dialogue with an external party concerning passwords to sexually explicit websites and covering other potentially unlawful actions.

The officer resigned before the investigation was completed.

Even though the officer resigned, the investigation highlighted a number of areas that were subject to risk and would benefit from a prevention strategy. A strategy was designed by the CMC and implemented by the agency. That strategy included:

- a comprehensive review of the agency's exposure to misconduct and security risk, particularly in relation to IT systems
- implementation of risk management procedures
- a review of policy framework
- a review of human resource programs (e.g. staff induction and development programs)
- regular refresher training in the practical application of the agency's code of conduct and acceptable standards of ethical behaviour
- a review of work practices
- a review of the agency's exposure to risk from the use of IT resources
- a review of procurement activities
- an examination of inventory and asset management practices
- promulgation of the outcomes of the investigation and the implementation of any changes in operational practices and monitoring functions, to promote greater awareness of the requirements for appropriate use of the Internet and e-mail as well as government resources generally
- implementation of the changes and regular review of progress.

Starting an investigation

Once you have decided to conduct a formal investigation of a matter, you need to develop the **scope and purpose** and to **choose an investigator.**

Developing the scope and purpose

You need to be clear about what kind of investigation will be required so that you can impart this clarity of understanding to the investigator.

It is vital to establish the **scope and purpose** (sometimes called the **terms of reference**) of the investigation at the outset, since they bear directly on:

- the powers that will be needed to investigate the complaint
- the resources that will be needed
- the authorisation necessary to undertake the investigation, and
- the kinds of investigation outcomes that are possible.

A scope and purpose is a brief statement setting out the bounds of the investigation and its purpose for your agency. It should take account of the practicalities of an investigation, particularly the resources available to the investigator. Without a statement of scope and purpose, the investigator may be tempted to take the investigation into areas that are not necessarily material to the original allegations. The investigation may blow out or lose direction.

The scope and purpose will usually be developed by you, often in consultation with the investigator. However, sometimes you may delegate the entire responsibility to the investigator.

Scope: 'What is the investigator's focus?'

The scope should be a brief description of the conduct being inquired into. But it should not just reiterate the allegations made by the source.

The scope should be framed in neutral terms that do not suggest that the issues have been prejudged, or an assumption has been made that a person has engaged in wrongdoing. A scope helps the investigator start the investigation in a focused and impartial way.

A useful question to ask when drafting a scope for an inquiry is: 'How is this matter relevant to the agency?' This will normally involve finding a function or role of the agency that might be affected. The agency's functions can be found in its legislation, in its policies and procedures, in its code of conduct and in work contracts.

Set a time frame for the scope of the investigation that will let the investigator gather the relevant information. A particular day may be specified, or you might go back six months or two years, depending on the conduct in question.

Purpose: 'Why are we doing this?'

You should also work out the purpose of the investigation for the agency. For example, it could be one or more of these:

- To inquire about and report on a matter referred to the agency by the CMC.

- To determine whether or not a disciplinary breach has been committed.
- To examine the implementation of policies or procedures.
- To fulfil a statutory function of the agency.

practical tips

for writing a scope and purpose

- Check with your agency's human resources and legal departments for details of disciplinary procedures, statutory functions and contract or employee awards or agreements.
- Try to frame them as broadly as possible while still keeping focused. This may avoid the need to amend your document if more information comes to light. For example: 'An investigation to establish if an internal e-mail was sent to Ms Andrews on or about 1 January 2004, to identify and interview the employee responsible, and to determine if any disciplinary breach has occurred.'

Defining the scope and purpose requires you to clarify the key issues arising out of the complaint. You should consider the findings that might logically or conceivably be reached by the investigation, but avoid prejudgment 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 that, upon investigation, might be shown to be in accordance with a policy; but the policy might be shown to be unreasonable. The scope and purpose should be sufficiently broad to permit the investigator to make findings about the policy as well as the conduct.

Similarly, if the investigation relates to allegations about the waste of public money, the scope and purpose should authorise recommendations (related to the allegations) for the avoidance of waste in the future.

In other cases, it might be appropriate for the scope and purpose to be framed in such a way as to require the investigator to make recommendations not only about the action that should be taken in relation to this particular matter, but also about any redress for anyone who has suffered detriment as a result of the conduct.

Once you have determined the scope and purpose of the investigation – and if you have not already chosen who will be the investigator – the next step is to choose and brief the investigator. At whatever point the investigator becomes involved, it is important that you are in agreement about the scope and purpose of the investigation.

Choosing an investigator

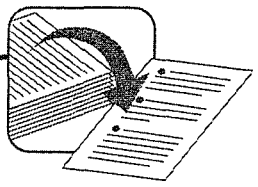
Any legislation, guidelines or policies governing the disciplinary system applicable to an agency will generally set out who may conduct disciplinary investigations. It is not uncommon for investigations to be made the responsibility of a specialist internal unit or external consultants including retired former senior officials, or a senior member of staff.

The choice of investigator will be guided by the nature of the complaint and by any relevant legislative prescriptions. Where at all possible, an investigation should not be conducted by anyone with direct involvement with the person or matter being investigated. To avoid any suggestion of a conflict of interest, supervisors should not be given the task of investigating or overseeing the investigation of a subordinate. The investigator who is appointed should have sufficient seniority to conduct an interview with a subject officer. (For further information on conflict of interest, see Module 5.)

important

It is important that the CEO and the investigator agree on the scope and purpose of the investigation.

to sum up



Regardless of how you choose to handle a matter, you must from the start be aware of the importance of maintaining confidentiality and preserving evidence.

When deciding how to deal with a matter, consider the advantages and disadvantages of available options (e.g. managerial response, mediation, investigation) and seek a solution that comes closest to meeting the interests of all stakeholders.

Before deciding which option to embark on, gather sufficient information to enable you to gauge the likely consequences of each of the different options. Check if your agency already has in operation its own method of dealing with a complaint to prevent any future complaints of the same kind. Each complaint made against a public officer can be viewed as an opportunity to improve systems.

If you decide to go ahead with a full-scale investigation, be sure that you and the appointed investigator agree on the scope and purpose of the investigation.

Before outlining the steps involved in conducting an investigation, the next module will explain the importance of ensuring confidentiality and procedural fairness throughout the process.

Responsibilities of the investigator

A guide for investigators in public sector agencies

module 4

This module assumes that your agency has made the decision to investigate a matter. It focuses on the role of investigators and their chief responsibilities, namely to ensure confidentiality and provide procedural fairness. Without these the integrity of your investigation may be compromised or the outcome overturned.

Contents

Role of the investigator

You have been tasked with carrying out an investigation on behalf of your agency. This means that you are responsible for gathering all the relevant evidence or information and then using this to find the facts. **But an investigation is not a trial.** You are not a prosecutor or plaintiff, but an impartial fact-gatherer. You have a duty both to collect the information and to assess it. At the end of the process, you must report your findings, and possibly make recommendations. You must do this in an independent and objective way.

The success of an investigation will often rely on the integrity and ability of the person conducting it. You must be neutral in relation to the protagonists to a dispute, but must also be aware of any power imbalance between the parties. You must understand the motivations and stresses that have led to the complaint, but must not identify personally with the complainant. You must be prepared to be persistent in pursuing complaints that may be unpopular within an agency because of their substance or because of the unpopularity of the complainant.

To be effective, an investigator and an investigation must have the confidence of both sides. The best way to achieve this is by listening fully to both sides and giving thorough consideration to what is being said.

Facts not in dispute can be accepted at face value. Facts in dispute should be subjected to a constant process of checking, challenging and analysing – this is known as the investigation process.

The head of an agency is responsible for inquiring into matters that might affect the agency's operations. As an investigator, you are acting under the authority of the head of your agency.

You should make sure that you have a written delegation of authority from the head of your agency to conduct the investigation. The agency head should also delegate to you any powers that are available for you to adequately inquire into the matter.

The level of authorisation you need to begin an investigation will depend on its nature. If the investigation is in the nature of a legislative disciplinary investigation in the public sector, you will need authorisation from the agency CEO.

If an investigation arises out of a public-interest disclosure, check with your agency's internal procedures on dealing with public-interest disclosures to ensure that they have been complied with. In other circumstances, all that may be required is authorisation from a relevant manager.

The process of authorisation should have been dealt with either in your agency's formal mechanisms for dealing with various types of complaints or grievances raised by members of the public or staff, or in relevant delegations of authority. Where the matter is in doubt, refer it to your CEO for a decision.

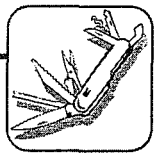
Although you may have been tasked with carrying out the investigation, there are many people both within and outside your agency who can help you or offer advice. They are:

- your agency's
  - audit staff
  - personnel staff

- legal staff
- information technology staff

- the CMC
- experts such as accountants and document examiners.

An investigation is not an adversarial process – you are not out to 'get' someone. It is an inquiry, and so you should go into the process with an **open mind.** An investigator is not on the side of any party to the complaint. An investigator 'owns' neither the complaint nor the witnesses for or against the allegations.



practical tips

for preventing an investigation outcome being overturned

- Make sure that due process (e.g. as outlined in these guidelines) is followed.
- Be very familiar with the relevant disciplinary procedures, particularly if they are contained in an act or regulation; and take care not to omit any steps.
- Be careful about adopting the findings of some other investigator — any disciplinary outcome should be based on your independent investigation.
- Ensure that the outcome of your investigation is firmly supported by the evidence.
- Check that your evidence is complete, with all available witnesses interviewed and all documentary evidence gathered.
- Weigh any exculpatory evidence against evidence supporting a charge.

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

Ensuring confidentiality

What is 'duty of confidentiality'?

An investigator's duty of confidentiality simply means that you have been entrusted to keep information to yourself and only use it for your investigation. Most of the information you will collect will be confidential. Often the very fact that you are conducting an investigation will also need to be kept confidential. Although you cannot guarantee confidentiality, you should do everything in your power to keep confidential:

- the source of the investigation (including the names of any whistleblowers)
- the fact an investigation is taking place, and the subject matter
- the identity of the person under investigation
- the identities of any witnesses
- any documents gathered during the course of the investigation.

In the public sector, various statutory and/or contractual requirements for confidentiality will or may apply to the conduct of investigations and their outcomes. Unauthorised disclosure of confidential information will also generally be proscribed by the agency's code of conduct.

As noted in Module 3, confidentiality serves a number of important functions. Preserving the confidentiality of the identity of the person making the complaint and the person who is the subject of the complaint minimises the risk of harm to these parties.

Another important function of confidentiality is to ensure the integrity of the investigation. If a potential witness feels that they are unable to trust the discretion of the investigator, they will be more reluctant to come forward with relevant information. Where material uncovered in an investigation is kept confidential, there is less risk of contamination of evidence. Accordingly, any witnesses interviewed in the course of an investigation should be advised not to discuss the matter with other witnesses or other third parties. Before interviewing any witness, investigators need to ask whether that person has discussed the matter with anyone else.

If you receive media inquiries about the investigation, you should first refer to your agency's media policy. If necessary, your agency (through your CMC Liaison Officer) may contact the CMC's Monitoring and Support Unit for advice. (See also Module 9.)

Identity of the source

The identity of the source of information should be kept confidential wherever possible. Do not release any information that might reveal that person's identity, including indirect information such as a physical description, location or other personal data unique to the person. Doing so can have detrimental effects on the source and may reduce the trust that people have in you. Even if the source consents to their identity being revealed, keep it confidential wherever possible.

However, you cannot promise anonymity because at some stage in the investigation the need to maintain procedural fairness may mean that it becomes impossible to keep the source confidential (see next section on procedural fairness). The source should be made aware of this fact. Take

into account the source's concerns but explain that their details may need to be revealed in order for you to conduct your investigation properly. Discuss with the source any fears they may have if their identity is revealed.

important

Do all you can to keep the identity of the source confidential, but never promise anonymity.

The identity of those involved in the investigation

The identity of the person under investigation, any other person involved in the investigation, and the subject matter of the investigation should be kept confidential. While it may be necessary during the course of the investigation to discuss aspects with different witnesses, you must never lose sight of the fact that the inquiry is not complete until a report is prepared. The report is the place to discuss the details of your investigation and who did what.

The documents

The documents that you gather during your investigation are also confidential. This includes details of a complaint and records of interview taken during your investigation. Some internal documents may also be confidential – for example, personnel records. It is important not to misuse any information that you gather during your investigation. See 'Gathering documentary evidence' in Module 6 for information on dealing with documentary evidence during an investigation.

practical tips

for ensuring confidentiality

Avoid:

- putting information on an unsecured computer
- interviewing people where they can be seen or heard
- giving confidential information to others to copy or type, or to address or send
- not blacking out names, addresses or phone numbers on some documents
- leaving messages on desks or a phone service
- sending sensitive material by mail
- leaving documents on the photocopier
- leaving incoming or outgoing faxes on the machine.

Providing procedural fairness (natural justice)

What is procedural fairness?

The rules of procedural fairness, sometimes called natural justice, apply to any decision that can affect the rights, interests or expectations of individuals in a direct or immediate way. They have developed to ensure that decision-making is fair and reasonable. At every stage of your investigation, you should proceed in accordance with the rules of procedural fairness.

The rules of procedural fairness are:

- not being biased, and
- giving a fair hearing.

Procedural fairness is, at law, a safeguard applying to the individual whose rights or interests are being affected. However, you as investigator should not regard your procedural fairness obligations as a burden or impediment to your 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 identifying issues.
- The comments made by the subject officer might expose weaknesses in the investigation, which may save you later embarrassment.
- It also provides advance warning of the basis on which the investigation report is likely to be attacked.

The application of the rules of procedural fairness will depend on the circumstances of each case. More information on the rules is provided below.

The right to an unbiased decision

Being unbiased is a crucial aspect of procedural fairness. You should not be biased in your investigation.

Bias can arise in a number of ways:

- being partial (favouring one person over another), or
- being closed-minded (not listening to or taking into account what someone has to say), or
- having a conflict of interest between your role as investigator and gaining some personal advantage or avoiding a personal disadvantage.

However, the law goes beyond looking for actual bias. It also looks for the perception of bias. This approach is reflected in the well-known phrase: *Justice should not only be done but should be seen to be done.* The law will look at the person doing the investigation and ask: 'Is there anything about the person, or the conduct of the person, that might give rise (in the mind of a fair-minded member of the public) to a reasonable suspicion that the person may draw a conclusion based on self-interest?' If so, the law will generally state that the person should not conduct the investigation.

This issue is discussed in 'Avoiding conflicts of interest' in Module 5, and in 'Choosing an investigator' in Module 3.

During an investigation, circumstances may become apparent that increase the potential for bias on your part. It is important for you to recognise such a potential, and **remove yourself from the investigation as early as possible.** Don't wait for the courts to decide for you. Let the head of your agency know about potential bias on your part. If the reasons are documented, make sure you and others keep them secure.

Obviously, to ensure an impartial decision, the roles of decision-maker and investigator should be undertaken by different people.

To avoid allegations that you are biased because of prejudice or prejudgment, do not comment on the investigation or engage in idle conversation about any aspect. If you don't say anything during your investigation about those involved (except, of course, when you interview or write a report), then people won't be able to make allegations that you said something that indicates bias on your part.

practical tips for avoiding bias

Be mindful of the potential for conflict between your role as investigator and matters personal to you. Ask yourself:

- **Do I have, or will I have, a personal relationship with any of the people involved in the investigation?** Mere knowledge of a person, or the fact that you have worked with them, is not enough to make out a case of bias on your part. You should look to see whether your personal relationship with the person is based on a close friendship and favouritism, or based on animosity.
- **Was I a participant in any of the issues involved in the investigation?** If you witnessed something, or managed or supervised the area concerned, you should not be inquiring into those issues.
- **Do I have a financial interest in any matter involved in the inquiry?** If you or a family member are likely to gain or lose money from a decision or finding of your investigation, you should not be a part of it.
- **Am I prejudiced in any way towards or against a person involved in the investigation, or does my behaviour or comment suggest that I may have prejudged issues or people?**

The law of procedural fairness requires a decision-maker to listen to, and take into account, people's point of view on any matter that adversely affects them.

