



NSW RURAL FIRE SERVICE



# CONDUCTING A VOLUNTEER DISCIPLINE INVESTIGATION

## **GUIDANCE ON INVESTIGATIONS AND PREPARING INVESTIGATION REPORTS**

## Document control

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## 1 Steps taken by an investigator

### Read

- Read and understand the Volunteer Discipline Process Service Standard, the Investigation Standard Operating Procedure and these guidelines so you are clear about your role.

### Review

- Review the terms of reference for the investigation so you understand the scope of the investigation.
- Review the sections of the legislation, Regulation or Service Standard the NSW RFS volunteer member concerned appears to have breached, so you are familiar with what is expected of NSW RFS members.

### Plan

- Plan your investigation to ensure you identify the details of the complaint/allegation, the persons involved, the tasks to be completed and the order and timeframes in which to complete them.

### Gather

- Collect documentation where relevant.
- Prepare interview questions for all persons involved.
- Conduct and document interviews; ensuring interviewees sign the record of interview.
- Undertake site visits, where relevant.

### Assess

- Collate information/evidence gathered for each allegation.
- Review information/evidence and identify and resolve any gaps.
- Analyse information against details of complaint/allegations.
- Decide on your findings on the balance of probabilities.

### Prepare

- Prepare investigation report including details of complaint/allegation, the investigation process, the information/evidence collected, your analysis and findings (and any recommendations regarding disciplinary action where requested in the terms of reference) .

### Submit

- Submit your report to the relevant Appropriate Disciplinary Authority.

## 2 Key symbols

Symbols have been used to highlight important information.



### Action

This is something you need to do in the management, investigation and/or preparation of an investigation report.



### Caution

This indicates that caution is needed when dealing with an issue and describes the risk.



### Communication

This indicates that communication is required and describes the type.



### Safeguard

This identifies a safeguard provision. Safeguards are important in the preservation of procedural fairness and natural justice.

## 3 Role of the investigator

You have been tasked with carrying out an investigation of behalf of the NSW Rural Fire Service. This means that you are responsible for gathering all the relevant evidence or information, and then using this to find the facts.

An investigation is not an adversarial process or a trial. That is, you are not on the side of any party to the complaint/allegation, nor are you out to 'get' someone.

An investigation is an inquiry and so you should go into the process with an open mind and conduct the investigation with objectivity, impartiality, procedural fairness and in accordance with any requirements found within NSW RFS Service Standard 1.1.2 Discipline and associated SOPs.

You have a responsibility both to collect the information and to assess it. At the end of the process you must report your findings (and possibly make recommendations) to the Appropriate Disciplinary Authority (ADA). You must do this in an independent and objective way.

The success of an investigation relies on the integrity and ability of the person conducting it. You must be neutral in relation to the persons involved, but must also be aware of any power imbalance which may exist between the parties.

You must understand the circumstances that have led to the complaint/allegation, but must not identify personally with the person making them.

You must be prepared to be persistent in pursuing complaints/allegations that may be causing issues within the brigade, district or region because of their nature, or because of the popularity or otherwise of the persons involved.

To be effective, an investigator and an investigation must have the confidence of all parties, including witnesses. The best way to achieve this is by listening fully, and giving thorough consideration to what is being said by every person you interview.

Where the information/evidence shows clearly that the facts of the allegation are not in dispute they can be accepted at face value.

Where the information/evidence shows there are differing versions of events, and so the facts are in dispute, the information/evidence should be subjected to a constant process of checking, challenging and analysing – this is known as the investigation process.



**Caution**

Your integrity and credibility as an investigator and a member of the NSW RFS is on show. How you conduct yourself as an investigator before, during and after an investigation will ensure the reports and recommendations you make today and into the future are always viewed in good light.

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**Action**

Ensure you have read and understand Service Standard 1.1.2 in particular SOP1.1.2-2 Seek guidance from the Regional Office or Professional Standards Unit if you become concerned or uncertain about a course of action or issue once engaged to undertake an investigation.

