



ASIA PACIFIC FORUM
ADVANCING HUMAN RIGHTS IN OUR REGION

Undertaking Effective Investigations



A Guide for National Human Rights Institutions

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Undertaking Effective Investigations: A Guide for National Human Rights Institutions

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Foreword

Investigating allegations of human rights violations is essential to securing justice for victims. Whether the focus is on resolving individual complaints or uncovering systemic failings, effective human rights investigations uncover the facts of a case and provide a pathway to redress and restitution.

Investigations are a vital part of the work of nearly all national human rights institutions (NHRIs). Most NHRIs in the Asia Pacific region have mandates to conduct investigations in response to complaints of human rights violations. Some are also able to initiate their own investigations into situations that appear to raise human rights concerns.

The complaints that NHRIs receive and the investigations they undertake reflect the enormous diversity of their national settings. For example, some operate in situations of conflict or impunity and, as a consequence, their work can include investigations into gross violations of human rights. A number of NHRIs have conducted investigations that look at broad issues affecting the civil, political, social, economic and cultural rights of their citizens, while others have narrower mandates that primarily focus on resolving individual cases of discrimination.

No matter what the setting or the complaint, NHRIs must have the institutional capacity and a team of skilled investigators to collect evidence, conduct interviews, develop recommendations and report on their findings. It can be challenging and confronting work.

This Manual provides a comprehensive overview of the key skills that NHRI investigators require in order to conduct effective investigations. For example, interviews are an almost universal element of all human rights investigations. Accordingly, the Manual devotes considerable attention to planning and conducting interviews with witnesses. There is also a strong focus on emerging areas of human rights investigation, such as collecting and preserving evidence from digital and online sources.

While the Manual includes examples of good practice from NHRIs and other State oversight agencies, one case study has been used throughout to illustrate what can happen when investigators do not follow good investigative processes.

During the most recent regional training needs assessment of APF member institutions, a number of NHRIs said that developing skills in conducting investigations was a high priority. This Manual is a first step to respond to this need and will be complemented by a blended-learning course to provide additional skills and knowledge to support NHRI investigators staff in their important work.

I hope this Manual will be a valuable resource for NHRIs in the Asia Pacific and beyond.



Kieren Fitzpatrick
Director
Asia Pacific Forum of National Human Rights Institutions

Acknowledgements

The writer of this Manual is Gareth Jones, who is a former Director of Major Investigations at the Canadian Military Ombudsman's Office. He was also a member of the Special Investigations Unit of Ontario, conducting 500 criminal investigations of police officers when a death or serious injury occurred, including approximately 100 police shootings. He has delivered training for investigators in many countries around the world.

The Manual was enriched through information, materials and comments provided by representatives of several APF member institutions, including: Padma Raman and Darren Dick (Australian Human Rights Commission); B.S. Nagar (National Human Rights Commission of India); Ariunaa Tumurtogoo and Amy Rogers (National Human Rights Commission of Mongolia); Shreeram Adhikari (National Human Rights Commission of Nepal); Sue O'Shea (New Zealand Human Rights Commission); Krissi Shaffina Twyla A. Rubin and Flora C. Atilano (Commission on Human Rights of the Philippines); and Shirani Rajapakse (Human Rights Commission of Sri Lanka).

Chris Sidoti, Greg Heesom, James Iliffe, Kieren Fitzpatrick, Lisa Thompson and Suraina Pasha from the APF also contributed in their respective ways to the development of the Manual.

List of abbreviations

APF	Asia Pacific Forum of National Human Rights Institutions
CCTV	closed circuit television
CMC	Crime and Misconduct Commission
Cst.	Constable
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
DVR	digital voice recorder
FBI	Federal Bureau of Investigation
G20	Group of Twenty Finance Ministers and Central Bank Governors
IRT	Investigation Review Team
MCM	Major Case Management
NGO(s)	non-governmental organization(s)
NHRI(s)	national human rights institution(s)
PLO	Police Liaison Officer
QPS	Queensland Police Service
SCAN	Scientific Content Analysis
SDS	security and detention sector
SORT	Special Ombudsman Response Team
S/Sgt.	Senior Sergeant
UNDP	United Nations Development Programme

Introduction for users

As the Paris Principles¹ emphasize, conducting investigations is an important function of NHRIs. NHRIs generally cannot order anyone to do anything. They have to persuade their stakeholders and therefore their recommendations have to be built on firm, factual foundations. Their investigations have to be robust, fair and thorough – and be seen as such. If their investigations do not meet those standards, the credibility of the NHRI will suffer.

Doing an investigation to a standard where it can withstand scrutiny requires a structured approach, careful planning, appropriate resources and skilled investigators. Human rights investigations can be particularly challenging. They can involve complex, nuanced issues. Gathering the evidence might also be very difficult, particularly in conflict situations or where there is a significant imbalance of power and resources between the NHRI and those they are investigating.

Some of the key themes in this Manual include:

- the importance of doing investigations well, with a focus on thoroughness and objectivity
- that the credibility of the NHRI rests, in part, on being able to demonstrate that it has a sound investigative process in place
- that if the NHRI does not get the facts right, its findings and recommendations will be dismissed and its credibility will be severely damaged.

RATIONALE

There are many different kinds of investigations, such as criminal, workplace, regulatory, administrative fairness and so on. This Manual attempts to apply effective practices and processes from many of them to human rights investigations.

Different NHRIs have different mandates and, as such, may approach how they do their investigations differently. Some conduct broad investigations into systemic issues. Some focus on individual complaints. Some look at issues that have a criminal dimension, such as extra-judicial executions or torture. Others focus on discrimination in all its many forms. Some investigate all of the above.

As a result, not everything in this Manual may be directly relevant to the work every NHRI. However, the concepts and issues covered may be of value in particular areas of work or they may become relevant in the future.

TOPICS COVERED

The Manual is intended as a practical guide to support the challenging work undertaken by NHRI investigators in the field.

Given the diversity of mandates and approaches among NHRIs, the Manual focuses in some depth on core investigative skills, particularly interviewing. Good investigators are generally good interviewers. This includes strategies to ensure that an investigator obtains as much relevant information from any witness, willing or reluctant, as efficiently as possible.

It also covers in some detail how to plan an investigation, how to assess evidence and how to plan and carry out investigations into systemic issues. In addition, it includes tips on effective report writing.

¹ The Paris Principles were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, held in Paris in 1991. They were adopted by the United Nations General Assembly in resolution 48/134 in 1993. The Paris Principles relate to the status and functioning of national institutions for the promotion and protection of human rights. Further information on the Paris Principles is available at www.asiapacificforum.net/members/international-standards.

There are short chapters on collecting digital evidence and how to use the Internet as an investigative tool. Both are becoming increasingly important in virtually every field of investigation, including human rights investigations.

EIGHT PRINCIPLES OF EXCELLENT INVESTIGATION

Good investigations are based on eight fundamental principles.

- 1. Investigators must be as independent as possible.**
- 2. Investigators must be trained and experienced.**
- 3. All potentially relevant issues must be identified and, where appropriate, pursued.**
- 4. Investigations must be sufficiently resourced.**
- 5. All relevant physical and digital evidence must be identified, preserved, collected and examined as necessary.**
- 6. All relevant documentation must be secured and reviewed.**
- 7. All relevant witnesses must be identified, segregated where practical and thoroughly interviewed.**
- 8. The analysis of all the material gathered during the investigation must be objective and based solely on the facts.**



Not all eight principles are equally applicable, in equal measure, in every single case. Some may ultimately prove irrelevant to some human rights investigations. However, competent investigators will consider them all as they plan and carry out their investigations.

These principles can be used by investigators to assess the quality of their own investigations, as they progress, to ensure that they are on track. They can also be used to assess the quality of investigations done by others.

PROTECTING INVESTIGATIONS AND INVESTIGATORS

The Manual offers strategies that are designed to protect investigators from criticism. If a group or an individual does not like the findings of an investigation but cannot attack the facts to undermine those findings, they may attack the quality of the investigation itself. They will look for a flaw in the investigation to attempt to discredit the investigation in its entirety. If investigators adapt and follow the processes described in this Manual, they will be better able to successfully defend their investigation before an adjudicator, a court, the media or the public.

CASE STUDY

A case study is used throughout the Manual to illustrate the various points made. It is the story of Mulrunji, a 36-year old Aboriginal Australian who died in police custody in 2004 on Palm Island, Queensland, Australia. It raises several issues that involve human rights, a number of them systemic in nature. It is an excellent example as it richly illustrates, in both human terms and in terms of the vast financial consequences that can follow, what can go wrong with an investigation when some of the eight principles of excellent investigation are not followed.



Palm Island, 2007. Photo by Aidan Jones.



Rally outside Queensland Police Headquarters, Brisbane, Australia, 2007. Photo by David Jackmanson.

Case study: The Death of Mulrunji



Mulrunji² was 36 years old when he died on 19 November 2004 in the custody of the Queensland Police Service (QPS), in a police watch-house on Palm Island.³ Queensland is a state in the north-east of Australia.

Mulrunji was an Aboriginal Australian who had never been in serious trouble with the police. Palm Island is a small community located off the east coast of northern Queensland. It is home to 2500 Aboriginal residents, making it one of the largest Aboriginal communities in Queensland. Palm Island has had a reputation as one of the worst settlements in the country. As early as 1916, the Queensland Government had pursued a policy of using Palm Island as a dumping ground “for individuals we wish to punish”. Over the years, thousands of Aboriginal men, women and children from more than 40 clans were forcibly sent to Palm Island. It became known, in the words of one author as a “tropical gulag”.⁴ It was not until the mid-1970s that the Aboriginal community on Palm Island achieved some autonomy, with the creation of an Aboriginal Council.

WHY USE THIS CASE STUDY?

The death of Mulrunji is a case that has a strong human rights aspect to it. It involves a member of an indigenous population that has had a long and troubled history with the State, its power to detain its citizens and the process by which deaths that occur in the custody of the State are investigated. It was a case to which the Australian human rights community, including the Australian Human Rights Commission,⁵ devoted significant attention and resources because of the serious and systemic human rights issues it raised. It is a well-documented case, so the facts are reasonably clear. It inflamed relations between the police and the Aboriginal community. It stirred considerable public interest of all kinds. It polarized. It cost taxpayers millions of dollars. However, some eight years after it happened, it was still not fully resolved.

The main reason that it is being used as a case study is that it is, sadly, an example of what can go wrong when investigations are not done as well as they could and should be done, intentionally or otherwise.

19 November 2004: THE INCIDENT AND ARREST

Background

On the morning of 19 November 2004, police were investigating an allegation by three Aboriginal women – Gladys, Andrea and Anna Nugent – that Gladys’ partner, Roy Bramwell, had assaulted them in the house that Gladys shared with him. Andrea was so seriously injured that she had to be airlifted to the mainland for medical treatment.

2 It is a cultural tradition of indigenous peoples in Australia to not refer to the name of the deceased. The local community instead use the name Mulrunji to refer to the man in this instance.

3 A watch-house is part of a police station or court and is where those arrested are processed and placed in cells for temporary detention.

4 *Tall Man: The Death of Doomadgee*; Chloe Hooper; 2008.

5 Previously known as the Human Rights and Equal Opportunity Commission.

Gladys went to the police watch-house. She asked if she could return home to collect her medication. She did so, escorted by Senior Sergeant (S/Sgt.) Chris Hurley, who was in charge of the Queensland Police Service (QPS) staff on Palm Island.

They were accompanied by an Aboriginal QPS Police Liaison Officer (PLO), Lloyd Bengaroo. When they arrived at the house, a Patrick Bramwell was outside and began shouting at the officers. S/Sgt. Hurley arrested him for drunkenness.

The arrest

Mulrunji was also present outside the Bramwell house. He appeared intoxicated but otherwise had no sign of illness or injury. Apparently, he began verbally berating PLO Bengaroo, accusing him of “betraying his own people”. PLO Bengaroo told him to leave. S/Sgt. Hurley, who had not heard the conversation, asked PLO Bengaroo what had happened. Mulrunji, who was walking away, turned around and swore at the officers. S/Sgt. Hurley then arrested Mulrunji for public nuisance and placed him in his police vehicle next to Patrick Bramwell. The arrest took place at approximately 10.20am.

Arrival at the police watch-house

It was a short drive to the police watch-house. Upon arrival, S/Sgt. Hurley parked the police vehicle in the garage area at the rear of the police station. Roy Bramwell, who was the suspect in the earlier assault on Gladys and her sisters, was at the police watch-house, although apparently not under arrest. He was being spoken to by another QPS officer, Sgt. Leafe. Also present was an off-duty officer, Constable (Cst.) Steadman, who was on his way into the watch-house via the area where the police vehicle was parked. According to his notes, he had a view of the door into the cell area. The garage area was also visible to people from outside the watch-house, including two passersby, Alfred Bonner and Penny Sibley.

Removal from the vehicle

Mulrunji was taken from the back of the police vehicle and toward the door leading into the station. At this point, he was verbally protesting. According to witnesses, Mulrunji hit S/Sgt. Hurley hard in the face as he got out of the police vehicle. Penny Sibley and another witness state that S/Sgt. Hurley then punched Mulrunji in the face. Penny Sibley stated that she saw S/Sgt. Hurley hit Mulrunji “... in the side or the rib”.

The fall at the door

As S/Sgt. Hurley and Mulrunji went through the door into the watch-house, some kind of a struggle was going on. They both fell to the floor.

The mechanics of the fall – who fell in relation to whom, when, where and how – proved to be the crucial issue in this case.

S/Sgt. Hurley stated subsequently to Sgt. Leafe and others that he fell to the side of Mulrunji and did not land on him. Cst. Steadman, in a statement made three weeks later, stated that it appeared that S/Sgt. Hurley landed on top of Mulrunji.

Taken to the cell

After the fall, Mulrunji was no longer protesting or resisting his arrest. Sgt. Leafe assisted S/Sgt. Hurley drag Mulrunji down the corridor, through a doorway and into a cell.

The officers then took Patrick Bramwell who was, according to them, too drunk to walk, into the police station and dragged him to the same cell as Mulrunji. There were no other people in the cell.

Video recording and cell checks

S/Sgt. Hurley went to the main area of the watch-house where his office was located. The cell where Mulrunji and Patrick Bramwell had been placed had a video camera in it for monitoring purposes.⁶ S/Sgt. Hurley started recording the happenings in the cell. The officers were able to watch Mulrunji and Patrick Bramwell in the cells on monitors in the main area of the watch-house.

According to notations made by S/Sgt. Hurley and Sgt. Leafe in the watch-house register, the cell was checked at 10:55am. S/Sgt. Hurley wrote: "Two prisoners cell checked snoring".

In a subsequent interview with QPS investigators, S/Sgt. Hurley stated that he went into the cell at 10.55am. He stood over the prisoners, observed that they were both breathing and watched their stomachs rise up and down. According to him, they both appeared to be asleep and they were snoring.

At 11:23am Sgt. Leafe entered the cell and noted that Mulrunji was "cool" and had no pulse. Patrick Bramwell was asleep. S/Sgt. Hurley went and checked on Mulrunji. He stated that he felt a weak pulse.

An ambulance was called. It took between five to eight minutes to arrive. No first aid was given to Mulrunji by the officers prior to the arrival of the ambulance. Upon examination, an ambulance officer confirmed that Mulrunji had no vital signs present and that he was dead.

Notification

S/Sgt. Hurley immediately called the Townsville District Police Communications Centre to advise them of the death. The QPS chain of command was informed, as was the State Coroner and the Crime and Misconduct Commission, an independent body that can investigate the police. Next of kin were not notified of the death until approximately 3.40pm that day.

QPS investigation team

The investigation of the incident was assigned to a QPS Detective Inspector from Townsville, which is the nearest large community on the mainland, roughly 65 kilometres away.

The QPS investigation team included the Detective Inspector, a Detective Sergeant and an Inspector from the QPS Ethical Standards Command. Six technical support staff were also assigned, making a total of nine QPS officers. The technical support staff included a Scenes of Crime Officer, a Forensic Services Officer, a Scientific Section Officer, a Human Services Officer and two Constables.

The Detective Sergeant in charge of the Criminal Investigations Branch on Palm Island was in Townsville at the time of Mulrunji's death. Although the QPS dispute that he was appointed to the investigation team, it appears clear that he returned to Palm Island with the investigation team and assisted them with the investigation. To what extent he did so is a matter of debate. He certainly took part in the interviews of police – including S/Sgt. Hurley – and civilian witnesses, obtained written statements, transported Mulrunji's body to the airport, received a verbal briefing of Mulrunji's medical history and reported information back to the rest of the investigation team.

Arrival on Palm Island

The investigation team arrived at Palm Island airport at 2.55pm, some three-and-a-half hours after being notified of the death. S/Sgt. Hurley and Sgt. Leafe met them and drove the nine officers from the airport to the watch-house in two vehicles. None of the officers recorded any of the conversations during the journey.

⁶ Video cameras had been introduced into some watch-houses following a major inquiry into Aboriginal deaths in custody that took place between 1987 and 1991. The inquiry – the Royal Commission into Aboriginal Deaths in Custody – made 339 recommendations. These recommendations are available at www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf.

Interviews

The QPS investigation team began interviews of officers and civilians soon after arriving at the watch-house. Two of the officers conducted audio-taped interviews with the two QPS officers involved in the incident (S/Sgt. Hurley and Sgt. Leafe), PLO Bengaroo and three civilian witnesses.

One of the QPS interviewers was the Detective Sergeant who worked on Palm Island with S/Sgt. Hurley.

Watching the video

As soon as the QPS investigators arrived at the watch-house, they viewed the cell video tape. The QPS investigators seized the tape.

S/Sgt. Hurley was allowed to watch the video on 19 November 2004, after his initial interview, and again on the morning of 20 November 2004, with QPS investigators present. Later on 20 November 2004, after viewing the tape for the second time, S/Sgt. Hurley took part in a video re-enactment and a follow-up interview.

Scene processing

The QPS forensic investigators began their examination of the cell that afternoon.

It is unclear what other scenes, including other areas of the watch-house, such as the door area, were photographed, video-taped and forensically examined.

Dinner at S/Sgt. Hurley's home

At about 10.30pm on 19 November 2004, the QPS Detective Sergeant who worked on Palm Island and who was involved in the investigation went to S/Sgt. Hurley's home, which is in a secure police compound. He cooked dinner for S/Sgt. Hurley and other members of the QPS investigation team. They were at the residence for about an hour, eating dinner and drinking beer. There is no suggestion that there was excessive drinking.

20 November 2004: INTERVIEWS AND SCENE PROCESSING

Interviews

QPS investigators continued interviewing witnesses the day after the death. All of the interviews were audio-taped and some involved video-taped re-enactments.

S/Sgt. Hurley was interviewed twice that day by the QPS investigation team. The first interview was a video-taped re-enactment that lasted 14 minutes. The second interview was audio-taped and lasted 12 minutes.

The QPS investigation team conducted seven other interviews with police and civilians during the day, including interviews with Sgt. Leafe and PLO Bengaroo. It appears that no interview was longer than 20 minutes.

Scene processing

The arrest scene was not visited until 20 November 2004; that is, the day after Mulrunji died. S/Sgt. Hurley drove the QPS investigators to the scene.

Form 1

A "Form 1" is a QPS form used to report a death to the State Coroner under the *Coroners Act 2003*. The State Coroner uses the information in the Form 1 to assist him or her in deciding if an autopsy should be performed. The Form 1 is also used as a source of information by the forensic pathologist performing the autopsy.

A QPS investigator prepared the Form 1 regarding the death of Mulrunji on the evening of 19 November 2004. However, the form was not sent to the State Coroner until 22 November 2004.

The QPS investigative team had interviewed Roy Bramwell, who alleged that S/Sgt. Hurley repeatedly punched Mulrunji as he was being taken into the watch-house. That information was not conveyed to the pathologist in the Form 1.

23 November 2004: THE AUTOPSY

The autopsy on Mulrunji's body was performed by a forensic pathologist on 23 November 2004. A member of the QPS investigative team was in attendance.

The forensic pathologist noted a small abrasion above the right eye as the only external injury. Internal injuries included four fractured ribs, a ruptured liver and massive internal bleeding, which was determined to be the cause of death. He concluded that a massive amount of force would have been necessary to cause that level of damage to the liver. Death would have followed fairly quickly which, according to the pathologist, ruled out the possibility of the injury occurring prior to the arrest of Mulrunji.

Forensic toxicology tests determined that Mulrunji had a blood alcohol level of 0.292, which is almost six times the legal limit for driving a vehicle.

The cause of death was determined to be intra-abdominal hemorrhage, due to the ruptured liver and portal vein.

24 November 2004: THE CRIME AND MISCONDUCT COMMISSION TAKES CHARGE

The Crime and Misconduct Commission (CMC) is an independent body that, among other things, conducts independent investigations into misconduct in public sector agencies, including police departments. In dealing with complaints of, or potential, police misconduct, the CMC can choose to refer the matter to the Police Commissioner to investigate; monitor the Police Commissioner's investigation; work in cooperation with the Police Commissioner to complete the investigation; or conduct the investigation on its own.

On 24 November 2004, the CMC took full charge of the investigation. The CMC stated that it invoked its mandate as a result of the autopsy report. Three CMC investigators and an Aboriginal support person went to Palm Island and took over the investigation.

The CMC investigators were QPS officers on secondment to the CMC.

26 November 2004: POST-MORTEM REPORT RELEASED AND RIOTS FOLLOW ON PALM ISLAND

On 26 November 2004, the Coroner publicly released the autopsy report.

There had been a deep and lengthy history of distrust between the QPS and the Aboriginal community on Palm Island. It was anticipated that there would be a negative reaction from the Aboriginal community once the results of the post-mortem were released. Additional police officers were sent to Palm Island.

Riots erupted. The courthouse, police station and police barracks on Palm Island were burned down, including S/Sgt. Hurley's house. Police officers and their families were forced to barricade themselves in the hospital. Approximately 80 police from Townsville and Cairns were flown to Palm Island later that day to restore order.

After the riots, 28 Palm Island residents were charged with various offences including arson, unlawful assembly, wilful damage and assault on the police.

30 November 2004: THE SECOND AUTOPSY

Due to the sensitive nature of the death of Mulrunji and the community response, the State Coroner ordered a second autopsy.

On 30 November 2004, three forensic pathologists conducted the second autopsy, including a senior pathologist from outside Queensland.

The second autopsy confirmed that the cause of death was intra-abdominal hemorrhage due to the massively ruptured liver, caused by a significant amount of force. The injuries were said to be consistent with someone who had been involved in a fatal car accident.

8 December 2004: FURTHER INTERVIEWS

On 8 December 2004, the CMC investigators conducted audio-taped interviews with S/Sgt. Hurley, Sgt. Leafe and PLO Bengaroo.

Cst. Steadman was also interviewed by the CMC that day. It was the first time he had been interviewed regarding this case by any investigative agency.

February 2005: THE FIRST INQUEST

In Queensland, every sudden or unexpected death is investigated by a Coroner. However, the first Coroner appointed declared a conflict of interest, as he had had previous dealings with S/Sgt. Hurley. He stepped down.

March 2005 to September 2006: THE SECOND INQUEST

The Deputy State Coroner was appointed to take over the inquest, which began in March 2005. It took 18 months to complete, apparently due to legal wrangling, and included 17 days of actual hearings. Witnesses included members of Mulrunji's family, officers on duty at the time of Mulrunji's death, the Commissioner of the Queensland Police, the Palm Island Aboriginal Council and the Aboriginal and Torres Strait Islander Legal Service.

The Australian Human Rights Commission (the Commission) also exercised its powers and applied to intervene in the inquest to raise issues of systemic reform. The Commission submitted 40 recommendations. They focused on improving the independence and impartiality of investigations into custody deaths, along with other systemic issues relating to the Aboriginal community that, in the Commission's view, the case highlighted.⁷

One of the key issues that the Coroner focused on was the independence and impartiality of the QPS investigation. In her report, delivered in September 2006, she found a range of factors had adversely affected the credibility of that investigation, including:

⁷ The Commission's full submission is available at www.humanrights.gov.au/legal/submissions_court/intervention/mulrunji.html.

- officers from Townsville and Palm Island were on the investigation team
- some officers on the investigation team knew S/Sgt. Hurley personally
- S/Sgt. Hurley transported the investigating officers from the airport
- S/Sgt. Hurley drove the investigators to the scene of Mulrunji's arrest
- investigators ate dinner at S/Sgt. Hurley's house.⁸

In addition, she found that S/Sgt. Hurley intentionally caused Mulrunji's fatal injuries.

The Coroner made 40 recommendations, 14 of which were directly related to the quality of the investigation. Virtually all were based on the Commission's recommendations, with some minor amendments.⁹ The recommendations also included revising the Queensland Police Operational Procedures Manual to ensure that:

- officers investigating deaths in custody should not be from the region where the death occurred
- the impartiality, as well as the appearance of impartiality, of the investigation must be considered when assigning officers to investigate deaths in custody
- officers involved in an investigation into a death in custody must disclose any relationship with an officer involved in, or a witness to, that death.

December 2006 to June 2007: PROCEEDINGS AGAINST S/SGT. HURLEY

On 14 December 2006, the Queensland Director of Public Prosecutions (DPP) announced that S/Sgt. Hurley would not be charged with any criminal offence, due to insufficient evidence. After much public and media pressure, the Government of Queensland asked the former Chief Justice of the Supreme Court of New South Wales to review the decision not to charge S/Sgt. Hurley. He found that there was sufficient evidence to lay charges against S/Sgt. Hurley.

S/Sgt. Hurley was charged with assault and manslaughter on 5 February 2007.

The QPS police union began a public campaign to protest the decision, including raising money for S/Sgt. Hurley's defence.

The trial took place in June 2007. S/Sgt Hurley was found not guilty by the jury.

February 2007: CCTV TO BE INSTALLED IN ABORIGINAL COMMUNITY WATCH-HOUSES

In February 2007 the Queensland Premier agreed to install closed circuit television (CCTV) cameras in Aboriginal community watch-houses.

March 2007 to May 2007: TRIAL OF PALM ISLAND RESIDENTS

The trials of Palm Island residents charged with rioting were held between March 2007 and May 2007. One man was convicted of inciting a riot and four men were acquitted of rioting causing destruction. Twelve others had previously pleaded guilty.

8 The second inquest report is available at www.courts.qld.gov.au/__data/assets/pdf_file/0008/86642/cif-doomadgee-mulrunji-20060927.pdf.

9 More information is available at www.humanrights.gov.au/about/media/media_releases/2006/78_06.htm.

September 2008: APPEAL OF THE FINDINGS OF THE SECOND INQUEST

In September 2008, lawyers for S/Sgt. Hurley appealed the findings of the second inquest. The Supreme Court of Queensland ordered a new inquest.

December 2006 to November 2008: INVESTIGATIVE REVIEW TEAM INVESTIGATION

In December 2006, in response to significant criticism about the QPS investigation in the second inquest, the Queensland Police Commissioner created an Investigation Review Team (IRT) to examine the QPS investigation into Mulrunji's death. The IRT was made up of serving QPS officers.

The IRT investigated nine allegations, based on the Coroner's comments, specifically that:

- officers serving on Palm Island were involved in the investigation
- S/Sgt. Hurley transported investigators from the airport and to the scene of the arrest
- the QPS investigations team had dinner at S/Sgt. Hurley's residence
- witnesses discussed the incidents surrounding Mulrunji's death before the investigation was complete
- members of the QPS investigations team had "off the record" discussions with S/Sgt. Hurley
- the QPS investigation team did not thoroughly question PLO Bengaroo
- relevant information was not provided to the pathologist in the Form 1
- the QPS investigation team did not provide support to Aboriginal witnesses
- Mulrunji's family was not immediately notified of his death.

The IRT's findings were released publicly in November 2008. "Deficiencies" were found in the QPS investigation but no serious fault on the part of any of the QPS officers involved in the initial investigation. The IRT did not recommend any disciplinary action against any officer.

March 2010 TO May 2010: THE THIRD INQUEST

The Deputy Chief Magistrate of Queensland was assigned to reopen the inquest. Hearings commenced on 8 March 2010 and the findings and recommendations were released on 14 May 2010.

In his report, the Deputy Chief Magistrate agreed with the findings of the second inquest that the QPS investigation was seriously flawed. He noted his "broad agreement" with the 40 recommendations made by the Coroner in the second inquest. He also recommended that the CMC be given the resources and the legislative authority to conduct investigations into deaths in custody immediately after they are reported.

He did not find enough evidence to support the finding in the second inquest that S/Sgt. Hurley intentionally caused Mulrunji's fatal injuries.¹⁰

June 2010: CMC REVIEW

In June 2010, the CMC released its 187-page report¹¹, which commented on the initial QPS investigation and the IRT investigation. The CMC found serious problems with both.

10 The third inquest report is available at www.courts.qld.gov.au/__data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf.

11 The CMC Review of the Queensland Police Service's Palm Island Review is available at www.cmc.qld.gov.au/topics/police-and-the-cmc/misconduct-by-police/investigations-of-police/palm-island-review.

In respect to the initial QPS investigation, the CMC found that it was “seriously flawed, its integrity gravely compromised in the eyes of the very community it was meant to serve”.

The report also noted particular shortcomings, along the lines to those highlighted by the Coroner in the second inquest, including that:

- it was not conducted in accordance with QPS policies and procedures
- S/Sgt. Hurley was not thoroughly interviewed
- S/Sgt. Hurley was allowed to watch the video
- Roy Bramwell was not interviewed as soon as he could have been
- there are discrepancies between a recorded interview of Roy Bramwell and a signed statement he made
- investigators failed to interview Cst. Steadman.

The CMC supported the IRT conclusion that the QPS investigation was deficient. However, it also found that the IRT investigation was itself badly flawed for several reasons, including that the investigators:

- justified the conduct of the QPS investigation team on doubtful grounds
- demonstrated a lack of thoroughness and diligence
- asked questions which created a perception of bias
- accepted evidence without testing it
- asked a series of questions that appeared to be designed to elicit a specific response.

In fact, the IRT investigation was so biased, in the view of the CMC, that the CMC recommended disciplinary action against the IRT investigators, as well as several of the investigators involved in the initial QPS investigation.

March 2011: QPS REPORT RELEASED

In March 2011, the QPS released a 410-page report, vigorously rebutting the CMC’s findings. While it accepted that there had been some errors on the part of the QPS, it concluded that none were serious enough to warrant disciplinary action against any of the police officers who were part of the initial QPS investigation team or the subsequent IRT investigation team.

May 2011: MULRUNJI FAMILY SETTLE CIVIL ACTION

The family of Mulrunji filed a civil case against S/Sgt. Hurley and the Queensland Government in June 2007. In May 2011, Mulrunji’s family settled the matter for \$370,000.

October 2012: POLICE LEGAL FEES REIMBURSED

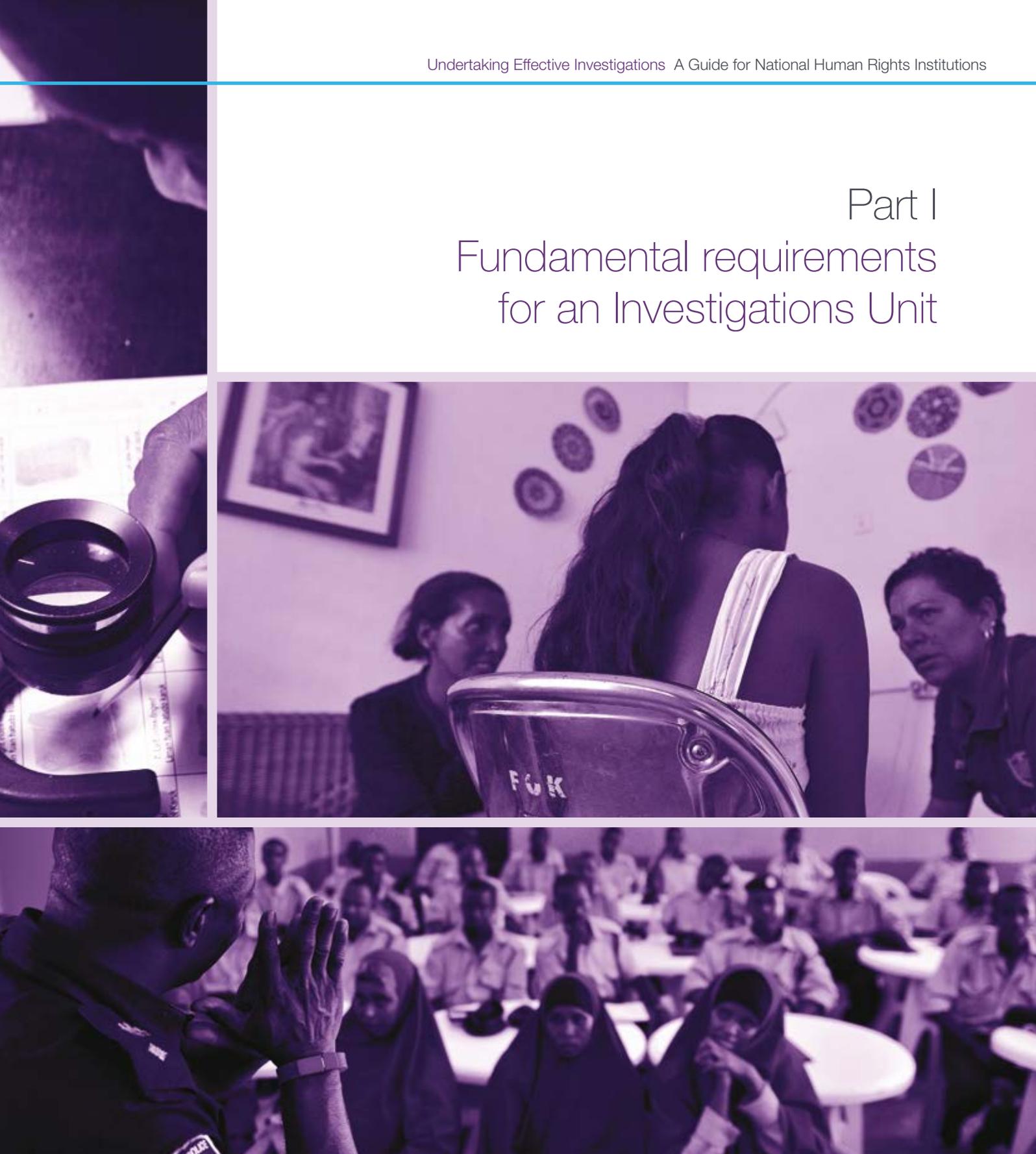
In October 2012, the Queensland Government announced it would reimburse the QPS for the legal fees paid for police officers involved in proceedings resulting from Mulrunji’s death. According to media reports, that included \$384,700 for representation of officers at the inquests and reimbursing the police union for \$280,225 for S/Sgt. Hurley’s defence costs at the criminal trial.