An investigation can certainly affect an individual, especially in relation to their reputation and their employment. In order for your investigation to comply with the law, you will usually need to seek out a person's version of

events and give them a chance to comment on any facts that might be detrimental or adverse to them.

The application of the requirement to inform the person of the allegation will vary depending on the circumstances. It will also depend on the scope of your brief as investigator – that is, whether you have been asked to make findings from your investigation, or whether that has been left up to a decision-maker.

The obligation to inform the subject officer of the substance of the allegations does not apply if the investigation does not directly involve proceedings that will affect the person's rights or interests. So, if an investigator is merely collecting information for the purpose of making a report or disclosure to a final decision-maker so that the latter can take action in respect of the matter, there is no obligation on the investigator to notify the person who is the subject of the complaint. However, if an investigator is asked to make findings and recommendations about the matter, the investigator should provide procedural fairness to the person against whom allegations have been made.

Accordingly, depending on the circumstances of your investigation, procedural fairness may require you to:

- at an appropriate time, inform people against whose interests a decision may be made of the substance of any allegations against them, or grounds for adverse comment about them
- give people a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise
- hear all parties to a matter and consider submissions from them
- 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.

When should the subject officer be told about the allegations, or allowed to respond?

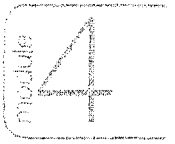
The right to be informed about the substance of allegations or adverse comment, and the opportunity to be heard, must be given before any final decision is made, or a memorandum, letter or the like is placed on the person's file.

The point in time at which the person who is 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 CMC suggests that the following basic principles be followed:

- There may be circumstances where initial inquiries (see Module 3) or the early stages of an investigation will reveal that there is no case to answer. In such circumstances it may not be necessary to inform the subject officer at all, if they are unaware of the investigation. This may save the person from suffering unnecessary stress. However, if anything is to be recorded on their file, they may need to be told.
- In circumstances where a complaint alleges wrongdoing, but the identity of the alleged wrongdoer is unknown, no-one should be notified of the allegations in that complaint unless they are a clear suspect.

- Where the person who is the subject of complaint is to be interviewed, it is appropriate to delay informing them of the substance of the allegations until the interview, if it appears that evidence could be tampered with or witnesses approached. Specifically, an investigator should be circumspect about informing the person where there is a risk that:
  - documents may be destroyed
  - records may be modified
  - postdated records may be produced
  - collusion may 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 before being interviewed.



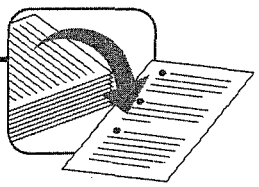
It is generally not appropriate to advise a person who is the subject of a complaint that it has been reported to the CMC. In referring a matter to be investigated, the CMC may include advice on when it will be appropriate to advise the person who is the subject of the complaint and what you can tell them. Certainly, if the CMC has informed you at the outset that it will be reviewing your investigation, you can seek advice from us about when and what to tell a subject officer.

There are also no hard-and-fast rules about how and when you must inform a person of the substance of any adverse comment about them. Certainly, no final decision can be made affecting a person's rights, interests or legitimate expectations without first providing them with an opportunity to respond. If your investigation report contains adverse comment and is provided to a more senior officer for a final decision, 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 before any decision is made.

If your investigation report contains any adverse comment about someone, make that person aware of the substance of the grounds for all proposed adverse comments to be made against them. If this information has been put to the person during an interview, it is not necessary to do this before finalising the report and handing it over to management or making it public. However, if you have told the person only some of the grounds, you must make them aware of the other grounds being relied on.

Similarly, if the grounds for adverse comment have changed significantly since the interview, you must communicate them to the person before you finalise your report. You should put such matters to the subject officer, as their response may influence your recommendations or suggest other avenues of inquiry.

to sum up



The success of an investigation will often rely on the integrity and ability of the person conducting it. Investigators are not mediators, conciliators or advisers. They are impartial fact-gathers.

Ensuring the confidentiality of the investigation and providing procedural fairness to all involved are a vital part of the role of the investigator.

Confidentiality is important because it minimises the risk of harm to innocent people and ensures the integrity of the investigation.

Procedural fairness is not so much a right that a person has if they become involved in an investigation, but a duty that the investigator has to those involved in the investigation. Regardless of whether the person wants to say anything to you, you should, as a matter of course, want to hear what the person has to say to you.

In any investigation, an employee should be extended procedural fairness.

Conducting an investigation

A guide for investigators in public sector agencies

module 5

When a serious matter is referred to your agency – for example, one that could potentially result in a dismissal or demotion – it must be handled by way of a formal investigation. This module is designed to guide you on how to conduct such an investigation. *It is important that you follow these guidelines closely.* **You might also find these guidelines useful for less serious matters.**

Contents

The framework

Clarifying the scope and purpose

As the investigator, you would have been given a scope and purpose for the investigation (or terms of reference) developed by the CEO. Alternatively you may have been asked to develop a scope and purpose yourself or in consultation with your CEO (in which case you should look at Module 3). Regardless of who developed the scope and purpose, you need to be clear on what it is you have to investigate.

If at any stage during the investigation you think that the scope and purpose need to be changed, seek prior approval from the CEO. If you do not seek clarification or approval you may find yourself investigating matters without proper authorisation. You do not want to find yourself in the position where your CEO does not agree with your actions and you have to explain why you have departed from the scope and purpose. A departure from the scope and purpose may cause unnecessary delays and possibly jeopardise the investigation.

A common pitfall of investigations is to lose focus by inquiring into interesting but irrelevant issues. If a matter does not fit within your scope and purpose, you should either seek approval to change your scope and purpose or just omit the matter from your investigation.

important

Always seek clarification of the scope and purpose from your CEO so that you understand exactly what you are to investigate. Likewise, any amendments should be authorised by the CEO. This will act as a deterrent to subsequent appeals about the matters under investigation. It will also protect you if the authorising person questions aspects of your investigation.

Avoiding conflicts of interest

All investigations must be conducted impartially. You as the investigator must not have, and must not be perceived to have, any conflict of interest in relation to the complaint, or to the persons, the conduct or the policies and procedures that are the subject of investigation.

Generally speaking, there can be no confidence in the outcome of an investigation where the process is tainted by actual or perceived conflict of interest, because, when this happens, any arguments made by the person who is the subject of the investigation about the integrity of the process can never be satisfactorily or totally rebutted.

It is no answer to an allegation of conflict of interest that you are not the ultimate decision-maker, because the allegation may be that, as a result of the conflict of interest, 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 could be based.

It is not always easy to identify a conflict of interest, particularly where the conflict is such that it may produce bias. Although your investigation must be conducted impartially, it is not realistic to expect that you 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 you have worked with that person (whether in a supervisory or other capacity) is not sufficient in itself to justify an allegation of conflict. An allegation of conflict must be based on something more, or something particular to the investigation. However, as noted in Module 3, to avoid any suggestion of conflict of interest, supervisors should not be given the task of investigating or overseeing the investigation of a subordinate. An investigator with sufficient seniority to conduct an interview of a subject officer should be appointed.

practical tips

for assessing conflicts of interest

Ask yourself:

- Do you have a personal or financial relationship with the person who made the complaint, the person who is the subject of the complaint, or anyone identified in the allegations?
- Would you or anyone associated with you benefit or suffer from any findings about the person who is the subject of investigation?
- Do you hold any personal or professional biases that may lead others to conclude that you are not an appropriate person to investigate this matter?
- Have you been directly involved in developing or approving policies, procedures or practices that are the subject of the complaint?

If you are in doubt whether or not a conflict exists, you should seek advice from a supervisor or manager (and ensure that the process is documented). If you decide that you are not an appropriate person to investigate the complaint, advise the CEO so that somebody else can be assigned to the investigation.

Be aware that, even if you step down from the position of investigator, you may still be bound by confidentiality provisions in respect of information received from the complainant or other sources.

For further information, see 'The right to an unbiased decision' (Module 4) in the section on procedural fairness.

Using investigation powers

Most agencies do not have extensive or coercive powers to gather information. But this does not mean that you cannot conduct a successful investigation. The key to gathering information is to start by getting the cooperation of people. People are more likely to provide useful information if you:

- tell them of the general purpose and importance of the request
- don't demand or threaten
- make them feel they are making a substantial contribution to the agency
- let them know you have the support of the head of the agency.

practical tip

for encouraging cooperation

You may find that people are more willing to cooperate with your investigation if you have a written document from the agency head requesting that employees cooperate.

Are the necessary investigatory powers available?

In nearly all investigations the three chief sources of information are:

- witnesses
- experts or other people with relevant knowledge or information, and
- records.

At the outset, you will need to ask yourself what powers you have and, in particular, whether you have the necessary power to get witnesses to talk to you about relevant events, to obtain information from people about policies, procedures and practices, and to access relevant records.

Where do you find out what your powers are?

Check with your legal unit for an accurate description of any powers you may have to gather information. Powers to conduct an investigation are usually found in:

- terms of delegation and any authorisations from the CEO of your agency
- your agency's legislation and regulations
- employment agreements or awards
- contracts
- codes of conduct
- employment law and common law.

What powers do you have to investigate the conduct of individuals?

Where an investigation is about the conduct of individuals, you need to determine whether or not you have the authority to get access to relevant documents and to question witnesses. In this context, it is important to distinguish between the right to ask and the power to demand. You as investigator may have the right to request people to answer questions and provide relevant documents, but if witnesses refuse to be interviewed, or access to documents is refused, you may not have the legal power to compel witnesses to be interviewed or otherwise provide information, or to require that records be provided.

With an internal investigation backed by the agency CEO there will be strong pressure on any employee of the agency to cooperate with the investigation. There are circumstances where sanctions can be applied against an employee who refuses to answer relevant questions. (See 'Dealing with difficult or uncooperative people' in Module 7.) You may have the power to request that any employee answer a reasonable question or provide a document that relates to or involves the work of the agency. Contractors can also be asked about the performance of a contract.

If employees wilfully refuse to answer or hand over documents, it may be a disciplinary matter. However, refusal to answer or provide documents does not help you gather evidence. If a person fails to answer a reasonable question, take that into account when assessing their credibility.

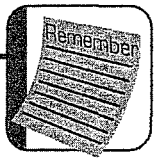
Where people outside the agency appear to be key witnesses, especially if there is reason to suspect they may be reluctant to cooperate, the absence of the necessary legal power may mean the investigation is frustrated in its early stages.

If the relevant records are all available within the agency then the investigation should be untroubled. However, if records are held by other people or agencies and these people or agencies are reluctant to produce them, then the investigation may stall.

Where lack of powers may prevent an effective investigation into a complaint from being conducted, contact the CMC's Monitoring and Support Unit or the Director, Complaints Services, to discuss whether to conduct a cooperative investigation, or to ask the CMC to assume responsibility for the investigation.

The CMC has the powers of a royal commission, including the legal authority to compel witnesses to attend and give evidence under oath and to produce documents (see ss. 75 and 82 of the Act). The CMC also has the power to require a person to answer self-incriminating questions.

remember



Where your investigation will be into allegations concerning the conduct of individuals, establish at the outset whether you have the necessary powers to get access to the witnesses and records you need for a proper investigation of the complaint.

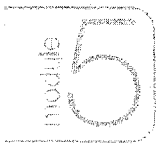
What powers do you have to access documents?

It may become necessary in the course of your investigation to access departmental documents or records.

If these documents belong to the department and are stored in areas where employees normally have access, you should have no trouble getting them. It would be preferable if your CEO makes reference to the seizure of documents and the like in your letter of appointment or equivalent when you are allocated the investigation.

However, you need to be more cautious if the documents are stored in an employee's personal work area. This may include a personal locker, locked drawer, filing cabinet or computer directory. In this case you are advised to contact your Investigations Manager (or equivalent), legal unit, CMC Liaison Officer or the CMC's Monitoring and Support Unit for assistance before you take any action.

The importance of planning



Planning is essential to ensure that:

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

The main planning tool available to an investigator is an **investigation plan.**

You should complete your investigation plan before you conduct any inquiries. This is because the planning process will clarify the approach to be taken – the plan will become the road map for your investigation. It allows you to stay focused on the job and alerts you to any potential problems before you encounter them.

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

Developing an investigation plan

There are any number of ways in which you may draw up your investigation plan and many agencies may already have a plan developed. **An example of how you may present your plan is set out on the next page.**

While it is important that you start with a plan, investigations rarely proceed as originally predicted. You should therefore be ready to revise your plan, perhaps drastically, as new information emerges during the course of an investigation. Always follow the facts, rather than trying to make the facts fit into your plan.

INVESTIGATION PLAN

File no.: *132/07/123*

Investigator: *Michael Good, Area Manager. (Authorised by Director ESU)*

Background: *At 10:00 am on 5 January 2004 an anonymous telephone call was received at the Ethical Standards Unit advising that Ms Andrews who operates the department's reception office had just received an internal e-mail containing improper sexual suggestions and, as a result, Ms Andrews had become visibly upset and left the office.*

Scope of investigation: *An investigation is to be commenced to establish if an internal e-mail was sent to Ms Andrews on or about 5 January 2004, to identify and interview the employee responsible and to find out if a disciplinary breach has occurred.*

Allegation/s: *That on 5 January 2004 an unknown departmental employee sent an inappropriate e-mail to a female employee.*

Relevant section of the Code of Conduct or policy the subject of the alleged breach:.....

Confidentiality issues/other risks: *In order to minimise embarrassment to the female officer and to avoid unnecessary disruption in the workplace it is necessary to keep this information confidential. There is also a need to act promptly as the e-mail could be deleted from the system.*

For each allegation:

Facts at issue	Action (based on avenues of inquiry)	Resources needed	Responsible person	Completion date	Outcome (e.g. does the action tend to confirm or dispute the facts at issue?)
Was an e-mail sent?	Download e-mail account of Ms Andrews.	• IT expertise and access	Manager, IT Section	6.1.04	E-mail located on system. Inappropriate and sexually explicit. Sent from a male employee's e-mail address.
Was e-mail offensive to recipient?	Interview Ms Andrews.	• Investigator • Tape recorder • Tapes • Copy of down-loaded e-mail • Interview room	Michael Good	6.1.04	Ms Andrews says she recently had a disagreement with the sender over the length of her skirts. She was extremely upset by the e-mail.
Was e-mail deliberately sent?	Interview male employee.	• Investigator • Tape recorder • Tapes • Copy of down-loaded e-mail • Interview room	Michael Good	6.1.04	Employee admitted sending the e-mail but says he sent to the wrong address. Says he meant to send it to his girlfriend.

practical tip

Look around!

During an investigation it is often useful to look at what happened just before and just after the conduct in question. For example, you might look at transactions that occurred around the time of a transaction of interest and try to find similarities or differences. In the above case, you may want to check other e-mails sent by the male employee to determine whether or not there is a pattern of behaviour.

If necessary, the CMC's Monitoring and Support Unit will provide advice and assistance in the development of an investigation plan. The principles outlined above apply to all kinds of investigations. However, modifications to the format of the investigation plan may need to be made to suit the specific investigation being conducted.

In respect of public-interest disclosures, the investigation plan should incorporate strategies to protect the identity of the whistleblower.

An investigation plan will be the foundation of your inquiries. It will define what you do, why you do it and when you do it. Its primary purpose is to keep your investigation focused. For best results, the plan should work from the general to the specific and be updated regularly. Before you do any task, see where it fits within the plan.

It may be useful to develop your investigation plan in consultation with whoever authorised you to conduct the investigation, to ensure that it reflects accurately the brief you have been given.

A good investigation plan usually includes the following components:

Investigation overview/background

This is a brief narrative about how the investigation came into existence. You should state how the information came to your agency's attention, the general ambit of the investigation, the general details given by the source of the initial information, and any other relevant information. If you have conducted some initial inquiries, detail them here.

Scope and purpose

Include the statement of scope and purpose (see Module 3), as approved by the CEO of your agency or the relevant person under delegated authority. When this was drafted earlier, you would have clarified exactly what was being alleged in the complaint. Nailing a complainant down to specifics is not always easy, but reducing the allegations to written (and preferably suitably edited) form helps.

The allegations

A single complaint may contain a number of separate allegations, and these need to be dealt with individually. The CMC will usually have listed the separate allegations in its letter to your agency. The investigation plan should include only those allegations that are to be investigated.