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## 4 Ensuring confidentiality

As a NSW RFS investigator your 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 of other people that you have spoken to during the course of your investigation, you should do everything in your power to keep confidential:

- › the identity of the person making the complaint/allegation
- › 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.

Confidentiality serves a number of important functions. Preserving the confidentiality of the identity of the person making the complaint and the member concerned minimises the risk of harm to these parties.

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 person and may reduce the trust that people have in you. Even if the person consents to his/her identity being revealed, keep it confidential if possible.



### Safeguard

You cannot promise total anonymity because at some stage in the investigation process the need to maintain procedural fairness may mean that it becomes necessary to inform the member concerned. You should always ensure that the person who made the complaint/allegation is made aware of this fact.

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Another important function of confidentiality is to ensure the integrity of the investigation. If the persons involved do not feel they are able to trust the discretion of the investigator, they will be more reluctant to come forward with relevant information. The rapport that is built between the investigator and the parties to an investigation is paramount. Accordingly, any parties or witnesses interviewed in the course of an investigation should be advised not to discuss the matter with other witnesses or third parties.

You should remember that the documents that you gather during your investigation are also confidential.



### Action

- › Remind all persons that you come in contact with throughout the course of your investigation of the importance of confidentiality.
  - › Have all parties complete a confidentiality agreement.
  - › Keep all documents collected in the course of your investigation secure and confidential.
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### Communication

#### [Confidentiality Agreement](#)

An example of a completed agreement is attached to this guide – see Appendix 2

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### Caution

- › Do not conduct your interviews or phone calls where you can be heard.
- › Avoid conducting interviews where parties can be seen by others.
- › Administrative staff who provide administrative assistance (e.g. typing) must complete Confidentiality and Conflict of Interest declarations.
- › Avoid leaving your Investigation file and contents open on your desk.
- › Always lock your computer when not typing or working on your report.
- › Always remember to check the photocopier for documents when photocopying, ensuring you remove them when done.
- › Always consider if you have a conflict of interest that needs to be reported and managed.

## 5 Providing 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. At every stage of your investigation, you should apply procedural fairness as it serves a number of important and related functions:

- › It provides a means of checking facts and identifying issues.
- › The comments made by the member concerned or witnesses might expose weaknesses in the investigation.
- › It informs the basis and direction of the investigation.

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 close-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.

The perception that an investigator is biased can be just as damaging to an investigation as actual bias. To avoid allegations or speculation that you are biased, do not comment on, or engage in idle conversation about any aspect of the investigation with other NSW RFS members, unless it is with the appointing officer, Regional Manager or Director Regional Services. If you don't say anything during your investigation about those involved (excepting at interview or when writing the report), then other parties won't be able to make allegations that you said something that indicates any bias on your part.



### Caution

Ask yourself the following questions:

1. Do I have a personal relationship or association (more than mere knowledge or the fact you are NSW RFS members) with any of the people involved in the complaint/allegation?
2. Was I a participant in any of the issues involved in the complaint/allegation?
3. Do I have a financial or other interest in the outcome of this matter either positive or negative?

If you have answered **YES** to any of these questions you are likely to have a conflict of interest. Immediately seek advice from your Regional Manager or Professional Standards Unit.



### Communication

Service Standard 1.1.33 Conflicts of Interest  
[Conflict of Interest Declaration Form](#)



## 6 What is natural justice/procedural fairness?

The rules or principles of natural justice, also known as procedural fairness, have been developed to ensure that decision making such as that undertaken during an investigation are fair and reasonable. Natural justice involves investigators informing people of the allegations against them or their interests in the investigation matter, giving members a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule).

At law the rules of natural justice are to be observed at all times when exercising statutory power that could affect the rights, interests or legitimate expectations of individuals and members.