The Mulrunji case: Table of referrals

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Part I

Fundamental requirements for an Investigations Unit



Chapter 1: Independence

Chapter 2: Training and experience

Chapter 3: Adequate resources

Chapter 1: Independence

KEY QUESTIONS

- **Why is independence an important issue for NHRIs?**
- **How can NHRIs demonstrate independence?**
- **What is impartiality?**
- **What powers do NHRIs require to conduct effective and efficient investigations?**



1. INDEPENDENCE

Independence is the first and most essential requirement for NHRIs.¹²

NHRIs have a mandate to promote and protect human rights, including through the investigation of human rights violations by both State and non-State actors. To ensure that their investigations, recommendations and decisions are seen as credible and are respected, the NHRI must be, and must be perceived to be, independent.

The Paris Principles set out five necessary guarantees of independence:

- legal independence
- operational independence
- policy independence
- financial independence
- independent members.

Legal independence

The Paris Principles provide that NHRIs should be established through the country's constitution or through legislation. In practice, constitutional or legislative provisions normally specify that the NHRI is to carry out its functions independently.¹³ By establishing the NHRI in its constitution or legislation, the State protects the NHRI from undue interference by the executive arm of the Government.

Operational independence

The NHRI needs independence to determine its priorities, programs and projects; that is, all aspects of its operations, subject to the law and available resources. It should be empowered to “[f]reely consider any questions falling within its competence”.¹⁴ The NHRI should have the power to determine freely which of its functions should be given priority in the performance of its mandate, as well as the structure of the organization that best meets this purpose. The Government should not be able to direct the activities of the NHRI, including in relation to its priorities, as this may prevent the NHRI from pursuing areas and issues of concern that it considers most important in the promotion and protection of human rights.

12 See *National Human Rights Institutions in the Asia Pacific*; Brian Burdekin with Jason Naum; 2007; p. 43; and *National Human Rights Institutions: Best Practice*; Commonwealth Secretariat; 2001; p. 5.

13 Paris Principles; “Competence and responsibilities”, para. 2.

14 Paris Principles; “Methods of operation” para. (a).

Policy independence

The NHRI must be able to determine its practices and procedures and make its own findings, conclusions and recommendations in the course of its work. Whether providing advice to the parliament or the Government,¹⁵ undertaking broad investigations and inquiries¹⁶ or handling individual complaints of human rights violations,¹⁷ there should be no external interference.

Financial independence

NHRIs are State institutions and they rely on States to provide their core operational budgets. However, the Paris Principles recognize the connection between independence and funding and provide that the NHRI should have adequate funding “to enable it to have its own staff and premises, in order to be independent of the Government and not subject to financial control that might affect its independence”.¹⁸

The NHRI must have control over its budget once allocated. For this reason:

- a general grant of funds should be provided, and not be earmarked for particular activities or purposes
- the NHRI should be responsible for the administration and allocation of funds, subject to reasonable financial accountability measures applicable to other independent State institutions
- the use of funds should not require governmental approval prior to expenditure.

Independent members

The independence of the NHRI is further promoted through the process of appointing members, as well as the terms and conditions of its members. This would include:

- an open and transparent selection process that includes:
 - advertising vacancies broadly
 - broad consultation and/or participation in the application, screening and selection and appointment process
 - assessing candidates based on predetermined, objective and publicly available criteria
 - maximizing the number of potential candidates from a wide range of groups in society
 - selecting members to serve in their own individual capacity
- appointment by an official act for a specific period of time¹⁹
- dismissal only on the basis of defined grounds following a determination by a properly constituted court or tribunal
- guarantees of immunity from prosecution for actions undertaken in good faith in their official capacity. Immunity should extend to the premises and records of the NHRI.

2. INDEPENDENCE AND INVESTIGATIONS

NHRIs and other “oversight agencies” across the world seek to distance themselves from those they investigate, literally and figuratively, in order to promote both their real and perceived independence from the Government.

15 Paris Principles; “Competence and responsibilities”, para. 3(a).

16 Paris Principles; “Competence and responsibilities”, para. 3(a).

17 Paris Principles; “Additional principles concerning the status of commissions with quasi-jurisdictional competence”.

18 Paris Principles; “Composition and guarantees of independence and pluralism”, para. 2.

19 Paris Principles; “Composition and guarantees of independence and pluralism”, para. 3.

Locating premises away from entities they may investigate

The NHRI should, ideally, not be located in or near other government buildings, in the middle of a government compound or in facilities guarded by military, police or security forces. Locating the NHRI in such facilities not only has implications for its independence, it also raises issues regarding confidentiality and accessibility.

Branding

The NHRI should have its own logo and branding and should not use the crest, logo or other branding of the Government.

Freedom from Access to Information laws

If the NHRI operates in a jurisdiction that has Access to Information (or Freedom of Information) laws, the application of those laws to the NHRI should not adversely impact on the real and perceived confidentiality of the NHRI and the integrity of its investigative process.

Hiring and firing

The NHRI should have total control over the employment of staff, including developing its own recruitment, retention and promotion processes. However, this may be subject to reasonable, merit-based selection processes applicable to government employment practices.

Obtaining the assistance of specialised personnel from other investigative agencies may assist the institution in undertaking its functions. In such cases, however, the institution must recognise the dangers of real or perceived bias and must ensure strict independent oversight of such personnel, particularly such personnel coming from agencies that the NHRI regularly investigates, such as the military, police and security forces.

Hiring staff who have recently left agencies that the NHRI regularly investigates can also be problematic. While their experience and knowledge of the organization may be an asset, there is a danger that employing too many, particularly in senior positions, may compromise the independence of the NHRI, or at least the perception of independence among stakeholders.

Legal help

All investigative agencies need good, independent legal advice. The NHRI should have access to legal advice that it can trust, either through hiring in-house counsel or retaining outside lawyers. It should not have to use government lawyers or government-retained law firms as this may lead to a conflict of interest for those lawyers.

Points of contact

Caution should be exercised when an agency under investigation offers a “liaison person” or a “point of contact”, supposedly to assist the NHRI with its investigation.

To the extent that he or she facilitates constructive engagement with the NHRI, the allocation of a “liaison person” can be helpful. However, the investigator must always remember that this person is primarily responsible to the agency under investigation. Care must be exercised with respect to passing on any information about witnesses or evidence related to the organization under investigation.

In summary, it is the NHRI's investigation and the NHRI should control the process as far as possible. Investigators should not agree to deal exclusively with a “liaison person” unless the NHRI decides that, in those particular circumstances, it is ultimately a beneficial arrangement.

3. IMPARTIALITY

Conducting fair, thorough and impartial investigations is crucial if the NHRI is to be effective. Investigators have to be impartial and be seen to be impartial.

The investigation will be compromised and will not withstand scrutiny if anyone involved in it, or anyone observing it, concludes that the investigator:

- is biased toward one party or the other
- has made up his or her mind prior to completing the investigation.

An investigator should maintain a professional relationship with everyone associated with an investigation. However much empathy an investigator may feel, it cannot be reflected in the way the investigation is conducted. An investigator can be rightly criticized for being too friendly with someone under investigation or for championing a complainant's cause before all the evidence is gathered.

THE MULRUNJI CASE

EVIDENCE RELATING TO INDEPENDENCE AND IMPARTIALITY

- **Police were investigating police.**
- **Many of the police investigators knew the officers who were under investigation.**
- **There was some evidence that officers under investigation were – or appeared to be – given information and treated more favourably by police investigators because they were fellow police officers.**
- **S/Sgt. Hurley met and transported the investigating QPS officers from the airport to the police station.**
- **One of the QPS officers who interviewed S/Sgt. Hurley worked with him on Palm Island. This officer also assisted in the interviews of other key police and civilian witnesses.**
- **Police investigators had dinner and drinks at S/Sgt. Hurley house on the night of Mulrunji's death.²⁰**
- **The CMC investigators were not permanently employed by the CMC. They were temporarily attached to the CMC and this may have impacted on perceptions, however well they did their job.**
- **The IRT investigation still involved police investigating police.**
- **The QPS had the final decision regarding whether any officer should be disciplined.**



²⁰ The QPS Acting Assistant Commissioner explained in response to the CMC report in 2011 that "it was common practice for police to provide meals for other police when they are visiting places like Palm Island or other communities as the communities don't generally have restaurants or places where you can get a meal, particularly after hours".

THE MULRUNJI CASE

COMMENTS AND/OR RECOMMENDATIONS IN THE SECOND INQUEST

Impartiality, and the appearance of impartiality, should be the first priority when selecting officers to conduct investigations into deaths in custody.

- **Officers investigating a death in custody should be from another region.**
- **The involvement of officers who knew or were friends of S/Sgt. Hurley was inappropriate and compromised the integrity of the investigation.**
- **Investigating officers should be explicitly required to disclose any relationship with an involved officer.**
- **There should be CMC (i.e. independent oversight) involvement in investigating deaths in custody, as soon as possible after the death has occurred.**



NOTE: The Coroner in the third inquest agreed with these findings and conclusions. He noted the “flaws of the QPS investigation into this death, in terms of transparency, independence and thoroughness”.

4. INVESTIGATIVE POWERS

The Paris Principles state that the NHRI should have the power to “freely consider any questions falling within its competence” and to “hear any person and obtain any information and any documents necessary for assessing situations falling within its competence”.

To do so, the NHRI needs clear and unambiguous powers to collect evidence and to conduct investigations. The absence of such powers may lead to confusion, delay and incomplete investigations.

Ideally, an NHRI should have the following powers.

Identify and frame any issue(s) as the NHRI deems fit

The NHRI can decide which aspects of a complaint it will or will not investigate and how to frame the issue(s) for investigation, including investigations into systemic human rights issues if necessary.

Conduct “own motion” (*suo moto*) investigations

The NHRI should not need a complaint to begin an investigation.

Summons or subpoena witnesses

The NHRI should be able to summon witnesses to give evidence.

Compel evidence under oath

In jurisdictions where evidence is usually given under oath or affirmation, the NHRI should be able to administer an oath or affirmation and take evidence accordingly. Those who choose to lie can, theoretically, be prosecuted for perjury.

Right to access any person

The NHRI should have the right to speak to anyone relevant to its inquiry, even if they are in custody. Access to the person should not be delayed.

Right to enter any premises to further an investigation

The power to access places without permission is very important for NHRIs, particularly if there are grounds to believe that evidence related to human rights abuses is present in those premises. Unannounced visits – where little or no notice is given by the NHRI – are discussed in Chapter 5. There may, however, be reasonable limitations, including any power of entry applying only to government premises, including detention centres, police stations, military buildings and so on.

The right to obtain documents and other relevant evidence

The NHRI should have the power to obtain documents. The definition of evidence should be broad enough to include both physical and digital evidence as necessary. All evidence should be provided immediately upon request, unless the NHRI consents to any delay. Obstruction, including, among other things, misleading the NHRI, destroying or altering evidence or preventing or delaying access to people or documents, should be an offence.

Where an investigative agency has these powers, it is generally rare that they need to be used because everyone knows they exist. Problems are more likely to arise in jurisdictions where they do not exist or are not clear.

KEY POINTS: CHAPTER 1

- **NHRIs must be, and must be seen to be, independent and impartial. If not, they risk having their investigations challenged and their recommendations ignored.**
- **The key elements for the independence and impartiality of NHRIs are set out in the Paris Principles.**
- **Powers to conduct effective investigations should be set out in the NHRI's establishing legislation.**
- **Those powers should be used robustly, as and when necessary.**



Chapter 2:

Training and experience

KEY QUESTIONS

- **What training should NHRI investigators have in conducting investigations?**
- **What experience should they have?**
- **What are the qualities of a good investigator?**
- **What skills do they need?**



1. INTRODUCTION

NHRIs are commonly required to investigate serious violations of human rights, including deprivation of life and liberty; servitude and slavery; serious physical and psychological harm; human trafficking, systemic mistreatment of whole populations; and systemic discrimination against groups on any number of grounds.

A competent and comprehensive NHRI investigation can expose rampant injustice. It may save lives. It may be the catalyst for systemic change that improves the lives of hundreds, thousands or even millions of people, however incrementally.

For an investigation to be competent and comprehensive, the investigators who do it must be suitably trained and experienced. If they are not, the investigation will likely be flawed.

2. TRAINING

NHRI investigators should receive regular training. Untrained investigators inevitably conduct poor investigations.

Unfortunately, there are very few post-secondary courses available to equip investigators with the knowledge and skills they need in the field. While there are several courses at a few universities and similar institutions in North America and Europe, these tend to focus on criminal investigations and/or forensics, rather than administrative investigations. While some of those techniques are relevant to human rights investigations, there is still a huge gap in formal academic training focused purely on the practical aspects of administrative investigation.

There is, however, some excellent basic training available for NHRI investigators, both online and in face-to-face courses. This Manual is intended to supplement these resources by focusing specifically on the requirements of NHRIs.

3. IN-HOUSE TRAINING

In addition to formal training, NHRI induction and mentoring programs – where new investigators are paired up with more experienced ones – can provide many benefits. These programs are most effective when they are structured and substantial. They must give the new investigator the opportunity to follow a case through from start to finish, so he or she can observe, learn and participate. The new investigator should not be burdened with a significant caseload while being mentored.



Photo by the Human Rights Commission of the Maldives.

For example, the following three-stage approach helps introduce the new investigator to investigative interviewing:

Help plan and participate as the second interviewer

Have the new investigator help plan an interview of a less significant witness and then let him or her sit in as a second interviewer (see Chapter 15 on investigative interviewing).

Plan and lead the interview of a less important witness

Have the new investigator plan and lead the interview of another less important witness, this time with the experienced investigator acting as the second interviewer.

Plan and lead a major interview

Use the same process with a more important witness. Before long, the new investigator will have developed or refined the skills necessary to lead any interview.

4. EXPERIENCE

Investigating is not for amateurs. Investigators should have experience in conducting investigations. How much experience depends on the seriousness of the issue or event under investigation. Obviously, investigations of serious human rights violations require investigators with more experience.

The good news is that this experience can be developed reasonably quickly. New investigators in NHRI's that do a lot of investigations will generally be exposed to a broad range of cases in a short amount of time and will gain the experience necessary to graduate to more serious cases.

5. NHRI STAFF SHOULD REFLECT THE DIVERSITY OF THEIR SOCIETY

As far as possible, the NHRI's investigations team should reflect the diversity of the community within which it operates. Diversity helps make the investigations team more effective by promoting access to and acceptance by different groups; by broadening the team's skill base; and by increasing its ability to engage constructively with all parties to complaints.

6. WHAT QUALITIES DO GOOD INVESTIGATORS USUALLY HAVE?

Patience

Investigators need to be patient. They need patience to locate, collect and review large amounts of evidence and they need patience to deal with the inevitable obstacles and challenges they will encounter during an investigation.

Curiosity

Good investigators tend to be curious. They want to know what happened, when, where, how and why. They want to know the truth.

Follow the evidence

Investigators must begin every investigation with an open mind. Good investigators do not assume anything. They are prepared for anything to emerge as they begin to investigate. They do not accept or reject any possible explanation until they have the evidence to do so.

Scepticism

Good investigators do not necessarily accept evidence from anyone at face value. They look for corroboration wherever possible.

Persistence

Competent investigators never give up without a very good reason. They want to get to the truth and do not take no for an answer. If they are told that evidence – for example, a document or electronic file – is not available, they will want to know why. They will pursue the evidence unless there is a reasonable explanation as to why it cannot be provided.

Adaptability

Investigators have to be flexible in their approach. No two investigations are the same and all present unique challenges and opportunities. Investigators should be good at identifying both and developing strategies to deal with them.

Empathy

A degree of empathy will assist an investigator to better engage with and understand the perspectives of the people they are investigating. Empathy can also help build rapport with the parties to a complaint.

A thick skin

Nobody likes being investigated. A lot may be at stake, both personally and professionally, and some parties to an investigation may take it personally. Those who are culpable, or who may be embarrassed by the outcome of an investigation, will not welcome an investigator and will seek to undermine the investigation. If that fails, they may claim that the investigative process was flawed. One way of doing so is to attack the credibility, impartiality or professionalism of the investigators. Investigators need a thick skin to deal with criticism.

Courage

Fear of physical harm or retribution is a very valid concern for some NHRI members and investigators. It can take a great deal of personal courage to conduct human rights investigations, especially in conflict areas. There may also be very serious consequences for investigators (and their employers) who embarrass powerful people with facts that they do not like. These consequences may also extend to family members.

Judgment and common sense

Good judgment and common sense are much underrated qualities. Investigators sometimes have to make difficult decisions, including what issues to investigate, what investigative avenues to pursue and to what extent. As mentioned in the Chapter 6, they have to be able to justify why they chose to – or choose not to – interview someone. That takes sound judgment, based on common sense.

Strategic thinking

Investigators need to be able to think ahead and think strategically. They need to be able to answer a range of challenging questions to ensure an effective investigation:

- What approach will work best?
- What are the possible obstacles?
- How should a failure to cooperate be dealt with?
- Is it possible to resolve or avoid a potential problem, before it arises?
- How should responsibility for a lack of cooperation and delays be dealt with in order to address the difficulties encountered?

7. WHAT TECHNICAL SKILLS DO NHRI INVESTIGATORS NEED?

Investigators should have the skills to:

- plan an investigation
- understand the culture and environment in which they operate
- identify what issues require investigation
- frame issues to ensure that the investigation can be completed within a reasonable period and within available resources
- identify potential sources of evidence
- use limited resources judiciously
- conduct thorough, objective interviews of witnesses
- identify, obtain, examine and preserve documentary, physical and digital evidence
- assess evidence fairly
- write clear and comprehensive reports, as concisely as possible.

KEY POINTS: CHAPTER 2

- **Conducting investigations is a challenging task.**
- **Investigators need to be appropriately trained.**
- **Investigators need an appropriate level of experience.**
- **Investigators need a range of personal and professional skills.**



Chapter 3:

Adequate resources

KEY QUESTIONS

- **Why is adequate resourcing important?**
- **What factors need to be considered in order to maximize the use of available resources?**
- **What is the technique of “front-end loading” and how best can it be used?**



1. INTRODUCTION

Investigations cost money, regardless of who does them. NHRI investigations are no different. NHRIs need enough resources to do them within a reasonable time.

Resources refer to the investigations staff, as well as the infrastructure and support that are needed for investigators to undertake their duties, such as office space, computers, communications equipment, transportation and so on.

A failure to provide sufficient resources can mean that investigations are not done thoroughly or within a reasonable time. This can undermine the credibility and reputation of the NHRI and can also lead to expensive and lengthy follow-up investigations, reviews and inquiries, as happened in the Mulrunji case.

2. STABLE AND SUFFICIENT FUNDING

As mentioned in Chapter 1, the Paris Principles require NHRIs to be adequately resourced to undertake their statutory functions.

Such funding should enable the NHRI “to have its own staff and premises, in order to be independent of the Government and not subject to financial control that might affect its independence”.²¹

NHRIs must have control over their budgets once allocated. For this reason:

- a general grant of funds should be provided, and not be earmarked for particular activities or purposes
- the NHRI should be responsible for the administration and allocation of funds, subject to reasonable financial accountability measures applicable to other independent State institutions
- the use of funds should not require governmental approval prior to expenditure.

A lack of financial independence can limit the effectiveness of NHRIs. Governments can seek to silence NHRIs by reducing the funds available to them.

21 Paris Principles; “Composition and guarantees of independence and pluralism”, para. 2.

3. RESOURCES REQUIRED FOR INVESTIGATIONS

NHRIs need a variety of resources to conduct effective investigations.

People

The NHRI needs a sufficient number of investigators and support staff to meet its obligations. This may include managers, legal officers, administrative officers, technicians, translators and other experts. The necessary background and experience for NHRI investigation personnel is discussed in Chapter 2.

Equipment

Investigators should be suitably equipped in order to maximize their productivity. Equipment may include laptop computers, digital voice recorders, badges, digital cameras, mobile phones and other communication devices.

Expenses

Investigators working in the field will require sufficient support and resources. Funding may be required to cover the costs of travel and accommodation, experts, translators, transcribers, office space and so on.

4. CASE ASSESSMENT AND TRIAGING

NHRIs cannot investigate every single complaint that comes to their attention. They simply do not have the resources to do so.

NHRIs must therefore prioritize the issues and allocate their resources accordingly. They have to decide whether or not to investigate, based on a range of factors discussed in more detail in Chapter 4. In determining whether or not to investigate a matter, investigators need to consider a number of questions, such as:

- Does the NHRI have jurisdiction?
- Does another agency have jurisdiction and, if so, is it more appropriate that it investigate?
- How old is the complaint? Will it be possible to gather sufficient and credible evidence if a significant amount of time has passed?
- Does the complainant have a personal interest?
- Would it be in the public interest to investigate?
- Are there significant consequences for the complainant or others?
- Does the complaint raise systemic issues?
- Would an investigation be a wise use of the NHRI's resources?

The NHRI has to be able to set out clear reasons for why it will, or will not, investigate a particular complaint.

5. DELAYS AND BACKLOGS

Delays and backlogs impact on the credibility of the NHRI and the human rights protection system. As the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme note:

Backlogs in complaints handling are not uncommon, and where they grow large, can undermine the institution's ability to devote resources to other programme areas or to deal with systemic issues. Ultimately, large backlogs and delays can lead to a total loss of credibility for the institution since investigation timelines will become unreasonable.²²

²² Toolkit for Collaborating with National Human Rights Institutions; 2010; p. 23.

6. WHAT RESOURCES DO INVESTIGATORS NEED?

Single-issue complaints generally require far fewer resources than investigations involving broader systemic issues. A complaint from a prisoner about a guard spitting in his food will need fewer resources than an allegation of large-scale systemic discrimination based on gender.

However, regardless of the complexity and breadth of an investigation, investigators need two things to conduct an investigation that will withstand scrutiny:

- sufficient time to carry out a thorough investigation
- sufficient resources to gather evidence while it is still fresh.

Time

Investigations take time. Investigators need to be given sufficient time to do them thoroughly. If an investigator is overloaded with cases, the inevitable result is that few, if any, will be completed within a reasonable time. The investigation might be simple and straightforward. It might need only one investigator. However, it may not get done if that investigator is overburdened with a large number of similar cases.

Resources

Every investigator knows that the best evidence is collected close to the time of the alleged incident. Evidence can be perishable. It may be altered, lost or destroyed as time passes. Witness evidence and memories are less reliable with the passage of time. The solution is to assign enough investigators and resources to the investigation so that the evidence can be gathered and secured as soon as practical.

In serious or evidence-intensive cases, consideration should be given to a technique called “front-end loading”. It is an approach used by many investigative agencies to conduct major investigations, mainly criminal investigations and homicide cases in particular. It involves deploying as many people as possible to an investigation from the very beginning. They are tasked to secure and process scenes, locate and interview witnesses and gather any other evidence before it disappears.

The number of investigators assigned depends on the case itself. As discussed in Chapter 5, a key part of planning an investigation is estimating what and where the evidence is and then assigning enough resources to gather it in a reasonable time.

In determining and allocating resources, relevant criteria include:

- the amount of time since the events under investigation took place
- the seriousness of the complaint or incident
- the location and number of possible witnesses
- the location of scene(s)
- the location and quantity of physical, documentary and digital evidence.

Front-end loading is sometimes known as “blitzing”, which accurately describes the approach: a fast, powerful response to capture evidence as quickly as possible, while it is still fresh. It is a technique that has been adapted very successfully for major investigations into systemic issues, as discussed in the case study in Chapter 29.

THE MULRUNJI CASE

ADEQUACY AND UTILIZATION OF RESOURCES

- The CMC noted that it did not have the resources to investigate all deaths in police custody “as the immediate and sole investigator”. The Coroner recommended that it should be given those resources.
- The QPS investigation appears to have been well resourced. However, those resources may not have been used efficiently. It took considerable time to locate and interview some witnesses who should have been interviewed immediately.



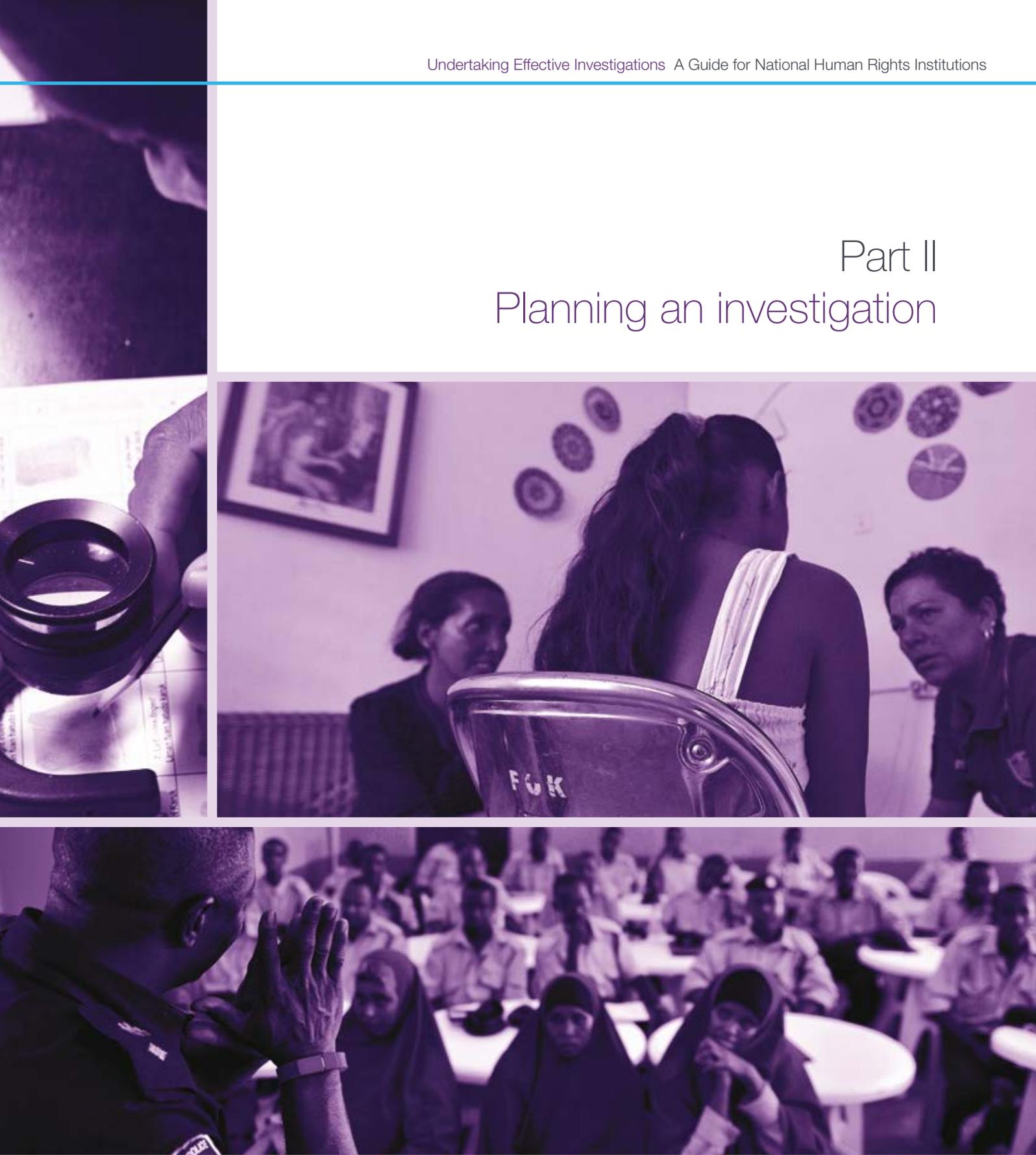
KEY POINTS: CHAPTER 3

- Investigations require resources and NHRIs need stable and sufficient funding to undertake them.
- Investigators need to be given enough time and resources to conduct investigations properly.
- Investigators must have a realistic workload. If there are delays or backlogs in investigating complaints, the credibility of the NHRI will be at risk.



Part II

Planning an investigation



Chapter 4: Identifying the issues and deciding whether to investigate

Chapter 5: Investigation planning

Chapter 4:

Identifying the issues and deciding whether to investigate

KEY QUESTIONS

- **What is the importance of identifying the issues?**
- **Having identified the issues, what considerations apply to deciding whether or not to undertake an investigation?**



1. INTRODUCTION

Before the NHRI launches an investigation, it should decide exactly what it is, and what it is not, investigating.

As the NHRI reviews a complaint or another matter that has been drawn to its attention, the first thing it should do is to identify the human rights issue(s) involved. That may involve seeking clarification directly from the complainant and/or other sources, as well as undertaking some background research.

Once that is done, it should decide as quickly as possible:

- Do the issues fall within the NHRI's mandate?
- How will they be framed?
- What will be investigated?
- What will not be investigated?

Hopefully, the NHRI will have some discretion in deciding what it is able to investigate and how to frame the issue(s) to be investigated. Some investigative agencies do not have that luxury.

2. GENERAL GUIDELINES FOR SELECTING ISSUES

Be specific

Keep the issue or issues as focused as possible.

Keep an open mind

Investigators must not make up their minds too early as to exactly what happened. Good investigators do not rule anything out until they have sufficient evidence to do so. They do not discount a possible explanation as to what happened, however distasteful or unlikely it may appear.

THE MULRUNJI CASE**ISSUE IDENTIFICATION**

The Coroner stated that all deaths in custody should be treated as homicides “until otherwise determined”. That did not happen in this case, according to the Coroner.

**Prioritize**

If there is more than one issue apparent or being alleged, assess which is the most important using the criteria set out above and consider how the remainder should be ranked.

Manage expectations

It is crucial to manage expectations from the outset. Clearly set out the scope of the investigation, including any limits on what is being investigated. That will help refute any allegations at the end of the investigation that the NHRI did not tackle issues that it had promised to address.

Consult

Get input from others who may have relevant knowledge or a particular interest when framing the issues to be investigated.

The New Zealand Human Rights Commission followed this approach in planning its inquiry into equal employment opportunity issues in the aged care workforce.

PROCESS OF THE INQUIRY

The Inquiry was framed by the Terms of Reference and ten key issues were explicitly canvassed. These issues had been identified in the National Conversation about Work, in the literature and in conversations with thought leaders in the aged care sector. Participants in the Inquiry were asked if the ten issues were the right issues and the consensus was that they were. The major section of the report was organised around the ten issues. The Commission made the decision to identify these key issues at the outset to clearly signal that the focus of the Inquiry was on employment issues in the sector and to provide boundaries around the scope of the Inquiry. This ensured that the Inquiry added to, rather than duplicated, previous work relating to aged care.

**3. DECIDING WHETHER TO INVESTIGATE**

The NHRI may have no discretion to choose what issue to investigate. Its legislation may require it to investigate each complaint that falls within its jurisdiction. If that is the case, then the following criteria are probably irrelevant.

Once the NHRI has determined the human rights issue(s) involved, it must also be able to explain why it will investigate the matter. Just as importantly, it should be able to explain why it will not undertake an investigation, if that is the decision made.

The following questions can assist the NHRI as it considers what issues it will investigate and why.

Does the NHRI have the jurisdiction/mandate?

The NHRI must have the authority to deal with the issue. Before it can undertake an investigation, it must be satisfied that the known facts of the matter fit within its mandate. For example, if the NHRI has the mandate to promote and protect human rights, it must be clear about the connection between the human rights issue at stake and that duty.

Does the NHRI have the resources to do the investigation properly and within a reasonable period of time?

There is not much point starting an investigation without having the capacity to conduct it. It is almost certain to end in failure. The NHRI needs sufficient human and financial resources to plan the investigation, conduct it and report on the findings, all within a reasonable period of time.

Would an investigation be an effective use of those resources?

As discussed in Chapter 3, the NHRI will not have unlimited resources. It will often have to make difficult decisions about where and how to focus its resources. Therefore, it may have to consider which investigation will provide the best result for the resources invested. For example, it may seek to address a systemic issue affecting a particular group in the community. It may seek redress for an individual whose human rights have been violated. It may also seek to undertake an investigation that will build community awareness of the NHRI and demonstrate its value as a human rights watchdog.

Is another body investigating the matter, or should one be?

If another competent body is investigating the incident or issue, such as the police or an auditing agency, that may be a valid reason for the NHRI not to conduct an investigation, at least at that point in time. If that agency is in a better position to conduct an investigation, let it do so. However, if there is a human rights dimension to the matter that is not being considered, or if the matter falls within the jurisdiction of the NHRI, that may be a valid reason to become involved. There may also be opportunities to collaborate with other agencies to conduct investigations.

Is an investigation in the public interest?

If it is clear that some agency should be seeking to address a particular issue – and none currently are – then the NHRI may want to take a leadership role in the matter. For example, an investigation may be necessary to restore public confidence in an agency or organization that has been criticized for breaching human rights. The more serious the allegations are, the more reason to conduct an investigation.

Have there been a number of similar complaints?

If the NHRI has received a number of similar complaints on the same issue, it might suggest an investigation is warranted. If a large number of complaints have been received, that might indicate an underlying systemic problem that needs to be addressed (see the following section in this chapter on identifying systemic issues).

How old is the issue?

The passage of time poses a range of challenges for an investigator. Evidence is perishable. Historical cases can require a lot of resources to investigate properly. It can be more difficult to establish the facts with any degree of certainty. And an investigation may rekindle old animosities.

However, there may be circumstances where it is necessary to investigate, if only to shed light on an issue that continues to cause deep concern to the community, or a segment of it. For example, “truth and reconciliation” inquiry processes in countries such as South Africa have proven quite successful in addressing past injustices.

In 1997, the **Australian Human Rights Commission** launched the report of its historic two-year inquiry into the forcible removal of Aboriginal and Torres Strait Islander children from their families.

The report documented practices that took place over nearly two centuries up until the approximately 1970. Indigenous Australians had long seen these policies and practices of removal as one of the most fundamental wrongs done to them and as the foundation of much of the disadvantage they suffered.