The investigation plan should deal with the following aspects of each allegation:

- **Proofs/facts at issue.** List here the facts that need to be established to determine the truth or falsity of the allegation. In cases involving a complaint about the conduct of an individual, the facts at issue will usually include:
  - the identity of the person alleged to have engaged in the conduct
  - the place and the date that the alleged conduct occurred
  - whether or not the conduct itself was wrong
  - whether or not the person did the thing alleged, and
  - whether the person did or did not have authority to engage in the conduct.

  As well, the relevant legislation or procedures alleged to have been breached may contain specific requirements or elements that must all be satisfied in order for a breach to be made out. All of these elements or requirements comprise the facts at issue or proofs.

- **Avenues of inquiry.** Here you identify the potential sources of information that will help you to establish the facts at issue. This may be by means of interviewing specific witnesses, examining documents and so on. This component of the investigation plan assists an investigator to consider what evidence is required to test the allegations, and what sources may be used to get that evidence. It also compels the investigator to weigh the advantages and disadvantages of different methods of gaining evidence.

  It is useful to break down the sources into:

  - documents that should exist or that might be obtained
  - things that might have been used or created, and
  - people who might have witnessed events, created documents or handled things (see 'Deciding who should be interviewed' on the next page).

  Your focus should not be on trying to prove or disprove something, but on thinking broadly about all possible sources of information about a matter. The sources may come from within your agency or from outside it.

practical tip

Brainstorm!

One of the best ways to think about avenues of inquiry is to brainstorm, either by yourself or with someone you can trust. Brainstorming means trying to come up with as many possible explanations, or scenarios, as possible. The value of brainstorming is:

- you are encouraged to think very broadly
- imagination and creativity are encouraged, and
- you do not judge or criticise the answers that come to mind.

module 5

Confidentiality issues/other risks

Mention any issues up front. For example:

- 'The source is a public official who has made a public-interest disclosure.'
- 'Fears exist that documents might be destroyed.'
- 'Certain people might release information to others.'
- 'The media may take an interest if the matter becomes public.'
- 'A conflict of interest may be involved.'

Resources

Give an estimate of the resources you will need to conduct a successful inquiry, for example:

- people required
- computer facilities

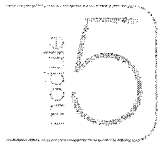
- tape- or video-recording equipment
- stationery
- storage facilities
- vehicles.

Time frame

Give a rough estimate of the time frame for the investigation. It can never be set in concrete, but a timely conclusion to your inquiry is necessary, while at the same time making sure that the process is fair.

Your investigation plan should include a list of specific tasks to be performed based on the avenues of inquiry you have come up with, the resources available and the time frame for the investigation. Try to arrange the tasks in order of completion.

Deciding who should be interviewed



People are a valuable source of information during an inquiry because:

- they may have directly perceived something with their senses – 'I saw', 'I heard', 'I touched', 'I smelt', 'I tasted'
- they may have created a document
- they may have used something
- they may have left a trace (for example, a computer audit trail) when using something.

All witnesses who are relevant to the investigation should be interviewed. As part of the process of preparing the investigation plan, you should identify those people who can assist in the inquiry. You should have asked yourself: 'What people may have information or created documents or used things relating to the subject matter of my inquiry?' If other sources of evidence become apparent during the investigation, revise your investigation plan accordingly.

Determining the order of interviews

The first interview in an investigation usually occurs with 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 who is the subject of the complaint, and
- their availability.

When witnesses are interviewed sequentially, you should avoid delays between one interview and the next to minimise the opportunity for collusion.

Never interview witnesses together. Always interview people separately and ask them to keep it confidential. A witness's evidence can become corrupted – either deliberately or inadvertently – if that person learns what other witnesses have said or done. It can cause some people to change their version of events or alter their perceptions about an event.

As a general rule, the person who is the subject of a complaint should be interviewed last. This will allow you to collect as much information as possible from other sources first, putting you in a good position to

determine the appropriate questions to ask the person. It also minimises the risk of evidence being tampered with or witnesses being intimidated.

However, there will be situations where this general rule about interviewing the subject officer last does not apply. For example, it may be appropriate to interview them earlier in the investigation to tie them down to a version of events that your investigation can then prove or disprove (see the first scenario below). In other cases, interviewing the subject officer early may save time and effort by clearing them straightaway (see the second scenario below).

Tying a subject officer down to their version

Allegations have been received that inappropriate e-mails have been sent from an officer's computer.

How would you deal with this?

You may wish to interview the subject officer first to establish a few facts about how she uses her computer. You may want to find out whether the officer is the only person who had access to the computer and whether it is password protected. You might then want to verify the password and whether or not the subject officer has given it to anyone else or written it down somewhere where others can see it. By doing this, you have committed the subject officer to a version of the facts. For example, if the subject officer tells you that her computer is password protected and that nobody else knows the password or has seen it, she cannot then at a later date seek to explain away the matter by saying that the password was on a Post-it note stuck on her computer.

Clearing a subject officer's name quickly

An organisation has received an allegation from the neighbour of an employee stating that the employee was stealing photocopier paper and was storing the boxes in his garage. Initial inquiries with work colleagues found that the employee was seen walking to his car with photocopier paper boxes and placing them in the boot of his car. However, no-one knew what was actually inside the boxes.

How would you deal with this?

You might decide to interview the employee straightaway. He might tell you that the boxes were taken out of the rubbish bin and were full of shredded paper, which he was using to pack fragile ceramic pots he was sending to relatives overseas. You might then go to the man's home, where his explanation is confirmed, thus saving yourself a full-scale investigation.

Arranging for an interpreter to be present

Where a person to be interviewed does not have a working command of English, you should use an interpreter for the primary language of the interviewee. This need should be anticipated as part of the planning stage for the interview so that it does not arise unexpectedly. Similarly, where a person to be interviewed is deaf or has a speech defect you should call in a specialised interpreter for the relevant disability.

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 witnesses to later resile from their statement on the basis that they had not properly understood the questions.

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

It may be permissible for the interviewer to find a third party with some ability in the interviewee's language to act as an intermediary if:

- what is required from the witness is simply some basic information, as opposed to evidentiary material
- the conversation is intended only as a preliminary stage before a full interview is considered, or
- there is an urgent need to talk to the person.

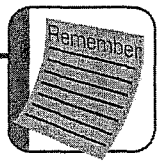
This intermediary person, however, has no legal or evidentiary standing to interpret.

It is particularly important to avoid using family or friends of an interviewee as interpreters, because there is a very real danger that the interpreter will empathise with the interviewee to the extent that objectivity is lost and the responses are prompted, coached or inaccurately interpreted.

The workplace may have a number of workers who can act as interpreters. However, wherever an investigation involves a fellow member of staff, an investigator should be very circumspect in the use of workplace interpreters. There are several reasons for preferring the use of an **external interpreter.** Confidentiality is one of the prime considerations. A witness may also be less inclined to provide information in the presence of a colleague. Moreover, there is a chance that any partiality by the workplace interpreter, either in favour of or against the witness, may taint the translation.

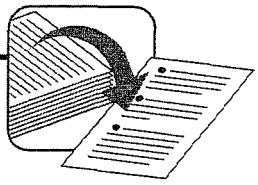
You should clearly outline to the interpreter what their role is – make it clear that they should interpret what is said exactly, and they are not to add interpretations or clarifications. Strongly impress upon the interpreter the need for confidentiality and impartiality. See Module 7 for details about how to conduct an effective interview.

remember



Don't use family or friends of an interviewee as interpreters, or fellow staff members. Engage an external interpreter.

to sum up



More investigations suffer in terms of quality because of poor planning than for any other single reason. A good investigation starts with careful planning and preparation, with a clear understanding of the parameters of the investigation, and with proper authority. Care and attention spent getting it right at the outset will avoid considerable difficulties later on. Modules 6 and 7 take you through the steps involved in gathering evidence.

Gathering evidence

A guide for investigators in public sector agencies

module 6

As an investigator you should have a basic understanding of the rules of evidence and a thorough understanding of how to go about gathering evidence that will stand up in a court of law. This module looks at the nature of evidence and at three of the four main sources of evidence: documentary evidence, expert evidence and evidence from a site inspection. The next module is devoted to examining the fourth and possibly most difficult form of evidence: oral evidence.

Contents

The nature of evidence

Sources of evidence

Evidence-gathering is the process of obtaining information relevant to the complaint. Evidence can be either direct or circumstantial:

Direct evidence is evidence of what a person actually said or did or perceived through any of their five senses.

Circumstantial evidence is evidence from which facts may be inferred. (An inference is a conclusion that has some degree of probability of being true.)

In an investigation the main sources of evidence are:

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

The relative importance of each of these information sources 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.

In most investigations into the conduct of individuals, the main types of evidence are the oral evidence of witnesses and documentary evidence. In some cases, however, you may need to obtain expert evidence.

All evidence collected should be reliable and relevant to the aims of your investigation. Often you will obtain a great deal of extraneous information, but you should avoid being diverted by this. 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.

You should always try to get your information directly from the source. Evidence may become unreliable and difficult to use when a witness starts telling you what other people said they had seen or done. However, not all indirect evidence of this kind is unreliable, and it may be the only evidence you can find. When assessing indirect evidence, ask yourself: 'What is the likelihood of the evidence being distorted?'

As an investigator, you must always conduct yourself with integrity. Never resort to untruthfulness, trickery, deception or unlawful means to obtain evidence. Note, however, that withholding information does not amount to trickery or deception. (See 'Providing procedural fairness' in Module 4.)

Forensic evidence

Depending on the nature of the allegations and the nature of the evidence that you obtain during an investigation, that evidence may take on the character of **forensic evidence** at a later stage. In this context, 'forensic evidence' does not refer to forensic medicine but is the technical term for evidence used in, or connected with, a court of law or a tribunal.

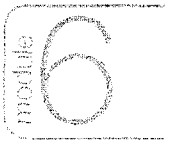
For an investigator, the implications of evidence being or becoming forensic in nature are very significant. If, at the start of your investigation planning, it appears that the allegations, if proven, may end up being the subject of legal proceedings, you will have to proceed with caution – you will need to take considerably more care in the way you obtain and record the evidence.

Where a disciplinary investigation arises out of alleged criminal conduct by a staff member, disciplinary proceedings should take into account any criminal proceedings. If the evidence is clear and admissions have been made, you may consider beginning disciplinary action immediately. You should consult the industrial relations section of your agency or Crown Law, and seek the view of police investigators on how your investigation may be affected by, or affect, the police investigation.

Perhaps the most important consequence of evidence being forensic 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 a matter may need to get professional legal advice.** And this is the benefit of doing a proper investigation plan at the start of the investigation, as outlined in Module 5. A proper plan will help you to identify those questions and issues about which you will need professional advice. A good investigator will ask for this help.

important

If the possible legal proceedings are criminal in nature, the investigation should be conducted by trained specialist investigators only. (See also Module 1.)



Understanding the rules of evidence

Applicability of the rules of evidence

A basic understanding of the rules of evidence is useful for an investigator. As noted above, the allegations made in a complaint may in some circumstances ultimately become the subject of legal proceedings. Another reason for you to have a general familiarity with the main rules of evidence is that, even if these rules do not apply to your investigation, 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 inquisitorial proceedings (such as 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

There is a general rule against hearsay evidence, but there are a number of exceptions to this rule. A 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 himself or herself'. For example, a witness who states 'I was talking to Bill and he told me that he saw Mary take the money' is giving hearsay evidence.

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. Putting this 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.**

It is important to note that the rule against hearsay applies only where the rules of evidence apply. Nevertheless, in all situations investigators should make every effort to track down and get direct evidence. If this is not possible (for example, because the source of the direct evidence refuses to be interviewed) then your report should record this.

Investigators should be aware that one of the primary exceptions to the rule against hearsay is statements made by alleged wrongdoers where they admit their wrongdoing. The reason for this lies in an assumption that people don't tend to make damaging confessions against their self-interest. Therefore, any damaging confession is inherently likely to be true. If Bill from the earlier example says something along these lines – 'Mary told me that she took the money' – this would carry some weight.

Opinion evidence

As the investigator, you have the task of finding out what happened and why. A witness's opinions about a person, or about what happened or should have happened, are irrelevant to your inquiry. Therefore, as a general rule, a witness interview should not contain 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.*

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 of the matter. Similarly, where witnesses have acquired considerable practical knowledge about a matter through life experience, they may be able to express an opinion about that matter even if they are not an expert.

Applying the appropriate standard 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**. Therefore an acquittal in criminal proceedings will not necessarily mean that disciplinary proceedings 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 seriousness of the issues involved. The more serious the allegation, the higher is the degree of probability required (known as the *'Briginshaw test', Briginshaw v. Briginshaw* (1938) 60 CLR 336).

At the conclusion of many investigations, of whatever nature, it will ultimately be an issue of one person's word against another's. In deciding which witness is the more credible, you should consider a range of factors, including the demeanour of the witnesses, their possible motives and any inconsistencies. Only in exceptional circumstances should you take the past behaviour of any party into account. Evidence of past behaviour may be relevant only if the behaviour is markedly similar, recent, and/or serious.

If a person has had allegations of dishonesty proved against them in the past, this may be taken into account in assessing credibility.

Gathering documentary evidence

Some of the most reliable evidence in an investigation is documentary evidence. On the whole, documents don't tend to lie – except, of course, where they are forgeries or are manufactured after the event to mislead.

One of the first steps that you should take in an investigation is to *make secure any relevant documentary evidence* – all relevant files, diaries, computer disks and the like. If all relevant documents are made secure as a first step, 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 the investigator's possession or control should be regarded with suspicion.

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

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 and then use the photocopies during the course of the investigation. The original documents should be kept secure under lock and key.

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

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 (for example, a sign-on book) can be removed if a new one is made available.

When dealing with documentary evidence:

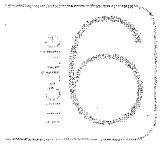
- keep all the documents relevant to an investigation in a secure place
- make sure that originals are not marked, changed, lost or damaged
- take photocopies for use during the investigation
- keep a record of when, where and how you took possession of the documents, and how they are stored
- when you remove any documents, provide a receipt or some other record, together with your contact details.

Gathering expert evidence

Sometimes it is not possible for you to find the facts yourself and you may need the help of experts.

Experts are commonly required for advice on:

- medical, psychiatric or psychological illnesses
- accounting or financial matters – you can go to <www.cmc.qld. gov.au/library/CMCWEBSITE/Speech_AuditorinthePS.pdf>
- computer or machine functioning – you can go to <www.cmc.qld. gov.au/library/CMCWEBSITE/Speech_ForensicComputingintheCMC. pdf>
- scientific analysis of documents or other things.



Document examiners and handwriting experts

Depending on the nature of the matters under investigation, you may require the services of a document examiner or handwriting expert. The telephone book contains listings of such people. These experts may be needed to establish when documents came into existence, whether they are forged and, 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.

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, and
- evidence from an expert in the field of handwriting comparison who has formed the opinion that the writing is that of a particular person.

Other professional help

An investigation may also be assisted by the use of other professional experts such as accountants, valuers or engineers. Once again this will be guided by the nature of the matters under investigation.

There is no foolproof formula for selecting an expert. By contacting a professional association you may be able to get the names of some highly recommended members. Other useful sources of relatively affordable and independent expertise are the universities and TAFEs.

When obtaining a report from an expert, get the person to:

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

Gathering evidence from a site inspection

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.
- Arrange an appointment time (preferably for the time of day when the original event took place) and explain the purpose.
- Take 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.

Recording and storing evidence

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 and 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.

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.

Confidentiality requirements (see Module 4) mean that strict security should surround the conduct of any investigation into a complaint, particularly complaints that relate to the conduct of an individual. Maintaining confidentiality is particularly crucial in handling whistleblower cases. Whistleblowers may, often justifiably, be anxious about the prospect of leakages of information about their disclosure. Showing them that you take a very serious view of security can allay their anxiety.