It is worth noting however that should action being taken by a district manager or by or on behalf of the NSW RFS that will not directly affect a person's rights or interests, there is no obligation to inform the other person of the substance of any allegations or other matters in issue.

For example, if you are merely collecting information to make a report to management so that action can be taken, there is no obligation to notify the subject of the complaint. However, if an investigation will lead to findings and recommendations about the matter, as investigator you should provide natural justice to the person against whom allegations have been made.

Similarly, the person or persons who ultimately make a decision on the basis of the investigation report must also provide natural justice, by allowing the person adversely commented upon to make submissions regarding the proposed decision and proposed penalty.



### Caution

Any person or persons who decides any matter without hearing both sides, although that person or persons may have rightly decided, they have not done justice.

NSW RFS Fact Sheet – Natural Justice can be found in Appendix 1

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“Justice must not only be done, but should manifestly and undoubtedly be seen to be done”  
Lord Hewitt 1924

## 7 ‘The hearing rule’ (Five principles)

### Principle 1: Seek to ensure a hearing appropriate to the circumstances to hand

A disciplinary investigation and hearing is different from proceedings before a court. An ADA is not a court and the rules of evidence do not apply as they would in a court.

An oral hearing may not always be necessary or, indeed, appropriate. A member who is the subject of disciplinary proceedings may choose not to appear at the hearing but simply submit a letter or other submission for consideration by the ADA; this is what is known as ‘on the papers’. Similarly, an appeal may be considered and decided on the basis of the written record and written submissions from the respondent.

### Principle 2: A hearing before the decision

Natural justice must be afforded before a decision is reached and before a final view is formed as to what decision to make (e.g. penalty). If there is not a hearing, the material submitted by the respondent must be considered before any decision is reached. This principle is breached if the respondent is told

that a 'draft' or 'in principle' decision has been made, yet suspended until after their submission has been received.

The same principle applies to an investigator when conducting an investigation (i.e. formation of a preliminary opinion or view prior to interview or collection of all the facts).

### **Principle 3: Full disclosure before the decision**

The respondent is entitled to know the nature and substance of the allegations that have been made against him or her before the interview or any flow on hearing. The identity of the person making the allegation may be relevant and if it is, then it should be made known to the respondent.

This aspect of the rules of natural justice will normally be satisfied by providing the respondent with a copy of the report referred to in Service Standard 1.1.2, including a copy of the allegation that has been made.

Sometimes it may be necessary to give the respondent more than one interview or hearing in order to comply with the requirements of natural justice. For example, if further adverse information is collected, or new allegations made, after the date of the earlier hearing. In such a case, the further information or new allegations must be given to the respondent and a reasonable opportunity to allow the respondent to respond to such material.



#### **Safeguard**

Depending on the sensitivity of the allegation (e.g. involvement of children or young persons or genuine fear for personal safety) it may not be appropriate to supply a copy of the allegation as submitted to the investigator. In this instance a précis of the allegation must be supplied to the respondent and reasons provided as to why the original is not been supplied. Any précis made must adequately address the matter under investigation and allow opportunity for reasonable defence and must be endorsed as accurate by the complainant.

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### **Principle 4: A reasonable opportunity to respond**

A respondent must be given a reasonable period in which to consider the allegations that have been made against them and to respond. What is reasonable may vary, depending upon the complexity of the issue, whether an urgent decision is essential, and other relevant factors.

In most cases this issue is dealt with by the Regulations or Service Standards. However, the Investigator must be willing to consider applications for extensions of time or the adjournment of an investigation or hearing in appropriate circumstances.

Where an extension of time or an adjournment is granted the investigator should advise the respondent of any new deadline or interview date in writing so there can be no misunderstanding.



#### **Communication**

[Notification of Discipline complaint and allegations in relation to the matter](#)

An example of a completed notification letter is included in Appendix 4

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### **Principle 5: Genuine consideration of any submission**

The Investigator must give proper and genuine consideration to what is said by the respondent.