The Commission's inquiry would be a cornerstone of the national commitment made in 1991 to a ten-year programme of national reconciliation between Indigenous and other Australians. Its terms of reference included making recommendations on policy and law reform, compensation and processes to assist family reunions. The inquiry also examined contemporary government practices relating to the removal and care of Indigenous children.²³



Is there a lot at stake?

Is an investigation necessary to establish the facts that might remedy what appears, on the face of it, to be a serious injustice? Will there likely be serious consequences to someone, or a group of people, if an investigation is not conducted?

How will the decision to investigate, or not investigate, reflect on the NHRI?

If the NHRI does decide to investigate the matter, will it be accused of overstepping its mandate? Will it be accused of wasting limited resources? If it decides not to investigate, will it be accused of timidity or failing in its duties?

Is the complaint malicious, frivolous or vexatious?

In some cases, a complaint may clearly be trivial or frivolous. These complaints can often be dealt with quite easily. However, the complainant may argue that the matter is not trivial to them. The NHRI must be prepared to explain why it has determined that the complaint is trivial. Complaints that may be malicious can be more difficult to handle. Is there actual evidence to suggest that a complaint is malicious or being made in bad faith? If so, the NHRI must be prepared to articulate what that evidence is. It can often require the same amount of time and resources to prove that a complaint falls into this category as it takes to actually investigate the substance of the complaint.

4. IDENTIFYING SYSTEMIC ISSUES

A systemic issue may be the root cause of widespread human rights violations.

The NHRI may be able to resolve an individual complaint, however if it ignores the systemic issue that created the problem in the first place, it will inevitably receive similar complaints in the future.

It is wise to identify if there are any possible systemic issues – and decide whether or not to investigate them – before launching an investigation.

²³ The Commission's report – *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* – is available at www.humanrights.gov.au/social_justice/bth_report/index.html.

There are various approaches to identifying and tackling systemic issues. The *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*,²⁴ referred to throughout this Manual, explains how to plan and conduct large-scale inquiries into systemic issues. It discusses in detail how to identify the scope of the issues that the national inquiry will deal with, including a chapter on how to choose the issue that will be the subject of the national inquiry. As it notes, a number of criteria must be considered when the choice is made, including:

- how objectively significant the issue is in the country
- how strong public perception is of the significance of the issue
- whether the issue has been the subject of a previous inquiries or investigations
- how much external commitment there is to addressing the issue
- the potential that exists to build broader, long-term public interest in the issue.

Another possible – and complimentary – approach is to conduct multiple complaint investigations. This approach is discussed in Chapter 27.

KEY POINTS: CHAPTER 4

- **Identify what issues the complaint raises.**
- **Decide which issues, if any, will be investigated.**
- **Be able to justify the reasons for that decision.**
- **Determine if there are any underlying systemic issues.**



24 The Manual was jointly published by the APF and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in 2012. It is available at www.asiapacificforum.net/support/resources.

Chapter 5:

Investigation planning

KEY QUESTIONS

- What are the advantages of planning an investigation?
- What are the key elements that investigation plans should contain?



1. INTRODUCTION

No matter what type of investigation the NHRI is about to undertake, careful planning at the outset is key to conducting a focused, thorough, efficient and effective investigation.

There are many advantages to creating an investigation plan, including:

- establishing exactly what is – and what is not – being investigated
- pinpointing where the evidence might be
- identifying what problems might arise and the strategies to deal with them
- determining what resources are required so the investigation can be completed within a reasonable time.

An investigation plan should be a fluid and flexible tool that can be adapted as necessary for each investigation conducted by the NHRI. It is designed to help the investigator, not add an extra layer of paperwork. It should provide a reasonably comprehensive roadmap for the investigation but not create an additional burden.

It is worth it. The time and effort spent identifying the issues and the sources of evidence, mapping out an overall strategy, anticipating potential problems, estimating resources and timelines, as well as setting investigative milestones, will help keep the investigation on track and avoid unnecessary delays and distractions.

The investigator or investigating team should complete an investigation plan prior to beginning any investigation. In most cases, there will be enough time to put a plan together. In urgent cases, which require an immediate response, there may be less opportunity to do so. In these situations, a basic plan should be prepared in the time available. When further time allows, the plan should be reviewed and finalized.

Many NHRIs plan their investigations. Some have developed investigation plan templates. For example, the **Commission on Human Rights of the Philippines** has a detailed six-category investigation plan template.²⁵

The investigation plan template below is adapted from one prepared by the Canadian Military Ombudsman. However, it can be easily adapted to meet the specific needs of individual NHRIs.

²⁵ *Manual on Investigation and Case Management Process*; Commission on Human Rights of the Philippines; 2012. The six categories include: the allegations; the respondents; the relevant law(s); evidence provided to date; further evidence to be sought; and the plan of action and timeframes, which includes interviews and site inspections.

While not all of the categories may be relevant to every investigation, the investigator planning the investigation should consider them all.

The plan should be reviewed and updated as the investigation progresses.

The length of the plan will depend on the scope, volume and complexity of the issues under investigation.

THE INVESTIGATION PLAN TEMPLATE

The template is divided into the following segments:

- What is being investigated?
- What is the overall approach to gathering the evidence?
- What and where is the evidence?
- What problems might arise during the investigation?
- What resources will be required?
- How are internal and external communications going to be managed?
- What are the milestones and timelines?
- When will the investigation be completed?



2. WHAT IS BEING INVESTIGATED?

The first step in an investigation plan is to set out as precisely as possible exactly what is being investigated. It may be a specific allegation or series of allegations. It may be an issue that has been identified as appropriate for an “own motion” (*suo moto*) investigation. It may be a number of interrelated issues or allegations.

Obviously, the issue has to have a human rights dimension. That should be clearly identified and articulated.

If any apparent systemic issues have been identified, those issues should be clearly framed and an indication given as to whether they will be investigated.

Do not make the scope of the investigation bigger than it needs to be. Keep the issue(s) as narrow and as focused as possible. In the interests of clarity, it may be prudent to note any related or similar issues that are not being investigated.

3. WHAT IS THE OVERALL APPROACH TO GATHERING THAT EVIDENCE?

A brief outline should be prepared setting out the overall approach to conducting the investigation. What is the strategy? How is it anticipated that the investigation will unfold? What investigative steps will be taken and in what order?

Decide, for example, if witness interviews should wait until documents have been collected and reviewed. When, if at all, should investigators go to any scene that relates to the investigation? Should witnesses be interviewed in a certain order, if at all possible?

No two investigations are exactly the same. There will be many variations to an overall strategy.

4. WHAT AND WHERE IS THE EVIDENCE?

Identify who should be spoken to and what documentary, physical and digital evidence should be gathered. The following categories may be helpful as the investigator goes through that process. Many are interrelated.

Laws and standards

Investigators need to know the legal, regulatory and ethical standards that apply to whatever matter is being investigated. These standards provide both the context and a baseline to the investigation.

For example, if the NHRI is investigating the treatment of detainees, there are internationally accepted standards that provide for the right to life and security and freedom from torture and cruel, inhuman or degrading treatment or punishment. There may also be similar provisions in the national constitution. They will almost certainly be directly relevant as the evidence is gathered and assessed.

Witnesses

A list should be made of who the investigator will likely want to speak to during the investigation, including a one-line reason as to why, as well as where those individuals are physically located. If possible, the method to be used to conduct the interviews – in person, by phone or by some other means – should be determined. Any preferred order of interviews should be detailed, explaining why, as necessary. For example, the first interview may be with the alleged victim, in order to gather more details relating to the complaint.

Documents

What documents may be relevant to the investigation? Who has them? Where are they? How many of them are there likely to be? How can they be obtained as quickly as possible? What will have to be done to make sure they are thoroughly reviewed, once they have been obtained?

Physical and digital evidence

If physical evidence is a consideration, it will be necessary to work out where it is, how it is going to be secured, whether a “chain of custody”²⁶ needs to be established and whether expert assistance will be needed to preserve and examine it.

If it is anticipated that digital evidence is to be gathered, the same questions need to be asked about sourcing that evidence. For example, is it likely that there is evidence on YouTube? If so, how can it be found and preserved? Might there be mobile phone video that has yet to be uploaded anywhere? Would CCTV footage have been recorded at the place where the incident occurred? Is there something on a hard drive that might be important?

The National Human Rights Commission of India has a policy to conduct investigations into police shootings, which can be found at Appendix 1 of this Manual. It is a good example of focusing on what evidence might exist as the investigation is planned. The policy sets out the importance of identifying potential evidence and then collecting it. It covers interviewing the officers involved and independent witnesses, gathering any relevant audio-visual recordings, preparing a scene diagram and liaising with medical examiners involved in any post-mortem.



²⁶ The “chain of custody” is the process by which an investigative agency can show chronologically where any item of physical or digital evidence was, what happened to it and who had access to and control of it, at any moment in time including since being seized by that agency.

5. WHAT PROBLEMS MIGHT ARISE DURING THE INVESTIGATION?

Investigators should attempt to identify possible difficulties that, based on their knowledge of the case or past experience, may arise during the investigation. Possible solutions should be developed to avoid them or address those obstacles, should they arise.

Lack of cooperation

If an organization or individual involved in the investigation is likely to be uncooperative, brainstorm ways of pre-empting or circumventing the problem as the investigation is planned. Dealing with an obstructive agency or person is never easy for an investigator, but things can be made simpler if he or she has a strategy in place. For example, could that information be obtained from other sources? Would it be useful to make clear to all stakeholders when the investigation is launched that full cooperation is required and expected? If it is almost inevitable that any legal powers available to the NHRI will have to be used – such as a subpoena or power of entry – then build that into the plan.

Fear of reprisal

As discussed in the section on whistleblowers and confidential informants in Chapter 17 of this Manual, a fear of reprisal can be a major concern in many investigations. Intimidation, coercion or simply not wanting to get involved may prevent witnesses from coming forward and hamper the investigation.

There may be things that can be done as the investigation is planned to encourage witnesses to come forward. Effective messaging will be an important part of this process (see section 7 below).

There may be steps that can be taken to provide a degree of protection to those who come forward., including using any available “whistle blower” legislation. If so, plan how they will be used and in what circumstances. It may also be possible to put in place measures to increase confidentiality, such as interviewing witnesses at a safe(r) location and establishing private methods of communication.

Culture and language

Do cultural, language or other issues need to be considered during the investigation? Is there anything that can be done to address these issues before the investigation begins? If a translator is needed, this should be organized early in the investigation. Similarly, investigators may need assistance and advice to understand the culture and protocols of a group that is going to be a part of the investigation. There are a number of practical issues to consider. For example, will the leaders of the community involved in the investigation expect witnesses to be approached through them? Or is it appropriate for the investigator to contact witnesses directly?

Access to sources of evidence

Accessing sources of evidence is clearly very important. It is difficult to do a thorough investigation otherwise. As the investigation plan is developed, think about what impediments there may be to accessing that evidence. Based on experience, is it possible or likely that a key witness will be transferred to the other side of the country once it is known that he or she will be required for an interview? Will other witnesses be unavailable? Will there be “unavoidable delays” in an organization providing the documents that have been requested? Will the organization expect the investigation to be carried out through a designated “point of contact”, rather than going straight to the source?²⁷

Destruction or tampering with evidence

Are there grounds to suspect that evidence might be destroyed or tampered with before it can be secured? If so, plan what can be done to preserve the evidence. For example, the investigator can inform whoever has custody of that evidence that its existence is known and put the responsibility on him or her to preserve it.

27 The advantages and disadvantages of having a designated “point of contact” are discussed in Chapter 1.

Alternatively, the investigator may want to use any powers at his or her disposal, including any legal power of entry without notice, to gather that evidence before it disappears or is altered.

Need to use powers

It may be that the NHRI will be required to use those legal powers at its disposal, such as powers of entry or summons, during the investigation. For example, when investigating allegations of torture or ill-treatment in a detention facility, investigators may be able to conduct an unannounced visit to that facility and interview detainees and staff. That will require coordination, resources and planning. It will also be necessary to map out how that visit will be coordinated and executed in this segment of the investigation plan. For example, if investigating a complaint of overcrowding in a prison, it may be best to conduct the inspection in the early hours of the morning, when detainees are in their cells.

Collusion between witnesses

If there is reason to think that witnesses will collude or otherwise obstruct the investigation, consider whether there is anything that can be done to minimize the possibility of that happening. For example, this could include conducting witness interviews simultaneously or immediately after each other. However, the investigation plan must provide for a sufficient number of investigators to do so.

6. WHAT RESOURCES WILL BE NEEDED?

How many people will be needed to conduct the investigation within a reasonable time? What technical or other support will be necessary? How much is the investigation likely to cost?

Consider and estimate as accurately as possible:

- the number of investigators and support staff required
- research requirements
- forensic and other experts
- legal advice
- travel and related costs
- translation services
- transcription services.

This process allows the NHRI to assess whether the use of resources matches the importance of the issue to be investigated. If there are insufficient resources to investigate the issues thoroughly and within a reasonable time, or the case does not warrant the investment of the resources required, then they are logical reasons not to begin the investigation.

7. HOW ARE INTERNAL AND EXTERNAL COMMUNICATIONS GOING TO BE MANAGED?

Some investigations will be conducted away from public scrutiny. In other cases, however, the NHRI may seek to draw attention to its investigation, especially if it will be asking for input from anyone who has information relevant to the matter.²⁸

²⁸ This occurs most frequently during national inquiries or as part of larger investigations. Communications strategies for identifying and engaging stakeholders in these situations are discussed in the *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, published by the APF and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

If it does, the NHRI will need to plan how it will:

- announce an investigation
- manage any information that it receives
- keep all stakeholders updated on the progress of the investigation, without compromising the integrity of the investigation
- ensure all other parties who should know about the investigation are kept informed of its progress.

The NHRI may need to prepare a communications strategy to announce and support the investigation. This may include a range of elements, such as preparing media releases, holding a media conference, providing updated information on the NHRI website and using social media, such as Twitter and Facebook.

It is critical that the NHRI's communications staff work very closely with the investigators assigned to the case. There are a number of reasons for close cooperation. For example, communications staff may source information or evidence that is directly relevant to the investigation that the investigators may not otherwise collect. This evidence may come from television broadcasts, transcripts of media interviews and so on.

In larger offices, it is important to keep all staff fully informed about the launch of a major investigation or inquiry, to the maximum extent possible.

8. WHAT ARE THE MILESTONES AND TIMELINES?

As the investigation plan is developed, set out realistic targets and goals for completing various stages of the investigation. Factor in how much actual control you have over the pace of the investigation. Estimate how long it will take to obtain and review documents, at what point witnesses will have been located and interviewed and so on. Determine if any travel will be necessary, for example to visit a scene, interview witnesses or hold public consultations. Factor in how much evidence will have to be assessed and how long it will take to write the report.

Set targets

Targets place discipline on the investigation. It provides a roadmap that investigators can use as the investigation progresses. Build timelines into the plan.

At its most basic, a timeline may look something like this:

Week 1	Research/request documents with a two-week deadline
Week 2	Scene visit Begin to interview witnesses
Weeks 3–5	Review documents and continue witness interviews Begin outline of report
Week 6	Final witness interviews
Weeks 5–8	Begin drafting report and conduct any follow-up interviews
Weeks 8–9	Fact-check the report

9. WHEN WILL THE INVESTIGATION BE COMPLETED?

It is important to establish a rough estimate of when the investigation will be completed, based on:

- the complexity of the issue(s)
- how much background research has to be done
- available resources
- how much evidence will be collected, including the number of potential witnesses and the amount of documentation
- what obstacles identified in section four of the template may arise and how they will be addressed
- how long it will take to analyse all the evidence
- how long will it take to write the report.

Factor in some additional time

If it is estimated that the investigation will take three months, it makes sense to publicly state that it will take six months. That is not being misleading. However well an investigator plans, witnesses whose existence was unknown or documents that had never been considered, will emerge as the investigation is underway. Other factors beyond the control of the NHRI may also arise, such as receiving a fresh complaint that requires urgent investigation. Any or all of these things will inevitably add time to the investigation.

When the investigation is completed within the six-month timeframe, the NHRI will look professional, effective and efficient. It will have demonstrated its value to its stakeholders.

10. “ISSUE CREEP”

“Issue creep” is when new, but somewhat related, issues emerge after the investigation begins. Something is uncovered that seems to deserve further examination and the investigation branches out into different directions, as it is being conducted.

Issue creep should be avoided wherever possible.

In most cases, avoid dealing with new issues. It is simply not worth pursuing them, at least not at this point. It will almost certainly derail the current investigation. More resources will be needed. If they are not available, it will inevitably increase the time it takes to complete the investigation and delay is generally not a good thing for any investigative agency.

The solution? Put the new issues to one side or ask someone else to look at them. Come back to them after the current investigation is complete. Then decide if they should be investigated.

For example, consider an investigation into the how a government agency administers the process for providing care for severely disabled adults when caregivers, such as parents, are no longer able to look after them. The investigators may receive allegations about the poor treatment of residents in a group home where some of those adults live. It can be tempting to investigate those specific allegations.

However, this should be avoided as it is not directly concerned with the primary focus of the investigation. If possible, ask someone else in the NHRI to determine if such an investigation is warranted. Come back and investigate it if necessary, but do so after the current investigation has been completed.

In some circumstances, there may be a compelling reason to deal with the new issue now, rather than later. If that is the case, amend the investigation plan and source additional resources. In addition, the NHRI will need to explain to stakeholders why the original investigation will take longer than anticipated.

11. WHEN THERE IS LIMITED TIME TO PLAN

There may be occasions when events move so quickly that the NHRI does not have the luxury of time to plan the investigation properly. Do what can be done in the time that is available. Focus on the basics: issue identification, the overall strategy and evidence identification and preservation. When time is available, prepare something more substantial.

12. GET EVERYBODY INVOLVED

Everyone involved in the investigation, even those on the fringes, should have input into the investigation plan, such as NHRI management, communications staff, policy and research staff and others. The more input provided by colleagues and managers, the better. They frequently come up with information, ideas and approaches that the investigating team may have overlooked.

13. PLANNING MULTIPLE COMPLAINT INVESTIGATIONS

How to plan multiple complaint investigations is considered in more detail in Part VI of this Manual. It also includes an example of how an investigation into mass detentions at a recent G20 Summit was planned.

KEY POINTS: CHAPTER 5

- **An investigation plan should be completed for every investigation.**
- **The plan will help investigators focus on the issue(s) to be investigated, avoid obstacles and “issue creep”, identify the evidence to be collected, estimate the resources required and set realistic targets for completing the investigation.**
- **Each investigation is unique and each investigation plan will be subject to many different variables.**
- **The plan should provide a roadmap for the investigation; it does not have to be a detailed document.**
- **Prepare an investigation plan template tailored to the mandate of the NHRI.**



Part III

Investigative interviewing



Section I: Who to interview and how to interview them

Section II: Initial preparation

Section III: Setting up and organizing interviews

Section IV: Conducting the interview

Introduction to Part III

Speaking to people in order to get information from them is a central component of nearly every kind of credible fact-finding process. A critical aspect of many investigations is asking the right question, in the right way, to the right person, at the right time.

Of the eight principles of excellent investigation set out in the introduction to this Manual, one of the most important provides that all witnesses who have relevant information should be identified, segregated where practical and thoroughly interviewed.

As the Office of the United Nations High Commissioner for Human Rights has noted, “interviewing is the most common method of collecting information about alleged human rights abuses”.²⁹ Interviewing witnesses is therefore a core function of an investigator’s job.

Good interviewing practices will increase stakeholder confidence in the competence, thoroughness and objectivity of the investigator and – by extension – the NHRI. The opposite is also true; bad interviewing practice will undermine the credibility of the NHRI. Further, the failure to interview, or at least attempt to interview, people who may have information about whatever is being investigated may result in the investigation being unable to withstand scrutiny.

There are many different ways to conduct effective interviews, depending on who is being interviewed, the subject matter of the investigation and the powers and resources that the investigators have at their disposal. However, the approach to interviewing described in Part III of this Manual can be adapted and applied to any situation.

Section I [Who to interview and how to interview them](#)

- Chapter 6: Identifying the people to be interviewed
- Chapter 7: Types of interview
- Chapter 8: Factors affecting which interview type to choose

Section II [Initial preparation](#)

- Chapter 9: Preliminary research
- Chapter 10: Special factors regarding witnesses
- Chapter 11: Logistics and other special considerations

Section III [Setting up and organizing interviews](#)

- Chapter 12: Setting up the interview
- Chapter 13: Organizing the interview

Section IV [Conducting the interview](#)

- Chapter 14: The six principles of effective interviewing
- Chapter 15: The 12 stages of an interview
- Chapter 16: Improving interview skills
- Chapter 17: Interviewing individuals who fall into a special category
- Chapter 18: Recording interviews
- Chapter 19: Assessing credibility

29 *Training Manual on Human Rights Monitoring*, Professional Training Series No. 7; 2001; p. 109.

Section I

Who to interview and how to interview them



Chapter 6: Identifying the people to be interviewed

Chapter 7: Types of interview

Chapter 8: Factors affecting which interview type to choose

Chapter 6:

Identifying the people to be interviewed

KEY QUESTIONS

- **What is the best way to locate possible witnesses?**
- **Once possible witnesses have been identified, what factors should be considered when deciding who should be interviewed and who should not?**



1. INTRODUCTION

As discussed in Part II, an investigation plan will identify those people who may have information about the issue being investigated. In most cases, it will be reasonably clear from the start those people whom the investigator will want to interview. In some cases, however, it may not be so obvious or it may only become apparent as the investigation unfolds. An investigator should always be open to the possibility that he or she may identify further witnesses as the investigation progresses.

2. DOING WHAT IS REASONABLE TO FIND WITNESSES

Every reasonable effort should be made to identify possible witnesses. If insufficient effort is made by the NHRI to locate possible witnesses, the investigation may be open to criticism. There will be a real problem if key witnesses emerge after the investigation has been concluded and it is clear that a more thorough process would have uncovered them. It is even worse if those witnesses then provide evidence that may contradict the investigator's findings.

It is important to document what steps have been taken to identify and locate possible witnesses. The investigator may fail to make contact with them – or they may not want to make contact with him or her – but it is essential for the investigator to be able to demonstrate that every reasonable effort was made to locate them.

3. CANVASSING FOR WITNESSES

People who may be able to contribute important information to an investigation may not come forward for any number of reasons, including that they are not aware of the investigation. Attempting to contact them is an important part of the investigative process.

Canvassing for possible witnesses can be done in many ways, including:

- providing information via the media, including social media
- distributing leaflets
- posting notices at the scene of an event
- returning to the scene on the same day and time as an event occurred
- ask community groups, NGOs and others to share information about the investigation through their networks
- going door-to-door in the area where an event occurred
- advertising in the media
- posting questionnaires on the NHRI website.

The New Zealand Human Rights Commission used this last approach in its inquiry into equal employment opportunity issues in the aged care workforce. It noted that “the website that the Commission co-hosts with the EEO Trust – www.neon.org.nz – made an online survey available to interested parties. People were also invited to write in, either by email or post, with their views. In all, almost 900 people participated in the Inquiry.”



NHRIs can target their canvassing efforts by identifying those people who are likely to be possible witnesses and where they are likely to be found. For example, if investigating an event, consider the following questions:

- Who was there at the time?
- Who may have been there?
- Who should have been there?
- Who was there immediately before and immediately after the event?
- Who did key players speak to before or after the event?

If a particular agency is being investigated, look at that agency’s organizational chart. It may help identify potential witnesses. This is particularly important when investigating systemic issues as it helps the investigator to determine those people who are responsible for establishing and delivering any policy or process under investigation.



UN Photo by Basile Zoma.

THE MULRUNJI CASE

WHO WERE THE POSSIBLE WITNESSES?

Background and context

- **Mulrunji family members and friends**
- **Residents of Palm Island, including the Mayor and other officials**
- **Persons with knowledge of policing on Palm Island, including officers posted there**

The event

- **All the police officers at the police watch-house**
- **Anyone else at the police watch-house, including civilian staff, civilians and prisoners**
- **PLO Benjaroo**
- **Anyone who witnessed Mulrunji's arrest**
- **Anyone who saw the police vehicle between the place of arrest and the watch-house**
- **Ambulance personnel who attended the police station**
- **Anyone any officer at the station spoke to, immediately after the event**

After the event

- **QPS investigators, including Scenes of Crime Officers**
- **CMC investigators**
- **Forensic pathologist and mortuary attendants**
- **Forensic pathologists at the second autopsy**
- **Use of force experts**

If the investigators were looking at systemic issues

- **Expert in culture and history of Aboriginal communities**
- **Expert in culture and history of QPS**
- **Australian Human Rights Commission regarding similar incidents and lessons learned**
- **Expert in best practices regarding custody of prisoners in similar situations**
- **Expert in police chain of command**
- **Expert in police use of force**
- **Expert in how to conduct investigations into deaths in police custody**



4. DECIDING WHICH WITNESSES TO INTERVIEW

In some cases, the NHRI may be able to identify hundreds of possible witnesses to an event, or series of events, or people who have been affected by a systemic human rights issue. There may simply not be the resources available to interview them all, even if it would be ideal to do so. Few organizations do. In these situations, the role of the investigator is to triage. Triage is the process by which an investigator uses his or her judgment to decide who must be interviewed and who it may not be necessary to interview. The goal is to identify those individuals who are likely to have the most information about the issue being investigated and to concentrate on those individuals.

In deciding who to interview, and who not to interview, it is important to consider:

- the seriousness of the investigation
- the resources available
- the time constraints set out in the investigation plan
- the proximity of the witness to the event or issue
- the potential uniqueness of the person's evidence
- the availability of the person to be interviewed
- any concerns about credibility or identity.

Proximity is particularly important. As a rule, those who are closer to an event or issue are more likely to provide the most valuable evidence.

THE MULRUNJI CASE

WHO SHOULD HAVE BEEN INTERVIEWED?

In the Mulrunji case, all the officers at the police watch-house on duty that day should have been segregated, if practical, and interviewed immediately. Even if they did not directly witness the interaction between S/Sgt. Hurley and Mulrunji, they may have had conversations with those directly involved or heard utterances from them.

One officer who directly witnessed parts of the event, Cst Steadman, was not interviewed until 8 December, several weeks after the event. He was not on duty at the time but he was clearly a key witness, as he was present when Mulrunji was brought into the watch-house.

The same principle of immediate interviewing applies to the ambulance personnel who attended the police station shortly after the event and any other prisoners or any civilian staff, such as cleaners, who may have been at the watch-house any time that day. They may, or may not, have important evidence, such as information they received about what had happened from S/Sgt. Hurley or any other source, or any utterances they heard made by anyone.

Roy Bramwell, who was at the police station and was apparently the only civilian inside the watch-house, was allowed to leave before investigators arrived. He was not interviewed until the following day.

Other possible witnesses may have included anyone who provided use of force training to QPS officers, as well as anyone involved in any previous similar situations involving any party, including S/Sgt. Hurley.

Investigators should have considered a witness canvass at the scene of the arrest and in the area of the watch-house. It is not clear if this was done.



KEY POINTS: CHAPTER 6

- **Every effort must be made to identify possible witnesses. Failure to do so may compromise the investigation.**
- **It is important to document the steps taken to identify and contact possible witnesses in order to demonstrate that every effort was made by the NHRI.**
- **Use a broad range of canvassing techniques to identify possible witnesses.**
- **Where circumstances prevent all those identified from being interviewed, interview those people whose evidence will have the greatest significance.**



Chapter 7:

Types of interview

KEY QUESTIONS

- **What methods of interviewing should be considered?**
- **What considerations should be taken into account when selecting the most appropriate interviewing method for any particular situation?**



1. INTRODUCTION

In selecting the most appropriate method of interviewing to meet a given situation, investigators generally have the following options:

- face-to-face
- Skype
- telephone
- written questions
- e-mail
- questionnaires and surveys.

Each of these approaches is discussed in this chapter.

2. FACE-TO-FACE INTERVIEWS

Face-to-face interviews are generally the best method, especially if the person being interviewed is likely to have crucial evidence. However, issues such as geography, availability, cost, barriers to access or lack of cooperation may affect or limit whether a face-to-face interview can be conducted.

The advantages of face-to-face interviews include:

- questions and answers are free-flowing and in real time
- new issues that come up can be addressed immediately
- the investigator is better able to keep control of the process
- the identity of the interviewee is more likely to be assured
- the investigator has a better opportunity to assess the credibility of the interviewee than using any of the other methods
- the investigator can view and record any physical evidence, such as any injury to the interviewee
- the investigator can revise the question areas as the interview proceeds
- documentary and physical evidence, such as video records or photographs, can be produced and examined
- it can be more difficult for an interviewee to be evasive or deceptive
- it demonstrates the professionalism and thoroughness of the investigation
- it may help build rapport between the investigator and the interviewee.



UN Photo by John Isaac.

3. SKYPE INTERVIEWS

Many investigative agencies use Skype or similar technology, such as Facetime, to conduct interviews. This can be a very efficient and cost-effective method. Skype has all of the advantages of face-to-face interviewing, except for physically being in the same room as the interviewee. There are additional advantages.

The advantages of using Skype for interviewing include:

- there are no travel expenses
- there is no time spent traveling
- the set-up costs are minimal
- there is minimal inconvenience for both the investigator and the interviewee
- the interview can be audio or video recorded.³⁰

The disadvantages of using Skype include:

- not everyone has access to the technology
- there may not be a reliable Internet connection during the interview
- it is virtually impossible to know who is doing what, off camera
- it may be more difficult to assess body language.

30 As discussed in Chapter 18, all audio and/or video recording of interviews should comply with whatever law on such activity applies in the NHRI's jurisdiction. Consent should always be obtained from the interviewee.

4. TELEPHONE INTERVIEWS

The advantages of telephone interviews include:

- they are cheap, convenient and efficient in places where people have access to phones
- the interview can be digitally voice recorded
- they are ideal for low-level fact-finding

The disadvantages of telephone interviews include:

- the identity of the interviewee may be uncertain and therefore an issue
- others may be present on the other end of the phone and they may be influencing, assisting or pressuring the interviewee (it is always advisable to inquire who else is present when interviewing a person who is using a speaker phone)
- someone else may be listening to the interview
- it is impossible to assess body language
- audio quality may be an issue
- the interviewee may be recording the interview, which may impact the integrity of the investigation should that person share the recording with other parties to the investigation prior to the investigation being concluded.

5. WRITTEN QUESTIONS

Sometimes known as “written interrogatories”, this method is technically a form of interviewing. The investigator prepares a list of questions, sends them to the person from whom he or she wants evidence and requests a response. The questions may be sent directly to the person or to an intermediary, such as the person’s lawyer or employer.

It is not recommended as a form of interview. It has all the disadvantages of a telephone interview, plus several more, including:

- the interviewer loses virtually all control of the process
- it can impact on the timelines set out in the investigation plan; for example, even if a deadline for a response is set, it may not be met
- there is no certainty as to who actually prepares the responses
- the level of detail in the responses may not be sufficient
- the responses often create further questions, requiring the process to start again and therefore creating delay.

Written interrogatories are generally not an effective way of conducting investigative interviews. They result, in many instances, in self-serving answers that provide little use in furthering an investigation. If someone asks for questions in writing, the first response should be to advise the person that it is not the policy of the NHRI to conduct interview using this method.

However, there may be times when there is no choice but to provide written questions. For example, there may not be sufficient resources to obtain the evidence any other way. The person concerned may decline to be interviewed other than by written interrogatory and there may be no way of overcoming that. The legal power to compel the witness to be interviewed by some other means may not be available to the NHRI. Alternatively, if the power to summons is available, it may not be sensible to use it every time someone insists on written questions, particularly if a witness is not a key one. Indeed NHRIs should avoid acquiring a reputation for being heavy-handed with the legal powers at their disposal.

If it is ultimately agreed that the NHRI will provide written questions to someone, it is important to make sure that the person knows what weight will be attached to any responses provided. In other words, given that it is a poor method of interviewing, it is good practice to make it clear that little weight may be attached to the answers given.

There are exceptions to the rule. Written questions may be helpful where the objectivity and credibility of the agency or organization responding are not a matter of concern. For example, it may be an efficient way clarifying a question with an expert witness that has already been interviewed or provided a report.

6. E-MAIL INTERVIEWS

Interviewing someone in real time by e-mail can be useful. It is quick, cheap and produces a written record that can be attributed to the person's e-mail address, should the identity of the respondent ever become an issue. In addition, the response is immediate and that minimizes the opportunity for collusion and the crafting of answers.

However, e-mail interviews have all the disadvantages of telephone interviews, including uncertainty as to who may be responding and who may be with them. Further, e-mail may not be an option in circumstances where access to a computer is or could be a problem.

E-mail does work well for follow-up questions from face-to-face interviews. These are interviews where there are no concerns over credibility, concoction or identity. They do not have to be undertaken in real time, normally simply involving a few brief questions to clarify matters that the interviewer forgot to ask during the original interview, or concerning issues of which he or she was not aware at the time the original interview was conducted.

7. QUESTIONNAIRES AND SURVEYS

If there are a large number of possible witnesses, it is worth considering developing a questionnaire or a survey that covers the main issues, if that is a practical option. A questionnaire is a halfway step between the witness canvassing process discussed previously and taking a full statement from all the witnesses. Once completed, the responses can be used to identify those witnesses who the investigator might want to interview in more depth.

Questionnaires and surveys are an approach that can work especially well when investigating systemic issues that may impact hundreds or thousands of people. It may also work to identify issues and witnesses in investigations of historical issues.

The National Human Rights Commission of Mongolia created a survey as part of its national inquiry into torture. It sent the survey to 1400 detainees and received 1338 responses, an amazing rate of return.³¹ The Commission used a similar approach in its major investigation, conducted in 2012, into the rights of children living and studying in religious institutions in Mongolia:

As part of the information-gathering process, the Commission surveyed religious institutions including 26 Buddhist monasteries in 8 districts of Ulaanbaatar and 28 monasteries in 12 provinces nationally. 7 Christian and 1 Islamic institution were included in the survey.³²



31 This inquiry is discussed in detail in the *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, which noted that “the surveys were a particularly important tool for the inquiry to obtain evidence from the very persons who are at the most risk of torture”.