The running sheet

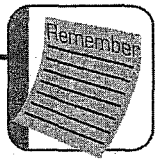
A valuable practice for investigators is to maintain a 'running sheet' or 'log' for every investigation. Often placed on the inside cover of the file, a running sheet is a chronological record of events that have taken place in the investigation. More recently the trend is to maintain the running sheet or log electronically on a computer, especially where more than one person is involved in the investigation. At a minimum, running sheets provide a record that can easily be audited of who did what and when. They are particularly useful where:

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

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, and
- state records be kept under safe custody and proper preservation.

remember



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 your investigative actions.
- Document reasons for deviating from the investigation plan.
- Document any action/inaction that is contrary to best practice.

Granting access to documents

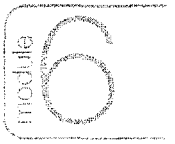
As the investigator you may face the situation where a person who is the subject of the investigation wants to gain access to documents relating to the complaint and the investigation.

Access to such information involves the balancing of two competing principles. There is the interest of the person under investigation to know the allegations made against them, and the nature of the evidence you have gathered that both supports and contradicts those allegations. But there is also the need to ensure the integrity of your investigation. If you reveal critical evidence, the investigation might be prejudiced. Moreover, there may be circumstances where it is not in the best interests of the investigation for identifying information to be disclosed.

The decision about which of these considerations should prevail is not always one that is open to the investigator to make. As a threshold issue, you should be aware of any statutory rights of access that the person who is the subject of the complaint may have.

The Freedom of Information Act

The Freedom of Information Act 1992 (the FOI Act) confers on a person a legally enforceable right to be given access to an agency's documents. If a request to access documents related to your investigation is made under the FOI Act, a document may be exempt from release. A government department, a public authority, a council and the holder of a public office may refuse access to a document under FOI if it is an exempt document (s. 28 of the Act). For example, a document may be exempt from release if it contains matter the disclosure of which:



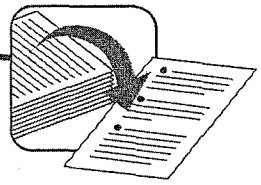
- is prohibited by an enactment mentioned in Schedule 1 of the FOI Act, unless the disclosure is required by a compelling reason in the public interest – section 48(1) of the Act
- could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law – section 42(1)(a)
- could reasonably be expected to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained – section 42(1)(b)
- could reasonably be expected to prejudice the effectiveness of a method or procedure for the conduct of tests, examinations or audits by an agency, unless its disclosure would, on balance, be in the public interest – section 40(a)
- could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel, unless its disclosure would, on balance, be in the public interest – section 40(c) – or
- would disclose information concerning the personal affairs of any person – section 44(1). However, this exemption cannot be used where the information concerns the person by whom, or on whose behalf, an application for access to the document is being made – see section 44(1).

Depending on the circumstances, other exemptions contained in the FOI Act may also be available. See Division 2 (Exempt Matter) of Part 3: (Access to Documents).

You should also be aware of any other statutory rights of access to documents that may exist.

Different considerations apply where documents are subpoenaed by a court. There are only limited grounds for objecting to production of documents under a subpoena, and if confronted with a subpoena you should seek legal advice.

to sum up



The rules of evidence generally do not apply to administrative investigations. However, it is useful to have a basic awareness of these rules to ensure that the evidence you obtain is the best available and that, where applicable, the evidence will be admissible in any subsequent legal proceedings.

Evidence can be either direct or circumstantial. There are four main sources of evidence — from documents, from experts, from site inspections, and from interviewing people. (Interviewing, or oral evidence, is discussed in the next module.)

It is crucial that you as an investigator create a paper trail of your actions in an investigation. This will help to protect you at a later stage if your methodology or conclusions become the subject of a complaint to an outside agency.

Module 7 now examines what is involved in gathering oral evidence, arguably the most difficult form of evidence to gather accurately.

Gathering oral evidence: interviewing

A guide for investigators in public sector agencies

module 7

The manner in which an interview is conducted can significantly affect both the extent and the quality of information obtained. This module will show you what is required to be a good interviewer.

Contents

The art of interviewing

One of the main aims of an investigator obtaining oral evidence should be to minimise the possibility of people subsequently denying, changing or contradicting the information they have given. You should therefore apply some basic rules in all interviews.

The first rule is to ensure that you are properly prepared for the interview. How do you know if you're properly prepared? Ask yourself these questions:

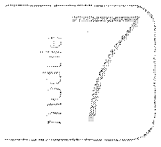
- *Do I feel confident about conducting the interview?* If not, don't do it. Seek the assistance and approval of senior management in obtaining the services of an experienced investigator.
- *Is senior management confident that I am the appropriate person to conduct the interview?* If unsure, check.
- *Could the investigation lead to legal proceedings that are criminal in nature?* If so, seek the services of a trained specialist investigator.

Secondly, as with every other facet of the investigation, you must be –and be seen to be – impartial.

Thirdly, at the outset of every interview it is important that you clearly inform the interviewee of the reason for the interview, although it is not necessary to mention all the factors relevant to the subject under discussion at this stage.

Fourthly, you must avoid making any statements that cause a witness to believe that they will obtain any privilege, concession or immunity from official action.

Within these bounds, an investigator has a fair degree of flexibility in the conduct of an interview.



Preparing for an interview

The objective of any interview is to find out the facts and to obtain sufficient information to confirm or deny the basis of the complaint. To do this properly, you must interview all relevant parties, including witnesses and the subject officer (the alleged wrongdoer).

When you planned the investigation as a whole, you had to decide who should be interviewed and the order in which the interviews would be carried out. (See Module 5.) In preparing for the interview/s, you will need to contact the people to be interviewed and choose a suitable interview setting for each person. People should ordinarily be contacted at their place of work to attend an interview.

In determining the most appropriate way of contacting interviewees, you should take note of established protocols and any special need to protect the confidentiality of the person. You should strive to respect the privacy of staff and to guard against your communications being intercepted. It is wise to consider any special cultural, gender or other factors relating to the individual interviewee. Finally, if your organisation has a procedure such as a written notice to attend an interview, you should comply with that procedure.

practical tips

for getting ready

- **If you don't feel confident about conducting the interview, don't do it.** Seek the assistance and approval of senior management in obtaining the services of an experienced interviewer.
- Before interviewing anybody, check with senior management that you are the appropriate person to conduct the interview.
- Also consider whether the investigation may lead to criminal proceedings (see Module 1).

Choosing an interview setting

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.

The choice of setting will vary according to the person being interviewed. Ideally, the room 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). There may be occasions when you have to conduct the interview at an outside location if no private meeting room is available at the person's workplace.

Face-to-face interviews are the preferred method of interviewing as they have a number of advantages that allow you to make a more accurate assessment of a person's credibility. They are more responsive and flexible, more spontaneous, and they allow you to observe and respond to both verbal and non-verbal cues. However, if it is not possible or practicable to conduct a face-to-face interview, you may need to consider alternatives.

important

Location and timing should be discreet, so that the person does not have to explain their whereabouts to colleagues.

Alternatives to face-to-face interviewing

Two alternatives to face-to-face interviewing are telephone interviews and written responses.

With **telephone interviews** there is potential for misunderstanding, and you will not be able to see important non-verbal cues. You should only resort to a telephone interview if you need the information urgently and the person is far away. If at all possible, you should immediately fax a copy of the record of the conversation to the person to approve, or amend and approve. A telephone interview may also be acceptable if you simply want to clarify some details, or if you need brief or less formal information. You may be able to record your conversation from a speaker phone.

You could also consider the option of video conferencing. You might have your own facilities or be able to hire a facility from a conference centre, depending on available resources and cost.

Written requests for information will sometimes be an appropriate method of eliciting information. Because this process gives the respondent time to consider and prepare their response, written requests for information will be suitable where you require detailed or more formal information.

However, you should be aware of the drawbacks of this form of information-gathering. The formality of written requests and responses can be intimidating and time consuming for respondents, and this medium is 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 their words or responses.

Written requests create more delays in the investigation than would result from face-to-face interviewing, and you should also be aware of the risk of loss of confidentiality and of collusion between witnesses in this form of evidence-gathering.

The CMC recommends that this procedure not be used in lieu of an interview of the subject officer.

checklist 7

practical tips

for conducting an interview

- Be familiar with and comply with any relevant legislation and approved procedures.
- Make sure you set objectives for the interview, prepare a list of essential issues to be covered, and familiarise yourself with the details of the case.
- Remember that the purpose of an interview is to obtain answers to six categories of question — Who? What? When? Where? How? Why? (The answers to the last two types of questions are important in terms of correcting policy or implementing new procedures.)
- Avoid making assumptions; if in doubt, ask further questions.
- Resist any temptation to enter into discussion or argument with the person being interviewed; remain calm and polite, and maintain your objectivity.
- Gather *all* relevant information, not just information that supports the complaint.

- If you need to show documents or other things to the person, make sure that you have them ready and available.
- If there are a lot of documents, you should consider the order in which you will show them to the witness, and have them placed in a file in that order.
- If you are working with another investigator, decide on your respective roles before you start the interview; for example, who is going to ask which questions and who is going to take notes, produce the documents, operate the tape-recorder and so on.
- Think about how the person is likely to react during the interview. Be prepared for the person to stay silent, or to refuse to answer certain questions, lie, be anxious or aggressive, or never stop talking.

Recording oral evidence

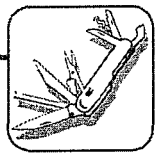
When preparing for an interview, it is important to consider how the interview is going to be recorded and make the necessary arrangements. The most important rule in all cases where oral evidence is being taken is that it be **recorded accurately.** The most reliable way of ensuring accuracy is to tape-record the interview. Written records of interview or witness statements should only be used when circumstances do not allow taping.

important

The CMC's preferred method of recording oral evidence is tape-recording.

module 7

practical tips when tape-recording



- Test the quality of the recording before commencing, for example by saying something like 1, 2, 3 into the tape and then playing it back.
- Speak clearly and audibly.
- Do not talk over the witness or let the witness talk over you.
- Do not handle documents while asking questions or let the witness handle documents while talking. This will avoid the shuffling of papers obscuring the sound of the voices on the tape.
- Mark the outside of the audiotape with suitable identification, the time and date, and sign it.

Should you give the interviewee a copy of the tape?

A person who is the subject of complaint should always be given a copy of the tape of their interview at its conclusion.

Often other interviewees will ask if they can get a copy of the tape of the interview, or of the investigator's notes. These requests should also be granted – unless, in so doing, the confidentiality of the investigation is put at risk. This is something that you must consider carefully. It may mean that you make copies of the tape or notes available to interviewees only after the person, or another person who is to corroborate the evidence of the first person, has been interviewed. In other words, making the tape and notes available to interviewees may be a question of timing.

What if tape-recording is not practicable?

Sometimes tape-recording is simply not practicable. For example, you might have to conduct the interview on a factory floor where the level of background noise would make tape-recording unwise. Or your tape-recorder might break down just when you're about to start the interview, or, for one reason or another, the recorder might not be readily available. Some witnesses might refuse to speak on tape.

In such circumstances you will have to keep a written record of interview by taking meticulous notes of the questions asked and the answers given. You should have the person read over the notes you have taken and get the person to sign off on the notes to indicate that they are accurate. However, as stated above, the CMC's preferred option is to tape-record all records of interview.

Should you take written statements as well?

No, written statements are not necessary if an interview is recorded. (If it becomes necessary to prepare a written statement, you may contact the CMC's Monitoring and Support Unit for advice.) A summary of the interview should be annexed to the investigation report (see Module 8) and a précis included in the report.

Should you allow a third party to be present?

Interviewees will sometimes ask if they can have another party, such as a lawyer or a union representative, present during the interview. The presence of a third party may help the person feel more comfortable and thus make the interview easier to conduct.

You should consult your agency's policy on requests for the presence of third parties. As a general rule, a subject officer may have either a union representative or their lawyer (and a specialised interpreter, in the case of those who do not have a working command of English, or who have a communication barrier other than language – see Module 5).

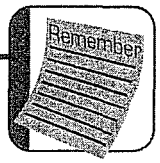
When dealing with third parties:

- **Make it clear to the third party that their role is simply to observe, and not to take part in the discussion or interview:**
  - Make sure the third party understands that their role is not to advocate for the witness during the interview (this is particularly important in relation to union representatives or lawyers).
  - You should also ensure that the third party does not suggest answers or 'lead' the person being interviewed.

- **If the third party is a person likely to interviewed in relation to the matter, they should not be allowed to be present during the interview of another person.**
- **Confidentiality must be ensured in relation to both the interviewee and any third party:**
  - Where the intervention of third parties may jeopardise the confidentiality of the process, action should be taken to prevent this happening.
  - The issue of confidentiality must be balanced against the legitimate right of interviewees to have a support person of their choosing present during their interview.
  - Make it crystal clear to both the interviewee and the third party that they should not talk about the content of the interview.
  - Seek an undertaking from the third party that they will respect the confidentiality of the issues discussed during the interview.
  - If the third party will not or is unable to provide such an undertaking, they should not be allowed to be present during the interview.
- **In some cases the third party may be asked by more than one person to attend the interviews:**
  - Where this may create difficulties or put the third party in a difficult position, the third party should not be put in a situation where they could inadvertently (or intentionally) compromise the investigation.
  - Potential conflicts of interest can be avoided by asking the third party whether they have been asked to assist any other person; for example, a workplace union delegate may have been asked to represent them all.
  - In such cases, discussions should be held before the interview begins to establish whether other representatives would be available.
  - In these situations, it may be preferable for a paid union official rather than the workplace delegate to act as the third party rather than involving the workplace delegate.

These are matters for the investigator's judgment, common sense and negotiation with interviewees and third parties.

remember



Whenever a support person is present during an interview with a person, 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 interviewee
- has not agreed to assist any other people likely to be interviewed during the investigation
- undertakes to respect the confidentiality of the matters discussed in the interview.

Planning the interview

Rigorous preparation is essential for good interviewing. Planning an interview, and having a clear idea of what you are trying to get out of it, will enable you as interviewer to set the agenda. Logic and careful analysis are needed for this.

As part of the planning process, you should anticipate how to deal with difficulties that may arise during the course of the interview, such as:

- emotional, hostile or resistant witnesses
- irrelevancies
- getting off the track
- disruptions, and
- the answers leading in an unexpected but important and relevant direction.

All interviews call for a high level of skill. Apart from a thorough knowledge of the agency concerned, including its policies, practices and procedures, a successful interviewer needs to have good analytical skills, an ability to communicate effectively, and a high degree of good sense, professionalism and integrity.

During the course of an investigation, you may obtain information which suggests that the person being interviewed has committed a criminal offence unrelated to the allegation you are investigating. Or you may discover that the matter you are investigating is more serious than you originally assessed. Once you have established a suspicion of a criminal offence, you should terminate or suspend the interview and seek advice from your agency's legal section or the CMC's Monitoring and Support Unit.

If serious criminal offences are detected and you do not discontinue your investigation, there may be a risk that evidence would be contaminated, thereby jeopardising any subsequent criminal investigation.

module 7

important

When interviewing people, you must be fair to them. Explain things carefully, do not try to trick them, and give them ample opportunity to respond to your questions. If they raise relevant issues during your interview of which you were unaware, it is your duty to go away and inquire into them.

Developing the questions

Before an interview, you should have prepared all the questions to be asked. It may be necessary to deviate from the prepared questions to ask follow-up questions. You should not be reluctant to follow tangents raised by a person during the course of the interview. However, having preset questions will help you to cover all the ground that needs to be covered. As part of planning, you should anticipate possible responses and decide on further questions to test these responses.

Different people will respond in different ways to particular forms and styles of questioning.

The degree of cooperation will vary. Whereas some people will be forthcoming in their responses, some will be more reticent, and others will actively seek to withhold information. Some may feel confident giving information, but others may feel intimidated and require support. You should adjust your interviewing approach to cope with this.

When questioning people about a matter, you will need to be alert to how they are responding to your questions. 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.

When developing questions, bear in mind that the object is to gather information that will prove or resolve the facts at issue that were identified in your investigation plan.

Most interviews are characterised by a relatively friendly and non-threatening but businesslike approach, the use of **open-ended questions**, and requests to offer any information that might be of assistance to the investigation. Open-ended questions begin with 'Who?', 'What?', 'When?', 'Where?', 'How?' and 'Why?'. Such questions allow the witness full range in answering and do not lead the witness in any particular direction. For example: *What can you tell me about these photographic files?*

Open-ended questions such as 'What happened then?' are particularly useful where it is important that the information being provided by the witness is not contaminated by matters that are not known to them.