#### **“The Bias Rule”**

Bias can take a number of different forms, including:

1. being partial, or favouring one person over another; or
2. being close-minded and not listening to or taking into account what has been said on behalf of the respondent; or

3. having a conflict of interest between findings of fact and possibly gaining some personal advantage or avoiding a personal disadvantage from the outcome.

Even where no actual bias exists the investigator must be careful to ensure that they avoid any appearance that they may be biased. The bias rule will be broken where there is a reasonable apprehension of bias attaching to the person who makes a decision - that is, if an onlooker would reasonably consider a bias. This may exist, for example, if the decision maker has a family or financial interest in a decision; has displayed hostility towards one party or favouritism towards another; or has or appears to have prejudged the issues to be decided.



### **Caution**

Any person conducting an investigation must be always mindful to adhere to natural justice and failure to do so may jeopardise a disciplinary hearing or have the matter overturned or set aside on appeal.

## **1. Planning an investigation**

Planning is essential to ensure that:

- › the investigation is carried out methodically
- › you use your time to best effect
- › sources of information/evidence are not overlooked; and
- › opportunities for people to collude or remove, destroy or alter evidence are minimised.

The main planning tool available to an investigator is an investigation plan.

Ideally you should prepare an 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.

There are a number of ways in which you may draw up your investigation plan, and an example of how to set out a plan is detailed below.

While it is important that you start with a plan, investigations do not always 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.

### **Example Investigation plan**

#### **Background**

This is a brief summary about how the investigation came about. How the complaint/allegation came to the brigade, district or region's attention, the details provided by the person making the complaint/allegation and any information obtained by the 'next in charge' role who received the complaint when they undertook their initial assessment.

#### **Scope and purpose of the investigation**

This should be detailed in the terms of reference provided to you when you were selected to conduct the investigation.

#### **Allegation or issue to be investigated**

A complaint may contain a number of separate allegations, and these need to be dealt with individually. The investigation plan should include only those allegations that are to be

investigated that have been appointed as part of your terms of reference.

### **Sources of information**

Identify the potential sources of information that will help you to establish the facts at issue. This may be through interviewing specific witnesses, examining documents, conducting site visits 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
- › relevant Service Standards or Policies at the time of the alleged action subject to investigation.

Your focus here 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 the NSW RFS or from outside it.

Usually all sources of information have been exhausted **before** interview of the respondent.

### **Any confidentiality or other risks which must be managed**

This will only be relevant if the person who has made the complaint has requested that their identity be confidential, or where the 'next in charge' role who initially assessed the complaint/allegation has identified other persons who may be at risk.

List the facts that need to be established in order to determine whether the actions, conduct or behaviour of the NSW RFS volunteer member concerned occurred as alleged. The facts at issue will usually include:

- › the identity of the NSW RFS volunteer member concerned
- › the place and the date that the alleged actions, conduct or behaviour occurred
- › whether or not the actions, conduct or behaviour itself was wrong, i.e. it breached legislation, Regulations, Service Standards or Policy
- › whether or not the person did what was alleged, and
- › whether the person did or did not have the authority to take the actions or engage in the conduct/behaviour.

### **Tasks to be completed**

The overall timeframe for the investigation should have been detailed in the terms of reference. Your investigation plan however should include a list of specific tasks and the order in which they should be completed, based on the information sources you have come up with.



## **Communication**

### [Investigation Plan Template](#)

An template of a Investigation Plan is included in Appendix 5

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## 8 Gathering information

### Scheduling interviews

The first interview in an investigation usually occurs with the person who made the complaint. The order in which the remaining witnesses are interviewed will depend on:

- › the importance of their evidence
- › their degree of association with the member concerned, and
- › their availability

When scheduling interviews avoid delays between one interview and the next and never interview witnesses together. Always interview people separately and ask them to keep what was said at the interview 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 assessment about what in fact happened.