32 The case study is provided in Appendix 2 of this Manual.

While each questionnaire should be tailored to meet the individual requirements and circumstances of the issue(s) under investigation, the following general guidelines should be followed.

- Explain who is doing the investigation and what is being investigated.
- Be careful how the questions are framed. Any hint of bias will erode credibility.
- Keep it simple. Ask for basic information, not a detailed account. That should be left for a formal interview.
- Do not create expectations that cannot be met.
- Do not make it too labour-intensive.
- Ensure that contact information for the NHRI is included.
- Ask for detailed contact information, including a preferred way of getting in touch.

8. GROUP INTERVIEWS/FOCUS GROUPS

There may be occasions where it is appropriate to gather information from potential witnesses by holding focus groups or otherwise interviewing a number of individuals simultaneously. This approach was used by the **National Human Rights Commission of Mongolia** in another of its investigations, conducted in 2011, into alleged violations of human rights by mining companies.³³ It was also used by the **Australian Human Rights Commission** in its investigation into the treatment of women in the Australian Defence Force, which is discussed further in Chapter 27.

There are a number of advantages to conducting group interviews, such as convenience and the effective use of time and resources. But there may also be disadvantages. If there are conflicting opinions within the group then any imbalance of power among group members may inhibit an honest and candid exchange of information. For example, if an investigation is focusing on the culture or operations of a particular workplace then it may be effective to interview a group of staff members separately from the management team.



Photo by the APF/Michael Power.

33 The case study is provided in Appendix 3 of this Manual.

KEY POINTS: CHAPTER 7

- **In most circumstances, face-to-face interviews are the ideal method for gathering evidence.**
- **Where face-to-face interviews are not possible or practical, consider conducting interviews using Skype, telephone, written questions, questionnaires, surveys or e-mail.**
- **Where a method other than a face-to-face interview is chosen, assess the evidence gathered accordingly.**



Chapter 8:

Factors affecting which types of interview to choose

KEY QUESTIONS

- **What criteria should be used to decide which type of interview method is most appropriate?**



There are many factors to consider when thinking about which type of interview method will work best in the different circumstances that the NHRI will encounter.

Safety

Investigator and interviewee safety is always the most important consideration when deciding what type of interview method to use. Conduct a risk assessment when deciding whether a face-to-face interview is necessary. Identify if there are any safety issues that relate to the interviewee and/or the environment in which the interview will be conducted.

Importance of the evidence

If a witness is particularly important to the investigation, a face-to-face interview should be conducted if at all possible. For example, if that witness is a key decision maker – such as senior official solely responsible for approving a policy or procedure that is the subject of the investigation – then he or she alone can give evidence as to why that decision was made.

Cost

There are often costs associated with conducting face-to-face interviews, including travel to and from the place where the person is located, in the event that he or she cannot come to the NHRI. It may not be cost effective – or even possible – to conduct the interview in person, even though that may be the best option. Where cost is an issue, a cost-benefit analysis should be undertaken to establish whether or not the cost can be justified.

Witness availability

Is the witness available? He or she may be leaving the country or have other commitments. If so, a Skype or telephone interview may be an appropriate option.

Concerns about credibility

If there are evidence-based concerns about the credibility of a witness, that may be a factor in favour of conducting an interview in person. Face-to-face interviews can provide greater opportunities to accurately assess that person's credibility, as opposed to other interview methods. Body language and other methods of credibility assessment are discussed in Chapter 19.

Concerns about identity

An investigator can be criticized for not establishing exactly whom it was that he or she was interviewing. For example, it can be difficult to determine the identity of an interviewee with complete certainty over the phone, by e-mail or by exchanging written questions and answers. Where identity is an issue, the investigator should consider conducting the interview face-to-face or by Skype.

Concerns about the integrity of the process

An investigator may have concerns that pressure is being put on the interviewee to say certain things. The more the interview environment is controlled by the investigator, the less opportunity there is for such pressure to be applied, at least directly and in real time. Face-to-face interviews provide the investigator with the greatest degree of control.

Likely length of interview

Longer interviews are usually best done face-to-face.

Where the interviewer wants to show the interviewee something or get something from the interviewee

If it is important to show an interviewee something, or to obtain something from him or her, then the face-to-face interview method is usually the best option.

In circumstances where the interviewee's movement is limited

Obviously the options are limited if the interviewee is in custody or otherwise unable to leave the place where he or she is located, perhaps through injury, physical impairment or disease.

KEY POINTS: CHAPTER 8

- **While face-to-face is the preferred interview method, issues such as the importance of the evidence, its availability elsewhere, credibility, safety and cost have to be taken into account when making the decision.**
- **In certain circumstances where the person to be interviewed cannot be physically present, there may be no alternative but to choose another interview method.**



Section II Initial preparation



Chapter 9: Preliminary research

Chapter 10: Special factors regarding witnesses

Chapter 11: Logistics and other special considerations

Chapter 9:

Preliminary research

KEY QUESTIONS

- **What steps should the interviewer take to make sure the issues are fully understood?**
- **What should the interviewer know about the person being interviewed before the interview takes place?**



1. INTRODUCTION

Preparation is a key principle of effective interviewing. The more important the witness is to what is being investigated, the more time should be spent preparing. For example, interviewing a senior military officer about allegations of systemic human rights abuses during a military campaign he commanded would involve far more preparation time than interviewing one of 30 bystanders who caught a fleeting glimpse of an alleged kidnapping of an activist who has since “disappeared”.

2. LEARNING ABOUT THE ISSUE(S)

An investigator should try to be as knowledgeable as possible about the interview subject before the interview takes place. In some cases, that can be very difficult to do, especially if the investigation takes place in the immediate aftermath of an event, when the issue(s) may not yet be clear. However, as far as possible, detailed preparation should involve:

- obtaining, reading and understanding any relevant documents before the interview starts
- understanding the structure and culture of the organization being investigated, particularly if it is a large bureaucracy such as a government agency or a military body
- understanding the context of whatever it is being investigated, including political, economic and cultural considerations
- reviewing any previous complaints and/or investigations involving the same organization.

3. LEARNING ABOUT THE INTERVIEWEE

The investigator should attempt to know as much as possible about the person he or she is interviewing, at least in so far as it relates to the issues under investigation.

This could include:

- knowing his or her title, including the correct spelling
- determining specific areas of responsibility and reporting relationships
- establishing any relevant career history
- identifying any other relationship or interest that may be relevant to the investigation
- reading every piece of documentation gathered during the investigation to date that refers to the interviewee and was generated by, sent by or sent to him or her

- reviewing any statements made by other parties that may be relevant to, or refer to, the interviewee
- undertaking media searches (some jurisdictions have companies that will, for a fee, review media archives for information about an individual)
- checking whether any other information has already been gathered about the interviewee, perhaps in relation to a previous investigation or complaint
- obtaining any other relevant background information.

The investigator might also decide to conduct an Internet search regarding the interviewee; for example, seeing if access can be legally gained to his or her Facebook, Twitter, LinkedIn or Myspace accounts, or any other social media source. The purpose is to find any useful background information. That might include interests and affiliations that may be useful in establishing a rapport with the person during the interview.

In addition, the investigator should also establish:

- what part the interviewee played in the issue or incident being investigated
- what role he or she plays in the organization being investigated
- what is his or her background
- what relationships the interviewee has to other witnesses
- whether there are any special considerations, such as concerns about confidentiality
- whether gender, ethnicity, race, caste, class, sexual orientation, residence or other personal considerations could form a possible barrier or help develop a rapport.

4. THINK ABOUT WHAT THE INTERVIEWEE MAY BE THINKING

Put yourself in his or her position. This is probably the most important consideration in preparing for an interview.

Some questions that the investigator should consider include:

- Will the interviewee be keen to give as full an account as he or she can?
- Do barriers exist that may prevent this happening?
- What should the interviewee know?
- Does the interviewee have an “agenda”?
- Is the interviewee likely to have an interest in the outcome of the investigation and, if so, what is it?
- What subjects would he or she probably like to avoid during the interview?
- What areas may the interviewee be reluctant to discuss, for whatever reason?
- What questions will the interviewee anticipate?
- What is likely to be his or her attitude to the investigation?
- Has the interviewee had an opportunity to tell his or her story previously?

Consider what the interviewee’s perception of you might be. What or who do you appear to represent? Will you be seen as a threat or someone who may be able to help? Will the interviewee think that you are biased? To what extent can you offer the interviewee protection from reprisal or retaliation?

Some witnesses may not be happy to be interviewed. Others may not trust you or understand either your role or the purpose of the investigation. On the other hand, some witnesses may see the interview as a means of telling their story or seeking redress for an injustice they have experienced.

5. PREPARING THE QUESTIONS TO ASK

As a general rule it is advisable to start with broad, open-ended questions. It allows the interviewee to tell their story in their own words. Prepare question areas about overall themes and topics to lead off the interview, as opposed to targeted questions.

Leave specific questions until later in the interview. Closed – “yes or no” – questions can be used to make an interviewee provide clear, concrete answers, especially if he or she is being evasive.

As the questions and question areas are being prepared, invite input from anyone else within the organization who has been involved in the investigation, even though they may not be present at the interview.

Be careful about writing down a list of specific questions and then asking them in rote fashion. There is a real danger that the investigator will ask the questions without listening to the answers.

Always listen to the responses that an interviewee provides.

KEY POINTS: CHAPTER 9

- **Good preparation is key to conducting effective interviews.**
- **Learn as much as possible about the issues being investigated.**
- **Consider the interview from the interviewee's perspective. Prepare your approach and questions accordingly.**
- **As an organization, consider selecting interviewers with whom the person being interviewed is likely to feel most comfortable.**
- **Anticipate and address any potential concerns before they arise.**



Chapter 10: Special factors regarding witnesses

KEY QUESTIONS

- What special considerations apply regarding “at risk” and vulnerable witnesses?
- What other special considerations apply and how should they be handled?



1. “AT RISK” AND VULNERABLE WITNESSES

Physical fitness

A person selected for interview must be physically fit to be interviewed. The immediate medical needs of a witness take precedence over the questioning. However, there are exceptions to the rule, such as taking a dying declaration. While this is extremely rare, it does happen.

Find out if the person is on medication, particularly if it may have – or someone subsequently alleges it may have – affected their recollection of what happened. Determine whether the person has a vision or hearing impairment that might impact their testimony.

Mental fitness

The witness should be competent to provide a statement that will be of use in the investigation. If a witness has a learning disability or mental health issues, a decision has to be made as to whether or not the need to interview the person outweighs any harm that may be result from doing so. Some questions to consider that may influence the decision include:

- What competence issues does the witness have and what impact does that have on short-term and long-term memory, as well as on the ability to communicate?
- Is the evidence that he or she is likely to give available from some other source?
- Will medical records have to be obtained and, if so, is there a possibility that they will be disclosed to a third party, with or without consent?

If the decision is made to proceed with the interview, extra care is needed regarding how a statement is taken from the person. Expert assistance may be needed, at least to provide advice on what approaches and techniques may be appropriate for the circumstances. Patience and care need to be exercised about asking leading questions or making suggestions. The investigator must not be condescending and must listen closely to what the witness says. After the interview is over, corroboration should be sought, as it should be in virtually any interview.

2. CULTURAL AND RELIGIOUS ISSUES

Cultural and religious sensitivities must be taken into account and accommodated to the greatest extent possible. Care must be taken to eliminate any preconceived notions. As much information as possible must be obtained and, if necessary, expert advice taken. Causing offence, even unknowingly, may create animosity, reduce cooperation and potentially derail the broader investigation. In addition, the reputation and credibility of the investigator and the NHRI may be compromised.

Investigators should be aware of possible cultural or religious issues that may impact on the investigation. Unless the cultural context is fully understood by investigators, something of importance may be missed or misinterpreted.

If at all possible, the NHRI should have someone who has direct knowledge of the relevant cultural or religious issues as a member of the investigative team. His or her input will be invaluable. He or she can help other team members to avoid doing or saying things that may offend, as well as help build the rapport that is essential to a good interview.

What the interviewee and the investigator consider to be appropriate and polite may be completely different. The investigator should be aware of those things that could cause offence or discomfort to the interviewee, such as:

- touching; or example, whether handshakes should be soft or firm, which hand should be used or whether touching is simply not acceptable at all
- how much personal space may be appropriate
- whether punctuality is important
- acceptable ways of addressing the person
- whether or not eye contact may be considered invasive
- which gestures are acceptable and which are not.

The onus is usually on the investigator to adapt his or her approach to ensure that the interviewee feels comfortable. The investigator should also be aware of religious holidays, fasting periods and similar considerations when the interview is scheduled.

It is important to recognize that a cultural group is not always homogeneous. A different approach may need to be used with members of different sub-groups.

Cultural or religious practices may need to be considered in a range of different areas, not just during the interview itself. Setting up the interview may require the investigator to identify the appropriate way to contact the interviewee. For example, there may be an expectation that contact with potential witnesses will be made through the leadership group or hierarchy that exists in the community where the witnesses reside, as opposed to contacting them directly. In many cases, it will be appropriate to arrange meetings with community leaders to explain the purpose of the investigation and what will be done. That can be a very positive thing. The opportunity should also be taken to explain what is being investigated and why interviews are required. Ask community leaders for their assistance.

Support persons

It may be appropriate to allow a support person to attend the interview. This person provides emotional support to the witness and may assist in other ways, such as advising the investigator of the best way to approach interviewing the witness. In some cases, such as interviewing children, it may be mandatory. The support person should not be a witness in the investigation, however, that may be difficult in some situations. Generally, the support person should not give evidence on behalf of the witness. In order to protect the integrity of the investigation, ask the support person not to discuss the content of the interview with anyone else until the conclusion of the investigation.

THE MULRUNJI CASE

ABSENCE OF A CULTURAL SUPPORT PERSON FOR INITIAL INTERVIEWS

The submission by the Australian Human Rights Commission to the Coroner in the Mulrunji case noted the importance of cultural issues in conducting a fair and thorough investigation:

Difficulties in cross cultural communication between police and Aboriginal witnesses may have impaired the effectiveness of the investigation of this matter by police. Significant attention should be given by the Police Commissioner to the training of officers, particularly those who are working in or near large Indigenous communities such as Palm Island in relation to communication with Indigenous people and the use of support persons and interpreters. This is a matter that is fundamental to the effective and fair administration of justice in Queensland.³⁴



3. OTHER FACTORS TO BE TAKEN INTO ACCOUNT

Gender

In considering who should conduct an interview, assess whether the gender of the investigator is an issue, either for the witness or the cultural environment in which the interview is taking place.

Literacy

Literacy is another issue that the investigator must consider. It should never be assumed that the witness can read or write. It can be embarrassing for everyone involved if that assumption is made and the witness is then unable to review and sign a statement that has been prepared for him or her.

This is a delicate area. If it is suspected that literacy may be an issue, attempt to address it ahead of time. Experience shows that the best solution is to avoid written statements altogether and digitally voice record interviews, as discussed in Chapter 18.

Intimidated witnesses

The likelihood of witnesses feeling intimidated should be carefully assessed. Anyone in detention, in a war zone or in the custody of or under the influence of someone who has authority of some kind over them is likely to feel intimidated. The person will, quite reasonably, be reluctant to provide evidence. He or she may choose not to talk at all, fail to provide a full and complete account or skew the evidence so that it is not accurate. Witnesses may say something that they think you want to hear, as opposed to what they really know. In those situations all that an investigator can realistically do is to emphasize, as often as possible, that all that he or she is interested in is the truth.

That may not work of course. The investigator's presence is not necessarily permanent. The person who may be the subject of retaliation, however, probably has no choice but to stay. He or she may quite reasonably feel that the personal risks and the risks to his or her family from telling the truth far outweigh any benefits.

Investigators should not forget that witnesses may also feel intimidated by them. Those tasked with conducting interviews should make sure that they clearly explain who they are and the purpose of their investigation. This ensures that witnesses who may feel threatened can make an informed decision as to whether or not they will cooperate. Be empathetic. Explain how the interview will be conducted and how the information will be used.

34 See Recommendation C39; www.humanrights.gov.au/commission-submissions-mulrunji-1.



UN Photo by David Manyua.

Retaliation

Retaliation against someone for cooperating with an investigation can be a very real concern.

The legislation or mandate of the NHRI may contain provisions that prohibit any kind of retaliation for providing information to it. How much confidence people have in such legislation may vary. It is necessary to ensure that everyone knows about these provisions – especially those who would retaliate – and to investigate any allegations of retaliation aggressively and robustly.

In some circumstances, special measures can be taken if a person has to give formal evidence. This can include, for example, the use of disguises and video links. An agency may have access to some form of witness protection programme. That is not common for many agencies because the costs are prohibitive, as discussed in Chapter 17.

Retaliation can be overt or it can be subtle and easy to hide. Allegations of retaliation can be very difficult to investigate. Do not make promises about protecting a witness from retaliation or create expectations that cannot be kept. If they are made and not delivered, the credibility of the NHRI will be seriously compromised, along with the cooperation that could otherwise have been provided by others.

Interpreters

Interviewing someone who does not speak the language in which an interview is to be conducted can be very time-consuming. In these cases an interpreter will be needed.

Where an interpreter is required, consider:

- how much confidence can be had in the integrity and independence of the interpreter
- his or her competence in both languages
- the interviewee's perception of the interpreter and whether that person's ethnicity, gender, community status and so on might create a barrier that would inhibit the interviewee.

4. JUVENILE WITNESSES

Interviewing children can be a very sensitive and difficult process. The first rule, as with any other vulnerable witness, is to do no harm. NHRIs have a responsibility to protect, as well as to investigate. The last thing an investigator wants to do is to add further trauma.

The investigator should first decide whether or not it is necessary to interview the child at all. If sufficient evidence can be gained from another source, it may not be necessary. If it is decided to interview a child, the interview should be especially well prepared. If there are any doubts or uncertainties about the interview, expert help should be sought.

The following factors should be taken into account when interviewing juveniles.³⁵

Age

The younger the child, the more difficult it will be to conduct the interview.

The investigator needs to ask whether the child is mature enough to understand and respond to the questions that will be asked. A further aspect to be considered is how much weight should be given to his or her evidence.

Physical and mental capacity

The investigator should determine whether the child has any disabilities, including any impediments to communication.

Medical needs

The immediate health and safety needs of the child are paramount. Any immediate concerns must be addressed before any thought is given to conducting an interview.

Routines

If possible, the interview should be fit in with the child's routine, rather than the requirements of the investigation or the investigator.

Location

Wherever possible, disruption to the child should be minimized or avoided altogether. An appropriate location should be chosen and kept as private as possible. For example, a child should not be interviewed at his or her school.

Support person

As with any other interview, the interviewee should be made to feel comfortable and secure. It may, or may not, be appropriate to have a parent or relative present. However, it will almost certainly be essential to have a suitable adult present, such as a counselor or support person. This may also be required by law.

³⁵ In December 2011, the Scottish Government published a detailed guide to interviewing child witnesses. *Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland* is available at www.scotland.gov.uk/Publications/2011/12/16102728/2.

Keep it brief

The interview should focus only on those areas that have to be covered. As far as possible, avoid having to re-interview the child later. If a second interview is necessary, it should cover only new areas or essential clarification. This applies equally to all interviewees. Do not go over the whole event or issue again.

Get help if needed

There are various interview techniques and strategies that can be used both to gather information and to avoid – or, at least, minimize – harm. They include play as an interview technique. Unless the interviewer is experienced in this approach, he or she should seek expert assistance from someone with experience in conducting interviews with children. As a general rule, more help will be needed when interviewing younger children.

Be very careful about making suggestions or leading child witnesses

Children can be very susceptible to suggestion and eager to please. Be very careful about asking leading questions.

KEY POINTS: CHAPTER 10

- **When preparing to interview a witness, investigators should identify if there are any special circumstances that might apply. If so, it should consider whether the interview should be conducted at all and, if it is, what special arrangements will be necessary.**
- **Factors where special arrangements may be necessary include the physical or mental fitness of the witness; cultural or religious issues; witnesses who may be at risk or vulnerable; and those who do not speak the investigator's language.**
- **Particular care needs to be taken when interviewing children and other vulnerable people.**



Chapter 11: Logistics and other special considerations

KEY QUESTIONS

- **How does what happened to witnesses after an incident affect the investigation and the credibility of the evidence those witnesses may subsequently give?**
- **When should any powers available be used to compel witnesses to give evidence and when should evidence be given under oath?**
- **What issues should be considered when planning the timing of interviews and the order in which they are held?**



1. INTRODUCTION

Before discussing how to structure the interview, it is important to consider some of the things that impact on the interview, such as:

- assessing what happened to witnesses immediately after an incident
- the segregation of witnesses
- using any powers available to compel testimony
- the timing of interviews
- the order of interviews.

2. ASSESSING WHAT HAPPENED TO WITNESSES AFTER AN INCIDENT

In many cases, the investigation may start some time after an incident occurred. There may have been investigations into the incident by other agencies, such as the police.

One of the first things to consider when preparing to conduct interviews is what happened to all the parties immediately after the incident. Did what happened impact the integrity of the investigative process? Were there opportunities for collusion and contamination of witness evidence? If so, were they accidental, deliberate or passively condoned?

Some questions that need to be answered include:

- Were all persons involved in the incident segregated as soon as practical and up until the point they were interviewed? If not, why not?
- Who spoke to whom prior to the interview, and in what context?
- Was the witness provided with any documentary information or permitted to review other evidence, such as other statements or video footage?
- If a lawyer represented the witness, did that lawyer represent any other person involved in the incident?
- Did the people involved in the incident have the opportunity to meet before making notes or giving statements and, if so, how and why?

3. SEGREGATING WITNESSES

Witnesses should be segregated as soon as possible after an event, in order to preserve the integrity of their evidence. Segregation minimizes the possibility of collusion and other tainting of evidence, inadvertently or otherwise.

In many cases, however, this will be impractical. If the investigation is taking place well after an event has happened, it will likely be impossible. There could be numerous reasons for this, including the number of potential witnesses, available resources, time constraints, lack of cooperation and other practical considerations, such as the time necessary for investigators to physically reach the witnesses.

Options that investigators can consider in these circumstances, if feasible, include:

- asking everyone to independently write down what they saw and heard in as much detail as possible and as soon as possible
- obtaining the contact details of potential witnesses and arranging interviews at a later date.

A standard question at many interviews is to ask what information the witness has received from other sources, especially if there was no witness segregation.

Witnesses should also be instructed not to discuss anything about the incident with anyone else until the investigation is completed. Even if it is done in good faith, talking about what happened with someone else may leave the witness open to allegations of collusion and possibly improperly modifying his or her account.

THE MULRUNJI CASE

FAILURE TO SEGREGATE WITNESSES

The Queensland Police Service Operational Procedures Manual provides that:

Members directly involved in the incident or who are witnesses to the incident should not discuss the incident amongst themselves prior to being interviewed.

In the Mulrunji case, the involved officers later stated that they were unaware of this provision.

There were three officers and PLO Benjaroo at the police station when the incident happened. They did not segregate themselves pending the arrival of investigators, nor were they ordered to do so. They did not record any conversation they may have had. They did, however, discuss what had happened. The Coroner found this inappropriate, however the QPS defended the officers on the grounds that they had to wait for the QPS investigation team to arrive.

They may have watched the cell video prior to the QPS investigation team arriving.

The Coroner also found that S/Sgt. Hurley had been told what a civilian witness, Roy Bramwell, had said after S/Sgt. Hurley had given his first statement. S/Sgt. Hurley then amended his account of what happened when he gave a second statement, apparently to address what Mr Bramwell had said. A similar thing happened with another officer. The Coroner described this as “orchestrated”.



4. USING POWERS AVAILABLE TO COMPEL TESTIMONY

In certain circumstances, any powers of subpoena that are available to the NHRI may have to be used to compel otherwise reluctant witnesses to give evidence.

A “friendly subpoena” may also be served. This occurs in cases where someone is quite happy to give evidence but is concerned about potential retaliation or the perception of others, should they be seen to do so voluntarily. The person served with the subpoena can then legitimately claim that he or she have no choice but to be interviewed by the NHRI.

5. TAKING EVIDENCE UNDER OATH

Some NHRIs may have the power to take evidence under oath or affirmation. Normally reserved for formal hearings, it is a tool rarely used in field investigations. However, it may be worth considering in some situations, particularly where there are concerns about credibility. If sworn testimony is going to be taken for only one or two witnesses in an investigation, the interviewer must be in a position to explain why only certain witnesses were required to do so. In those circumstances, it may be worth considering interviewing all witnesses under oath.



UN Photo by Fred Noy.

6. TIMING OF INTERVIEWS

This is the golden rule for all investigations: Get the most comprehensive a statement possible, as quickly as possible.

The best evidence is the freshest. Memories fade or are tainted, inadvertently or otherwise. Some academic studies have shown that the longer the passage of time before a statement is taken, the less likely it is to be accurate.

The number of times a person recalls an event is also important. A study by Northwestern University found that an individual's "memory of an event can grow less precise – even to the point of it being totally false – with each retrieval".³⁶ The memory is rewritten every time it is remembered, eventually distorting the original memory.

In many cases, it is prudent to interview witnesses immediately after each other or, if there are enough investigators available, to interview witness at the same time. This minimizes the possibility of actual or perceived collusion. What an investigator does not want is an interviewee sharing the questions he or she has been asked with a fellow witness who has yet to be interviewed.

It is best practice to interview witnesses as soon as possible after an incident. However, there are cases where a witness is not, or claims not to be, physically or emotionally fit to give an immediate statement. In most cases, the trauma is obvious. However, not all such claims should be taken at face value. If there are grounds to suspect that the claim is not genuine, the investigator should use his or her own judgment, meet with the person if possible and, where necessary, ask for medical evidence to support the claim.

WHEN TO INTERVIEW WITNESSES

In Canada in 2008, during a bus journey across the Prairies, a passenger, who turned out to have a mental illness, drew a sharp knife and decapitated the passenger who was asleep in the seat next to him. The two had never met before. There were 30 other passengers on the bus. They managed to get off and lock the bus door behind them. They then watched in horror as the man walked up and down the bus, cutting pieces of flesh from the victim's body, including one of his ears, and eating them or stuffing them in his pockets.

Police arrived shortly afterwards. They arrested the man. They escorted the witnesses to a nearby town, segregated them and interviewed them immediately, one by one.



7. THE ORDER IN WHICH INTERVIEWS ARE CONDUCTED

Deciding the order in which to interview witnesses depends entirely on the circumstances of the case. Generally, but not always, the process should start with the alleged victim or complainant. This provides an opportunity to get more details about the complaint, including identifying possible investigative avenues and obtaining any documents or other evidence that the complainant may have not yet provided.

The next step should be to interview any independent witnesses, starting with those closest to the event or issue.

³⁶ "Your memory is like a telephone game", Marla Paul, Northwestern University News; 19 September 2012; available at www.northwestern.edu/newscenter/stories/2012/09/your-memory-is-like-the-telephone-game.html. The paper was published in the *Journal of Neuroscience* in September 2012.

Interviews should then be conducted with those alleged to be responsible for the human rights violation that is the subject of the investigation. By this point, the interviewer should be in a position to ask reasonably well-informed questions, as well as focus on the key issue(s). If there is more than one alleged perpetrator, begin with those closest to the event or issue and then work out or, if relevant, up through the chain of command.

In some circumstances, it may be preferable to interview the subject of an investigation first, in order to obtain the evidence while it is still fresh and to reduce the possibility of collusion. In police shootings, for example, it is crucial to interview the involved officer(s) as soon as is possible after the event, rather than waiting for other evidence to be gathered.

In cases that have a systemic component, such as an alleged discriminatory policy, it may be appropriate to interview the key decision makers – such as those who created, implemented and have the power to change the policy – toward the end of the interview cycle, rather than at the beginning.



UN Photo by Martine Perret.

THE MULRUNJI CASE

ORDER AND TIMING OF INTERVIEWS

S/Sgt Hurley was formally interviewed three times, including once on the day that Mulrunji died.

Cst Steadman, an off-duty QPS officer who saw S/Sgt. Hurley and Mulrunji enter the watch-house, was not interviewed by either the QPS or the CMC until three weeks after the death.

Roy Bramwell was not interviewed until the day after the death, even though he was present in the police watch-house when the incident happened.



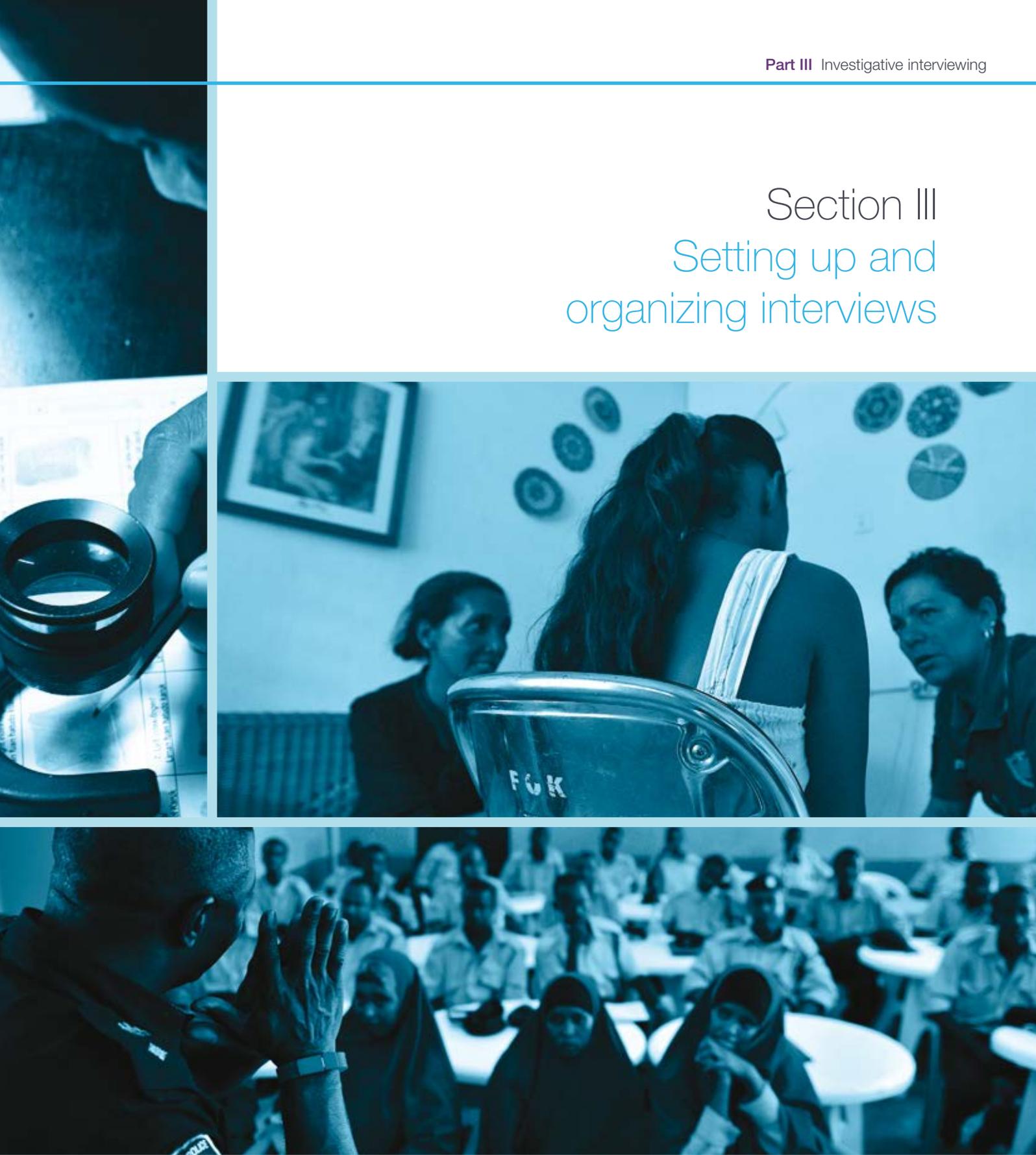
KEY POINTS: CHAPTER 11

- **Segregate witnesses as soon as possible after an event in order to preserve the integrity of their evidence.**
- **Interview witnesses as soon as possible after an incident.**
- **In some cases, it may be prudent to interview witnesses immediately after each other.**
- **Investigators should consider the most effective order in which to interview witnesses.**
- **NHRIs may need to use any powers that they have to compel a reluctant witness to give evidence.**



Section III

Setting up and organizing interviews



Chapter 12: Setting up the interview

Chapter 13: Organizing the interview

Chapter 12: Setting up the interview

KEY QUESTIONS

- **What are the key factors that an interviewer needs to consider when setting up an interview?**
- **What considerations need to be taken into account when choosing the location for an interview?**



1. INTRODUCTION

The following key factors need to be considered when setting up an interview:

- making initial contact with the witness
- confidentiality
- any documentation or other evidence that needs to be requested
- factors influencing the choice of location.

2. INITIAL CONTACT

Care should be taken when making initial contact with a potential witness, particularly if confidentiality might be an issue.

Messages must not be left with colleagues, on voicemail or on emails sent from or to work. There may also be circumstances where contacting a person at home is not advisable.

When direct contact with the person concerned is made, the interviewer should explain who he or she is, the mandate of the NHRI and what is being investigated. It should not be assumed that the person already knows. If appropriate, any disruption that may be being caused by asking for an interview should be acknowledged and accompanied with an explanation that this is a fact-gathering exercise and that it is considered important to have that person's perspective.

3. CONFIDENTIALITY

Confidentiality is a critical issue for whistleblowers, reluctant interviewees and many others. Some witnesses will only cooperate with the NHRI on the condition that their identity is kept secret.

Expectations must be managed up front. Witnesses should never be misled, as the reputation of the investigator and the NHRI is at stake. It is unlikely that absolute guarantees can be given that the identity of the witness will be kept confidential in all circumstances. Let the person know that there are limits to the protection that can be offered.

For example, if action is taken against another party as a result of the information a witness provides, procedural fairness will usually require that the person facing sanction is entitled to receive at least some indication of the source of that information. A judge may order disclosure of that source, thereby making any promise of confidentiality worthless.

There may be things that can be done to promote confidentiality, such as setting up channels of communication that are less likely to be compromised or choosing an appropriately private location for a face-to-face interview. However, it is unlikely that complete control can be maintained over the entire process. The fact that the interview is taking place may also be difficult or impossible to conceal, such as when interviewing people in detention.