There is an order in which questions should generally be put to a person in an interview.

Consider beginning the interview with some **general questions** about the person's recollection of events relevant to the matter under investigation. It is also helpful to ask questions in their chronological order.

Closed questions should be asked only after witnesses have told their story. Closed questions are those to which the answers are 'yes' or 'no'. They are useful to confirm matters once information has been obtained, but tend to restrict the opportunity for witnesses to articulate positions for themselves.

You should aim not to ask closed questions of the witness during the earlier part of the interview unless you are having difficulty in extracting information. Note the difference in these examples:

Closed questions	Open-ended questions
'Did you go to the records room at lunchtime?'	'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?'

In a court or other adversarial proceeding, closed or **leading questions** are generally only permissible in cross-examination. Although this rule does not apply in inquisitorial proceedings, persistent and continued use of such questions is not recommended. Similarly, long, drawn-out or convoluted questions should be avoided, as they only serve to confuse. Multiple questions should not be asked as a single question – for example:

> Did you access the e-mail system and use it to send inappropriate material to other employees, hoping they would find them amusing and expecting them to delete them but not realising that they would be intercepted by the e-mail manager and reported to the director?

Such a question only serves to confuse the issues and the interviewee, and does nothing to establish the facts. A more effective interview would go something like:

> Do you have access to the department's internal e-mail system?
>
> How do you gain access?
>
> On [specific date] did you access the e-mail system using that password?
>
> What e-mails did you send?
>
> What did you attach?
>
> Why did you send them to those people?
>
> What did you think they would do with them?
>
> Are you aware of the department's e-mail policy?
>
> Are you aware that e-mails are audited?

Each question should seek to clearly address one point only.

As the principal function of an investigator is to get at the truth of the matter, you must sometimes ask **difficult questions.** It may be useful in some circumstances to preface the question with an explanation such as: 'I'm sorry if the question I am going to ask is upsetting to you, but I have to ask it in order to investigate this matter properly.'

You may also need to ask appropriate **supplementary questions** to test the credibility and reliability of a witness's answers, especially as it is not unknown for people being interviewed to be 'economical with the truth'.

important

When interviewing the person who is the subject of the allegations, all the allegations should be put to the interviewee so that they can respond before you write the investigation report.

Questioning a person about documents

When questioning a person about a document, it is advisable to ensure that it is clearly identified by that person so that there can be no dispute later about which document was being discussed.

It will not be sufficient to merely show the person the document in question; you should also describe it in a way that distinguishes it – for example, 'a letter dated such and such, from x to y'. The person should be required to acknowledge or express ownership of the document – for example, by identifying it as a document that they have previously written, received or seen – and should sign and date any document referred to in the interview.

You may wish to give the document an identification number such as the person's initials followed by a number – for example, for Mary Smith: MS1, MS2 and so on. The document may then be attached to the interview summary, if relevant.

Dealing with difficult or uncooperative people

There will be times when you encounter difficult people – for example, those who are obsessive or irrational, or those who are unfocused and continually change the subject, or who embroider their answers with unnecessary detail or gossip. Other witnesses may trivialise the issues or attempt to undermine your authority. Such occasions require you to take a firm hand in the interview so as to control the process. However, you must also take great care to sift through these witnesses' evidence to ensure that you do not miss genuine allegations, admissions or rebuttals.

Some people may simply refuse to cooperate or answer any further questions. There are many reasons a person may refuse to cooperate with an investigation. For example, a person may be afraid of what will happen to them if it becomes known that they have assisted with the investigation.

No matter how skilful an interviewer 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, the investigator is not necessarily devoid of any recourse. Crown Law advice is:

> If an employee is under a legal obligation to comply with a lawful direction (such as that found in section 87(1)(d) of the *Public Service Act 1996*), then 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. Consequently, an employee who refuses to answer questions that he or she has been lawfully directed to answer may incur disciplinary action.
>
> The Chief Executive Officer 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.
>
> 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 is unavailable in the context of internal inquiries associated with disciplinary matters. The context of the purpose of the Public Service Act centres on the 'efficient and proper management and functioning' of the departments of state

> government. The public service as a hierarchical institution depends upon the performance and accountability of its officers to run efficiently. A pillar of service-wide discipline is the acceptance of and obedience to lawful orders from a superior authority, particularly in relation to accounting for the performance of official duties.

If a person 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. 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.

Suggested structure of the interview

There is no single correct formula for conducting an interview, but the interview will generally flow better and be more structured if it follows a logical path. A useful and commonly used format is the following:

1. The introduction
2. A 'What happened?' component
3. Specific questions
4. Closing the interview

1. The introduction

This includes:

- the time, date and place of the interview
- details of everyone present at the interview (including you and any support person)
- voice identification
- the purpose of the interview
- a short explanation of how the interview is going to be conducted
- details of the witness being interviewed – full name, date of birth, address and occupation
- ask the person whether they have any questions before beginning the interview. For example:

> I am Joe Bloggs and this is Fred Smith. We are at [...]. The date and time are [...]. Also present is Ms Brown, your union representative. For voice identification would each person present state their name and position [...].
>
> Mr Smith and I are making inquiries about [allegation]. I would like to ask you some questions about this matter, and my questions, together with your answers, will be recorded on this [equipment].
>
> Just to confirm with you: your full name is [...], your date of birth is [...], your address and occupation are [...]. Do you have any questions before we continue?

2. The 'What happened?' component

Here you ask some open-ended questions, such as 'What happened then?', 'What happened next?' and 'Why did you do that?'. This allows the witness to describe events in their own words.

3. Specific questions

You can ask this type of question to clear up any ambiguities or to deal with facts at issue that have not yet been covered. For example:

Q: You said earlier that you put the money in your pocket. Had you first put the money in the cash register?

A: No, I left the money on the ledge above the cash tray and when the woman left the counter I put it in my pocket.

Q: You said you went down to relieve [name] at the front counter. Do you recall what time it was?

A: I had the early lunch break, so it would have been about 1 o'clock.

4. Closing the interview

Towards the end of the interview you should summarise the issues raised by the person. This can often be used to bring the interview to a close, with the person feeling confident that they have been heard and understood. Also give them the opportunity to provide any further information they may wish to add, including a handwritten or typed statement. For example, if the subject officer has admitted to the conduct that is the subject of complaint, they should be given the opportunity to provide reasons or an explanation.

When interviewing the person who is the subject of the complaint, you should allow them to respond to allegations and facts uncovered during the investigation. You may need to paraphrase the allegations to protect the identity of a protected complainant. For example:

> 'There is evidence that [...]. Do you wish to comment on that?' *or*
>
> 'During the investigation it was discovered that [...]. Do you wish to comment on that?' *or*
>
> 'X said that you [...]. Do you wish to comment on that?'

Interruptions

If, during the interview, the interviewee indicates that they are tired or wish to take a break, then you should call a temporary halt to the interview. On the record of interview, note the time when the interview is halted and resumed and the reason for the break. Generally, it is better not to discuss the subject matter of the interview with the person during the break. When you resume the interview, ask the person to confirm the fact of the break and what, if anything, you said to them during the break that was relevant to the investigation.

Follow-up interviews

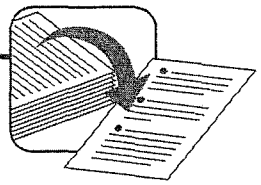
You should tell the person you are interviewing that you may require them to participate in a further interview or provide further information at a later date. You should also invite the witness to get back in touch to tell you anything extra that they think of at a later stage. Give them your contact details for this purpose.

Evaluating the interview

Once you have completed an interview, you need to evaluate what was said and whether you need to re-interview the witness or interview other people. You may have been told about documents that you were not aware of. Assess whether these would aid your investigation and, if so, what steps you would need to take to obtain them. Even if you think that the documents would not help you, it would be advisable to look at them to confirm your view.

As a general rule, always ask yourself at the end of each interview whether there are any other avenues of inquiry to pursue. You should also revisit your investigation plan and assess whether it needs to be changed. If so, make the necessary changes.

to sum up



Oral evidence is usually the most difficult evidence to obtain. People do not recall events clearly in a perfect chronological order. Our memories are imperfect and operate in odd ways. This poses problems for investigators. It takes skill to keep an interview focused and to draw out all the relevant information.

Once you have gathered all the evidence you can about a particular matter, and assessed it, it is time to write your investigation report and to consider closing down the investigation. The next module will explain what is involved.

At the end of the investigation

A guide for investigators in public sector agencies

module 8

After you have finished your investigation you must prepare a report and then complete and file all the paperwork. The investigation report is an important document because it is your agency's record, and may well be subject to outside scrutiny by, for example, one of the accountability agencies such as the CMC or the Queensland Ombudsman.

Contents

The investigation report

There is no single correct format for an investigation report. Your agency may have its own format, and as long as it contains each of the components listed below and is well structured, you can continue to use that format.

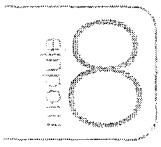
The following material should appear in an investigation report:

- Authorisation
- Scope and purpose
- Précis of complaint and allegations
- The complaint
  - Source
  - Complainant
  - Subject officer
- The investigation
  - Complainant's version
  - Subject officer's version
  - Other witnesses
  - Documentary evidence
- Conclusions
- Recommendations
- Manager's responsibilities
- Systemic issues and recommendations
- Attachments

A good investigation report will use headings to help the reader identify the evidence relating to each issue. The evidence should be appended, tabbed and referenced in the report. (See the following pages for a sample investigation report.)

If the investigation report does comment on a manager's responsibilities or systemic issues, these portions of the report can be issued separately and do not have to be provided to the subject officer. Once you have completed your investigation report, you should sign it and mark it 'confidential'.

If the investigation is to be reviewed by the CMC, the CEO should provide a covering letter, including the actions proposed or taken and reasons, and a copy of the full report along with any attachments.



important

Distinguish between fact and opinion

If you are conducting the investigation under a statutory power, it is important to determine the extent of your power to draw conclusions, and to be clear about the nature of the conclusions that you are

entitled to draw. In your report, be careful to distinguish between findings of fact and expressions of opinion, based on the evidence.

Sample of an investigation report

The following format for an investigation report is one that the CMC finds useful and recommends.

CMC FILE NO.: .....

AGENCY FILE NO.: .....

COMPLAINANT: .....

SUBJECT OFFICER/S: .....

INVESTIGATOR: .....

DATE: .....

Authorisation

Give a brief statement of the authorisation obtained for the investigation. The level of authorisation will usually be from the agency CEO. State also any delegated powers or authorities vested in the investigator and by whom.

Scope and purpose

Set out a brief summary of the boundaries of the investigation and its purpose for the agency. (The scope should be a brief statement of the conduct being inquired into. It should not just reiterate the allegations made, and should be framed in neutral terms.) See Module 3.

Précis of complaint and allegations

Set out a brief and succinct summary of the nature of the complaint as expressed by the complainant. Include the date and place the incident occurred.

Specify and number each allegation distilled from the complaint, having regard to any possible relevant criminal offence or disciplinary breach, or any specific section/clause of any relevant policy, procedure or code of conduct. Use corresponding numbers throughout the succeeding sections.

If other matters of concern not raised by the complainant have come to light during the investigation, these should be listed under the subheading 'Further allegations', which should be numbered sequentially following on from the other allegations.

The complaint

Source

State how the complaint was received. If the complaint is in written form, make this document Attachment 1 to the report.

The complainant

State the name and occupation/position of the complainant. (Mention any background information that may be relevant to the investigation of this complaint.)

Subject officer

State the name and position of the person about whom the complaint has been made. Provide a summary of the subject officer's employment history with the agency. (Mention any background information that may be relevant to the investigation of this complaint.)

The investigation

Provide a brief précis of how the investigation was conducted.

Give a brief account of who was interviewed, whether there were any other witnesses available and why it was not felt necessary to interview those persons.

Indicate the process by which any documentary or other evidentiary material has been obtained.

Complainant's version
In brief form, state the circumstances and particulars of the complaint that the complainant makes, with regard to the specific allegation distilled from the complaint.

Subject officer's version
Précis the salient points of the interview of the subject officer, including the person's responses to each of the allegations.

Other witnesses
Provide a brief summary of the versions given by each of the witnesses interviewed, and indicate if they corroborate or contradict the version of the complainant or the subject officer.

Documentary evidence
List the documentary evidence relied on in the investigation and summarise the effect of the documentary evidence. Repeat the process for each allegation.

Conclusions

Set out in brief form the investigator's opinion as to whether the evidence gathered, if accepted by the decision-maker, is capable of substantiating the allegations, and the reasons for these conclusions. Include relevant policies and procedures. If there is more than one allegation, they should be dealt with separately under headings that correspond with those used in the section 'The investigation'. A conclusion should be reached for each allegation and a basis for such conclusions should be given. It may be necessary to explain inconsistencies between the versions of witnesses and the reliability of persons interviewed.

Recommendations

The investigator should give his/her view of how the matter should be finalised. If the allegations are not capable of substantiation, it will usually simply be 'I am therefore of the view no further action is warranted'. If the investigator considers the evidence is capable of substantiating the allegations, alternative courses of action should be considered. These may include criminal or breach of discipline proceedings.

After considering the alternative courses of action, the investigator should make a firm recommendation as to the preferred option, with supporting reasons. If the recommendation relating to each allegation is the same, they may be dealt with under the one heading.

Manager's responsibilities

Set out any issues concerning the manager's responsibilities and any failure on the manager's part that may have contributed to the alleged conduct. Make any recommendations to address managerial deficiencies.

Systemic issues and recommendations

Describe the systemic issues/system deficiencies revealed during the investigation that may have contributed to the complaint and any recommendations for systems improvement and misconduct prevention. (See also Module 10.)

Attachments

Ensure that copies of relevant documents, including all documents relied on by the investigator and any relevant policies and procedures, are numbered and attached.

Attachments should be indexed and numbered in the order they are referred to in the investigation report (e.g. 'Attachment 1').

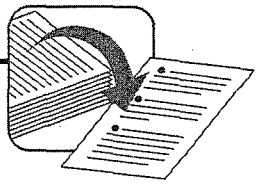
Closing the investigation

At the end of your investigation you must have completed and filed all the paperwork, but there is a tendency for eager investigators to ignore the less interesting aspects of finalising files.

As you finish your investigation, consider the following points:

- Is the file ready to be sent to storage? Will someone retrieving it in two years' time be able to understand the process and the paperwork?
- Have all the appropriate notifications been made? It is easy to forget to let relevant people know the result of an investigation if they are not the central players. So make a list of all those parties who should be informed and ensure that they are.
- Are there any other actions arising out of the investigation? Is the documentation organised accordingly? Quite often one investigation can trigger another one. So, as the first one ends, it may be necessary for there to be some coordination with the new file.
- Finally, the most searching question: 'Is my file good enough for an outside or management review as it stands?' **You should not part with your investigation file until you are entirely satisfied that all aspects are fully completed and the file is presentable.** As noted in Module 1, even if the CMC is only seeking advice on the outcome of your investigation, it may still become the subject of a review as part of a class or classes of complaints that the CMC targets or randomly selects for monitoring.

to sum up



There is no single correct format for an investigation report, but a good report will contain certain essential elements such as its authority, its terms of reference, details about the complaint and the investigation, any conclusions and recommendations, and any systemic issues that may have arisen.

At the end of an investigation, you must complete and file all the paperwork connected with the case.

Checklist for investigations manager

For the assistance of the investigations manager at the conclusion of the investigation.