The respondent should generally 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. It also minimises the risk of evidence being tampered with or witnesses being intimidated.



#### Caution

Service Standard 1.1.2 Discipline and associated SOPs contain timeframes that must be adhered to when notifying persons of a discipline interview or hearing. Ensure that you allow sufficient time as specified within the standard. Best practice is seven working days.



#### Communication

[Notification of intent to interview witness / respondent](#)

An example of a completed intent letter is included in Appendix 6

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### Conducting interviews

People are a valuable source of information during an investigation because:

- › they may have seen or heard something firsthand
- › they may have created or signed a document or file note
- › they may have used something e.g. a piece of equipment, NSW RFS vehicle etc.

All persons who are relevant to the investigation should be interviewed. These persons are typically identified during the planning phase. However others may be identified as the investigation progresses.

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, as long as they are relevant to the matters under investigation. However, having pre-set questions will help you to cover all the ground that needs to be covered.

The degree to which people cooperate with your questioning will vary. While some people will be forthcoming in their responses, some will be more reserved, and others may actively seek to withhold information. Some may feel confident giving information, while others may feel nervous and require support. You should adjust your interviewing approach to cope with this.

When conducting interviews during the course of your investigation:

- › 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 allegation
- › Remember that the purpose of an interview is to obtain answers about the facts – Who? What? When? Where? How? Why?
- › Maintain normal eye contact and non-confrontational body language/
- › Keep a barrier such as a desk between you and the person being interviewed
- › Adopt a conversational approach – use simple terms, get them talking and keep them talking
- › Avoid making assumptions; if in doubt, ask further questions
- › Have the interviewee draw pictures, make notes, anything that assists with memory recall
- › You are there simply to establish the facts, so **no interrogations**
- › Explore but do not cross-examine
- › 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

### Opening questions

The NSW RFS has prepared a standard set of opening questions that are to be used for all interviews, these questions are designed to ensure as investigator relevant procedural issues are managed in a consistent manner that provides for natural justice.

In the event that an opening question is not appropriate for the circumstance discretion of the investigator should be shown to revise the question or amend to suit.



### Communication

#### [NSW RFS Investigator's Opening questions](#)

An template set of opening questions are included in Appendix 7

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### Recording the interview

The manner in which the interview is conducted is at the discretion of the investigator due to the need to have to adjust the situation to suit both the investigation and also adhere to the principles of natural justice. An investigator may seek to record an interview by means of electronic audio recording; in this instance the intention to record the interview must be made known to the respondent prior to the commencement of recording, with permission obtained both before and again after commencement of the recording.

At the conclusion of the interview a copy of the audio may be provided to the interviewee, and must be provided upon request. If a transcript of the audio has been made, a copy of this transcript must also be provided to the interviewee.

*What if permission to electronically record the interview is not given or withdrawn during interview?*

In the event that permission is not given or withdrawn, the electronic audio recording of the interview must cease immediately. The investigator can commence manual typing of a statement or make notation by hand that can be typed later.



### Action

- › Where typed record of conversation or interview has taken place the person making the statement (interviewee) must be provided the opportunity to read and confirm the accuracy of the statement/notations made. Best practice is to have the interviewee initial each page with a conforming signature on the final page of the statement. A witness should countersign and that can be the investigator if they are present.
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- › If a person chooses not to sign the transcript an appropriate notation should be made to that effect.
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## Communication

### [NSW RFS Volunteer Discipline Statement Template](#)

An template of a statement is included in Appendix 8

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## 9 Informing the support person

Whenever a support person is present during an interview it is necessary to explain their role at the commencement of the interview to ensure that they:

- › understand they are not a potential advocate, but are there to provide support to the person during the interview and ensure they are treated fairly
- › have not agreed to assist any other people likely to be interviewed during the investigation
- › undertake to respect the confidentiality of the matters discussed in the interview.