4. REQUESTS TO HAVE SOMEONE PRESENT AT THE INTERVIEW

A potential interviewee may ask – or demand – that someone else be present at the interview, such as a lawyer or family member.

The investigator should use common sense as to whether or not this request is met. The key consideration is whether or not it will have a negative impact on the integrity of the investigation. Some questions to consider in such cases are:

- Is the person being coerced to have that person present?
- Is there a clear and genuine need for a support person?
- Is the person also likely to be a witness in the investigation?
- Does a lawyer represent other people involved in the investigation or just this witness?
- Will the presence of that person potentially have a “chilling” effect on what the witness might say?
- Does the person have a statutory or other right to have someone present?

In many circumstances, having a support person present is a very reasonable request, particularly with vulnerable witnesses. However, it can pose difficulties if the only support person available is also a witness or someone whom the interviewer would rather not have present. A judgment call may have to be made as to whether or not to allow that person to be present.

If another person is allowed to attend the interview, it should be made clear that the person is there to support the interviewee and not to interject or give evidence on behalf of the witness. If a lawyer is allowed to attend, it should be made clear to everyone that:

- the lawyer should represent that witness only
- the lawyer should not interrupt during the course of the interview.
- the investigator decides what is and what is not relevant, not the lawyer.

THE MULRUNJI CASE

ATTENDANCE OF THE POLICE UNION LAWYER IN ALL INTERVIEWS

The Coroner commented on the fact that all the involved officers, including S/Sgt. Hurley, were represented by the same police union lawyer. He noted this was wrong and that:

... [f]rom the point of view of the administration of justice, Hurley and the other police officers should have been represented separately to ensure ... that the integrity of independent versions of members directly involved and members who are witnesses to a police-related incident is preserved as far as practical. The result [of co-representation] is that the public is left with the perception that the effectiveness of the investigation of such a serious matter was fundamentally flawed.



5. REQUESTING DOCUMENTS AND OTHER POSSIBLE EVIDENCE

As the interview is set up, specific requests should be made for anything the interviewee may have, or may have access to, that might be relevant to the investigation. That might include documents, e-mails, recorded voicemails, photographs or video. The interviewee may assume that the investigator already has a certain piece of evidence or may not realize that it is important or relevant to the investigation. If the material cannot be accessed prior to the interview, the investigator should ask the person to bring it to the interview.

Obtaining and reviewing documents is discussed in more detail in Chapter 24.

6. CHOOSING A LOCATION FOR THE INTERVIEW

Safety

The most important factor to consider in setting up face-to-face interviews is the safety of the investigator and interviewee. Many NHRI investigators very bravely put themselves at risk to gather evidence. For example, investigators from the **Afghanistan Independent Human Rights Commission** who collected evidence for a 2012 report into aspects of policing in Afghanistan faced a very challenging task, given the volatile environment.³⁷

If there is any concern over personal safety, the investigator should consider completing a risk assessment. This applies to all interviews, not just those in conflict zones. NHRIs can often deal with people who are angry, scared, frustrated or volatile. Some may have mental health issues. Basic precautions must be taken in these situations, such as ensuring that there are always two investigators present at an interview.

Convenience to all involved

Being involved in an investigation in any capacity – as a witness, victim, suspect or subject – takes time and there may be a lot at stake. It may be a victim's only opportunity to share what has happened or a respondent's only opportunity to explain why he or she did what they did. Make the process as convenient as possible, particularly if vulnerable witnesses are involved. That may involve going to them to do the interview, rather than requiring them to come to the NHRI.

In many cases, going to where a group of witnesses live makes sense. On the other hand, it may be more convenient to hold an interview at the NHRI office, especially if a series of interviews are being conducted in a limited period of time or the investigator intends to refer to a number of documents during the interview.

Where the interviewee will feel most comfortable

If a witness feels comfortable, he or she will generally be more forthcoming. Even an evasive witness may provide more information if he or she feels comfortable. This may be a reason to interview a person in an environment such as his or her home or workplace. Take any cultural considerations into account.

Cost

The cost of conducting an interview may be an issue to consider. Is it cheaper for the investigator to go to the witness or, in some circumstances, to pay for the witness to come to the investigator?

³⁷ *From Arbaki to Local Police: Today's Challenges and Tomorrow's Concerns*; Afghanistan Independent Human Rights Commission; 2012; available at www.aihrc.org.af/en/research-reports.

Perception

Consideration must be given to how the witness will perceive the venue chosen for the interview. For example, if the investigation relates to a custodial death at a police station, what will civilians think if the investigator insists on them coming to the police station to be interviewed? Where possible, a neutral location should be selected.

Confidentiality

It is probably unwise to go to someone's workplace to interview a confidential informant or whistleblower. A location should be chosen that makes it less likely that confidentiality will be compromised.

Scene

Interviewing a witness at the place where the incident under investigation occurred can be very helpful. Make sure that the interviewee has no objections and that it won't re-traumatize him or her. In some cases, it may not be culturally appropriate. However, it may provide useful context and help the interviewee to recall information, particularly if the event was fairly recent. The investigator should find out if there have been any material changes to the scene since the incident occurred and be careful not to contaminate a scene if evidence is still being collected or may be collected in the future. Consideration should also be given to recording the interview on video. If you do not have access to professional video equipment, most smartphones can record short amounts of video. Visiting scenes is discussed in more depth in Chapter 21.

Where there is no choice

In some cases, there may be no choice about where an interview is conducted, such as when the interviewee is an inmate in a detention facility or a patient in a hospital. If there is reason to believe that the interview is probably being monitored, then the investigator should act accordingly. For example, the questions could be written down and the interviewee asked to respond in writing rather than verbally. That may not be a useful approach if the interviewee cannot read or write or the authorities choose to interrupt the process. However, the fact that they might do so may be compelling evidence that something is not right.

If the investigator is told that a statement cannot be taken, demand an explanation. This places the responsibility on to the authorities to justify why they will not let the investigator do his or her job and protects the credibility and integrity of the investigation.

KEY POINTS: CHAPTER 12

- **Setting up an interview provides an opportunity to establish rapport with the witness.**
- **Confidentiality is a major issue and must be taken into account when making initial contact with a witness.**
- **If someone else is allowed to be present at the interview, ground rules must be established as to what he or she may or may not do.**
- **Documentary and other relevant evidence should be requested from the witness when the interview is being arranged.**
- **The safety of those taking part in the interview should always be the main consideration. However, thought also should be given to issues such as convenience, comfort, cost and confidentiality.**



Chapter 13:

Organizing the interview

KEY QUESTIONS

- **What specific arrangements should be made when organizing the interview?**
- **What documents and equipment are required?**
- **How should the interview room be arranged?**
- **How long should the interview take?**
- **Are there guidelines on how to behave when first meeting the witness?**



1. WHO SHOULD CONDUCT THE INTERVIEW?

The short answer to this question is that it depends. Ideally, the interviewer should be knowledgeable about the overall investigation. They will have taken into account issues such as gender and culture and the ability to establishing a rapport with the witness (discussed in Chapter 14).

Consideration may also need to be given to the issue of “status”. For example, a senior official may feel disrespected if a junior investigator interviews him or her. However, some constraints may be imposed through limited resources and the availability of appropriate personnel. It is also often very helpful for the person who will be writing any subsequent report to be present at important interviews.

Knowledge of a particular field may be a consideration. There may be investigators in the NHRI that specialize in specific areas, such as custodial deaths or human trafficking, or certain types of investigation. Some agencies have investigators with different levels of training or expertise in a given type of interview.³⁸

2. HOW MANY INVESTIGATORS SHOULD CONDUCT THE INTERVIEW?

It is generally best to have two investigators conduct an interview, including those done by telephone and/or Skype.

Interviewers have a lot to do during an interview, including:

- asking questions
- listening to the answers
- watching body language
- making notes
- writing down the statement, if it is not being digitally voice recorded
- ensuring that recording equipment is functioning
- producing documents at the appropriate moment
- crossing off questions as they are answered
- developing new questions as new information emerges.

³⁸ Police services in the United Kingdom have developed various levels of investigative interviewing, including specialists for serious cases and specific types of interviews, such as with persons who have serious learning disabilities. For details, see the competency framework set out at pages 8-9 of the *National Investigative Interviewing Strategy: Briefing Paper*, published in 2009 by the National Police Improvement Agency; available at www.acpo.police.uk/documents/crime/2009/200901CRINSI01.pdf.

Why two interviewers?

It has become best practice across the globe to have two investigators involved in conducting interviews. This has long been the case in the criminal investigative world but it is now the “gold standard” in many administrative and regulatory investigations.

It makes practical sense. One investigator can concentrate on actively listening to the answers. He or she can focus fully on the interviewee, maintaining direct eye contact and building rapport. The other investigator can look after all the other things. It is efficient and effective.

Why not three interviewers?

Three persons on the other side of the interview table may be intimidating to the witness. A witness who feels intimidated is less likely to talk openly. It also increases the chances of an interviewer interrupting while the interviewee is in full flow.

Three investigators is also not a good use of limited resources. It may send the message that the NHRI is profligate, particularly if the cost of conducting interviews in the field is an issue.

3. WHAT RESPONSIBILITIES DOES EACH INTERVIEWER HAVE?**The lead interviewer**

The lead interviewer should cover the introduction, provide background information, ask the opening question and focus fully on the response. Once the opening question is answered, he or she should then ask any specific questions that have not been dealt with in the opening monologue.

The second interviewer

The second interviewer should make dot point notes of what the witness is saying, write down any new questions that arise as the witness responds, watch body language and nod and smile. He or she should say absolutely nothing until the lead interviewer has finished asking specific questions. Then the roles reverse. The second interviewer should then ask any questions that have not already been asked, including clarification of any answers given, if required.

4. GETTING ORGANIZED

Any exhibits, such as photographs or documents, should be organized before the interview starts and they should be in the order they are likely to be produced for the interviewee.

Original documents should never be taken into an interview in case they are deliberately destroyed by the interviewee.

If a video camera is available and is to be used, it is sensible to make sure it works (including the audio) and, if possible, actually records everyone in the room. Always use a digital voice recorder (DVR) in addition to the video camera.³⁹

If the interview is only being digitally voice recorded, test the DVR. Then test it again. Use two, just in case. Make sure there are spare batteries.

If a video will be played during the course of the interview, make sure the equipment works and there is someone who knows how to use it.

If the interview is likely to involve a discussion about a series of events over a period of time, a calendar should be available. If diagrams or maps are to be used, they should be ready and to hand.

³⁹ As discussed in Chapter 18, recording without consent is a criminal offence in some jurisdictions. Make sure there is always informed consent by the interviewee to digitally voice record the interview.

5. HOW SHOULD THE INTERVIEWERS PRESENT THEMSELVES?

Dress

It is important that investigators present themselves in a professional manner. Dress appropriately and in a manner that respects the interviewee and the environment. It would not be appropriate to walk into a major interview with a senior official wearing a T-shirt. On the other hand, it may not be respectful or helpful to walk into an indigenous community wearing a suit and tie.

Interruptions

Interruptions can destroy the rhythm of an interview, particularly when it is in full flow. Whatever is necessary should be done to minimize interruptions, including turning off mobile phones for the duration of the interview. Not only is responding to a call or checking e-mail during an interview rude, it also sends a message to the interviewee about his or her relative importance.

Who sits where?

There are various theories about whether the interviewee should face any window in the room, whether there should be a clock visible and so on. In practice, seating arrangements will depend on both the interviewee (how easily distracted he or she is) and the interviewer (on how proficient he or she is at keeping the interviewee focused on providing full responses to the questions being asked).

The interviewer should consider what will make the interviewee more comfortable. Sitting face-to-face across a desk? Sitting side-by-side? Having a couch in the room? It will depend on the interviewee and on the circumstances.

6. PHYSICAL SET-UP AND EQUIPMENT

If the interview is being conducted at a location where there is some control over the physical set-up of the room – such as the NHRI's office or a hotel boardroom – it may be possible to arrange the room to the investigator's advantage. Safety should always be the main consideration. In cases where safety may be an issue, the investigator should sit closest to the door and make sure there are no objects within reach that could be used as weapons.

The equipment to be used, if possible, should include:

- two digital voice recorders (DVR), in case one breaks down or malfunctions
- batteries
- paper and pens, for notes and diagrams
- a camera to take photographs, particularly to record injury
- water and glasses.

7. HOW LONG SHOULD THE INTERVIEW TAKE?

Part of preparing for an interview involves estimating how long it is likely to take. Of course, there will be many circumstances where the interviewer will not be sure. However, it may be possible to make an informed guess based on knowledge of the case, past experience and the relative importance of the witness.

Make sure enough time has been set aside for the interview. Take as long as is needed, particularly with key witnesses, although that can sometimes be difficult with interviewees who have limited time available.

Care needs to be taken that an interview does not take too long. For example, if an interview lasts more than three hours or so, everyone – including the investigators – will begin to get tired, particularly if it is not the only interview of the day. It can be easy to lose focus if an interview takes too long.

It is important to take breaks. If the interview goes over to the following day, so be it. For example, in one case, an interview with the head of a government organization that was being investigated for significant systemic issues took three days in total, with five hours of actual interview each day. In a second case, a tape-recorded interview of a police officer who had shot a fleeing unarmed suspect took four hours, with two 15-minute breaks.

The length of an interview is one indicator of its thoroughness. A short interview may indicate it was cursory and that important issues were not explored in sufficient depth. That may indicate bias, incompetence, a deliberate cover-up, a failure to identify key points or a combination of all of the above. Of course, there may be a perfectly reasonable explanation, but it is usually worth inquiring why an interview was relatively brief.

THE MULRUNJI CASE

LENGTH OF INTERVIEWS

The interviews done by the QPS investigators immediately after Mulrunji's death were, on the face of it, quite short, given the seriousness of what happened and the amount of ground to be covered.

S/Sgt. Hurley's first interview lasted 32 minutes, his second – a re-enactment – took 14 minutes and the third lasted 12 minutes, according to the CMC. Sgt Leafe's interview was 22 minutes long and Roy Bramwell's took ten minutes.

By comparison, an interview with an officer involved in a fatal police shooting in Canada took nearly four hours. The transcript of that interview was 18,000 words long.



8. THE USE OF VIDEO RECORDINGS AND NOTES DURING INTERVIEWS

Video is playing an increasingly important role in investigations, particularly investigations related to specific events. Many people have smartphones that can record video. CCTV is becoming more widespread. There is even “trophy video”, made by those responsible for an atrocity.

The question often arises as to whether a witness should be allowed to watch a video of an incident prior to being interviewed.

Generally, the answer is no. It is usually bad investigative practice. There is a danger – real or perceived – that a witness may consciously or subconsciously amend his or her evidence based on what is shown on the video and not what he or she actually recollects.

An investigator may wish to show the witness the video after an initial statement has been taken, particularly if there are discrepancies between what the witness has said and what is shown on the video. Give the witness an opportunity to explain any such discrepancy.

Similarly, there should usually be no problem with a witness referring to notes he or she made at the time of or immediately after an event, to refresh his or her memory, provided that the provenance of those notes is satisfactory.

THE MULRUNJI CASE

WATCHING THE VIDEO EVIDENCE

S/Sgt. Hurley was allowed to be present when the QPS investigators watched the video from the cell for the first time, at about 3.45pm on the day of Mulrunji's death.

There is some evidence that S/Sgt. Hurley may have watched it previously.



9. TIPS FOR BEGINNING THE INTERVIEW

Build on any rapport that has been developed

The investigator should try to build on any rapport that has been developed in any previous contact with the witness, or to develop it if there has not been any direct contact with the person previously. Make use of any information you have been able to gather, for example through an Internet search. If you know the person has an interest in football, casually bring football into the conversation.

Put yourself at ease

The investigator should do whatever he or she needs to do in order to feel at ease before the interview begins. A relaxed manner will usually be reflected in the quality of the interview.

Look for visual information

The investigator should look at the witness for visual information that may be relevant. Does he or she wear glasses, have a hearing aid or have any visible injury? Is he or she wearing anything that indicates an affiliation with an organization?

Explain the interview process

Reinforce what the interviewee has already been told during initial contact. Repeat the personal introduction and explain again the purpose of the investigation, the role of the NHRI and why it is important to get the interviewee's account of what happened.

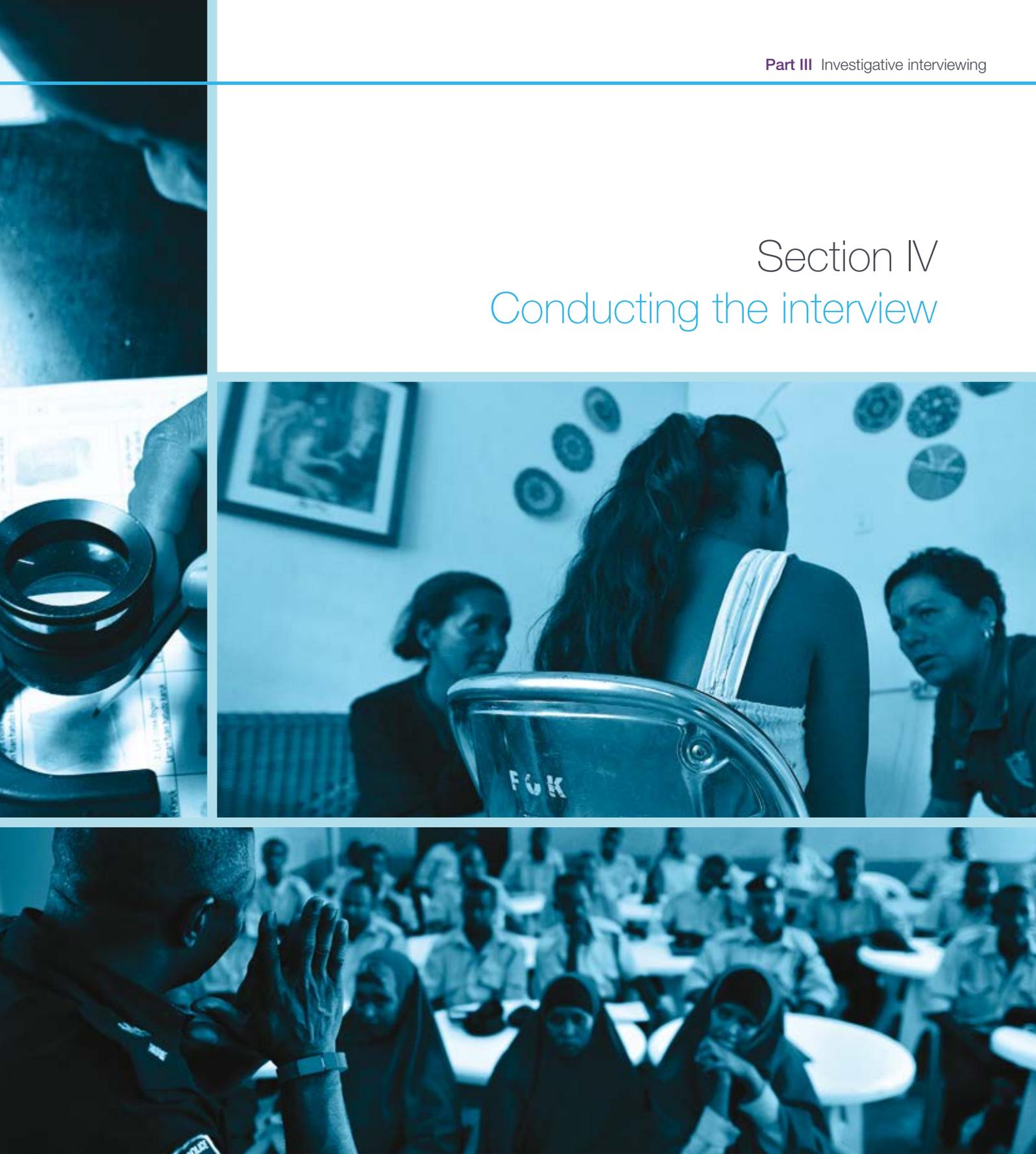
Tell the interviewee beforehand how the interview will be structured. Encourage him or her to be as detailed as possible – even if that detail may seem unimportant – and, if at all possible, ask the witness to go through what happened in chronological order. Finally, keep the tone relaxed and friendly.

KEY POINTS: CHAPTER 13

- **Ideally there should be two interviewers, one to lead the interview and one to support.**
- **The lead interviewer should have relevant knowledge, expertise and status.**
- **All documents should be organized before the interview starts, as well as any equipment, video recordings or notes that may be used during the interview.**
- **The interviewer should dress appropriately and consideration should be given to seating arrangements and the physical set-up of the interview room.**
- **Interviews should take no more than three hours or so. Include time for breaks if it is necessary for the interview to be longer.**



Section IV Conducting the interview



Chapter 14: The six principles of effective interviewing

Chapter 15: The 12 stages of an interview

Chapter 16: Improving interview skills

Chapter 17: Interviewing individuals who fall into a special category

Chapter 18: Recording interviews

Chapter 19: Assessing credibility

Chapter 14:

The six principles of effective interviewing

KEY QUESTIONS

- **What are the main principles that investigators can follow to ensure that their interviews achieve their objectives?**



1. INTRODUCTION

Investigators interview all sorts of people, in all sorts of different situations, including:

- victims, complainants or their family members
- independent witnesses
- community leaders
- government officials and other civil servants
- police, prison and military officials
- individuals suspected of breaching human rights, including those who create or implement policies or procedures that may violate human rights
- subject matter experts (SMEs)
- members of NGOs or other interest groups.

On the face of it, the approach used to interview someone who may have been involved in ordering extra-judicial killings will be far different from that used to interview the family members of those killed, witnesses to the event or staff at an NGO who may have background knowledge of what happened. Similarly, the approach used to interview a victim of sexual assault as a weapon of war is going to be far different from that used to interview a senior bureaucrat responsible for developing a policy to prevent cyber-bullying in high schools.

But there are far more similarities than differences in the overall approach to planning and conducting interviews. The underlying skills, processes and techniques involved in asking questions, whatever the circumstances, are universal. It doesn't matter what kind of interview you are conducting, how formal the process is or what the ultimate purpose is, the same six principles apply in every case.

THE SIX PRINCIPLES OF EFFECTIVE INTERVIEWING

1. **Prepare as much as it is possible to prepare**
2. **Establish a rapport with the interviewee**
3. **Be thorough**
4. **Be objective**
5. **Keep control of the process**
6. **Listen actively**



PRINCIPLE 1: PREPARE AS MUCH AS IT IS POSSIBLE TO PREPARE

The more preparation, the better the interview will be.

Good preparation will:

- help investigators focus in on the most important evidence
- make it more difficult for a witness to be misleading or evasive
- demonstrate that the investigator is competent and professional
- establish a rapport with the witness.

As discussed previously, the investigator should do as much research as time permits in order to learning as much as possible about:

- the issue(s) under investigation
- the person being interviewed.

PRINCIPLE 2: ESTABLISH A RAPPORT

The more that an interviewee feels that the investigator empathizes with him or her, the less defensive and more forthcoming he or she is likely to be.

Of course, not everyone you interview will automatically like you and vice versa. They may distrust you. They may be frightened. They may feel they have something to fear. They may not embrace accountability. They may think that you can do nothing for them. They may be offended or feel that they are losing face simply by being questioned. They may have no respect for you or the NHRI.

Regardless, every effort should be made to build a rapport. It is a process that often begins long before the interview takes place. It should start when contact is first made with the interviewee. Investigators should try to defuse any concerns and be empathetic, polite, respectful, appropriately inquisitive and interested, regardless of any personal feelings they may hold towards the individual.

PRINCIPLE 3: BE THOROUGH

Investigators need to cover all relevant areas of questioning during the interview. They can be rightly criticized if they shy away from difficult or sensitive issues. All relevant issues have to be canvassed, however intrusive, embarrassing, pointed or personal. That may include questions that go to the competence or integrity of the interviewee.

PRINCIPLE 4: BE OBJECTIVE

It should never be forgotten that investigative interviews are part of a process that is designed to search for the truth. Investigators must keep an open mind. If they have already decided what the person is going to say or have made some other judgment about the person, that attitude will inevitably be reflected in the interview. In such a case, the investigators will not be concentrating on the answers being given, they will hear what they want to hear.

The interviewee will quickly realize that the investigators have made up their minds, which is great if the investigators are on his or her side. It is also great for the interviewee if the investigators are too deferential and avoid tough questions. Equally, the interviewee will become defensive if it is clear that the investigators have already decided that he or she is at fault for something.

Leading questions and unnecessarily aggressive cross-examination often indicate a lack of objectivity. Questions that suggest the answers or otherwise guide a witness should normally be avoided, as should being overly sceptical or disrespectful. However, you should always ask for an explanation or clarification when the answers given are ambiguous or simply don't seem to add up.

PRINCIPLE 5: CONTROL THE PROCESS

It is the investigators' interview so, to the extent that is possible, it is for them decide:

- when and where the interviews takes place
- who should be present
- how long it will last
- the issues that are relevant and those that are not
- the focus of the interview
- what questions must be asked
- how the interview will be recorded
- the pace and tone of the interview.

This will be a huge challenge in many situations and impossible in some others, for example, in an active conflict zone. In these situations, the investigator doesn't normally have a lot of choice regarding the interview location and will be fortunate to determine many, if any, of the other factors. But in less volatile circumstances, investigators should try to control the interview process as much as they can. In all cases, any reasons why they are prevented from doing so must be documented.

PRINCIPLE 6: LISTEN ACTIVELY

It is shocking how often investigators do not actually listen to what the interviewee is telling them. That could be for many reasons: laziness, lack of training, lack of competence, a failure to prepare adequately, having already made up their mind as to what the interviewee will say or, in some cases, because they do not want to hear what is being said.

The best interviewers use active listening techniques, which is discussed in Chapter 16.

THE MULRUNJI CASE**QUESTIONS S/SGT. HURLEY WAS NOT ASKED**

The CMC found that the initial QPS investigators never asked S/Sgt. Hurley:

- whether or not he had hit Mulrunji
- whether he had watched the video prior to the arrival of the QPS investigators
- why Roy Bramwell had been released before he could be interviewed
- why he had changed his story after his first interview.

**KEY POINTS: CHAPTER 14**

In the course of an investigation, the six principles of effective interviewing should be considered every time an interview is prepared. If this is ignored, investigators may:

- fail to gather important information
- not understand what is happening
- overlook relevant issues
- fail to identify avenues of resolution
- miss important facts
- undermine their own credibility and that of the NHRI
- allow an injustice to continue.



Chapter 15:

The 12 stages of an interview

KEY QUESTIONS

- **What are the 12 stages of an interview?**
- **How important is what happens after an interview has been completed and how should that be handled?**



1. INTRODUCTION

Investigative interviews generally have 12 separate stages.

Not all of them may be equally applicable in every single interview. In some rare circumstances, one or two stages may not be relevant at all. However, investigators should consider them all as they plan and conduct an interview.

The 12 stages are designed to:

- obtain the maximum amount of relevant information from the interviewee
- protect the investigator from accusations of incompetence or bias
- minimize subsequent allegations that the witness was tricked, not offered an opportunity to offer relevant information or not give his or her side of the story.

As discussed in Chapter 13, the lead interviewer is the only investigator who speaks during stages 1–4.

THE 12 STAGES OF AN INTERVIEW

1. **Introduction by the lead interviewer**
2. **Establishing the background**
3. **The opening question**
4. **Asking specific questions**
5. **Clear-up questions by second interviewer**
6. **Brief summary**
7. **Is there anyone else who should be interviewed?**
8. **Is there any other relevant evidence that should be gathered?**
9. **Is there anything that has been missed or anything the interviewee would like to add?**
10. **Thank you and what happens next**
11. **Do not discuss with anyone else**
12. **Contact us if anything else comes up**



2. THE INTERVIEW

The interview begins

First, make sure the digital voice recorder is on and working.

Stage 1: Introduction by the lead interviewer

This part of the process sets the stage for the interview to follow. The lead interviewer describes who is present and their position and role; when, where and why the interview is taking place; that it is being digitally voice recorded; and what is – and, if appropriate, what is not – being investigated. The investigator should also explain the role and mandate of the NHRI. It is important that the interviewee knows that the NHRI investigator is not a police interrogator.

That is a lot of detail to cover and it may be that everyone present at the interview already understands this information. However, it is crucial to get it down on tape, in case the interviewee subsequently alleges that he or she was never told about the purpose of the investigation, who the investigator was or worked for, or that they did not know the interview was being recorded.

Stage 2: Establishing the background

The main purpose of this stage is to establish why the person is being interviewed. This will give context to anyone who subsequently reads a transcript or summary of the interview and who may not be familiar with the case or those being interviewed.

The interviewee should be asked about himself or herself insofar as it relates to the issue(s) under investigation. Depending on the circumstances, that may involve occupation, career history, role in a chain of command, family relationships or education – anything that gives context to the issue or event being investigated.

Basic information should also be recorded in this stage, including full name, age, date of birth, address and so on. Contact information should be sought, such as mobile phone number, e-mail addresses (there may be more than one), and preferred way of being contacted (in case there is any subsequent dispute). There will then be a permanent record of that information, in case the interviewee needs to be contacted in the future.

Stage 3: The opening question

The interview should start with a very broad, open-ended question that gives the interviewee ample opportunity to share information. A typical question would be: *“Tell us in as much detail as you can about (the issue being investigated)”*.

Hopefully the interviewee will talk. And talk. And talk. As he or she does so, the second interviewer should cross off prepared question areas as they are covered and write any new ones that arise. The lead interviewer should actively listen to what the person is saying. He or she should focus exclusively on the interviewee. Eye contact should be maintained (if it is culturally appropriate) and the interviewer should nod, smile and, above all, look and be interested.

Eventually, the interviewee will stop speaking. At this point the lead interviewer should say nothing. He or she should look expectantly at the interviewee, nod, smile and offer non-verbal encouragement. In the vast majority of cases, the interviewee will start talking again. As long as what is being said is not repetitive or irrelevant, let the interviewee talk.

Stage 4: Asking specific questions

At some point, the interviewee will come to a stop. At that point the next stage – specific questions – can begin.

Thank the interviewee for the information he or she has provided and advise him or her that you have some follow-up questions. Hopefully many of the questions that have been prepared will have been answered during the opening narrative. Questions that have already been answered should not be repeated, unless there are ambiguities or insufficient detail.

At this point, any new avenues that have come to light during the response to the opening question should be followed up

Questions at the beginning of the specific questions stage should be:

- broad and open-ended; they may become more targeted (or closed) as the interview progresses, particularly where clarification is necessary or if the interviewee is being evasive
- short; one sign of a good interview is when the questions are far shorter than the answers
- clear and simple; plain language should be used at all times.

GENERALLY GOOD QUESTIONS

In some cultures, people enjoy showing others how knowledgeable they are. A good interviewer will take advantage of that by giving the interviewee, particularly one in a position of power, the opportunity to show how much they know. The following openings to questions work quite well:

- **Tell me more ...**
- **Can you expand on that?**
- **I don't quite understand ...**
- **Help me understand why⁴⁰ ...**
- **So, can you explain that to me in layman's terms?**
- **I am not sure I understand so could explain that again, in as much detail as you can...**

On the other hand, in some cultures it is considered rude to talk excessively about oneself. Good investigators will take advantage of that too.

GENERALLY BAD QUESTIONS

Generally bad questions include questions that are:

- **too long**
- **contain multiple questions**
- **include an opinion**
- **a statement, not a question.**



Stage 5: Clear-up questions by second interviewer

In this stage, the roles of the interviewers are reversed. The second interviewer now focuses on any areas that have not been covered by the lead interviewer. Often these questions are designed to clarify and expand on answers given during stages 3 and 4. The lead interviewer takes notes and watches body language and so on. This stage continues until the second interviewer has run out of questions. In major interviews, this role reversal may happen more than once, as further answers raise additional questions.

40 "Why" questions are usually very good in this context, as long as they are not accusatory.

Stage 6: Brief summary

Eventually, both interviewers will have exhausted all their questions. An important part of active listening is repeating back what has been heard. At this point, the interviewer should give a summary of the main points made by the interviewee and an acknowledgement that what has been said has been understood.

Stage 7: Anyone else who should be interviewed?

Always ask the interviewee if he or she thinks there is anyone else who should be interviewed who might have relevant information.

Stage 8: Is there any other relevant evidence that should be gathered?

The interviewee should be asked if he or she is aware of any other relevant evidence that should be obtained. That may include documents, e-mails, voicemail recordings, video and the like.

Stage 9: Is there anything that has been missed or anything the interviewee would like to add?

The interviewee should be asked if there is anything that he or she thinks is relevant to the investigation that was not covered during the interview.

There are two primary reasons to ask the questions at stages 7, 8 and 9.

Firstly, because there might be evidence that the interviewee has of which the interviewer is not aware and which did not emerge during the interview.

It should be remembered that interviewee may not have much experience of investigations or investigators. They will presume that the interviewer is an expert and therefore knows know what he or she is doing. If questions are not being asked about something or someone then the person may quite naturally assume that it must not be important.

Secondly, and crucially, the interviewee will find it more difficult to subsequently claim that he or she would have happily volunteered the information but was never asked.

This was a defence put forward by a former Prime Minister of Canada in a public inquiry when asked why he did not tell investigators in a previous investigation about a significant sum of money he had been given by a lobbyist and kept in a bank in New York. He stated that the investigator in the previous investigation had not asked him the right question.

Stage 10: Thank you

It is polite to say thank you at the end of an interview, even if the level of cooperation has not been high. The interviewee should also be given some idea of what will happen next, at least in relation to the investigative process and when it is anticipated that the investigation will conclude.

If the level of cooperation has not been high, this is the point to reiterate why and give the interviewee an opportunity to respond.

Stage 11: Do not tell

Interviewees should always be asked to undertake not to talk about what was discussed during the interview with any other party, until the conclusion of the investigation. It should be explained that this is to protect the integrity of the investigation and that is also in the interviewee's best interests (though he or she may not necessarily agree). There is generally little that can be done to enforce this request but, if it comes to light that an interviewee has breached such an undertaking, then it may impact on any assessment of that person's credibility.

Stage 12: Call us if anything else comes up

Provide the interviewee with your contact details and those for a substitute person, should you be away. Request that they contact you immediately should they recall anything else about the issue being investigated, if anyone involved in the case asks them about the interview or if anything else emerges that might be relevant.