- ❑ Have all relevant witnesses been interviewed?
- ❑ Have all interviews been tape-recorded?
- ❑ Have all exhibits been obtained, labelled and safely secured?
- ❑ Have receipts been issued for property/documents seized?
- ❑ Have all exhibits been shown to the relevant witnesses?
- ❑ Has the subject officer been interviewed or given the opportunity for an interview?
- ❑ If interviewed, has the subject officer been provided with a copy of the interview tape?
- ❑ Has the subject officer had the opportunity to comment on any adverse findings made against him/her?
- ❑ Have all interview tapes been correctly labelled and securely stored, with the record protection lugs removed?
- ❑ Was the investigation impartial, and would it stand scrutiny from an outside agency?
- ❑ Has an investigation report been completed in the required format?
- ❑ Has all **relevant** information been included in the report, including any exculpatory evidence (i.e. evidence of clearing/lifting of blame) or other information favourable to the subject officer?
- ❑ Have all interviews been summarised in the report?
- ❑ Have any systemic or procedural issues been addressed?
- ❑ Is the investigation report sufficiently comprehensive to provide the basis for an informed decision by the organisation (e.g. disciplinary proceedings or procedural changes)?
- ❑ Are the conclusions justified and supported by the evidence?
- ❑ Has a firm recommendation been made as to how the matter should be finalised?
- ❑ Are copies of all relevant documents (e.g. Authority to Investigate, computer printouts, photographs) attached to the report and listed as attachments?
- ❑ Have steps been taken to mitigate any possible adverse impacts on the workplace?
- ❑ Does the matter need to be referred to another agency or board (e.g. Professional Registration Board)?

Managing the impact of an investigation

A guide for public sector managers

module 9

This module presents strategies that you, as a public sector manager or supervisor, can use to manage the impact of an investigation, both during and after the investigation.

Contents

What is meant by 'managing the impact'?

Investigations should not be carried out with the preconceived notion that misconduct has occurred. Rather, they are designed to get to the truth of a matter. In doing so, they can, in fact, re-establish a person's reputation after it has been damaged by a complaint. Even when an investigation does uncover wrongdoing, it can have a favourable impact by helping a public sector agency recover and refocus its energy on its core business.

Managing the impact means:

- anticipating where the impact will be greatest
- considering how the investigation is likely to affect staff morale
- devising strategies to minimise the adverse effects.

An investigation might find that no wrongdoing has occurred, or it might find that there is insufficient evidence to establish the truth of the matter.

When apparent wrongdoing is uncovered, options include a recommendation that the CEO should consider disciplinary action.

The person who originally reported the matter (if that person's identity is known) should be informed of the outcome of the investigation.

What factors influence the impact of an investigation?

There are many factors, but some important ones are:

- the nature and extent of the allegations being investigated
- the extent to which staff knew of the allegations before the investigation began
- which people are implicated, and what their relationship is with the rest of the staff and with the community
- the nature and breadth of the investigation
- the culture of the agency
- the attitudes of the CEO and senior officers
- the outcome of the investigation
- staff perceptions of how their managers have handled the investigation process
- the expectation that things will change as a result of the investigation, or that they will go on as before.

Where will the impact be greatest?

Usually the impact of the investigation will be greatest in the work units where the staff who are the subject of the investigation work.

The investigating officers may need to have access to material from the

work site to use as evidence, such as files, data, other documents and electronic systems that are used on a daily basis. If this happens, it may cause some temporary disruption to work in that area.

In some cases, the investigators will ask for your assistance to minimise disruption. They may even be able to notify you of their intended visit, to give you time to collect the records they require and to make arrangements for handling the impact. So talk to them about:

- making arrangements to ensure that the staff have access to material that is essential for day-to-day operations
- making photocopies of documents or creating a backup of a computer's hard-disk contents before it is removed.

You should seek advice from the CMC about preserving computer-related evidence, or visit the CMC website at <www.cmc.qld.gov.au>.

How are staff likely to react to the investigation?

You can expect a wide variety of reactions; you can also expect those reactions to shift and change as the investigation continues.

The reactions of staff will depend very heavily on the agency — on its history, its culture and the state of management–staff relations. They will also depend on the personal history of individual staff members — whether they have previously undergone such investigations, whether they trust management and the agency, and how close they are to the subject of the investigation.

With some staff, the news that a work colleague is under investigation will not cause any strong response. Most, however, will react more emotionally. Generally, they will know enough about the process to be worried about what an investigation means for them personally and whether they might be caught up in the allegations. They will usually also want to know more about what it means for the subject individual and for the agency as a whole.

In workplaces that interact closely with the community (for example, schools or regional public services), there is the added pressure for many staff of worrying about the reputation of the agency within the community.

Staff reactions to the news that their colleague is being investigated can range from shock, anger and denial (which may continue for weeks or months) to relief that something is finally being done.

They may react with:

- disbelief
- anger towards management for not supporting the subject officer
- anger towards management for allowing the misconduct to occur
- further allegations about official misconduct
- mixed feelings towards management about not informing staff of the allegations sooner and yet recognising, when this is explained, that the investigation might have been compromised if management had done so
- relief that the allegations are finally being investigated (in cases where the allegations, or similar allegations, were widely known in the workplace before the investigation began).

Signs to watch for

Staff may display the classic stages of grief – denial, anger, bargaining, depression, and finally acceptance. They may be grieving for the loss of a belief that they had in the person under investigation, or for the loss of their image of the agency as being honest and ethical. As well, an atmosphere of distrust may develop in the workplace, in which gossip and innuendo are rife about the subject's and others' involvement in the alleged misconduct. There may also be an increase in stress leave or sick leave and decreases in productivity.

If, as the investigation progresses, staff receive more information about the matter (officially and unofficially), and this information seems to point in the direction of misconduct having occurred, some of the more common responses may be:

- anger towards the subject of the investigation for betraying and manipulating colleagues to facilitate his or her own corrupt interests
- shock at the extent of the person's misconduct and associated uncertainty about being able to 'pick out the bad apple'
- disbelief that the person could have 'been so stupid'
- feelings that long-held suspicions have been vindicated
- a marked softening in criticism of management's apparent lack of support for the subject during the investigation
- a greater willingness to accept the decisions that management has taken or is taking during the investigation, which at first appeared to them harsh or ill-informed
- a desire to put the event behind them and get on with work.

Some staff feel strongly for quite a while. They may, for instance:

- feel guilty about, responsible for or complicit in the person's conduct by virtue of not having been aware of it
- fear that they, too, will be investigated
- fear being identified as a staff member of a corrupt section or agency – in the minds of the community, family and friends as well as their professional peers
- fear that career prospects will be jeopardised
- dwell excessively on the event.

It is difficult to prescribe strategies, as they will depend on the personality of each staff member, in particular their coping mechanisms. But recognising signs of stress is an important step in dealing with the problem. Watch out for:

- ***emotional outbursts*** indicating anger, fear or depression
- ***effects on mental functions***, such as difficulty in thinking clearly, making decisions or concentrating on the job
- ***behavioural changes***, such as sudden insomnia or resorting to alcohol more frequently or in greater quantity
- ***physical signs of shock***, such as nausea or fainting immediately after an event, or even chest pains, other aches and pains or, in the longer term, fatigue.

Managing during an investigation

When you, as a manager, first hear of an investigation, it is possible that the investigation is already under way. This is because some investigations at first need to be conducted ***covertly***.

The investigation may then move to the ***confidential stage***, which means that you will be informed but will not be free to inform other staff.

Finally, the investigation will move to the ***overt stage***, with everyone in the organisation aware that it is taking place.

As a manager, you need to ***plan*** during the confidential stage of the investigation for managing the issues that will arise once the investigation reaches the overt stage.

Develop a plan of action

Be fully prepared with detailed information and support structures before the time comes when you have to inform staff about the allegations being investigated.

Your plan of action should, to the fullest extent possible, set out what to do in chronological order and outline strategies for communicating with staff and outside agencies, including the media.

Consider setting up an internal group with representatives from legal, internal audit, policy, misconduct prevention, unions and any other relevant areas. This group could develop strategies to manage and coordinate the agency's end of the investigation. Part of this group could, for example, be given the task of examining areas of the agency that have been shown to be at risk.

Once the investigation has reached the overt stage you will need to:

- communicate and show leadership
- provide support
- gain the trust of staff.

Communicate and show leadership

Keep a high profile during the investigation. Staff are looking to managers for information, reassurance and leadership. Even if management decisions are not popular, staff are more forgiving if the decisions made are communicated.

Don't allow rumours to flourish. Keep the channels of communication open. Because people differ in the way they absorb information, you should use a range of communication modes, including staff notices or bulletins, and agency-wide forums and unit meetings, as well as encouraging staff to approach managers. Varied presentation will also help to reinforce important information.

Delegate the task of communicating to unit managers. If unit managers are unable to provide the information that staff need because of the requirements of the investigation, find out from staff what they want to know and tell them as much as possible. Be clear and up-front about what information is presently not available, and when it is likely to be available.

Arrange for the CEO to be involved in consultations with staff wherever possible throughout the investigation. This will not go unnoticed and will add to staff confidence in management's handling of the investigation.

Beat the 6 o'clock news. When information is going to become public, all staff should be told before the media report it. It is also a good idea to address staff on the progress of the matter so that they do not feel abandoned during the public exposure of the agency.

Allow staff to talk about what's happening. Productivity will pick up more quickly if staff feel they've had a chance to 'get it off their chests' by discussing the issues with their workmates. Expect staff to be talking about it in the corridors, in tea-rooms and at workstations. It is important, however, to provide formal channels as well, where staff can air their feelings.

Be aware that effective communication about the matter will also help deter others who might have been contemplating similar misconduct. Sometimes it takes formal investigation to crystallise the issues in other people's minds so that they focus on what they are doing and ask themselves whether any aspect of their behaviour might be questionable.

If the agency is to report publicly on the outcome of the investigation, be sure to alert staff to the release of the final report and provide adequate access to a copy. In many cases it is not until the report on the investigation is released that staff are convinced there is evidence of the subject's misconduct. It is also a good idea to provide staff with a formal response from management to the key issues and recommendations of the report. This will reassure staff that management takes the recommendations seriously and plans to be open about any changes that may occur in response to the report.

For the agency as a whole, the impact of an investigation may be such that specific public-relations strategies should be developed. If the report is made public, the agency can expect some difficulties in recruiting staff or securing contracts for services, and will need to work out a coherent plan for dealing with them.

Involving the media

Even if these difficulties are not expected, it is a good idea to make a statement when the report is made public to show both staff and the community at large that management has come to grips with the conditions that allowed the misconduct to occur.

Involving unions

A well-planned communication strategy developed by management to keep staff informed about an investigation will include relevant unions. Staff who are union members may in any event approach union representatives to ask for information about the investigation, their rights, the treatment of those under investigation, and management decisions. Union representatives have the right to approach management to seek information for their members in the agency.

By specifically including union representatives at staff briefings, managers can send a clear message to both union and non-union members that their management of the impact of the investigation will be as transparent as possible. As well, forums held by unions for staff who are members provide an additional avenue for staff to seek information and discuss their concerns about the investigation.

practical tip for union representatives

Union representatives should be aware that a conflict of interest could develop if they represent more than one person involved in an investigation; for example, a subject officer and a witness, or more than one subject officer.

Provide support

For all staff

Consider arranging counselling options before briefing all the staff. This may include off-site one-to-one and/or on-site group counselling. Some people will want to talk to an impartial third party with no connections to the agency. Some prefer to have consultations between management and staff mediated by a trained professional. Others may want no involvement at all.

Provide appropriate support for staff who become involved in the confidential stage of the investigation.

Above all, work to create a culture in your agency wherein an investigation is seen not as a disaster or a crisis, but as an opportunity for people to clear their reputations and for your agency to refocus itself on its core business.

For complainants

The *Whistleblowers Protection Act 1994* requires agencies to establish reasonable procedures to protect their officers from reprisals that are, or may be, taken against them for making a public-interest disclosure. Often complainants will feel that they are being victimised after they make a complaint. Even if their name is kept confidential, they may assume that the subject officer knows and is dealing unfairly with them as a result.

To manage reprisals, whether perceived or actual, the Human Resources Manager, or you as manager, should:

- be alert to any harassment in the workplace and deal with it immediately
- provide feedback on the progress of the investigation
- provide counselling services through an employee-assistance program
- manage issues such as diminished work performance separately from the complaint in accordance with the agency's performance-appraisal system
- inform employees and supervisors about the agency's grievance procedures, the requirements of its code of conduct and whom they should contact.

The CMC can provide information to whistleblowers and complainants — phone (07) 3360 6060 or toll free on 1800 061 611 and ask to speak to the Senior Complaints Officer. See also the CJC's *Exposing corruption: a CJC*

guide to whistleblowing in Queensland, which is available on our website at <www.cmc.qld.gov.au>. See also the Office of Public Service Merit and Equity information sheet Managing for a public-interest disclosure: checklist for complying with the *Whistleblowers Protection Act 1994* (available at <www.opsme.qld.gov.au>).

For internal witnesses

Acknowledge the courage demonstrated by staff who are witnesses in an investigation, particularly in disciplinary hearings. Some people may be uncomfortable about a public acknowledgment but would appreciate formal acknowledgment in private. The decision should be made on a case-by-case basis, in consultation with the witness.

Staff who are called as witnesses are assisting in uncovering the truth of a matter. The truth could lead to the exposure and punishment of a colleague, or it could lead to the clearing of a colleague's name. Either way, the burden of responsibility on the witness can be profound.

Most people would have mixed feelings about playing this role, and some might even be worried about their personal security, with or without justification. If a witness expresses fear, contact the CMC. The simple expression of genuine support and a clear plan of action in the event of a problem is enough to put most people's minds at rest.

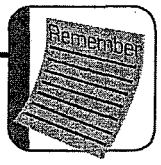
When staff support the person who is being investigated, they may not understand why it appears that you are not doing everything possible to help the person. Staff may interpret your lack of action as treating the person as 'guilty until proven innocent'. If necessary, tell staff what is being done to help, and what is not possible. Note that 'natural justice' does not require the subject to be informed of developments during the confidential stages of an investigation.

For yourself

Don't overlook the need to take care of yourself during and after an investigation. Managers are just as susceptible to shock and stress as staff. You may feel a sense of betrayal, or you may mourn the loss of a long-held belief about the person or the agency.

Managers need to be able to come to terms with their own personal reaction while at the same time helping staff with theirs. If necessary, seek support from your CEO or, within the constraints of confidentiality, from your agency's counselling service.

module 9 remember



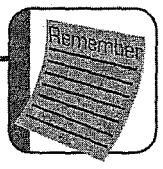
Some staff will be personal friends of the subject and will wish to remain so, no matter what the outcome of the investigation.

Gain the trust of staff

Managing the impact of an investigation is a lot easier if staff feel they can trust you. Trust, in this context, is not based on agreement, like-mindedness or 'being one of the team'. It is based on having clear, consistent leadership. Factors that contribute to staff trust include:

- ***Being honest at all times.*** Hiding problems will not improve management standing in the long term. It doesn't improve trust. Mistrust happens when staff can't understand those who manage them. So, for example, you should admit your ignorance if you do not know the answer to something raised in a staff forum, but give an idea of when more information will be available. However, you should never plead ignorance as a ploy, to stall communication. Stalling is usually obvious and creates suspicion.
- ***Not making promises that cannot be kept.*** Consistency in following through with decisions is fundamental to gaining and keeping trust. If something genuinely gets in the way of being able to carry out a promise, be honest – tell staff why, and allow for feedback.
- ***Getting to know what matters to staff and responding to their concerns.*** It will not always be possible to satisfy all concerns, but staff will have more respect for you if you explain your actions.
- ***Asking for feedback and acknowledging it.*** Treat feedback as valuable information. However biased, it will give a realistic picture of staff opinions and concerns.
- ***Listening to staff carefully and checking with them that they have been understood.*** Staff will know if consultative processes are genuine or 'just going through the motions'. This does not mean acting on every view put by staff. However, consultation with staff goes a long way towards making them feel valued.
- ***Keeping an accurate record of the progress, process and outcome of consultations.*** When you hold formal consultations with staff, ensure that minutes are prepared and distributed promptly.
- ***Trusting your staff.*** Trust must be mutual. You cannot expect your staff to trust you more than you trust them. If managers mistrust their staff it will be subtly communicated, despite any attempt at disguise, and staff will reciprocate.

remember



A rule of thumb is: don't assume anything, and be prepared to be surprised.

After the investigation

An investigation may reveal evidence of poor administrative procedures rather than actual wrongdoing. In some cases the investigator may recommend remedial and preventive action that the agency can take.

The implementation of misconduct-prevention strategies and other reform measures ought to be broadly based, with contributions from as many sources within the agency as can be practically incorporated. Approaching the task in this way helps to build general commitment to the reforms and restores a sense of control to the agency.