The support person is a key person in ensuring the welfare of the interviewee and fairness of an interview. An investigator should keep an eye on the body language and commentary of the support person to gauge if questioning is becoming inappropriate. A support person can always interject and request a recess if they feel the person been interviewed is becoming upset, angry or emotional.

The investigator can also recess the interview for appropriate reasons during interview.

## 10 Written responses from the NSW RFS volunteer member concerned

Sometimes it may be more appropriate to request that the respondent concerned provide their response to the allegations in writing, as this process gives the person more time to consider and prepare his/her response. Written requests for information may be suitable if there are multiple allegations and you require very detailed 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 the member concerned, and this method is clearly not appropriate for any person who has difficulty in communicating in writing. It also restricts the opportunity for follow up questions to clarify a response where necessary.

## 11 Understanding evidence

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 senses, e.g. see, touch, hear etc.

**Circumstantial evidence** is indirect or secondary evidence from which facts may be suggested.

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 an allegation regarding the management of brigade finances, documentary evidence such as the brigade's accounting books/records would be essential.



In most investigations into the actions, conduct or behaviour of NSW RFS volunteer members, the main types of evidence will be the oral evidence of witnesses and documentary evidence. In some cases, however, you may need to obtain expert evidence or undertake a site visit.

All evidence collected should be reliable and relevant to the aims of your investigation. Often you will obtain a great deal of unrelated 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 proof 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 told them they had seen or heard (hearsay). 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, misleading or biased?'

As an investigator, you must always conduct yourself with integrity. Never resort to untruthfulness, trickery, deception or unlawful means to obtain evidence.

It is vital for an investigator to collect both evidence that goes to prove the matter at hand and evidence that goes to disprove the matter at hand. Only collecting evidence to the exclusion of other evidence to disprove will deny natural justice and affect the future outcomes of your investigation report.

## **12 Making a finding on the balance of probabilities**

Making findings on the balance of probabilities is not just a matter of mathematics. As the investigator you are not just weighing up that, for example, five (5) people have described one version of events and three (3) people have described a different version, and then going with the majority rule. What you are considering is:

- › the relevance of the information provided to the facts at issue i.e. there is a logical connection between the facts which are at issue and the documentation or interview material used to determine them
- › if the person providing the information saw or experienced the actions, conduct or behaviour firsthand, or whether instead they heard about it from some other person such as the person making the complaint, the NSW RFS volunteer member concerned or a witness (i.e. hearsay), or it is just 'their opinion' or 'what everybody knows happened'
- › if the documentation is authentic and reliable i.e. it is original, dated, signed, on letterhead etc. or a copy that could have been tampered with in some way
- › if there are other sources of information to back up or verify a particular version of events e.g. if the person making the complaint alleges that an incident involved conduct by the NSW RFS volunteer member concerned, on a particular day, yet that person denies being on duty that day, the post incident report can be used to back up or verify if the person was/was not on duty.

The strength or adequacy of the information/evidence necessary to substantiate a fact on the balance of probabilities will also vary according to:

- › the type and seriousness of the allegation
- › the likelihood or chance of an event/incident occurring as described
- › the consequences to the NSW RFS volunteer member concerned that may arise from a particular finding. For example if the consequences of the allegation being substantiated is the NSW RFS volunteer member being demoted, disqualified or removed from the brigade register, the standard of proof and weighting of the evidence must be higher than if the outcome is likely to be a reprimand.

Whilst making a determination on the balance of probabilities is relatively straightforward when there are only documents to review, it is more difficult where there are no witnesses to the incident/event, or



where multiple people are largely recounting their opinion or information they heard from another source.

Any conclusion you come to on the balance of probabilities must always be based on information that can be proven.

### 13 The Briginshaw Test

Usually the role of an investigator is to determine whether alleged events occurred. To do this, the investigator needs to determine whether there is a sufficient amount of evidence to prove the allegations. The amount of evidence required is known as the 'standard of proof'.