3. AFTER THE INTERVIEW

Just because the interviewer has turned off the DVR or stopped writing out the statement or closed the notebook does not mean that the interview is over. An interviewee may well let down his or her guard or just simply relax, and then say something new and important.

Let the interviewee talk. Wait until he or she has finished talking before asking any questions. Say thank you and state that it is important to record what has just been said. The interview can then be restarted but it should only cover this new information.

Information provided “off the record”

Sometimes an interviewee will offer information prior to, during or, more often, at the end of an interview, provided it is “off the record”. In general, nothing is “off the record” in investigations, though it may be agreed that it will not be recorded there and then.

Usually the interview does not want the information to be traced back to him or her. An investigator knows the limits of what can be promised in relation to confidentiality and should share that information with the interviewee. Nothing should be promised that cannot be guaranteed. This issue, particularly as it relates to “whistleblowers” is discussed in Chapter 17.

Assessment of the value of the evidence given

Once the interview is over – and while it is still fresh in his or her memory – the investigator should assess the information gathered, preferably with the colleague who conducted the interview with him or her, as well as any others involved in the investigation.

Some questions to consider include:

- How does what the witness say impact the overall investigative strategy?
- Did the interview open new investigative avenues?
- Were other potential witnesses or other evidence identified?
- What follow-up is needed?
- What impact may that have on the timelines set out in the investigation plan?
- How will other colleagues involved in the investigation be briefed?
- Should the interview be transcribed (if digitally voice recorded) or will a summary suffice?

Conducting further interviews

There is nothing wrong with conducting a second or, if necessary, a third or fourth interview with a witness should new information arise or clarification be required.

However, care should be taken about taking so many statements that the credibility of the witness becomes undermined. Going over issues that have already been fully addressed should be avoided. There is usually no need to cover the entire event again at a subsequent interview. It should instead look at those specific areas that may not have been fully explored in the initial interview or any further information that has come to light since the previous interview.

Back to back interviews

If back-to-back interviews have been arranged, take a break between interviews to regroup. Reflect on what information has been raised and discuss whether this should be incorporated into upcoming interviews.

Interviewee welfare

It is critical that the NHRI take practical steps to support the welfare of interviewees. It can be very traumatic for some people to tell their story. As discussed in Chapter 10 on interviewing vulnerable witnesses, investigators should anticipate the needs of different witnesses and make appropriate arrangements to support them before, during and after the interview, to the greatest extent possible.

Investigator welfare

In addition to their physical safety, it is important that investigators also look after their emotional well-being. Interviewing can and will take its toll on investigators, especially interviewing vulnerable people. They will listen to emotionally harrowing stories from people who likely need help, and often need it immediately. However hard they try, however committed they are, however much they care, it may be simply impossible for investigators to make much of an immediate difference. That reality can take a huge emotional toll on the investigator.

Investigative supervisors have an important role to play in monitoring the well-being of their investigators and offering practical support and guidance, where appropriate.



UN Photo by Martine Perret.

KEY POINTS: CHAPTER 15

- **As a general rule, every interview has 12 separate stages:**
 1. **Introduction by the lead interviewer**
 2. **Establishing the background**
 3. **The opening question**
 4. **Asking specific questions**
 5. **Clear-up questions by second interviewer**
 6. **Brief summary**
 7. **Is there anyone else who should be interviewed?**
 8. **Is there any other relevant evidence that should be gathered?**
 9. **Is there anything that has been missed or anything the interviewee would like to add?**
 10. **Thank you and what happens next**
 11. **Do not discuss with anyone else**
 12. **Contact us if anything else comes up**
- **The interview does not always end when it has formally been closed. Further evidence may be offered “off the record”. There may also be the need for a follow-up interview.**
- **Consideration needs to be given to supporting the emotional well-being of those who are interviewed and the investigators who interview them.**



Chapter 16: Improving interview skills

KEY QUESTIONS

- **What skills does an interviewer need in order to improve his or her interviewing technique and achieve better outcomes?**



The suggestions set out in this chapter aim to assist investigators to improve their interview skills and enable them to ask specific questions at stages 4 and 5 of the interview process.

1. DO NOT INTERRUPT

Interruptions often destroy the flow of an interview. As the interview proceeds, an investigator may think of an important question to ask. However, he or she should wait until the person stops talking before asking it.

Never interrupt, unless the interviewee is clearly:

- repeating himself or herself
- veering off on irrelevant tangents
- is being deliberately evasive or abusive.

2. DO NOT ASSUME

Investigators should never assume that they know what someone will say. If they do assume that, they will probably not listen well to what the interviewee is telling them. They should be prepared for anything.

3. ASK FOR CLARIFICATION

The purpose of an interview is to get information and to understand it.

If the interviewee says something that is not perfectly clear, the investigator should say so. He or she should not be afraid to say “I’m sorry, I don’t understand”.

Some investigators like to give the appearance that they are aware of all of the issues under investigation. They believe they will lose face if the witness thinks that they don’t know something or be perceived as incompetent or having not done enough research.

Investigators must not pretend that they understand something they do not. They should also not be afraid to acknowledge when they don’t understand something. For example, it may be a technical term or how a particular chain of command works. In many cases, the interviewee will be glad to explain if asked.

If an investigator does pretend to understand, the interviewee may realize that they actually do not and the investigator will lose his or her credibility. It can also seriously jeopardize the interview. For example, the investigator could be easily misled by the interviewee, should he or she choose to do so.

Asking for clarification is not a sign of weakness or an admission of failure. It is good interviewing technique.

4. USE DIAGRAMS, PHOTOGRAPHS, VIDEO AND OTHER AIDS

Asking an interviewee to create a diagram that illustrates key aspects of the issue being discussed can be very helpful, particularly when a specific event is being investigated at a specific scene. In some cases, there may already be a scene diagram or sketch prepared that the interviewee can mark up. In other cases, he or she may need to create one from scratch. Scene photographs can be used in the same way. Video can also be viewed, if appropriate – for example, from a scene or from the media – which the interviewee may be able to use as a reference. Be careful about re-traumatizing a witness, if circumstances make that a possibility.

5. ENCOURAGE THE INTERVIEWEE TO DESCRIBE EVENTS CHRONOLOGICALLY

Recounting events in the sequence in which they occurred can be a great help in understanding what happened. However, it is important to be aware that not all cultures are accustomed to describing events chronologically.

6. REVEALING INFORMATION

Investigators must be very careful about unintentionally giving away too much information in their questions, including information that the interviewee may not have known. The interviewee may be able to modify his or her response. Far worse, sources may be revealed.

What is revealed during an interview often comes down to the professional judgment of the investigator, if it is part of the overall interviewing strategy. Sometimes an investigator will give away facts deliberately, in order to encourage or prompt a truthful answer or to see how the interviewee reacts.

7. PURSUE A QUESTION THAT IS NOT BEING ANSWERED

Sometimes interviewees will do everything they can to avoid answering a question. They may pretend not to understand or they may attempt to deflect a question, often by responding with a question of their own. They may claim that they “can’t recall” something, when it is objectively clear that they should be able to. They might also attempt to avoid the question altogether: “How dare you ask me that. I will not dignify that question with a response.”

If it is clear that an interviewee will not answer a straightforward question, don’t give up. Repeat the question. Ask if he or she understands the question. Reframe the question, if necessary. Break the question down into its component parts. As the United Kingdom’s National Police Improvement Agency says in its guide to investigative interviewing: “Investigators are not bound to accept the first answer given. Questioning is not unfair merely because it is persistent.”⁴¹

If an interviewee insists that he or she “can’t remember”, and it is clearly obvious that they should be able to remember, set out the facts for them, as in this example:

You state that you can’t remember if you were in the vicinity when the prisoner was injured. You say you have no recollection of any assault. We have sworn testimony from six independent witnesses who say that you were looking straight at him when he was hit, along with CCTV footage that shows clearly that you were present when it happened, along with you telling the family of the prisoner on a voicemail that you had been there. Can you please explain that to me?

41 National Investigative Interviewing Strategy: Briefing Paper; 2009; p. 8; available at www.acpo.police.uk/documents/crime/2009/200901CRINSI01.pdf.

If the evasion continues, the interviewee should be asked to explain why he or she is refusing to answer the question. It may be necessary to inform the interviewee that his or her credibility may be one of the things that will be factored in to the assessment of all the evidence at the conclusion of the investigation. If that approach does not succeed, it should be made very clear – on the record – that the interviewee has refused to answer the question.

8. NOTE GENERALIZATIONS AND HEARSAY

Interviewees may provide hearsay evidence.⁴² It should not be discounted automatically or ignored. It may reveal a worthwhile new area of investigation.

Using generalizations is standard practice for many organizations. For example, “we never discriminate”, “we respect human rights” or “we would never do anything like that”. It is important to ask for any actual evidence to support such statements.

9. INTRODUCE MATERIALS AND EXHIBITS AS THE INTERVIEW PROGRESSES

As noted previously, it can be useful during the course of an interview to show the interviewee something, such as a photograph or a document, or to play a video. In such cases, it is important to make sure that a record is made of what is being produced and that it is identified as precisely as possible in the body of the written statement (or described on tape, if the interview is being digitally recorded).

10. USE COMMON LANGUAGE

As the questions are asked, the interviewer should try to mirror the type of language and phrasing used by the interviewee. For example, when interviewing someone who has had limited education, the investigator should use simple, clear language. People should be spoken to in a way that is respectful and in words that they understand.

11. IDENTIFY INPUT FROM OTHERS

A fairly standard area of questioning is to explore whether the witness has received information about what is being investigated from any other source, particularly if there is reason to suspect that collusion may be an issue. It may also be useful to identify whether anyone has put any pressure on the witness about the interview, including areas to cover and areas to avoid.

12. ASK DIFFICULT QUESTIONS

It can be very difficult – heartbreaking, even – to ask questions about very sensitive and personal topics but an investigator is not doing his or her job if such areas are avoided. It is, of course, good practice to be sensitive and to ease the process as far as possible. However, all relevant evidence is needed in order to make an informed decision about what to do next, including bringing those responsible to justice or remedying a systemic wrong.

Ask the interviewee about his or her prior history where it is relevant, including criminal records or previous similar incidents or allegations. Sometimes hard questions simply have to be asked.

The opportunity must be given to the interviewee to rebut any allegation. It may not be comfortable for the investigator, especially where he or she has been successful in establishing a rapport with the interviewee, but the job is not being done if difficult questions are not asked.

⁴² Hearsay is something that a person has heard from another party but do not know for themselves to be true.

13. AVOID LEADING QUESTIONS

Leading questions are ones that suggest the answer. An example of a leading question is:

Officer, I should imagine you shot the suspect because it was a dark alley and you probably couldn't see that the balloon in the man's hand was not a firearm and you must have felt your life was in danger, as would anybody in those circumstances, and so you shot him, which is just what you had been trained to do, isn't that right?

Investigators should avoid using leading questions. However, they might be useful when someone who is being evasive needs to be pinned down on a specific fact. If so, be sure to include only one fact in each question. Seek a response to that question before moving on.

There may also be circumstances where a leading question may encourage an interviewee to be more forthcoming, particularly if he or she is likely to remain silent or uncooperative unless some kind of rapport can be established. Framing questions to give the interviewee an impression of empathy may produce results. It is an approach used regularly and effectively by skilled investigators.

14. CROSS-EXAMINE THE INTERVIEWEE

Cross-examination is where an investigator tests the accuracy of an interviewee's statement. It may involve putting conflicting information to the interviewee and asking for an explanation or inquiring further on topics where there is reason to suspect the interviewee is being deceptive.

It is the duty of an investigator to explore any inconsistencies. However, do not use an overly aggressive or accusatory approach. That may make the investigator look biased or hostile.

It is important to note that even if a new statement is inconsistent with an older one, it does not necessarily mean that the interviewee is lying. On some occasions there will be a reasonable explanation. As such, it is good practice to put any contradictory evidence to the interviewee in a measured and reasonable way.

15. RECORD A DESCRIPTION OF INJURIES

Ask the interviewee to describe any physical injuries he or she has sustained in connection with the issue or event under investigation, in as much detail as possible. Take photographs or record video of those injuries.

16. RECORD A DESCRIPTION OF IMPACT

Depending on the issue under investigation and the role of the interviewee in it, it is often useful to ask the person to describe the impact of what has happened on his or her life and, possibly, the impact that it has had on others. Invite the interviewee to tell their story. It can be very compelling evidence, particularly in human rights investigations.

17. ASK FOR OPINIONS

An opinion isn't always evidence – unless it comes from a genuine expert – but in many cases it can be useful in formulating findings and recommendations. For example, ask interviewees for their suggestions and recommendations about how to resolve or respond to the systemic issue under investigation, should they agree that an issue exists.

18. TREAT EVERYONE WITH RESPECT

Every interviewee should be treated with respect. While some may be abusive, contemptuous or aggressive, responding in a similar fashion is unprofessional and rarely productive. It is also inappropriate within a human rights context.

KEY POINTS: CHAPTER 16

- **Interviewing is an important skill that must be developed if all relevant evidence is to be collected in a credible form and used to produce an effective result. The key is to establish rapport with the interviewee so that he or she is encouraged to provide relevant and truthful information.**
- **To achieve that requires a good understanding of interpersonal relations, including:**
 - behaviour
 - being prepared to admit when the evidence is not clear
 - recognizing when questions are not being answered or being answered as opinion, rather than fact
 - framing questions appropriately to exclude bias or suggested answers
 - being prepared to ask difficult questions
 - treating the interviewee with respect, regardless of the circumstances.



Chapter 17:

Interviewing individuals who fall into a special category

KEY QUESTIONS

How should an interviewer deal with:

- eyewitnesses?
- hostile witnesses?
- persons in power?
- whistleblowers and confidential informants?
- expert witnesses?



1. EYEWITNESS EVIDENCE

In many investigations, eyewitness evidence is crucial. However, it is also notoriously unreliable due to a number of factors, including how the brain processes and stores information and how that information is recalled.

Recalling traumatic events, which many investigations conducted by NHRIs require of interviewees, can be challenging, particularly when time has passed between the event and the interview.

A court in the United Kingdom has developed a set of guidelines – “ADVOKATE” – to help assess the value of eyewitness evidence to a specific event.⁴³ These criteria are worth considering as the interview progresses.

- A** *Amount of time under observation.* How long did the witness have the person/incident under observation?
- D** *Distance.* What was the distance between the witness and the person/incident?
- V** *Visibility.* What was the visibility at the time?
- O** *Obstructions.* Were there any obstructions to the view of the witness?
- K** *Known or seen before.* Did the witness know, or had the witness ever seen, the person before? If so, where and when?
- A** *Any reason to remember.* Did the witness have any special reason for remembering the person/incident? Was there something specific that made the person/incident memorable?
- T** *Time lapse.* How long has elapsed since the witness saw the person/incident?
- E** *Error or material discrepancy.* Are there any errors or material discrepancies in the first and subsequent accounts of the witness?



43 *R v Turnbull* (1976), 63 cr app R132; (1977) QB 224 (CA); WLR (1976) 3 WLR 445.

2. HOSTILE WITNESSES

In general, hostile witnesses are those who may be negatively impacted by the investigative findings or who have friends or colleagues who may be negatively impacted. They may also be people who simply do not want to be involved in an investigation, even though they have no direct interest in the outcome. No one usually enjoys being part of an investigation. Those who are the subjects of an investigation like it even less. They may not want to be interviewed. They may do what they can to avoid being interviewed. If they are left with no choice but to be interviewed, they may choose to do what they can to confuse, mislead, distract, intimidate or bully the investigators during the course of the interview.

There are things that can be done in these situations.

Firstly, if all the necessary research has been done, the investigator will be prepared, knowledgeable and professional. He or she should keep to the identified question areas, be persistent and focus on the key issues. He or she should fight all attempts by the witness to mislead, distract or evade.

Secondly, the investigator must not react to provocation by arguing or debating with the witness, particularly about why the investigation is being conducted or why the witness is being interviewed.

If a witness becomes loud or indignant, or questions the investigator's competence or integrity, then the investigator is probably on the right track. The witness may likely to try to distract the investigator with statements such as "How dare you question my integrity" or "I will not dignify that question with an answer". Again, this often indicates that the investigator is raising issues that the interviewee would prefer to avoid.

3. INTERVIEWING PEOPLE IN POSITIONS OF POWER

Interviewing people in positions of power raises a number of particular challenges. The first is that such individuals may refuse to be interviewed in the first place. However, that should not stop them being asked, or compelled to attend, if the NHRI chooses to exercise its legal powers. The onus is then on the person to explain why he or she chose to decline.

It can be a delicate process to manage if the interview does take place, particularly if the person being interviewed has some real or perceived influence that could impact on the investigator or the NHRI. The goal is to be respectful but not deferential. It is a fine balance. The investigator should prepare well and not avoid the key issues. It should be expected that the person being interviewed will respect the process. His or her level of openness and cooperation should be incorporated into the assessment of the evidence and weight that is attached to it.

4. WHISTLEBLOWERS AND WITNESS PROTECTION

4.1. Who are whistleblowers?

A "whistleblower" is commonly defined as someone who raises a concern about wrongdoing occurring in an organization or body. Usually the person is a member of, or works for, that organization.

The alleged wrongdoing often includes corruption, misuse of funds, health and safety issues or abuses of human rights. Whistleblowers may make a complaint about the conduct of specific individuals in the organization or about policies and procedures of the organization.

They may, or may not, have used a complaint or review mechanism within the organization to address their concerns.

4.2. Why are they useful?

People with “inside” knowledge can be a very valuable source of information to human rights investigators. They know the organization, how it works, the key decision makers and what its failures may be. They can assist investigators uncover evidence of which they were not aware or open up new avenues of investigation that had not previously been considered.

4.3. Handling whistleblowers

How the NHRI treats whistleblowers will reflect on its credibility. If the NHRI develops a reputation for not dealing with them fairly, or not doing what it can to protect them, then the inevitable consequence will be that other whistleblowers will be less likely to come forward.

Consider things from the whistleblowers perspective

Investigators should try and see the situation from the perspective of the whistleblower, just as they would with any other witness. What is at stake for them? Why are they doing this? Do they have an agenda? What are or might they be frightened of? How can that be managed? How can the investigator balance the need to gain the confidence of the whistleblower and also manage his or her expectations?

Confidentiality

Whistleblowers want their identities to be kept private. They want protection. They want confidentiality. Investigators have a duty to let them know that there is no such thing as complete confidentiality.

These limitations are should be explained. For example, if the information provided by the whistleblower leads to some form of proceedings against someone, then that person is entitled to procedural fairness and the right to full answers as part of his or her defence. He or she has the right to know the case to be answered, including the evidence the whistleblower has provided.

It can also be easy for others to identify the source of the information from the questions that the investigators ask. As discussed previously, investigators should not give away information through their questions to other witnesses.⁴⁴

Educate

The NHRI should work with whistleblowers to identify how best to communicate safely and privately. The investigator should also inform the whistleblower about the dangers of communicating with the NHRI using their office-issued mobile phone or e mail account, using call display and call retrieval on phones and so on.

Compartmentalize

Anyone in the NHRI who does not need to know the identity of the whistleblower should not know that person's identity. That includes fellow investigators. The more people who know the whistleblower's identity, the greater the chance there is that his or her identity could be revealed, inadvertently or otherwise.

Don't interfere with another investigation

Investigators should do no harm. They should not, without good reason, become involved in an investigation for which some other agency is responsible. Other agencies, such as the police, may have priority. If they do, the investigator should, while monitoring what is happening, not directly interfere in that investigation unless there is good reason to do so.

44 Unless it is being done deliberately, as an interviewing tactic.

In certain instances, however, it may be important for the NHRI to undertake or continue an investigation; for example, if the allegation of human rights violation involves the investigating agency.

Parallel investigations can be challenging, with possible problems that include which agency has priority to which piece of evidence, including access to witnesses, documentary, physical and digital evidence.

Retaliation and reprisal

Many whistleblowers who have had the courage to come forward have ultimately regretted their decision. In many cases, they have experienced retaliation or reprisals for their actions.

Retaliation against people who come forward can be obvious and brutal, including instances of physical violence. It can also be subtle, such as receiving poor workplace performance reviews; being re-assigned to another role or office; having security clearances removed; being sidelined or ostracized by colleagues; being harassed or discriminated against; or any combination of the above.

The NHRI cannot protect a whistleblower from every different type of retaliation. However, they should investigate instances of retaliation against a whistleblower as a top priority. Most NHRIs have legislation that includes sanctions for interfering with an investigation or victimizing someone who has been involved in or contributed to an investigation. That should be made well known to all relevant parties and the NHRI should not hesitate to use those sanctions where it is required. This also helps build confidence in the NHRI among others who may come forward as whistleblowers.

4.4. Whistleblower protection legislation

Many jurisdictions around the world, including several in the Asia Pacific, have introduced legislation designed to protect whistleblowers from retaliation. In other jurisdictions, whistleblower protection laws are in development.

For example, the Republic of Korea has strongly-worded legislation where a whistleblower may request remedies for any retaliation. It includes compensation for economic loss, including legal fees and loss of wages. Japan has broadly similar legislation.

Whistleblower protection laws can look impressive on paper. They generally contain prohibitions against retaliation and significant punishments for those found to have retaliated, including remedies and restitution. They promote zero tolerance and, in some cases, include inducements for whistleblowers to come forward. Some legislation also provides sanctions for not coming forward.

In the real world, however, such legislation may not be as effective as intended. For example, in Canada, the agency established to deal with complaints of wrongdoing in the federal Government received 228 complaints between 2007, when it came into existence, and 2010. It investigated just five of them and none resulted in a finding of wrongdoing.

One approach that seems to have worked reasonably well is providing a financial incentive for whistleblowers. The Republic of Korea has a system where the Anti Corruption and Civil Rights Commission can award whistleblowers up to \$2 million (United States). Indonesian law includes a provision to grant “tokens of appreciation” to whistleblowers who have provided information to combat corruption. In the United States, millions of dollars have been paid to individuals who have provided information about corruption, waste and mismanagement, particularly in relation to government procurement. The legislation provides that the person is awarded a percentage of the money saved or recovered.

4.5. Assessing whistleblower evidence

As with any other evidence, good investigators do not immediately accept everything that whistleblowers tell them. They look for facts that support or contradict that evidence.

Investigators should assess how credible the whistleblower is, just as they would any other witness. They should ask themselves if the whistleblower:

- has an agenda
- is wrong
- is malicious
- is false.

Establishing any of these points can require a significant amount of investigation.

While the NHRI must do reasonable due diligence, it should not spend an excessive amount of time investigating the complainant. It should spend the necessary amount of time investigating the complaint. Assessing why the complainant has come forward, and the quality of the evidence that he or she provides, is part of that process but should not be the focus of it.

Often the true value of whistleblowers is not what they know but the documentation or other material that they bring with them.

4.6. Witness protection

Witness protection is an issue that NHRIs may need to consider. Some may have to deal with individuals who come forward with vital information about a very serious violation of human rights. Those people are vulnerable to retaliation, as noted in a submission by the Asian Legal Resource Centre to the United Nations Human Rights Council in 2010. It argued that:

... one of the major obstacles that prevents cases of human rights violations from being prosecuted in courts in most countries in Asia is the absence of effective witness protection mechanisms.

The paper provided examples from Nepal and Indonesia.⁴⁵

Some Asia Pacific nations have dedicated witness protection programs, including Thailand, Australia and New Zealand. Most of them are run by police or anti-corruption agencies. While the focus is generally on crime and corruption some, such as Thailand, mention human rights violations in their mandate.

The United Nations Office on Drugs and Crime has produced an excellent guide on witness protection.⁴⁶ While focused on the investigation of organized crime, it alludes to witness protection and human rights issues. For example, it covers witness protection in relation to human trafficking cases in some detail. Many of the principles set out in the guide, outlined below, are applicable to the protection of witnesses in human rights investigations.

45 Available at www.alrc.net/doc/mainfile.php/hrc15/627/?print=yes.

46 *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*; 2008; available at www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

GUIDE ON WITNESS PROTECTION

The purpose of the programme is to protect witnesses who have valuable evidence

The evidence the witness can offer must be significantly important to what is being investigated.

There must be a real threat to the witness or family

There has to be a genuine threat to the well-being of a witness. There has to be a real danger that, should protection not be provided, that evidence will not be available. In other words, it is very likely that the witness may be threatened, intimidated or otherwise coerced, with the prospect of very serious consequences, such as being killed.

Witness protection programmes must be sufficiently resourced

Witness protection is not cheap. It costs money. The machinery has to be in place to meet the goals of the programme. That means having enough people with the appropriate skills and experience to coordinate the programme and enough funding to make it credible.

There are different levels of protection

Different levels of threat require different levels of protection.

Not everyone in a witness protection programme has to be given a new identity and relocated to another country. Protecting a witness may be achieved by changing his or her address or telephone number; allowing him or her to give evidence via video link, from behind a screen or using voice or face distortion; or not disclosing the identity of the witness in documents given to other parties.

There are different kinds of witnesses wanting or needing protection

The witness who wants or needs protection may be a victim, a collaborator, a suspect or an admitted criminal. The approach will be different for each.

Witness protection should be entrenched in law, policy or the constitution

Many nations have witness protection laws or policies, including South Africa, Australia and Hong Kong SAR. Columbia has witness protection written into its 1991 Constitution.

Everyone involved has obligations

A witness has to make the effort to work with those who coordinate the witness protection programme. They must do nothing to jeopardize that.



5. EXPERT WITNESSES

Expert witnesses are individuals who have a scientific, technical, academic or other specialized expertise in a given field, such as forensic pathology, blood spatter analysis, migrant workers, hate crimes, war crimes and so on. They can provide NHRIs with very valuable insight into the history and culture of various groups, as well as national or international best practice.

Experts can also assist investigators to prepare for interviews with vulnerable persons, such as child witnesses, by educating them, formulating questions or giving strategic advice. The expert may also attend the interview, as an active participant or an advisor.

Take great care when selecting experts. They have to be genuinely neutral. Scrutinize their credentials before hiring them and conduct a thorough background check. Assess their credibility and integrity. Interview them carefully to make sure that what they are going to say on a given topic or issue is known and understood.

KEY POINTS: CHAPTER 17

- **No two witnesses are the same. Some witnesses need special treatment.**
- **Some witnesses have been through traumatic situations. Care should be taken to not re-traumatize them.**
- **Whistleblowers can be a valuable resource. Investigators need to plan how best to support people who ask for protection and the extent to which their evidence can be kept confidential.**
- **Do not believe everything that an expert witness says. Test, question and evaluate how objective and knowledgeable they actually are.**



Chapter 18:

Recording interviews

KEY QUESTIONS

- What are the different techniques available for recording interviews?
- What are the advantages and disadvantages of each?



1. INTRODUCTION

Interviews can be recorded digitally, using video or audio recorders. It is reasonably easy to do both in many environments, particularly with the technology available today. A digital voice recorder (DVR) is relatively cheap and most smartphones are able to record both video and audio.

Generally, video recording of interviews is accepted as the best method of recording interviews, as it provides the most comprehensive record of what actually happened during the interview. It records not just what was said by whom and when, but what each person present was physically doing.

The disadvantages are that video recording is not always practical, professional quality equipment may be cumbersome and intrusive and sometimes a camera operator will be needed, in addition to the investigators. This can pose challenges, especially out in the field. However, investigators can still make a video recording of interviews if they have a smartphone, although the phone's memory capacity and battery may limit recordings to relatively short interviews.

2. DIGITAL VOICE RECORDING

Digital voice recording involves using a small DVR. The interview is stored on a chip in the recorder and can be downloaded onto a hard drive for permanent storage.

Using a DVR is rapidly becoming the standard practice for recording interviews in many investigative agencies around the world. It is easy, reasonably cheap, it is not intrusive and it can be used virtually anytime and anywhere.

2.1. Advantages

There are four advantages to digitally recording interviews:

- accuracy
- productivity
- quality
- impact.

Accuracy

It is very important to have an accurate record of an interview. Digitally voice recording an interview means that an investigator is far less likely to be challenged on what was said as opposed to relying on a written record of the interview.

A digital voice recording of an interview will show:

- who said what, when and in what manner
- the overall tone and pace of the interview
- asides, phrasing, emphasis, hesitations, pauses and interruptions
- how long the interview took, in real time.

A written statement shows none of these things. It is often the investigators paraphrasing or interpretation of what the interviewee is saying. Even if the interviewee signs the written statement, there is usually opportunities to contest something he or she does not subsequently like. Even if the interviewee signed the statement, he or she may subsequently claim that it was not exactly what he or she said or meant, or that the investigator failed to include important information or ignored the overall context of what was said. It may come down to the word of the investigator against that of the interviewee.

Failing to digitally record an interview can leave the investigator exposed. Digitally recording the interview protects the investigator.

Productivity

DVR is a cost-effective and efficient method for recording interviews. Investigators can generally conduct far more interviews in a given period if they digitally record them, as opposed to writing them down.

Preparing a written statement takes a lot more time than digitally recording the interview. The investigators not only have to concentrate on the questions and answers, they also have to record what is being said, often in significant detail. It can be a slow and tedious process.

Quality

Digitally voice recording an interview allows the investigators to focus on the person being interviewed, rather than carefully writing down everything said. That enhances the quality of the interview, particularly if there is only one investigator.

Ideally there should be steady rhythm of question and answer between interviewee and investigator, at a normal conversational pace. Writing things down will disrupt that rhythm and the pace of the interview will be determined by how quickly the investigator is able to write. That does not make for a good interview. The final product is also usually far less detailed than a digitally voice recorded statement.

Impact

NHRIs often use moral persuasion to convince stakeholders of the strength of their recommendations. Most do not have the power to require anyone to do anything.⁴⁷ But they can convince, persuade and advocate, often very effectively.

As discussed in the chapter on report writing, putting a human face on an issue can be a very effective way of exerting moral persuasion. NHRIs need to demonstrate the reasons for their recommendations and to convince those responsible for implementing them why they should do so. Showing, as starkly and as honestly as possible, how human rights abuses have affected the lives of people is a very powerful way of doing that.

Direct quotations from recorded interviews can show the “human face” of the investigation. Someone describing what has happened to them in their own words is often far more compelling than any summary or paraphrasing of those words.

47 An exception is the National Human Rights Commission of India which can issue binding orders requesting law enforcement authorities to pay compensation to victims of human rights violations.

THE IMPACT OF PERSONAL STORIES

In the early 2000s, an investigation was carried out into Post Traumatic Stress Disorder (PTSD) in the Canadian Armed Forces (CF) by the Military Ombudsman. It became apparent that soldiers who exhibited any kind of stress illness were quickly labeled as "time wasters" and "weaklings". They were ostracized, stigmatized, harassed and humiliated by many peers and supervisors. They were thrown out of the army as quickly as possible.

Ironically, most were very good soldiers who had been exposed to appalling things while serving on peacekeeping and peacemaking missions across the world. In some cases, given their very limited mandate, they were ordered not to intervene, even as they witnessed atrocities happen in front of them. The psychological impact on them was severe.

Nevertheless, the culture within the CF was that non-visible injuries were a sign of weakness. As a result, soldiers who began to experience symptoms of PTSD refused to seek help, which only made things worse.

One of the people interviewed for the investigation was a very senior non-commissioned officer from the Airborne Regiment, which had the reputation of being the toughest unit in the army. He had served in Somalia, Bosnia and other conflict zones, mainly as part of United Nations deployments. The army was his life, as he said. He was extremely tough – on himself and on those he commanded – and took great pride in it. If any of his men exhibited any sign of mental weakness, he did whatever he could to get them out of his unit – and the army – as quickly as possible, using every tool at his disposal.

Over a period of years, however, he began to develop symptoms of PTSD, which he refused to acknowledge. Even though his symptoms got worse, he did not seek help as he knew that it would likely mean the end of his career.

One day, however, things changed for him. This is how he described, in his own words, how it happened:

Why I went and got help in the first place is that I came home from work and I sat down on the step. I had had so many of these attacks. I didn't know what was going on. I just sat there and started crying. My little girl came up to me, put her arms around me and she said, "Daddy, it's going to be OK". I looked at her right there and then and I said to myself, "I don't care. The military don't mean nothing to me. I am going to get help. Because she needs a daddy."

This excerpt was taken directly from the transcript of his digitally voice recorded statement. There is no way the power of his words could have been reproduced by summarizing what he said.



Investigator notes

DVRs can be used by an investigator to record his or her observations, particularly in the field. There may not be time or opportunity to write comprehensive notes but the investigator will usually have an opportunity to speak into a DVR.

2.2. Consents

An investigator must seek the informed consent of the interviewee before digitally recording the statement. Informed consent includes advising the interviewee about the purpose of the recording and who will have access to the recording or the transcript of the recording.

As noted previously, in some jurisdictions, recording without consent is a criminal offence. Secretly recording an interview may be legal in some jurisdictions but it is ethically questionable. It may be appropriate in extremely rare circumstances, however very strong justification is needed to do so. Legal advice must be sought beforehand. The ethical implications must be borne in mind, including any potential impact on the reputation of the investigator and the NHRI.

GUIDELINES FOR USE

- **Get consent.** Ask the interviewee to sign a form consenting to the use of the DVR just prior to the interview beginning, *as well as* noting it on the tape during the introduction stage of the interview.
- **Test.** Make sure the DVR is working just prior to the interview starting and have spare batteries available.
- **Visible.** Ensure the DVR is in plain view of the interviewee.
- **Advise** the interviewee when the interview is being recorded at the point when the DVR is turned on.
- **Introduce** who is present and what they do, the purpose of the interview, where it is taking place, the date and time and any other relevant information, such as any issues relating to confidentiality.
- **Confirm** that the interviewee knows the interview is being digitally voice recorded and has given his or her permission to do so.
- **Speak slowly and clearly.**
- **Describe any physical movements** discussed during the interview, so that they are clear to anyone listening to the recording or reading the transcript.
- **Describe any documents** or other materials that are shown to, or produced by, the interviewee during the interview.
- **Breaks.** The investigator should describe, while the recorder is on, the reason for, and length of, any breaks taken during the interview or in other situations where the recorder is turned off. In some cases, it may be advisable to leave the recorder running during a break. If so, all parties must be made aware of that. If something is discussed during an unrecorded stoppage period that is relevant to the interview, then it should be noted once the interview recommences.
- **Conclusion.** Note the time the interview concluded.
- **Accidental erasure.** Some DVRs have a “lock” function that protects against an interview being accidentally erased.
- **Security.** The investigator is responsible for the security of the DVR. Some DVRs have a digital lock, which require a password to access the recorder. Interviews should be downloaded from the recorder onto a secure hard drive as soon as practical. The interview should then be erased from the recorder itself. Use encryption and password protection, where possible, once the interview is downloaded.
- **Storage.** Create a retention and access policy for downloads of the interview.