To manage after an investigation:

- acknowledge the past
- identify the kinds of changes required
- plan and manage change — this will probably be more the responsibility of your CEO than yourself, but it is nonetheless important that you understand what is involved
- develop a plan of action.

Acknowledge the past

Arrange a formal 'closure' of the investigation for the agency once it is complete. This closure is an important way of separating the events that exposed the agency to scrutiny from its future direction, and of ending the associated uncertainty.

Communicating with staff as part of this process may include:

- thanking them for their cooperation during the investigation
- expressing your confidence in them
- perhaps telling them why you were unable to communicate more freely at the outset, if secrecy was required.

practical tip

mark the end!

There are many ways to mark the end of an investigation. A formal address to staff by the CEO is a good place to start. However, local events such as unit lunches or an information day can be effective.

Identify the kinds of changes required

Whether changes need to be made and, if so, what those changes should be will depend on the report of the investigators. In the investigation report, recommendations may be made about the remedial action that your agency should take to reduce the opportunity for misconduct to recur. (Even if

there is no evidence of misconduct, the investigator may still recommend cultural and procedural changes.)

The changes that your agency could make might include:

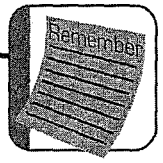
- ***Policy changes*** — for example, improving the accountability and openness of procurement, record-keeping and secondary employment.
- ***Procedural changes*** — for example, improving the objectivity and accountability of internal investigations, contracting for services and disclosing conflicts of interest.
- ***Structural changes*** — for example, ensuring the integrity of inspectorial and advisory functions and enhancing cross-functional communication.
- ***Systems changes*** — for example, ensuring that disciplinary systems are not merely punitive but are part of an integrated approach to employee management and development.
- ***Personnel changes*** — ensuring that corrupt staff are replaced with people who are strongly committed to ethical conduct.
- ***Cultural changes*** — changing 'the way we do things round here' (to raise ethical standards and create a misconduct-resistant environment).

Are planned changes to an agency always necessary?

No. Again, the need for change will depend on several factors, including the nature and outcome of the investigation. However, during an investigation at least, some of the agency's operations are likely to be subjected to intense scrutiny by the investigators. Such scrutiny may expose ethical weaknesses or opportunities for misconduct that would not have been uncovered in the normal course of events.

An investigation is bound also to raise the profile of ethics and probity among staff. As a result, the period after the investigation is a good time for an agency to plan and implement desirable changes.

remember



The greater the trauma to the agency during the investigation, the harder it is to get people to cooperate with post-investigation changes. Loss of faith in management may mean that staff are less open to efforts to 'lead' the agency in a new direction.

Plan and manage change

One of the key reasons for the failure of attempts to change agencies is that not enough thought and time is put into long-term planning. Although this responsibility is more the province of CEOs and senior managers, it is important to be aware of what is involved in planning for long-term change.

Change takes time, particularly cultural change, because it is about changing behaviour. There is no 'one size fits all' method of successfully implementing change. Dealing with different changes and with different

groups and individuals within an agency — perhaps with different expectations, cultures and norms — means tailoring the change process to their needs. However, there are key elements that should be common to all change processes. The presence of these elements will enhance the prospect of making effective change.

Decide what your agency wants to achieve

Take some time to develop a picture of what the agency wants to be and what needs to change to achieve it. After an investigation, your agency may be aware of an obvious need for change — for example, to policies and procedures. But before embarking on a process to implement the obvious, you need to think more broadly about the implications of change. A change in a policy or procedure is not an end in itself. The aim of any change process should be to change behaviour.

Know your agency

Knowledge of the agency is essential in determining what outcome is desirable and what changes are necessary if the desired outcome is to be achieved. You will then have to establish whether such changes are feasible. This knowledge also enables you to manage expectations during the change process.

There are two parts to knowing the agency:

- understanding the interdependencies of its components, and
- understanding its existing organisational culture or cultures.

Interdependencies exist between operational components (such as structure, policies and procedures) and the quality of an agency's leadership, values and communication. Therefore, to change behaviour you may need to change not only a particular procedure but also the way staff are managed, trained and supported. This may involve:

- reviewing the agency's code of conduct for continued relevance
- restating the values of the agency, and changing the way that values are communicated
- revising programs for leadership training, induction and general ethical awareness
- restructuring work groups and functional areas
- revising policies and procedures relating to conflicts of interest, gifts and benefits, and reporting wrongdoing
- reviewing systems of recruitment, performance management and discipline
- introducing new technology
- updating plans for preventing misconduct.

For more information on preventing misconduct, see Module 10 or the material on the CMC's website (<www.cmc.qld.gov.au>), or contact the CMC directly on (07) 3360 6060.

The ***existing organisational culture*** has a powerful influence on behaviour. Many agencies find that they have more than one culture. Different cultures can exist at different levels and among different functions. Using interviews, focus groups and surveys can help your agency to understand its culture.

The qualities of the existing culture will help to show how much preliminary work needs to be done before effective changes can be made. For example,

if each level in your agency's hierarchy has a strong subculture, you may need to put substantial effort into increasing openness and trust between those levels.

If you are contemplating substantial cultural change, or if management–staff relations are poor, consider engaging outside assistance to facilitate the change process, or aspects of the process — for example, an expert in diagnosing the organisational culture, an organisational change consultant or a communication specialist.

Develop a plan of action

Once your agency knows what it wants to achieve, what is likely to be feasible and how it might get there, it needs a plan of action. A good plan will:

- be developed and endorsed by senior management to ensure that it has a strategic focus and adequate resources
- be flexible because it may have to change as the process goes on
- identify incremental steps, achievement of which can be acknowledged and celebrated along the way — it is a good idea to schedule some easily achievable changes as early milestones, as this will help build the momentum for tackling more challenging steps
- clearly identify who is responsible for making decisions, reaching particular milestones and carrying out particular functions (including overall coordination) — choose people who are genuinely committed to the changes and who are trusted by staff
- be consistent with corporate values
- include a communication strategy, a strategy for the participation of those who will be affected by the changes (including staff and other stakeholders), a strategy for embedding the changes (including training, and rewarding desirable behaviour) and a strategy for measuring achievements.

Depending on the scale of the proposed changes, the plan may be multi-layered. Staff whose responsibilities are nominated in the 'big picture' plan may need to develop detailed plans that include the same key strategies — communication, participation, embedding and measurement.

Show leadership

Perhaps the most important element of effective change is leadership. Leadership is needed to create a collective desire for change.

Some models of organisational change suggest that agencies need a crisis to stimulate the desire for change. However, experience suggests that a crisis can create paralysing uncertainty, unless its impact is properly managed. It is therefore up to managers not only to acknowledge the uncertainty and discomfort that the investigation has caused, but also to emphasise the opportunities that it has provided for self-examination, for harnessing the heightened awareness of organisational weaknesses and for building on the agency's strengths.

remember

Leaders should model desirable behaviour at all times.

Communicate

Communication is another essential element of an effective change process. It needs to be planned carefully. You as manager need to continue to communicate honestly and openly with all those likely to be affected by the changes. You need to be accessible and sympathetic, listening to, anticipating and responding to the staff's concerns. You need to forestall the rumours and manage expectations.

Consider using a range of media for maximum effect — meetings, seminars, regular updates by e-mail or electronic bulletin board, visits by key managers to regional offices, newsletters, informal chats and so on. Make sure that the leaders in your agency maintain a high profile.

Remember to communicate not just the 'what', but also the 'when, why and how' of change. Communicate the incremental successes along the way rather than waiting until the end to say 'Well done'. If people don't get acknowledgment and support, especially when they are exploring new territory, the agency may never get there.

Managers send very powerful messages by how they act. Saying one thing and acting in another way can undermine the best-planned change.

remember

The key words are: communicate, communicate, communicate.

Use your agency's values

An agency's underlying values determine how it does things — from how it is led to what its systems, plans, policies and procedures look like. These values may be quite different from its stated corporate values. The success of any cultural change process is dependent on the corporate values being converted into action. Therefore:

- Consider reviewing the corporate values early in the change process. Check that they focus on public duty, integrity (openness, honesty, accountability, objectivity and courage) and leadership.
- Make sure that the agreed values are communicated clearly to staff and other stakeholders, and that you promote the values by acting in accordance with them and teaching others about their benefits.
- Make sure that your agency's code of conduct is up to date and that it reinforces the values by providing a practical guide to acceptable behaviour. Use it as a communication and decision-making tool during the change process.
- Make sure that the plan of action reflects the values you have agreed on. For example, the communication strategy should encourage openness, honesty and participation, and procedures should be reviewed for accountability and objectivity.

Build in participation

The last essential element of an effective process for change is participation. Participation can be a great motivator — it engages people's interest and gives them a sense of ownership of both the problem and the solution.

Staff are much more likely to resist change that is simply imposed on them. There is a much better chance of implementing effective change if the change process encourages participation by those who will be affected. Also, staff (and suppliers and receivers of services) often have good ideas about how things could be done better and what obstacles are preventing that happening. Therefore:

- Make sure that the plan builds in opportunities for participation, both formal and informal.
- Consider interviews, focus groups, surveys, seminars, suggestion schemes, staff (and possibly other stakeholder) representatives on management committees and working parties.
- If appropriate, arrange ethics training and refresher workshops about the agency's code of conduct and related corporate statements. This will help reduce staff concern about what is acceptable and unacceptable behaviour, and any fear of inadvertent breaches of expected standards of behaviour.
- It is a good idea to develop a package of material to provide staff with guidelines for ethical decision-making and expected standards of conduct. If your agency's code of conduct, corporate vision, values statements and ethical guidelines need to be reviewed, seek input from your staff. The CMC's Research and Prevention section has a range of resources available and can offer advice on training or provide comment on policy changes.

You need to make an explicit and visible commitment to change. It is no good simply announcing that change is necessary because the CMC or some other accountability agency says so. Change won't come about unless leaders genuinely want it to happen. Your commitment will be reflected in the choices you make about who will be responsible for managing the change, the degree of their power and expertise, and the support you give them.

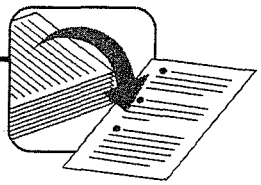
practical tip

talk to your staff!

Tell your staff:

- where the agency is going — what it is seeking to achieve
- how it hopes to get there — its plan of action and its values
- why the trip is necessary — why the changes?
- what's so good about the destination — how the changes will benefit the staff, the agency and the community.

to sum up



Very few investigations of public sector agencies will have a major impact on the agency concerned, but they all require action on the part of the agency's managers and supervisors in order to minimise disruption and maximise benefits.

Agencies differ, as do the circumstances of each investigation, so it is difficult to provide an all-purpose strategy. However, there are two key questions for you to consider when preparing a strategy to handle any particular investigation: 'What factors can influence the impact of an investigation on my agency?' and 'How are staff likely to react to the investigation?'

If you do not manage the impact of an investigation well:

- the grapevine will become the main source of information, rife with contradictory rumours and smear campaigns
- mistrust of management or loss of faith will increase
- fear will rise among staff that they, too, may be under investigation without knowing it
- staff will suffer more stress, particularly those in proximity to the subject, and this may result in absenteeism
- there will be lower morale and decreased customer focus
- productivity will suffer, particularly in areas and among people closely associated with the subject
- there will be increased trauma for witnesses who feel unsupported by the agency and uncomfortable with being personally identified with the investigation.

If you manage the impact of the investigation well:

- both staff and management will have a better understanding of what misconduct is and what is meant by a corruption risk
- codes of conduct and other standards of ethical behaviour will become more meaningful and will be taken more seriously
- the agency will be rewarded with a sense of having 'pulled together as a team'
- faith in management will be established, maintained or renewed
- staff will be more willing to participate in any proposed reform measures for the agency.

The aftermath of an investigation also provides an opportunity for an agency to plan and implement desirable changes. See Module 10 for more details about setting up strategies for preventing the recurrence of misconduct.

Troubleshooting

Retrieving an investigation when things go wrong

module 10

Even with the best-laid plans for an investigation, from time to time things may go wrong. However, the situation is usually retrievable if swift and appropriate action is taken to remedy the problem.

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important 

Obey the golden rules

When an investigation goes wrong, investigators should always obey the following golden rules:

Acknowledge the problem as soon as it is discovered

As well as acknowledging to themselves that a problem has arisen, investigators must consider who else should be notified. Depending on the nature of the investigation and of the problem, this may involve notifying the person who authorised the investigation. Usually anyone who has been unfairly prejudiced as a consequence of the problem should also be notified, but this does not apply if notification would have the effect of exacerbating the problem or compromising the investigation.

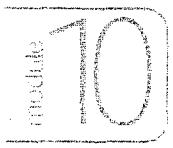
Fix the specific problem

Act to right the wrong immediately. Unfortunately this will not always be possible, and in some cases the investigation will not be able to be recovered.

Fix the general problem

In all cases where an investigation has gone wrong, investigators should examine their investigation procedures. If this reveals that the problem is procedural in nature, they should act to rectify this across the board.

Things that can go wrong



Considered below are some of the common examples of what can go wrong in an investigation, and what can then be done to retrieve it.

Actual or perceived conflict of interest

A conflict of interest on the part of the investigator may be discovered or alleged when the investigation is already under way. An investigator might become aware of facts or circumstances indicating a conflict of interest, which were not apparent at the outset; or an allegation of a conflict of

interest might be levelled by someone else after the investigation had commenced. Retrieving an investigation in these circumstances can be complex.

As soon as conflict becomes apparent or is alleged, the person who appointed the investigator and, where practical and appropriate, the complainant and the person under investigation, should be advised and their views ascertained. Only in exceptional circumstances (e.g. if advice would compromise any future investigation or the current investigation if it is, in fact, retrievable) should such information be withheld from the person who is the subject of the investigation.

Responsibility for determining whether an actual or a perceived conflict of interest exists will usually lie with the person authorising the investigation.

The preferred course of action is for the investigator to be removed from the investigation and a new investigator appointed. In practice, however, it may not always be viable to abandon the investigation, due to the passage of time or the state of the investigation (witnesses or other evidence may no longer be available, for example). If such investigations are to be retrieved, steps must be taken to overcome the damage that the conflict of interest would otherwise generate. These steps will, of course, depend on the particular investigation.

It may be necessary to bring in a third party to oversee or cross-check the investigation; and if it is impossible to re-interview a witness, this third party may review the tape-recorded interviews. Some aspects of the investigation may be able to be separated and treated differently. Perhaps, for example, the factual materials already obtained could be used, whereas other aspects of the investigation (such as interviewing witnesses) would need to be done again from scratch. A probity auditor might need to be appointed to vet the investigation report, or advice sought from an appropriate source, such as Crown Law or the CMC.

In determining whether an investigation tainted by conflict of interest can be salvaged, relevant considerations include:

- the nature of the conflict
- the remoteness of the actual or perceived conflict
- the seriousness of the allegations being investigated (the more serious the allegations under investigation, the more important it is that there is no actual or perceived conflict of interest).

Where the investigator alleged to have a conflict of interest is to continue with the investigation, or where material produced by that investigator is to be relied upon by a different investigator, if possible the consent of all relevant parties should be obtained. Otherwise the credibility of the concluding report will be diminished.

All decisions and actions must be documented.

In no circumstances should the investigator make a judgment about the existence of an actual or perceived conflict of interest.

Excessive delay

Claims of excessive delay in completing an investigation may come either from the person who is the subject of the investigation or from the complainant.

Steps to be taken by the investigator

The usual procedure for an investigator seeking to retrieve an investigation that has been excessively delayed is to:

- advise the person who authorised the investigation and the investigator's supervisor
- explain the reason for the delay
- review the investigation plan to see if it can be streamlined
- develop a timetable and meet those time commitments
- document the reasons for the delay and how the problem has been approached
- finish the investigation.

The seriousness of the allegations being investigated must be taken into account whenever consideration is being given to discontinuing an investigation. The more serious the allegations, the more disinclined an investigator should be to drop it.

Role of the supervisor

Often it will be the investigator's supervisor who discovers the delay. However the delay has been identified, the supervisor must act to rectify the problem and retrieve the investigation. He or she should:

- advise the person who authorised the investigation
- advise all other parties concerned
- closely monitor and supervise the completion of the investigation
- investigate the reason for the delay
- determine, in consultation with the peson who authoroised the investigation whether it would be fair to proceed with the investigation or whether, in the interests of justice, it should be dropped
- if the investigation is to proceed, consider whether a new investigator should be appointed or the matter reallocated
- determine whether any urgent action needs to be taken and prioritise it
- set a timetable for completion
- review the investigation plan to see if it can be streamlined in any way.