The standard of proof differs between civil and criminal matters. Case law has established that in civil matters, the standard is the 'balance of probabilities. This is a lesser standard than the proof required for criminal matters (criminal allegations must be proven 'beyond reasonable doubt').

Where allegations could have serious consequences for the alleged respondent, (e.g. removal from membership) the question of the strength of the evidence required will depend on the facts of each investigation.

However, in the Australian case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 the High Court cautioned against a purely mechanical comparison of mathematical probabilities and stated at pages 361–2 that the balance of probabilities test required the tribunal in this case to:

"feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... [A]t common law ... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal".

In essence the Briginshaw Test requires investigators to closely examine and scrutinise the evidence, to be satisfied that the evidence collected is strong enough to substantiate the allegations on fact, on the balance of probabilities i.e. not just making a finding because the evidence suggests they 'did it' more than they 'did not'.



#### Caution

- › Check that your evidence is complete, with all relevant persons involved interviewed and all documentary evidence gathered.
- › Ensure you are very specific as to what material or evidence is relied upon to support your finding and why it is that any evidence which points to a different conclusion is not relied upon or has been discounted.
- › Document in your report if you have made a conscious decision not to interview certain persons suggested by the respondent or witnesses and your reasons why (e.g. the person had no direct evidence of the incident and was proposed as a character witness only).

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### 14 The investigation report

An investigation report should be:

- › factual
- › accurate
- › clear
- › concise

- › complete
- › timely.

When preparing your report ensure that it contains all of the elements detailed in Service Standard 1.1.2 Discipline and associated SOPs.

Before finalising the investigation report and making findings (and if requested, recommendations), consider the following:

- › Have all issues in the Terms of Reference been addressed?
- › Was the NSW RFS volunteer member concerned advised of each allegation and given a chance to provide information in relation to the allegation?
- › Have all relevant witnesses been interviewed?
- › Where necessary, has the relevant evidence been put to witnesses?
- › Have all persons interviewed had the opportunity to review and make any necessary corrections to the record of their interview?
- › Have all persons interviewed signed their record of interview?
- › Are copies of these interviews attached to the report?
- › Have copies of all relevant documentary evidence (e.g. emails, log books, account books, photos, etc.) which have come to light in the course of the investigation been obtained?
- › Is all of the relevant documentary evidence attached to the report?
- › Have you applied the balance of probability test when determining your findings, i.e. an investigator should not find a fact to be established unless it is 'more probable than not' that it occurred?



#### **Communication**

[NSW RFS Discipline Investigation Report Template](#)

An template of a report is included in Appendix 9

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## **15 The investigation conclusion**

Once the investigator has completed the investigation report and submitted to it the appointing officer a time should be set aside to receive feedback on the report and discussion held as to any area that may need development or improvement. Investigation is a skill that gets better with practice.

Also from time to time an investigator may be exposed to details, and information that may be unpleasant, distasteful, vulgar or offensive. It is important that should you experience any difficulty following an investigation process that an appropriate debrief is sought from the NSW RFS Critical Incident Support Services (CISS) team. You may not feel the effects straight away and some effects can take time to have an effect, just know the CISS team is there for you and are available 24 hours a day.

16 Appendix 1 – [Natural justice fact sheet](#)

## 17 Appendix 2 – [Example of confidentiality agreement](#)

## 18 Appendix 3 – Example of [Conflict of interest declaration form](#)

**19 Appendix 4 – [Example of notification of discipline complaint and allegations letter](#)**

## 20 Appendix 5 – [Template of investigation plan](#)

**21 Appendix 6 – [Example of notification of intent to interview witness/respondent letter](#)**



## 22 Appendix 7 – [Template of investigator's opening questions](#)

## 23 Appendix 8 – [Template of volunteer discipline statement](#)

## 24 Appendix 9 – [Template of a discipline investigation report](#)