2.3. E-mailing interviews

It is possible to e-mail, as an audio file attachment, the recording of the interview. However, as with any e-mail, care should be taken to protect confidentiality. It may be possible to encrypt and password protect the audio file.

2.4. Transcription

Transcribing the recording of an interview can be time-consuming and expensive. Determine if it is really necessary to have the recording transcribed. A transcription may be necessary if the statement will be tendered in formal proceedings or when verbatim quotes are to be used. In the latter case, only those specific parts of the interview need to be transcribed. The recording is always available on the hard drive should further parts of the interview need to be transcribed.

A short, written, point-form summary of the interview may be sufficient in many cases. Using the timer on the recorder, the investigator should cross-reference key points in the summary with the relevant time on the recording.

If a transcript of the entire statement, or parts of it, is necessary, this can be done by someone appropriate within the NHRI or, in the case of more formal proceedings, by an external transcription service.

2.5. Proofing

If all or part of the interview will be quoted in any report, or used in any proceeding, the investigator should listen to those portions of the interview and check the accuracy of any transcript that has been prepared.

2.6. Possible problems

Reticence

There is a perception that digitally voice recording an interview may have a “chilling” effect on the interviewee. In other words, the interviewee may become reticent, guarded or even stop talking completely. In practice, this is rarely an issue. The interviewee normally forgets that the interview is being digitally recorded quite early in the interview.

The interviewee declines to have the interview digitally voice recorded

Some interviewees do not want the interview recorded. In these cases, educate and persuade the interviewee. Focus on the benefits to them.

- Point out that the process will take less time and the interview will finish sooner.
- Digital voice recording gives a permanent and accurate record of what the person says, which is in everybody’s best interests.
- Offer them a copy of the transcript (if one is made) or the audio file of the interview, but only after the conclusion of the investigation.

This approach may not always work. In some cases, the last thing an interviewee wants is an accurate record of what she or he said. Not much can be done about that except to make good notes about how you explained the benefits of recording the interview. That puts the onus on the interviewee to explain why he or she still declined to be recorded, should the issue ever arise.

The interviewee asks to record the interview

Will allowing someone to digitally voice record their own interview adversely impact the integrity of the investigation? If the answer is yes, then do not agree to the person recording the interview.

The interviewee asks for a copy of the recording

A copy of the recording should not be given to the interviewee until after the conclusion of the investigation, unless there will be no adverse impact on the integrity of the investigative process.

3. WRITTEN STATEMENTS

In some cases, it may not be practical to digitally voice record the interview or consent may not be given by the interviewee. In these situations, the investigator or the interviewee may have to write out his or her statement.

Written statements come in various formats. All of them should be signed and dated by both the interviewee and the investigator.

3.1. Notebook statements

Notebook statements are when a summary of what is being said by a witness is written down in a notebook, usually in the immediate aftermath of an event, in circumstances where taking a formal statement is not possible at that time. Many investigative agencies, particularly police forces, provide notebooks to their investigators precisely for this purpose.

On occasion, the witness may be asked to write down his or her account in the notebook itself. More often, the investigator writes down what the witness says and then the witness reviews and signs what has been recorded.

This method works best when investigators are dealing with a large number of witnesses and there is not enough time and/or not enough investigators available to take a full statement. It is effective in cases where it is necessary to get a brief overview of what the witness saw, heard or experienced, along with contact details for the witness. A decision can be made later if it is considered necessary to conduct a more formal interview.

The following general points are considered best practice for notebook use. They apply to recording anything in a notebook, not just witness statements. They are designed to protect the investigator from any subsequent allegation that a note was altered, added or deleted at a later point in time.

- Notes should be made as soon after an event as practical, while whatever is being described is still fresh in the person's mind.
- Notebooks should be paginated (pages are ordered and numbered).
- Write as legibly as possible.
- Do not leave any spaces or gaps in the text.
- Each entry should be dated and timed.
- It is acceptable to subsequently add to notes, as long as the time and date of any addition is recorded, preferably with an explanation as to why the new information has been added, if it is not obvious.
- Do not completely remove or cover over any errors; cross them out, but leave them legible.
- Sign off at the end of the day.

Sometimes, an investigator may write something down somewhere other than in his or her notebook, for whatever reason. For example, handwritten notes made during a digitally recorded interview. That piece of paper must never be thrown away. In fact, nothing that is written in relation to an investigation should ever be thrown away. It may become important evidence at any time, so it should always be added to the case record.

3.2. Contemporaneous questions and answers

The investigator should record every question and every answer, even noting if the interviewee does not respond. It can be a very time-consuming and laborious process. A lot of time is spent writing, as opposed to asking and answering questions.

The goal of a contemporaneous interview is to produce, more or less, a verbatim transcript of the interview. It makes sense then to simply digitally voice record the interview.

3.3. Composite statements

Composite interviews are when the investigator writes down a summary of what the interviewee says. Usually the interviewee will be asked to review and sign it.

Compared to an interview that is digitally voice recorded, there can be questions around accuracy. The statement is not the witness's own words, without exception and throughout. As noted previously, even if the witness signs the statement, it is easy for him or her to subsequently allege that it does not reflect precisely what was said, nor does it capture the tone or pace of the conversation or any gaps or interruptions.

As with other written statements, it is always possible to allege, rightly or wrongly, that the statement was fabricated.

3.4 Statements written by interviewees

In this scenario, a witness writes down his or her account of what happened. In many ways, this is quite similar to the questionnaire approach discussed previously in this Manual. This can, if circumstances permit, be a useful option, especially when dealing with a large number of witnesses.

There are, however, some issues to consider. It is not a good option to use with key witnesses and it may not be focused on the issue(s) under investigation. It may well include irrelevant information and not include relevant evidence.

3.5. Providing copies of statements

Interviewees should not usually be given copies of their statements – either written, a transcript of the recording or a copy of the audio or video recording – until after the conclusion of the investigation.

Investigators will want control over who has access to the statements. This protects the interviewee, the investigator and the integrity of the investigation.

Witnesses are generally entitled to copies of their statements if they are giving evidence at a proceeding, in order to refresh their memories. The witness will normally be provided with a copy of his or her statement just prior to giving that evidence.

KEY POINTS: CHAPTER 18

- **Digitally recording interviews is considered best practice. It is an efficient and effective method of recording interviews.**
- **Written statements are time-consuming and laborious. They are best restricted to those occasions when recording the interview is not possible or not acceptable to the interviewee.**



Chapter 19:

Assessing credibility

KEY QUESTIONS

- **What different techniques can be used to assess the credibility of a witness and how effective are they in achieving that objective?**



1. INTRODUCTION

Investigators are expected to assess the credibility of the people they interview and attach weight to the evidence they provide accordingly. It can be a very delicate and difficult task.

According to the Equal Employment Opportunity Commission in the United States, some factors that investigators may take into account when assessing the credibility of a witness include:

- demeanour
- consistency of memory and evasive responses
- level of detail regarding any given event
- bias or motive to falsify
- inherent (im)plausibility.

These are all relevant points, based on common sense. If a person has a fairly good memory for details and dates, but can't recall events that, by an objective standard, he or she should recall, then there may be a problem. If a response just does not make sense, then there will be the desire to ask further questions. If someone has an "agenda" – a motive to provide false or misleading information – then explore it.

None of these points are determinative in and of themselves. Someone may not remember an event in detail because they were traumatized by it, not because he or she is hiding anything. The person may have a hostile demeanour because he or she does not trust the interviewer. And just because a person has a motive to mislead, it does not mean that he or she is being misleading. If someone does not report something until months after an event – when others would have reported it immediately – it does not necessarily mean that person is making something up.

Investigators also need to remember that they bring their own perceptions, values and life experience into this decision making, often with serious consequences.

It is advisable to be cautious when assessing the credibility of a witness and to accept that the assessment may sometimes be wrong.

2. BODY LANGUAGE

Some investigators place a lot of emphasis on non-verbal communication, especially body language, when assessing credibility. They focus on things such as eye contact, hand gestures, rapidity of response, tone and volume of voice, facial expressions and body posture to assist them determine if the interviewee is telling them the truth.

The problem, however, is that different cultures, different backgrounds and different circumstances mean there are different ways in which non-verbal communication can be interpreted.

Eye contact is a good example. In mainstream culture in North America and many parts of Europe, firm eye-to-eye contact is generally perceived to be an indicator that someone is telling the truth. Looking away is the opposite. Yet in some cultures, such as among indigenous Australians, it is disrespectful to look someone in a position of authority in the eye. In other cultures, eye contact is typically quite brief or, alternatively, constant, intense eye-to-eye contact is the norm. Gender may often be a factor in relation to eye contact. According to the Federal Bureau of Investigations (FBI) in the United States, 23 out of 24 peer-reviewed studies found that eye contact was not an indicator of lying.⁴⁸

Getting it wrong can have very serious consequences. Investigators can quickly develop “tunnel vision”. They may decide, based on body language alone, that someone is being deceptive. It is then a short step to conclude that that person is guilty. The investigation then becomes focused on proving that the person is guilty, to the exclusion of other possibilities.

In addition to eye contact, there are other differences in what certain body language means to different people in different places. The following are typical examples of how common actions can be interpreted differently.

- A firm handshake is seen as a sign of trustworthiness in some cultures. It is frowned on in others that prefer softer contact or no contact at all.
- In some cultures, to shaking your head means to agree with something. In others, it means to disagree. Even smiling when you meet someone may be considered inappropriate.
- Some people interpret slouching as a sign of defensiveness. Others think it is impolite to have their head above yours and may therefore slouch intentionally.
- Giggling may mean embarrassment or it may mean that someone finds something funny. How loudly you speak may be interpreted in different ways by different people.
- Different cultures use facial expressions differently. While most are fairly universal, the extent to which they are used varies significantly. In some cultures the more animated the person’s facial expressions, the less respect they are displaying. Furrowing eyebrows may or may not indicate discomfort and, even if it does, discomfort does not mean the person is lying.

As the FBI study notes:

*Relying on false clues, or signs, about lying can have dire consequences ... Investigators must note that no silver bullet for identifying deception exists.*⁴⁹

3. SCIENTIFIC CONTENT ANALYSIS (SCAN)

The FBI paper does, however, recommend the use of statement analysis. It is a technique that involves dissecting how someone uses words and is designed to assess whether or not a person is lying about something.

SCAN is based on analysing a “pure” statement given by the suspect – that is, one in his or her own words – and looking for signs of deception. These could include the use of pronouns or certain verb tenses, glossing over critical areas and distancing themselves from certain events.

A lot of investigators strongly support this approach, while others are sceptical of its value. Reasonably detailed research has not found evidence that any court in the world has accepted it as admissible evidence.

48 “Evaluating Truthfulness and Detecting Deception”, David Matsumoto, Hyi Sung Hwang, Lisa Skinner and Mark Frank, in *FBI Law Enforcement Bulletin*; June 2011; available at www.fbi.gov/stats-services/publications/law-enforcement-bulletin/june_2011/school_violence.

49 Ibid.

3. HYPNOSIS

There is also no evidence that any court will accept hypnosis as admissible evidence. It is sometimes used with traumatized witnesses to help recall events that have been buried in their subconscious. The danger is that the process taints the evidence of that witness. Consequently it should only be used as a very last resort.

4. POLYGRAPHS

A polygraph is a machine that detects changes in the body, such as blood pressure, heartbeat and rate of breathing, during an interview. The theory is that an expert can interpret this data to determine if someone is being deceptive.

Acceptance of this evidence by the courts has been patchy, at least in North American and Australian jurisdictions, but it is still used as an investigative tool. Interestingly, a lot of people volunteer to take polygraph tests to try and prove their innocence.

Many NHRIs will not have access to polygraphs. However, where polygraph evidence is presented as part of an investigation, other corroborating evidence should be sought before giving weight to those findings.

KEY POINTS: CHAPTER 19

- **A number of techniques have been developed to assist investigators assess witnesses credibility, such as interpreting body language, Scientific Content Analysis and the use of hypnosis and polygraphs.**
- **While each has some merit, the conclusions reached by such methods should be supported wherever possible by corroborating evidence, before giving weight to them.**



Part IV

Obtaining and assessing different types of evidence



Chapter 20: Physical evidence, including death investigations

Chapter 21: Scene visits

Chapter 22: Digital evidence and forensic data retrieval

Chapter 23: Using the Internet as an investigative tool

Chapter 24: Documentary evidence

Chapter 25: Assessing the adequacy and quality of evidence

Chapter 20:

Physical evidence, including death investigations

KEY QUESTIONS

- **What is physical evidence?**
- **What do NHRI investigators need to know about it?**
- **What types of forensic testing are there?**
- **What special considerations apply in death cases?**



1. PHYSICAL EVIDENCE

1.1. What is physical evidence?

Physical evidence is anything that is tangible – that can be touched or held – that may have some relevance to the investigation. It could be a sample of earth from the banks of a polluted river. It might be a computer hard drive or the SIM card from a mobile phone. It could be cartridge cases found at the site of a mass grave. It might be a cassette tape or a memory stick. It could be an instrument of torture from a prison. It might be semen recovered during a medical examination, or blood spatter on the wall of a prison cell. It could be a disk with CCTV footage loaded onto it. It might be a fragment of a bone. It might be a “trophy” photograph found in someone’s possession. It could be any number of things that relate to the issue(s) being investigated.

1.2. How important is physical evidence?

Physical evidence is always a very important factor in certain types of human rights investigations, particularly when they intersect with the criminal investigations. Physical evidence is often crucial in the investigations of executions, torture, police brutality, systemic rape and similar allegations.

Physical evidence may not be as relevant in other types of human rights investigations, such as those focused on issues involving economic, social and cultural rights. However, there may be exceptions. For example, an investigation into pollution that is allegedly destroying economic livelihoods on a massive scale may well involve the collection and forensic analysis of physical evidence.

1.3. What investigators should know about physical evidence

NHRI investigators should consider the possible existence of physical evidence as they plan and carry out their investigation, however remote that possibility may be. There may also be occasions when investigators:

- are given physical evidence
- go to a scene and discover previously uncollected physical evidence
- realize that unless they secure physical evidence, it may be destroyed, removed or tampered with.

While NHRI investigators may rarely, if ever, have to collect physical evidence or submit it for forensic examination, there is always the possibility that this might be required. Always seek expert assistance in collecting physical evidence, if at all possible. If it is not possible, you may have to gather the evidence yourself.

STEPS THAT CAN BE TAKEN TO ENSURE THE INTEGRITY OF THE EVIDENCE COLLECTED

- **Taking photographs and video everything as you find it.**
- **Preparing a detailed diagram of the scene.**
- **Measuring distances to give some idea of the scale of the scene and the relative position of different items of evidence.**
- **Not touching anything without gloves.**
- **Bagging any item that may be relevant, one item at a time.**
- **Sealing the bag.**
- **Not putting items of evidence together in the same bag.**



The NHRI may find itself assessing the quality of an investigation done by someone else, to determine if it was done fairly and thoroughly. One of the principles of excellent investigation, outlined in the introduction to this Manual, is that all physical and digital evidence should be identified, collected and submitted for forensic examination as appropriate. If this has not been done then the investigation will likely be flawed.

Physical evidence is easily ignored, contaminated, destroyed or lost. It has to be handled properly. That means it has to be collected and stored in a way that prevents it from being altered or otherwise contaminated. For these reasons, NHRI investigators should be aware of what physical evidence is and how it should be handled.

1.4. Scenes

A scene is a place where something happened. It may contain valuable physical evidence, even if time has passed since the incident under investigation occurred.

Locard's exchange principle provides the foundation for all scene examinations. It can be summed up as follows: every contact leaves a trace.

In other words, everyone who is present at a scene brings something with them that they leave there. They also take away something from the scene, when they leave it. The same applies to inanimate objects that are brought into or leave a scene, such as a vehicle.

Such evidence is known as "trace evidence". Trace evidence could be anything, such as a hair, a drop of blood, a footprint, a fingerprint, a fleck of paint, a piece of glass, a fibre of cloth or a tread mark from a tyre. That evidence can be collected and forensically examined with a view to determining, for example, where it originated.

It can be very easy to contaminate a scene. Forensic investigators commonly wear disposal body suits and cover their footwear and hair when working a scene, in order to minimize the chances that they drop or leave something at the scene, such as their own hair. It is therefore not good practice to allow people to enter a scene if they do not need to be there.

The importance of NHRI investigators visiting scenes is discussed further in Chapter 21.

1.5. More than one scene

Always bear in mind that there may be more than one scene, depending on the circumstances. Think about the places where people involved were before and after the event. These places are also potential scenes. There may be physical – and digital and documentary – evidence at a place where an event was planned, as well as where it took place.

1.6. Scene processing

Processing a scene means examining it in a methodical fashion to minimize the possibility of evidence being overlooked. Processing should be done in a way that avoids destroying or changing any physical evidence.

The first task is to protect the scene from contamination. That includes limiting who can enter the scene and, if it is outdoors, protecting it from the elements.⁵⁰

Persons trained in scene processing will often work with the lead investigator to create a crime scene investigation plan. The plan will describe the area to be searched, what is being looked for and the order in which evidence will be collected. Sometimes, by collecting a certain piece of evidence in a certain way, other evidence may be lost. For example, testing for gunshot residue may destroy biological evidence, such as DNA.



UN Photo by Martine Perret.

⁵⁰ It may also include limiting what can enter the scene. In one fatal motor vehicle collision, the driver sustained massive injuries, with his body parts strewn across the scene. The collision had occurred in a residential street, in the early hours of the morning. The police had set up a cordon at the two intersections on either side of the scene, preventing people and vehicles entering it, pending the arrival of forensic identification investigators. They failed to think about the occupants of the houses within the cordon. That became obvious when a man emerged from one of the houses with his dog, for their normal early morning stroll. The dog promptly ran up to – and then off with – a large piece of torso, chased by officers.

A scene should be photographed and videoed before anything is moved. It should also be measured, preferably using GPS technology, with the intention of preparing a scale diagram, if required.

If warranted, the scene should be searched methodically using grid search methods. This is where the scene is divided into a grid, with each segment being thoroughly searched for possible evidence.

Investigators usually need expert help processing a scene to ensure that they do not miss crucial evidence or collect it in a way that leaves it compromised. For example, exhuming bodies from a mass grave may involve a variety of experts, including forensic pathologists, anthropologists and entomologists.⁵¹

Investigating a death scene for physical evidence is particularly important. It is discussed in the next chapter.

Environmental disasters, such as the Lapindo mudflow in Indonesia in 2006, may be deemed to be human rights violations. In such cases, there may be physical evidence that connects what happened with the impact on citizens; soil or air samples, for example.⁵² Physical evidence at the scene may also assist determine the cause of what happened. For example, was the event caused by an earthquake or was it the result of drilling for natural gas? The NHRI may have to rely on experts to provide the answer, however, the investigators should be aware of the potential importance of physical evidence in that process.

1.7. Securing physical evidence

Physical evidence should be identified and secured as quickly as possible. Most physical evidence is perishable, to some extent or the other. It can be deliberately or naturally destroyed or contaminated.

Ideally, each item of potential evidence should be bagged and sealed, using a unique seal number. Sealing the evidence in a bag preserves the item for any forensic testing that may be necessary, such as examining a cartridge case for fingerprints. “Bagging and tagging”, as it is sometimes known, should be done by an investigator who has received training in how to collect and preserve evidence.

1.8. Preserving physical evidence

Physical evidence has to be preserved in a manner that keeps it as close as possible to the condition it was in when it was found.

1.9. Photographing and videoing physical evidence *in situ*

It is very important to take photographs and video of physical evidence before it is moved. It should also be mapped and diagrammed, preferably using GPS technology.

1.10. Think of what might have happened when processing a scene

There will be occasions when investigators are unaware of all the facts as a scene is being processed. Scene processing is usually one of the first things that happen in an investigation. Witnesses have yet to be interviewed. Some may not be willing or able to speak to investigators.

However, once the investigator releases the scene, there is no guarantee that it will be in the same condition if new information arises that mentions physical evidence that was not collected, deemed irrelevant or just did not register as relevant with the investigator.

51 Forensic entomologists can assist in victim identification. They can use the presence of insects in or on a cadaver to help determine the location and time of death.

52 The Lapindo mudflow was released while a commercial enterprise was drilling for minerals near the town of Sidorajo, Indonesia.

It is generally not possible to collect every single item from every single scene “just in case”. Good investigators have to consider what might have occurred before processing a scene. They will try to identify physical evidence that may relate to what possibly happened and make sure that they are at least secured for possible examination.

Once physical evidence is gone, it is gone forever.

THE MULRUNJI CASE

ERRORS RELATING TO PHYSICAL EVIDENCE

The CMC made two criticisms of the QPS investigation in relation to physical evidence. The first was the S/Sgt. Hurley was not provided any direction on management of the crime scene. The second was that the investigators failed to collect S/Sgt. Hurley’s uniform.



1.11. Continuity/chain of custody

Investigators have to show in whose custody an item of evidence was at all times, from the point it was collected up to the point that it is used in any proceedings. The purpose is to minimize allegations that the evidence may have been tampered with. Evidence has to be stored in a location where as few people as possible have access to it.

1.12. What types of forensic examination and analysis are available?

NHRI investigators should be aware of the different kinds of forensic examination that are possible. Whether they are actually available may vary, depending on the location and resources of the NHRI.

Following are some common areas of forensic examination, with an overview of how they may assist investigators.

Video and audio analysis	<ul style="list-style-type: none"> • Enhancing digital and analogue evidence
Documents	<ul style="list-style-type: none"> • Origin • Authenticity • Handwriting analysis
Biology	<ul style="list-style-type: none"> • DNA testing • Blood spatter analysis
Chemistry	<ul style="list-style-type: none"> • Chemical analysis of objects
Firearms	<ul style="list-style-type: none"> • Relate a spent bullet or cartridge case to a given weapon or type of weapon • Identify weapon types • Estimate distance between muzzle and another object
Toxicology	<ul style="list-style-type: none"> • Analysis of body fluids and tissues
Forensic pathology	<ul style="list-style-type: none"> • Assists investigators determine cause and manner of death

1.13. Forensic science is not infallible

Forensic science is not perfect. Items may have been contaminated. The scientist may be incompetent or biased. DNA evidence, while generally regarded as determinative, may not necessarily be so, particularly if samples have been contaminated. Forensic evidence is often successfully challenged in the courts for a variety of reasons. Experts may have differing opinions as to the same piece of evidence, such as whether or not it is a given individual's handwriting on a document. Even fingerprint analysis may be inaccurate.

THE MULRUNJI CASE

POSSIBLE PHYSICAL EVIDENCE

Not all of these may ultimately prove relevant, or may not have existed, but QPS investigators should have considered all of them, as the investigation began.

- Blood from Mulrunji
- Blood from S/Sgt. Hurley
- Clothing from Mulrunji, including footwear
- Clothing from S/Sgt. Hurley, including footwear
- Police equipment S/Sgt. Hurley was carrying at the time of the event
- Other police equipment that might be relevant
- Video from the watch-house
- Any medical paraphernalia used by the medics
- Mobile phones from all involved parties
- Fingerprints/blood swabs from the area where S/Sgt. Hurley and Mulrunji went to the ground
- GPS technology from the police vehicle
- Police radio communications tape
- Any recordings of phone calls to and from the watch-house



Possible scenes

- The watch-house, including:
 - S/Sgt. Hurley's office
 - any other area that was visible to the route
 - involved officers' lockers
- The place where Mulrunji was arrested
- The route between the vehicle and the cell
- The vehicle in which Mulrunji was transported

Photographs and video

- The police vehicle
- Mulrunji (at scene, if possible, as well as at autopsy)
- S/Sgt Hurley, to show injury or absence of injury
- Watch-house with the vehicle *in situ*
- Walkthrough from the vehicle
- Lines of sight in the watch-house

2. DEATH INVESTIGATIONS

Death investigations can be particularly difficult, for several reasons.

- A key party – the deceased – is not in a position to provide his or her oral account of what happened.
- Being found culpable of an unlawful homicide has a very serious stigma attached to it, along with very serious penalties, up to and including death.
- Death investigations often have a high media profile and are the subject of public interest. There is a potential adverse impact on the reputation of the community in which the death occurred.
- If the State is involved or implicated in the death then there is a strong public interest in finding out exactly what happened.
- Law enforcement agencies tend to assign their most competent and experienced investigators to apparent homicide investigations. They are usually provided with considerable resources to ensure that their investigation is as thorough as possible.

While NHRI investigators may not often conduct the primary investigation into a death, they may be involved either at the time the primary investigation is occurring or at some point afterwards.

2.1. European Convention on Human Rights

Article 2 of the European Convention on Human Rights provides that every citizen has the right to life. It also mandates that there must be an effective investigation into any lethal force death where the State is involved. Such an investigation must be:

- independent
- effective
- reasonably prompt
- open to public scrutiny and involve the victim's next of kin.

Such investigations do not necessarily have to be criminal ones. They can, for example, be disciplinary investigations. European case law has established that when someone has “disappeared”, it falls under article 2 of the Convention if it can be shown beyond a reasonable doubt that the missing person was abducted or detained by the State. There must also be sufficient evidence that the person is likely dead.

There is, unfortunately, not much in the way of guidance regarding what constitutes an independent and effective investigation. The seminal case – *Jordan v United Kingdom* – established that investigators must be impartial and independent and that the investigation must be reasonably fast and adequate enough to determine the cause of death and those responsible for it.⁵³

The principles set out in article 2 of the Convention apply, to some extent, to any sudden and unexpected death, such as a fall in a nursing home, poisoning due to an environmental disaster or the sinking of a boat carrying undocumented migrants.

2.2. Death investigation scenes

This chapter considers those things that primary investigators should do to preserve and gather evidence at the scene of a possible homicide. Much of what follows can be applied or adapted to other kinds of scenes.

53 A summary of *Jordan v United Kingdom* has been prepared by the Netherlands Institute of Human Rights; available at <http://sim.law.uu.nl/sim/caselaw/Hof.nsf/2422ec00f1ace923c1256681002b47f1/7e0193f3af548611c1256a4200377c18?OpenDocument>.

- Secure the scene. Nobody should be allowed to go in or out until the investigators arrive, unless it is necessary to preserve life.
- Protect the scene from anything that may alter it, such as the elements.
- Plan how the scene will be examined.
- Make sure it is safe to go into the scene.
- Think about what may have happened and what may be relevant. That will guide the way the scene is processed. If something might be relevant, record it on video, photograph it, secure it or seize it. Do not rule anything out until there is sufficient evidence to rule it out.
- Get briefed. Get as much information as possible from any source about what happened. That will make it easier to decide how large the scene is and how to enter it without disturbing any evidence.
- Note anything that may subsequently prove to have a bearing on what happened, including lighting, weather, proximity of buildings, topography or any other potentially relevant factor.
- Make sure that enough of the scene has been preserved. It is difficult to work outwards and much easier to work inwards.
- Create inner and outer cordons.
- Establish a narrow corridor into the scene.
- Document who goes in and out, and when.
- Photograph and video the scene to the extent possible, before doing a walk-through.
- Have the right equipment available to process the scene properly, including light sources, evidence collection kits and clothing that minimizes the transfer of trace evidence.
- Do a walk-through of the scene without disturbing anything, although that may be difficult to do.
- Look down during the first walk-through. That tiny piece of glass that is about to be trampled into the mud may turn out to have some crucial evidential value.
- Identify any potential evidence that may be related to the death, for example bullet casings, tyre marks or blood spatters.
- Photograph and video everything from within the scene, including establishing overall orientation. Use scales to give an idea of distance.
- Document everything visible, including using GPS equipment, to create a scene diagram before anything is moved, if possible.
- Photograph the body *in situ*, without moving it.
- Conduct a superficial external examination of the body.
- Have experts available to assist with examining the body and the scene, if warranted (for example, a pathologist, anthropologist, odontologist, firearms expert, etc.).
- Does the evidence available suggest whether or not this is the actual place where the death occurred? If not, where did it happen?
- Assess whether or not clothing needs to be searched prior to the body being removed.
- Note and photograph any potentially relevant condition, such as evidence of lividity,⁵⁴ decomposition, wounds, scars, tattoos and so on.

54 Discolouration due to pooling of blood.

- Note the temperature of the body, if possible.
- Collect visible trace evidence, such as hairs or fibres, before removing the body.
- Consider bagging hands, to preserve any trace of gunshot residue, if relevant.
- Photograph the surface on which the body was resting, after it is removed.
- Prepare an inventory of everything that has been seized.
- Establish continuity of anything seized from the scene. A chain of custody must be created so that it can be demonstrated that a given piece of evidence was not contaminated, planted or tampered with.
- If possible, do not release the scene until key witnesses have been interviewed and the post-mortem has been completed.
- Consider bringing witnesses to the scene, if appropriate.
- Keep comprehensive notes of everything done, including the reasons why decisions were made, in particular which items it was decided to seize.
- Debrief all investigators involved in the case, before releasing the scene.

Some of these steps may not be practical in many circumstances, especially if resources are not available or the death occurs in an unstable or volatile environment. However, they do represent best practice and there should be valid reasons if they are not followed.

2.3. Communicating with the pathologist

The autopsy is potentially a very rich source of evidence. A thorough autopsy can take many hours. Some are video-taped. All should be photographed as they proceed. At least one investigator should be present throughout the autopsy.

It is essential that the pathologist performing the autopsy has all available information that might have some bearing on the cause and manner of the death. He or she can then focus the examination appropriately. For example, if there is a slight possibility that someone had contact with the deceased person's throat area, the pathologist can look for signs of asphyxia, such as a broken hyoid bone and/or petechiae in the eyes and elsewhere.⁵⁵ If the pathologist does not have all the available information available, he or she will be operating partially in the dark. There is only one chance at a first autopsy.

Investigators also have to communicate fully and openly with all other experts involved in the investigation.

THE MULRUNJI CASE

EVIDENCE NOT GIVEN TO THE PATHOLOGIST

Both inquests criticized the QPS investigators for not advising the pathologist, in writing, about potentially important information: that a civilian witness alleged that Mulrunji had been beaten by an officer at the watch-house.



55 Small spots caused by broken small blood vessels (capillaries). Their presence may indicate asphyxiation.



UN Photo by Yutaka Nagata.

2.4. Dealing with next of kin

Dealing with next of kin can be a very difficult and sensitive task. They may be a valuable source of evidence, which is needed to progress the investigation. Seeking this information may intrude on their grief, however, it has to be done.

Often, most families want information about the death. They want to know what happened, when, why and who is responsible. Once that is established, they want to see justice done.

Investigators should provide as much information as they can about the investigative process. They should also provide, if at all possible, as much information as they can about what they find, in general terms. This information should be provided on the condition that doing so does not in any way adversely impact on the integrity of the investigation process.

At the conclusion of the investigation, next of kin should be told the findings in as much detail as possible, on condition that it does not prejudice any upcoming proceeding or identify witnesses, without the consent of those witnesses.

In many Major Case Management models, an investigator is assigned to deal directly with next of kin.⁵⁶ His or her job includes:

- keeping next of kin informed of developments in the investigation
- explaining the investigative process
- viewing and identifying the body
- assisting with the return of property and personal effects
- accessing any community supports
- providing advice about dealing with the media
- supporting next of kin through any inquiry, judicial or similar process.

Some of these functions are directly applicable to some NHRI investigations, including the provision of information to next of kin, where possible.

56 The Major Case Management model is discussed in Chapter 29.

KEY POINTS: CHAPTER 20

- **Investigations into a death where human rights violations are alleged or apparent can be a very difficult and sensitive process.**
- **Proper processing of the scene where the body is found is crucial.**
- **Communication between the NHRI investigators and experts should be seamless.**



Chapter 21:

Scene visits

KEY QUESTIONS

- **What is a scene?**
- **Why should scenes be visited?**
- **What are the key considerations to be taken into account when visiting a scene?**



1. INTRODUCTION

The way in which a scene should be processed for evidence by primary investigators was discussed in Chapter 20. However, scenes are worth visiting for a number of other reasons.

2. WHAT IS A SCENE?

A scene should be thought of in the broadest sense possible. It is any environment where something relevant to the investigation takes – or took – place.

Thinking about potential scenes is very important when the NHRI is undertaking an investigation or inquiry into a systemic issue. For example, the inquiry by the New Zealand Human Rights Commission into equal employment opportunity in the aged care sector involved a Commissioner spending a week as an unpaid worker at a residential aged care facility.⁵⁷ That is an extended scene visit. Other scene visits could involve a visit to an immigration detention centre, a sweatshop employing child labour or, if the NHRI is investigating sexual harassment in the military, an army base.

It is important to keep in mind that there may be more than one scene that should be visited as part of the investigation.

3. WHY ARE SCENES WORTH VISITING?

In many cases, the NHRI will not be the lead investigative agency responsible for processing a scene, particularly where criminal offences are alleged or apparent. However, it is still a good idea for investigators to go to where something they are investigating happened, or is happening, if at all possible, because:

- it helps put the event or issue in context
- it allows investigators to assess possible important physical factors, such as sightlines, lighting and so on
- it may provide an opportunity to locate possible witnesses
- it may make possible witnesses aware of the investigation, especially if the investigators work with local stakeholders, including the media, to publicize the visit
- it provides an opportunity to interview witnesses at the location where they were when the event took place and, if appropriate, allows them to provide a re-enactment

57 The case study is provided in Appendix 6 of this Manual.

- it enables the investigator to assess whether all physical and digital evidence at the scene has been identified, secured and seized for possible forensic examination
- it may reveal new sources of evidence that were previously overlooked or ignored
- it may help assess the reliability of witnesses; for example, if the witness says he or she saw or heard something from a certain location, then the investigator may be able to determine if that was in fact possible.

It is usually worthwhile visiting the scene, even if the event being investigated happened a long time ago or another agency is responsible for any initial investigation. The investigator will get a sense of what happened that it is difficult to replicate from scene photographs or video.