Information leaks

Where it is important that the investigation be conducted covertly, but word has leaked out about it, the investigator should:

- report the matter to the person authorising the investigation
- ascertain the source of the leak, if possible
- take steps to ensure that witnesses are not harassed
- where appropriate, meet with relevant parties and decide ground rules
- determine the effect that the loss of secrecy has had, or will have, on the investigation
- in the areas where the investigation has been compromised, undertake a risk assessment including an examination of the prospects of successful completion

- if the investigation is to be continued, adjust or redesign the investigation plan.

Failure of procedural fairness

At relevant stages of the investigation, there may have been a failure to adhere to the principles of procedural fairness. This can sometimes be remedied by going back and affording the procedural fairness (or natural justice) that has been denied.

Then, if at all possible, to avoid any perception of prejudgment, somebody else should reconsider all relevant facts of the case and any submissions made by the person(s) affected.

In practice it will not always be possible to remedy a denial of procedural fairness. It may then be advisable not to act on any recommendations contained in the report, but instead to hand all relevant information to a new investigator who provides procedural fairness, makes a new finding and produces a fresh report (which may in practice be based largely on the original report). See also Module 4 for more information on procedural fairness.

Loss of an essential document

A situation may arise where a document integral to the investigation is lost. This may, for example, be a document or record obtained from a witness, a document not saved on disk, or a receipt. The steps to take on discovering that a document has been inadvertently lost are to:

- attempt to locate it
- record the loss on the file
- check whether any copies are available
- if there are no other copies, try to present the evidence in some other way.

In the case of a lost receipt or similarly unreproducible document, investigators should draw up a statement indicating that they have seen it, that it was previously in their possession, and what it said, including corroboration from any other witness(es).

Loss of a highly confidential document

If a highly confidential document is inadvertently lost rather than merely misplaced, there may be potential for it to fall into the hands of one or more third parties. If so, in addition to the steps to follow for the loss of an essential document (listed above), other necessary steps are to:

- identify who would be prejudiced by the loss, and alert them that it has been lost
- undertake a risk assessment of the likely consequences of the loss, and take appropriate remedial action
- advise anyone who could possibly be embarrassed or adversely affected by the loss

- demonstrate that there was no impropriety in its disappearance
- look at any systems failure that may have contributed to the loss, and implement necessary changes.

Failure to identify unrelated criminal matters during an investigation

An investigation may uncover evidence of criminal conduct unrelated to the allegations being investigated. For example, an analysis of an employee's work computer during an investigation into possible invoice fraud indicates that the employee may have downloaded child pornography.

If evidence of unrelated criminal conduct is found, the most appropriate response is to stop the investigation immediately and advise the person who appointed the investigator. That person, the investigator or the CMC liaison officer should then refer the new information to the CMC and/or the police. Uppermost in the investigator's mind should be to avoid any action that could prejudice the investigation of the unrelated criminal conduct. Once the allegations of unrelated criminal conduct have been appropriately referred and the necessary evidence secured, the original investigation can proceed.

Investigations that have become too complex

Any investigator who feels out of their depth due to the complexity of an investigation should:

- acknowledge it
- revisit the investigation plan
- seek advice and/or additional resources from the person authorising the investigation.

Investigations that have gone off track or lost focus

Often an investigator will be unaware that an investigation has gone off track. This may only become apparent when the issue is raised with someone senior to the investigator by a party affected by the investigation, or when the investigator reports to management.

This situation calls for a strong supervisory role by the person authorising the investigation. It may be possible for the investigation to be brought back on track by getting the investigator and the person who authorised the investigation together and talking through the issues. They could revisit the investigation plan, identify where, why and how the investigation has lost track, and formulate the future direction of the investigation.

If the investigation is beyond the competence or capability of the investigator it will be necessary to replace the investigator. If the course that the investigator has taken has irreparably compromised the investigation it may be necessary to abandon it entirely.

Considering prevention opportunities

module 11

A guide for managers in public sector agencies

Regardless of the outcome of an investigation, the investigation itself may highlight particular gaps in current internal controls or current practices which expose your agency to a greater risk of fraud or corruption. While an investigation may focus on a specific officer, work unit or operation, at the same time, it provides an opportunity to look at your agency as a whole, and to consider if the misconduct investigated in one area might also be occurring in other areas.

This module focuses on maximising prevention opportunities after an investigation or complaint. It does not attempt to cover the full range of proactive strategies needed to build agency resistance to fraud, corruption and misconduct. Instead, it outlines how prevention activities might be initiated as a result of an investigation or complaint.

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Why consider prevention options?

module 11

The prevention of misconduct, and resistance within organisations to threats of misconduct, are central to good governance and contribute to the integrity of the public sector.

The CMC has legislative obligations to:

- analyse intelligence and the results of investigations
- analyse systems used within agencies to prevent misconduct
- provide information and make recommendations on management and internal control systems
- provide advice and training to help agencies increase their capacity to prevent misconduct.

However, these should not be the CMC's sole responsibility. After an internal investigation has taken place, or inappropriate conduct has been detected, your agency will be in a position to shape its own prevention strategies.

By adopting a set of prevention obligations, your agency will be better equipped to define what is to be prevented, determine some valuable sources of information, particularise risks, identify possible controls and develop appropriate remedies.

Exploring prevention options after an event has occurred can allow your organisation to respond in a cohesive and structured way to what may have been a traumatic or disruptive experience. It provides an opportunity to test the effectiveness of the measures your agency has in place, and may reveal opportunities to improve procedures, systems, internal controls and organisational culture.

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Prevention initiatives are not optional

Proactive responses are required by the Financial Management Standard 1997. Reactive responses will also arise when any inadequacies in existing controls or misconduct risks are discovered — for example, through the investigation of a complaint.

To achieve the required change in focus from investigation to prevention, it is helpful to have staff who are skilled in risk analysis and organisational analysis.

The prevention perspective

Prevention initiatives within your organisation should accurately identify problem areas and trends, and devise suitable counter measures that can be effectively communicated and applied.

An ideal prevention-focused organisation is proactive and believes that prevention is better than cure; and it is comfortable with the view that misconduct prevention is a primary management responsibility. It pursues this view through the accountability arrangements it sets for itself, and supports its managers and staff by developing prevention strategies that are tailored to the agency's functions, risks and capacity.

It is important to explore issues beyond the investigation and any charges or disciplinary matters that may arise from it. It is possible, for example, that a specific investigation into a theft could give rise to broad concerns about the adequacy of fraud prevention controls, staff recruitment and selection practices, the use of credit cards, or the impact of external influences on a regulatory function.

A prevention focus will seek to enhance the organisation's capacity to resist corruption and misconduct, and not solely the particular conduct identified during an investigation.

To determine how your agency could shape its prevention approach it is helpful to have some appreciation of how misconduct might occur. Here is a simple model that could assist:

Misconduct/fraud = motive + targets + access + opportunity

Responses = e.g. recruitment, code of conduct awareness & training + internal controls & other prevention strategies

Adopting a model of this type will not only help your agency to identify the different areas of vulnerability, but will also indicate the prevention responses needed.

The model adopted by your agency may also be helpful to the staff who are responsible for writing a prevention report or exploring prevention opportunities. It will provide a framework within which they can consider matters relating to personal integrity or organisational controls. Recommendations and proposals to address the incidence of misconduct will vary greatly, according to whether it is appropriate to direct attention to changing systems (internal controls) or staff attitudes (motive).

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Investigators may be a useful source of background information to assist in the development of a prevention profile for your organisation. They can help provide insights into why different types of misconduct might occur in your agency, and which vulnerabilities are most likely to be exploited.

How can an investigator help with developing a prevention response?

module 11

Investigators in your agency can play a pivotal role in the prevention response to identified risks and vulnerabilities. They can do this by maintaining a prevention perspective when collecting evidence, and by recording general or specific issues that may merit a prevention response as they come across them.

The following is a list of questions that could prove helpful in developing prevention-related material:

- What are the issues of concern (apart from criminal/disciplinary breach)?
- What are the current system risks that potentially expose the unit/ operation to corruption?
- What internal controls are missing or ineffective?
- What previous internal control weaknesses have been identified and what remedial action occurred?
- What were the accountability systems and where did they fail?
- Is this a localised problem, or possibly generic?
- Are there any major underlying factors contributing to the system breakdown?

Acting on prevention-related material gathered by investigators requires careful management. There will need to be processes to allow relevant material to be referred to the appropriate work or skill area for attention, at the appropriate time and in a manner that does not compromise any ongoing investigation. The material to be referred should be identified, although not necessarily fully explained, in the investigation report. (See also Module 8.)

During the course of an investigation investigators will develop an appreciation of how events occurred and any avenues that were exploited. This knowledge makes investigators a valuable resource when follow-up actions and reviews of proposed prevention strategies are being considered.

practical tips for investigators

- Investigate with prevention in mind.
- Articulate the known problems and issues.
- Advise and refer specialist matters as necessary, and recommend within areas of your expertise.
- Refer administrative issues to responsible skill areas (e.g. audit, corporate governance, HR, IT) for their specialist action.
- Contribute, as required, to implementation, follow-up or review.

Possible prevention responses

Before determining the extent of an appropriate prevention response, your agency will need to decide the magnitude of the matters uncovered and the agency's capacity to provide or acquire the necessary expertise to deal with them. The following checklist may be helpful:

- **Resource costs**
  What are the necessary resources, in terms of staff and funds, to mount a prevention response?
- **Time**
  How long will it take to develop an appropriate prevention response?
- **Urgency and timing**
  Is it necessary to 'strike while the iron is hot'? When is it required?
- **Importance**
  Is inaction likely to damage your agency or lead to a repetition of the misconduct?
- **Materiality/significance**
  How big or far-reaching is the problem?
- **Potential that something can be done**
  Will a prevention response make a difference?
- **Strategic factors**

Is a prevention response appropriate at this time, or are other responses likely to be more effective?

By evaluating these matters, your agency could develop the most appropriate response. This could range from a full-scale systems review to the provision of mentoring or tutoring support to individuals. Possibilities include:

- **Major risk-based system review**
  Suitable where major or complex issues are addressed and when the response will have wide impact or result in significant change
- **Specific advice/recommendation**
  A response often appropriate when attention is focused on a specific area of activity
- **Education/training/awareness raising**
  Suitable when it is necessary to inform and advise a workforce or group and the intention is to influence attitude or behaviour
- **Policy/procedure revision**
  Appropriate when policies or procedures are non-existent or deficient
- **Advisory resources**
  Suitable when the availability of information and support is sufficient to provide the guidance required, often to a group of employees
- **Mentoring/assisted changes**
  Appropriate when there are identifiable personnel requiring support and guidance
- **Other**
  The appropriate response is determined by the particular circumstances.

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The extent of the prevention response should be commensurate with the identified risk

A major prevention exercise does not need to be instituted when the risk is low and the consequences minor or immaterial. Nor should there be merely a cursory examination of prevention options when an organisation identifies major risks that could have significant consequences.

The misconduct prevention systems review report

Planning

It is appropriate, in cases where development of the necessary prevention strategies demands a full systems review, to use project planning and management tools.

Project planning will include strategies to engage and commit managers, supervise the project, provide for consultation and allow for consideration of recommendations at managerial level. However, planning should not be so complex as to dominate considerations. It needs to be tailored according to the complexity and magnitude of the exercise, and sufficient to ensure that a successful review occurs.

As a general guide, a prevention systems review plan will cover:

- personnel involved (e.g. managers, work units, professional groups)
- initial scope and project reporting requirements
- key liaison personnel
- data gathering requirements
- broad and specific risk assessment
- how analysis and the development of recommendations will occur
- how findings and proposed recommendations will be tested for accuracy of fact and interpretation
- timeframes, milestones and completion dates.

The report

While there is no predetermined format for a report, the following guide will help with structuring the document and recording the necessary information.

Introduction

Explain why the review was undertaken, the authority under which it occurred, the processes adopted and the intended outcomes.

The current situation

Set the context and outline how things currently occur. Describe the relevant system or systems and the arrangements under which the agency conducts its business. It may be appropriate to include material on the agency's structure, finances and budgets, applicable legislation, its delegations, staff management practices, output requirements and performance measures.

Issues arising

Provide an orderly analysis of existing systems and arrangements, assess their effectiveness and, where appropriate, refer to research data or practices elsewhere.

Where possible, data used will allow comparisons to be made and departures from best practice to be identified. Here, too, will be the exploration of any deficiencies (in policy, for example) or risks that have been exploited in the past, and any that have been identified when describing the current situation.

Research and reference to information from those consulted during the review process could help to correctly define the issues and determine their management significance and their risk implications. It may also be helpful to outline the benefits of change and the consequences of keeping existing systems and arrangements as they are.

At this stage of the report it is likely that there will be an overload of information, making it necessary to group material or edit out minor matters. It is important that a report to management focuses on significant issues relating to the performance of the organisation, key risks to the organisation and the integrity of its personnel, systems and processes.

Proposed solutions

Proposed solutions should bear directly on the issues raised, be succinct, have regard to the magnitude of the problem and be relevant to the capacity of the organisation to adopt the change needed. Where defined standards or acceptable best practice are known, proposed solutions should assist the agency achieve that objective or move towards it.

In certain cases, especially in instances where several courses of action are available or there are varying views on the appropriate solution, it may be appropriate for the report to outline the pros and cons of the various options rather than pursue a specific course of action.

When detailing proposed solutions, address issues of cost, timeframes and resourcing and present comparative data.

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Implementation of solutions

It is common for reports to cover the implementation process, in order to help decision-makers approve or determine the next steps. Should implementation be referred to in the report, it is best if it follows a consultation process during which the proposed timeframes and the roles of the various parties are agreed. In all appropriate cases, comment from the affected work area should also be incorporated into the consultation process. This will assist in providing greater ownership of the report and its recommendations.

It is helpful, too, if implementation processes can include milestones and mechanisms to monitor progress and measure the impact of change.

practical tips for preparing the report

- Establish a committee to oversee the preparation of the report.
- Plan the structure of the report early.
- Focus on issues and principles, not on individuals.
- Use an independent party to test potential recommendations, options or solutions.
- Have a system for the review of drafts.
- Make sure that issues not included in the report but requiring attention are directed to the appropriate manager.
- Where possible, obtain consensus before a final draft is prepared.
- Should consensus on a final draft not be possible and management resolution required, clearly identify the differences of opinion.

There will be cases where, because of the significance of the issues uncovered, it will be necessary to develop a comprehensive prevention program. In such cases, leadership from management will be vital.

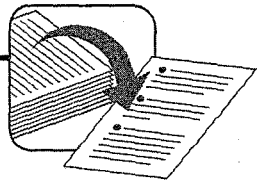
Although developing a wide-ranging prevention program may be costly, this will be offset by the savings and benefits, in terms of reduced opportunities for misconduct, fewer investigations, and the protection and improvement of the organisation's integrity and public standing.

Sources of prevention information

There are many sources of information on misconduct prevention, fraud prevention, corruption prevention and ethical conduct. Some that are readily available are listed below:

- Misconduct Prevention Advice portal on the CMC website: <www.cmc.qld.gov.au>
- key resources (e.g. training material and other publications from industry associations or central agencies)
- specific problem area advisory information (e.g. the various prevention sites on the Internet)
- CMC Prevention staff
- Internal audit units
- professional groups (e.g. fraud examiners, internal auditors or accountants, who may be able to provide relevant material or advice).

to sum up



All agencies subject to the *Financial Administration and Audit Act 1977* and the Financial Management Standard 1997 have obligations to undertake proactive prevention activities. Reactive prevention responses, occurring after a complaint or investigation, provide opportunities to assess the effectiveness of existing controls in the light of actual or perceived vulnerability. Such reviews can provide a powerful way of demonstrating the agency's commitment to integrity and forging new and better ways of dealing with risks.

Update record

For recording updates to these guidelines

Update No.	Filed by (initials)	Date of filing	Update No.	Filed by (initials)	Date of filing