The investigator should try to visit the scene at the same time and day of the week that the event happened, particularly if he or she is canvassing for witnesses. People often have routines that put them in the same place, at the same time.



UN Photo by Martine Perret.

CASE STUDY

Investigators who visit a scene, or a potential scene, may uncover something that is rather important, as happened in the following case investigated by the [Commission on Human Rights of the Philippines \(CHR\)](#):

On 28 November 2008 a 50-year old man living in Taguig City in the Philippines, was accosted by armed men in civilian clothes while walking past a mosque near his home. He was bundled into a white, unmarked van and driven away.

His family reported the abduction to local police and began to search for him. The man's son complained to the CHR through an intermediary shortly after the disappearance.

The CHR put together an investigation team. They quickly came to suspect that the police had abducted the man. They contacted local police who told the CHR investigation team that they had no knowledge of the man's whereabouts.

On 4 December 2008, six days after the abduction, the CHR investigation team, accompanied by the man's son, went to the headquarters of a police specialist criminal investigation unit in Quezon City to make further inquiries. By chance, an office door was left open. The man's son spotted a pair of sandals, which he instantly recognized as belonging to his father.

A search of the police station by the CHR investigation team resulted in the man being found in the office of a senior officer. A medical examination ordered by the CHR confirmed he had sustained several recent injuries.

The man alleged he had been beaten, electrocuted and partially strangled with his own turban while in custody.

There was no police documentation of the arrest.

There was no conclusive evidence that any judicial authorization existed to arrest the man.

Police were unable to offer any convincing explanation as to why the man had been detained incommunicado. One police agency simply refused to cooperate with the CHR.

Not surprisingly in the circumstances, the CHR concluded that the man had been unlawfully abducted and tortured, a very serious breach of his human rights.

As the CHR stated in its report, "the fact remains that [the man's] arrest was made in the most unlawful and irregular manner it can possibly be made".

The CHR recommended criminal charges against the arresting team and their immediate supervisors. All of which illustrates the tangible benefits that can come from visiting a scene.



THE MULRUNJI CASE

VALUE OF VISITING THE SCENE EVEN IF THINGS HAVE CHANGED

A senior outside lawyer – a former Chief Justice of New South Wales – was hired by the Queensland Government in late 2006 to review the decision not to charge S/Sgt. Hurley with a criminal offence. He went to Palm Island as part of his fact-finding. Although the actual scene was no longer there – the police watch-house had been burned down during the riots of 26 November 2004 – it gave him the opportunity to meet with local residents and better understand the context.



4. OTHER CONSIDERATIONS FOR INVESTIGATORS WHEN VISITING A SCENE

- Be careful. Investigator and witness safety is paramount and should be the top consideration when deciding whether or not to visit a scene.
- The scene may have changed since the event occurred. Things may have been moved. How things are different should be documented by the investigator, if it has any bearing on the investigation.
- If they exist, take photographs and video of the scene at the time the event occurred for the purpose of making a comparison.
- Investigators should think when they are at a scene. They should look and listen very carefully. They should consider how what they see and hear relates to what they know so far.
- Investigators should be prepared to deal with any new evidence they find or are given, particularly physical evidence. It should be secured and processed, just like any other such evidence.
- Finally, investigators should make good notes and take video and photographs, as appropriate.

KEY POINTS: CHAPTER 21

Investigators should:

- Think of a “scene” in the broadest sense possible
- consider that there may be more than one scene
- visit scenes whenever possible
- make safety the top priority when deciding whether or not to visit a scene
- document the visit.



Chapter 22:

Digital evidence and forensic data retrieval

KEY QUESTIONS

- What is digital evidence and where can it be found?
- Why is digital evidence important?
- How should such evidence be handled?
- How is digital data hidden and how may it be retrieved?



1. WHAT IS DIGITAL EVIDENCE?

Digital evidence is information and data of value to an investigation that is stored on, received or transmitted by an electronic device. This evidence is acquired when data or electronic devices are seized and secured for examination.

2. WHERE CAN DIGITAL EVIDENCE BE FOUND?

Digital evidence can be found on any device that is capable of electronically storing data. However, it is most commonly associated with computer systems.

Storage devices	<ul style="list-style-type: none"> • Hard drives • External hard drives • USB (flash) drives • Memory cards
Handheld devices	<ul style="list-style-type: none"> • Mobile phones or smartphones • Tablet devices, such as iPads • Digital multimedia (audio and video) devices • Pagers • Digital cameras • Global positioning systems (GPS)
Other devices	<ul style="list-style-type: none"> • Digital video cameras • Digital audio recorders • USB hubs • Memory card readers • Fax/copy machines • Video game consoles • Surveillance equipment • MP3 players • SIM card readers

3. WHAT POTENTIAL EVIDENCE MIGHT BE ON SUCH DEVICES?

Virtually anything may be found on these devices, including:

- e-mail messages
- documents
- Internet browsing history
- Internet chat logs
- lists of social media followers and friends
- photographs
- video files
- databases
- financial records
- accounting /business records
- event logs
- contact lists
- phone numbers
- building access records and codes
- passwords
- audio files
- GPS turn-by-turn logs
- phone call logs, with date and time
- voicemails.

Following are two examples that show the breadth of evidence that might be available from just a couple of devices that store data digitally.

Smartphones

With the advent of GPS on devices such as smartphones, it may be possible to establish a location using something found on a device, such as when and where a photograph was taken. That in itself may be crucial evidence. It may also be possible to retrieve e-mails, texts, Tweets, documents, calendars, PIN messages, call logs, contact lists and so on.

Photocopiers

Most photocopiers manufactured in recent years have built-in hard drives that record every document copied, scanned and sent using them. Depending on the circumstances of the case, that hard drive could potentially be a rich source of evidence.

4. WHY IS DIGITAL EVIDENCE IMPORTANT IN HUMAN RIGHTS INVESTIGATIONS?

One of the principles of excellent investigation discussed in this Manual is that all physical and digital evidence should be identified, preserved and forensically examined as necessary.

Among other things, digital evidence may help investigators to establish:

- patterns of movement
- who contacted whom when and what was communicated
- who had access to information and when it was accessed
- who entered and left a building at a given time
- when a document was created and who reviewed it.

Electronic devices – such as smartphones, video cameras and voice recorders – can also record events. For example, there might be a digital voice recording of someone giving orders to do something that amounts to a violation of human rights. As such, these devices are a potentially rich source of evidence.

NHRI investigators should consider what potential digital evidence might exist in relation to the issue under investigation, as they plan and carry out their investigations. They should also recognize that digital evidence can be easily hidden and – not so easily – altered or destroyed.

It is rare that an investigation of any sort does not include at least one potentially important piece of digital evidence. As the **Commission on Human Rights of the Philippines** points out in its Manual on Investigations and Case Management Process:

It is important to use modern techniques of investigation including explorations of cell phones and/or webmail.⁵⁸

Most reliable evidence

Digital evidence may be the most reliable evidence available to an investigator. It is difficult to alter or otherwise tamper with this type of evidence.

Witness evidence may be difficult to obtain and documentary evidence may be unreliable but digital evidence, provided it is genuine, almost always documents what has happened. Keep in mind, however, that digital evidence will still need to be assessed. For example, an event recorded on video may not provide the whole story. Video gives one perspective and, as with all things, it has to be placed in context. Further investigation will usually be necessary.

Most abundant evidence

Digital evidence can also be the most abundant evidence available. Abundance can, of course, be a challenge for investigators. Very few investigative agencies have the capacity to handle vast amounts of information.

It may be prudent for NHRI investigators to focus solely on gathering digital evidence that is key to the investigation; for example, attempting to determine exactly when a document was created or retrieving e-mails that have been deleted. There is a downside to limiting searches, of course. The investigator may miss something important. Assess where the evidence is most likely to be found, before starting to search.

5. HANDLING DIGITAL EVIDENCE

When dealing with digital evidence, general forensic and procedural principles should be followed, as discussed in Chapter 20.

- The process of collecting, securing, and transporting digital evidence should not change the evidence.
- Digital evidence should be examined only by those trained specifically for that purpose.
- Everything done during the seizure, transportation and storage of digital evidence should be fully documented, preserved and available for review.

Be cautious

If an investigator does not have expertise in handling and preserving digital evidence, it is usually best to wait before doing anything with the device until he or she gets the required help. Do not browse through it. In doing so, the investigator may unknowingly overwrite deleted evidence or otherwise do more harm than good.

58 *Manual on Investigation and Case Management Process*; Commission of Human Rights of the Philippines; 2012; section 6.1.

Some things that an investigator should consider are that:

- data or digital evidence may be lost if power is not maintained to the device
- data or digital evidence on some devices, such as mobile phones or smartphones, can be overwritten or deleted while the device remains activated
- software is available for mobile phones and smartphones that can be activated remotely to make the device unusable or to wipe all data from it (turning a smartphone off immediately is usually a good idea)
- data can be corrupted or rendered unusable if mishandled by someone who is inexperienced.

Plan

If, when drafting the investigation plan (see Chapter 5), the investigator identifies digital evidence as a possible factor, then he or she should consider the best approach to dealing with it. That may include:

- developing a strategy to secure it, should there be concerns it might disappear or be tampered with
- consulting an expert on how best to secure it, prior to seizing it
- having the expert present when it is seized.

Commissioning expert assistance usually costs money and this should also be factored in to the investigation plan as part of the “required resources”.

6. HOW CAN DIGITAL EVIDENCE BE HIDDEN OR DELETED?

Hiding information on a storage device is a relatively easy process, including doing something as simple as changing a file extension from “.doc” to “.xls”. Digital stenography is the practice of concealing information in a digital format, primarily within image and audio files, making it difficult to be found.

Deleting information permanently can be a bit more challenging. For example, just pressing the “delete” button and emptying the recycle bin on the computer does not necessarily mean that the information has gone forever. It is still on the hard drive and will remain there until it is overwritten. In many cases, an expert will be able to retrieve it. In other cases, there may be backup files that the person deleting those files has overlooked. There may also be auto recovery programs on the device.

Investigators should also think laterally. Good investigative work may establish that a particular document was e-mailed and so it may be possible to recover it via the e-mail program or from the recipient. It may also have been photocopied and is potentially stored on the hard drive of a photocopier somewhere, although establishing which one may be a very onerous task.

7. FORENSIC DATA RETRIEVAL

Identifying potential sources of digital evidence is of little value if the investigator cannot access it or, in trying to do so, destroys the data because he or she does not know how to access it.

NHRIs will likely need specialist help to retrieve information from digital devices. It is usually wise to seek assistance from computer forensic experts.

The goal of computer forensics is to examine digital media in a forensically sound manner with the aim of identifying, preserving, recovering, analyzing and presenting facts and opinions about the information.

Generally computer forensic experts will:

- secure whatever data needs to be examined
- clone it, if possible
- find every relevant file on a hard drive, including encrypted, hidden and deleted files.

These specialists use a number of tools to find, extract, and analyze data, including:

- disk imaging software
- disk cloning hardware
- forensic analysis software
- software or hardware write-blocking tools
- file recovery programs
- encryption decoding software
- password cracking software.

Forensic video/image analysis

Forensic image and video analysis experts analyze video recordings, photographs and other image data that may have a bearing on the investigation. They may be able to enhance the visual and audio quality of digital recordings, digitize analog recordings and repair damaged recordings in both standard analog and digital formats. Editing software may be used to determine if video or photographs have been altered. It may also help to compare person(s) or objects in a video or photograph in order to identify if there are any commonalities with another image.

Cost

This specialized forensic work is not cheap. There may be government agencies with which the NHRI can work order to retrieve digital evidence, should doing so not undermine the integrity of the NHRI investigation.

KEY POINTS: CHAPTER 22

- **Digital evidence may be the most valuable evidence in an investigation.**
- **NHRI investigators have to consider what digital evidence may be available, where to find it and how to preserve it so that extracting this evidence is done properly, particularly if data is hidden.**
- **The NHRI may need to seek expert help to retrieve this evidence.**



Chapter 23: Using the Internet as an investigative tool

KEY QUESTIONS

- **What is the most effective way of searching the Internet for information that may help an investigator?**
- **How can an investigator use social media?**
- **What online tools are available to assist in investigations?**



1. INTRODUCTION

The Internet is becoming an increasingly important tool for investigators. It can be used in several ways.

Firstly, investigators can use the Internet to obtain information that might be relevant to an investigation. This is the most important benefit. The Internet has vastly increased the quantity and breadth of information available to investigators. It has made research much easier and faster. It can help identify possible witnesses. It may provide video or photographic evidence of what happened. Documents may be published online. People may tweet, blog or post comments that may shed light on something under investigation.

Whether it is to see if a key witness has uploaded video to his or her blog about the matter being investigated, to download the most up-to-date version of a public policy or to see who is tweeting what about the issue under scrutiny, NHRI investigators should always consider the Internet as a possible source of evidence and information.

The Internet has undoubtedly played a very positive role for human rights defenders. The Arab Spring is a case in point. Many protests were organized via Facebook, Twitter and other social media. The international community, NGOs and the global public learned of human rights violations from video of human rights abuses uploaded to the Internet. However, human rights abusers can also use the Internet for their own purposes. For example, during the Arab Spring, Libyan authorities were able to identify and threaten rebels whose faces were captured on video uploaded to YouTube.

Secondly, investigators can use the Internet to establish a rapport with witnesses. As discussed in the chapter on investigative interviewing, two of the key principles of interviewing include preparing properly and building a rapport with the interviewee. The Internet may provide information that can be used to do both.

Thirdly, an NHRI can use the Internet to make people aware of the investigation. It can be a very effective tool to let people know what the NHRI is investigating and to invite their input.

This chapter will examine:

- the basic principles of conducting online searches
- how to use social media as an investigative tool
- online tools that may assist investigators
- using the Internet to communicate information about the investigation to stakeholders.

2. BASIC PRINCIPLES OF CONDUCTING ONLINE SEARCHES

Many people know how to conduct basic online searches using Google and similar search engines. However, there are ways of “framing” the search to get optimal results. Investigators should understand how search engines work, where to look for information and how to organize, access and preserve the information they find.

Google may not be the search engine of choice in every country or region. However, the same general principles apply to all search engines, from Yahoo India to Web Wombat in Australia or Mongolia Online.

Boolean search

The term “Boolean search”, or Boolean logic, refers to the logical relationship between several keywords or search terms. For example, Google assigns priority to search terms that come first. A search for “Asian human rights violations” may yield slightly different results to “Human rights violations in Asia”. The more precise the query is, the fewer and more relevant results will be returned.

There are times when excluding certain terms from searches might be helpful, especially when those terms are very likely to appear in results and lead to information overload. Having too much information is better than having too little, but the goal is to keep the focus on collecting relevant information. Investigators can use the “-” command in situations like this. If an investigator wants to search for an exact phrase, the phrase should be enclosed in quote marks; for example, “human rights violations”. The search results will contain that exact phrase and not return results that simply mention those three words. In some cases, several terms can be searched on an equal basis using the “OR” command.

Tip: It can help to enclose phrases in quote marks, such as “Detention centres” OR “prisons” in Japan. Searching this way will furnish more results and widen the scope of the search.

Here are some examples:

Google shortcut	Finds pages that have ...
Bellilious Park	the words “Bellilious” and “Park”
“Writ of Amparo”	the exact phrase “Writ of Amparo”
police-riot	the word “police” but NOT the word “riot”
~systemic	looks up the word “systemic” and synonyms
define: assam riots	Assam Riots defined.
site:(search only one website)	site: http://www.humanrights.asia/ “pakistan”
link:(find linked pages)	link: www.asiapacificforum.net
#...#(search within a number range)	monetary relief \$200000...\$300000
daterange:(search within specific date range)	sri lanka daterange:1998–2001
info: (find info about a page)	info: www.achrweb.org
cache: (view cached page)	cache: www.123khoj.com/
filetype:(restrict search to specific filetype)	filetype:ppt
allintitle: (search for keywords in page title)	allintitle:“DSI” human rights

Google shortcut	Finds pages that have ...
inurl:(restrict search to page URLs)	inurl:myanmar
site:.edu (specific domain search)	site:.edu, site:.gov, site:.org, etc.
site:country code (restrict search to country)	site:.af “Afghanistan”
intext:(search for keyword in body text)	intext: Kathmandu Post
allintext: (return pages with all words specified in body text)	allintext:non-governmental organizations

Master Google

Investigators should know how to use Google. Google is the world’s most utilized search engine but search results on Google can be simply too overwhelming to navigate. There are several shortcuts that can make an investigator’s life easier. These shortcuts are available online, as are lessons on how to improve search skills.⁵⁹

Keep search goals in mind

The search should be started with a goal in mind and queries organized carefully. If the objective of the search is not found in the first 15 minutes, the approach should be reassessed and the search tools or the language used for the search varied.

Using questions to do a search should generally be avoided. For example, it is better to search for “economic migrants in Asia”, rather than “are there economic migrants in Asia?”. While Google will generally ignore the “question” part of the query, the order of the words in the query is important for Google’s algorithm. As a result, framing the search this way can compromise the results.

Always more information out there

Online research on any topic can never be considered complete and closed. The flow of information continues every day – new databases and sites are crawled by Google every minute of every hour, new videos are uploaded to YouTube, new posts are made on Facebook and new tweets may be made that are relevant to the investigation.

If research on a particular topic is ongoing, the use of online monitoring tools could be a helpful strategy. These can be set up using basic search commands. Online monitoring tools include Google Alerts and Socialmention, which tracks mentions of a particular term on blogs and open social networks like Twitter.

Always more information out there – and not all of it is on Google

While Google is the world’s most utilized search engine, it only covers between four per cent and 20 per cent of content on the Internet. There are a number of other search engines that specialize in particular types of searches.

Wikipedia, which can be a useful research starting point, offers a long list of various search engines at http://en.wikipedia.org/wiki/List_of_search_engines.

The website search engine Collossus (www.searchenginecolossus.com) offers an international directory of over 3000 search engines, listed by country. It is an excellent resource.

⁵⁹ Google currently offers “Power Searching with Google”, a free series of online courses for researchers. It is an intensive programme that includes video materials, tutorials, tests and quizzes. It is available at www.powersearchingwithgoogle.com.

When conducting searches, investigators should “think local”. For example, in China, a search engine called Baidu (baidu.com or baidu.cn) could retrieve considerably better results than Google for anything related to China and Chinese websites. Similarly, an excellent search tool for Russian websites is Yandex (yandex.com or yandex.ru). Many other countries have their own ecosphere of social networking sites and search engines. Investigators should use the search engine that best fits their particular location of interest. Following are a few that are relevant to countries in the Asia Pacific region.

Afghanistan <ul style="list-style-type: none"> • BHANVAD 	Australia <ul style="list-style-type: none"> • EZILON • WEB WOMBAT 	Bahrain <ul style="list-style-type: none"> • ARABO Arabic 	Bangladesh <ul style="list-style-type: none"> • VELKI
India <ul style="list-style-type: none"> • 123 KHOJ • MY INDIA 	Indonesia <ul style="list-style-type: none"> • PENJEJAK 	Jordan <ul style="list-style-type: none"> • ARABO • JORDAN LINKS 	Maldives <ul style="list-style-type: none"> • ODP*
Malaysia <ul style="list-style-type: none"> • E-BOURNEO 	Mongolia <ul style="list-style-type: none"> • MONGOLIA ONLINE 	Myanmar <ul style="list-style-type: none"> • ODP⁶⁰ 	Nepal <ul style="list-style-type: none"> • EXPLORE NEPAL
New Zealand <ul style="list-style-type: none"> • EZILON 	Philippines <ul style="list-style-type: none"> • AKLAN • ALLEBA 	Oman <ul style="list-style-type: none"> • OMAN FINDOUTER 	Qatar <ul style="list-style-type: none"> • INDEX QATAR
South Korea <ul style="list-style-type: none"> • CHOL • DAUM 	Sri Lanka <ul style="list-style-type: none"> • LANKA LINK 	Thailand <ul style="list-style-type: none"> • SI SEARCH 	Timor Leste <ul style="list-style-type: none"> • ODP

Planning the search

An online search should be focused and planned. Investigators should concentrate on what – or who – they are looking for. They should think about where that information might be found. It is also important to think laterally. For example, if an investigator is trying to locate someone, what do they know about that person’s interests? Where are their friends? How would they pass their time? What activities could they potentially engage in, online and offline? Where did they graduate from school or university? How tech-savvy are they?

Ethics

Subject to the laws or regulations in a particular jurisdiction, everything on the Internet is in the public domain. In theory, there is nothing to prevent an investigator from using this information to further an investigation. However, the investigator should assess whether or not the website where the information was found has itself obtained that information legally and whether or not they have the right to release it.

Accuracy

It should always be kept in mind that just because something is on the Internet, it doesn’t necessarily mean it is true. Photographs can be altered, videos can be edited and documents can be fabricated. The reliability of any evidence sourced from the Internet should be assessed, just as with evidence from any other source. It must not be accepted at face value.

Always seek the original source of any fact found on the Internet that you intend to rely on. Always seek corroboration, if possible. Always explore any discrepancies.

⁶⁰ The Open Directory Project (ODP), also known as “Dmoz” (from “directory.mozilla.org”, its original domain name), is a multilingual open content directory of World Wide Web links. It is owned by Netscape but it is constructed and maintained by a community of volunteer editors.

3. USING SOCIAL MEDIA AS AN INVESTIGATIVE TOOL

Social media sites like YouTube, Twitter, Facebook and others provide platforms for online conversations and to post information. They are undeniably an important source of information about people and issues. That information may be of use to an investigation.

Video-sharing sites

YouTube is the world's largest video-sharing website, allowing users to view, upload and share videos. It can be a very rich source of useful evidence for investigators. For example, in the G20 Summit investigation referred to in Chapter 30, investigators downloaded hundreds of videos from YouTube. They proved to be the key evidence in the investigation.

YouTube is also the world's second largest search engine. Around 72 hours of video are uploaded to YouTube every minute and 70 per cent of its traffic comes from outside the United States, making it a truly global video search engine. Raw footage taken on smartphones frequently appears on YouTube, uploaded by "citizen journalists". However YouTube makes it difficult to upload videos completely anonymously. In addition, Google owns YouTube and it is worth noting that, in the summer of 2012, Google submitted a patent for face-recognition technologies, raising privacy concerns among YouTube users. Google's new social network, Google+, already has "Find my Face" facial-recognition technology.

Not everyone wants to be on YouTube. Many video-sharing sites operate through Torrent sites, whose users can potentially be tracked through an IP address, at least in some cases.⁶¹ The legality of Torrent sites remains unresolved but their popularity in video-sharing and file-sharing is soaring. Similarly, various smartphone apps allow video and photo file-sharing, which does not always leave traces online. For example, GO App allows users to anonymously share photos, videos, and comments.

Facebook

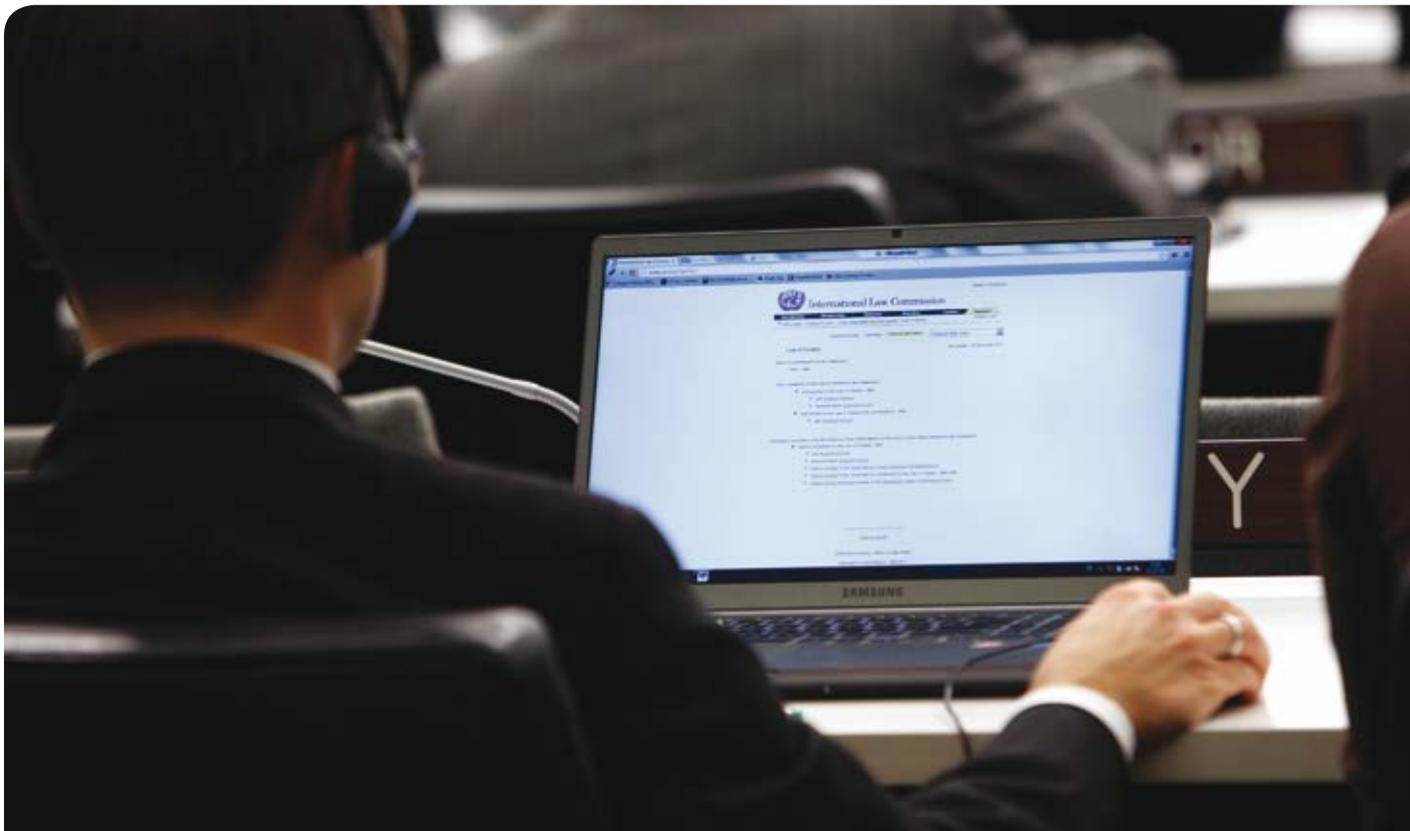
Facebook is the world's largest social networking site. It recently surpassed one billion monthly users worldwide. A large number of them are in the Asia Pacific region, including 60 million Facebook users in India. There are 11 million users in Australia or 55 per cent of the population. The Philippines, Indonesia, Thailand, Malaysia and Japan all have over 10 million Facebook users. In Indonesia, the number is close to 50 million or roughly 20% of the population.⁶² Growth in use is astounding, up more than 16 per cent in Indonesia and 10 per cent in the Philippines in a six-month period in 2012 alone.

Facebook has recently committed resources and energy to improving its search function. Search results can be surprisingly relevant. Facebook users tend to form groups around issues or events, engage in discussions and share updates. Reaching out to a group moderator or posting a simple call for information on the group's "wall" can be used to find witnesses and uncover relevant evidence. Much of the information on Facebook cannot be found through Google or other search engines because it resides within Facebook. Even so, many people have been surprisingly careless in sharing personal information on their pages. For example, Facebook has been used by police all over the world to catch criminals.

Facebook photos and videos can provide valuable evidence and leads. Facebook, like many other social media sites, offers a "facial tagging" tool, allowing users to tag photos of people they recognize on Facebook whom they have access to on the site. Facebook has experimented with an automatic photo recognition feature in the past but, for now, has turned it off due to widespread privacy concerns.

61 A torrent is a file sent via the BitTorrent protocol (peer-to-peer file sharing). It can be just about any type of file, such as a movie, song, game or application. During the transmission, the file is incomplete and therefore is referred to as a torrent. Torrent downloads that have been paused or stopped cannot be opened as regular files, since they do not contain all the necessary data. However, they can often be resumed using a BitTorrent client, as long as the file is available from another server. In context, the legality of sites providing torrent resource is at issue given copyright restrictions.

62 Facebook statistics by country are available at www.socialbakers.com/facebook-statistics.



UN Photo by Devra Berkowitz.

It should be remembered, however, that people will frequently have an account at more than one social networking site. A list of social networks and their focus is available at Wikipedia: http://en.wikipedia.org/wiki/List_of_social_networking_websites.

Twitter

Twitter is an online social networking and micro-blogging service that enables its users to send and read text-based messages of up to 140 characters. Twitter has also made a name for itself in real-time search. It maintains its own search engine at search.twitter.com.

Twitter keeps its real-time results for several days, depending on the volume of updates. In investigations, tweets can help create or verify a timeline of events, since all tweets are automatically time-stamped. Many tweets contain geographical information and search results can be narrowed down to conversations of certain topics within a particular geographical area.

Tweets often contain links to valuable evidence, such as photos, videos and links to blog posts or sites. However, Twitter's real strength is in capturing real-time information and "chatter".

Preserve the evidence once it is found

It is important to remember that all online results are time-sensitive. Things are posted and then taken down all the time. If the investigator finds something that is useful in the investigation, it should be preserved before it possibly disappears. It can be very difficult and expensive to find content later on.

Information on social media sites should be saved as soon as it is found and determined to be valuable. With YouTube video evidence, for example, it might be useful to capture and save the video using tools like Snapz or Freemake. Similarly, it may be wise to "screen capture" tweets if they may have some evidential value.

4. OTHER ONLINE TOOLS THAT MAY HELP INVESTIGATORS

Many programs and tools exist to help investigators identify, gather, secure and preserve evidence. Following are some suggestions for investigators to include in their toolbox.

<p>Tineye www.tineye.com</p>	<p>Tineye is a “reverse” search engine for images. It allows users to find where a particular image appears on the Internet. This is an invaluable tool for investigators trying to locate the original source of a particular image, identify instances of plagiarism and so on. Tineye finds where an image came from, how it is being used, if modified versions of the image exist or if there is a higher resolution version of the image available. It is free to use.</p>
<p>Google Images www.google.com/imghp?hl=en&tab=WI</p>	<p>Google Images allows users to conduct reverse image searches, similar to Tineye. Open Google Images and click on the camera at the end of the search bar. Enter the website address for any image and it will find where else that image is available on the Internet.</p>
<p>WayBackMachine http://archive.org/web/web.php</p>	<p>WayBackMachine keeps Internet archives of website pages. It is by no means perfect but it can help users to see what pages on a website of interest looked like in the past month, year or even several years ago.</p>
<p>Snapz www.ambrosiasw.com/utilities/snapzprox/</p>	<p>Snapz is a tool to record video. It and similar tools can be used to preserve video evidence.</p>
<p>Audio Hijack Pro www.rogueamoeba.com/audiohijackpro/</p>	<p>Audio Hijack Pro is a tool to record streaming audio. It and similar tools can be used to preserve audio evidence.</p>
<p>Whois.net http://whois.net/domain-name-search/</p>	<p>Whois.net allows users to conduct basic queries to find the contact name, phone number and address details of any domain name registrant. It is just one of many tools that can do this. However, there are hosting services that allow owners to stay anonymous.</p>
<p>Caches</p>	<p>Google regularly crawls the Internet and takes snapshots of each webpage. Simply click “cached” in the search results or use this link: http://webcache.googleusercontent.com/search?q=cache:http://example.com/⁶³</p>
<p>Public records</p>	<p>Public databases can be searched to find mobile phone numbers, landline phone numbers, addresses, names and more. An example of a public database that can be searched is: http://publicrecords.searchsystems.net.</p> <p>Depending on the data being searched, it should be kept in mind that many local government authorities maintain some sort of public database and the best option may be to contact the local library to find the full list of public databases available.</p>

63 Replace “example.com” with another website and that webpage will appear as it looked when Google last indexed it.

<p>Twitter search https://twitter.com/search-home</p>	<p>Twitter search allows a search of all available tweets, almost in real-time. However, Twitter only keeps those results for an undisclosed “limited” time, from a few days to a couple of weeks, including any deleted tweets. It is possible to access all tweets on Twitter for a fee, through Gnip.com. All tweets are currently being archived in the Library of Congress in the United States. Twitter has access to its own archives and can be asked by a court to provide past tweets.</p> <p>Google also keeps a limited archive of tweets and tools to search. Tweets keep changing as Twitter changes the way it archives tweets. Some excellent sites, such as http://undetweetable.com/ and Tweleted.com, have had to shut down because of these changes, however, their archives are still available.</p>
<p>Metasearch</p>	<p>Metasearch engines send search queries to several search engines at once, and display results in a logical, organized way. The Open Directory Project maintains a directory of metasearch engines at www.dmoz.org/Computers/Internet/Searching/Metasearch/.</p>

5. COMMUNICATING INFORMATION ABOUT THE INVESTIGATION TO STAKEHOLDERS

Investigators welcome any relevant evidence from virtually any source. In most cases, the more people who know about the investigation, the better it is for the investigation. As investigators decide who they want to contact, they should think about who might be interested in the investigation and how best to invite their input.

NHRIs should publish as much information as possible about the investigation on their websites. They should consider how best they can use social media to build awareness of the investigation. Would it be useful to post information on Facebook? Would using Twitter help or posting something on a listserv? Could the NHRI prepare a short video for YouTube or make an announcement on LinkedIn? The same tools can be used to keep people informed of the progress of the investigation and, of course, any findings and recommendations that are subsequently made.

KEY POINTS: CHAPTER 23

- **The Internet is a hugely valuable resource for investigators. It can help uncover evidence and let people know about an investigation.**
- **Online searches should be included in an investigation plan.**
- **Be smart and focused when you search.**
- **Search for information ethically.**
- **Do not accept everything found on the Internet at face value.**
- **Use social media as an investigative tool.**
- **Be aware of new tools and new ways to search for information online.**



Chapter 24: Documentary evidence

KEY QUESTIONS

- **What types of documents does an investigator need to gather?**
- **What are the seven stages involved in dealing with documentary evidence?**
- **How should documents be stored and archived?**



1. INTRODUCTION

Documents are often a rich source of evidence in human rights investigations.

The advent of documents that have been created or stored digitally, such as e-mails, has vastly increased the potential sources of documentary material that investigators should consider as they plan and execute their investigations.

Of course, there are always exceptions to the rule. In some cultures, or geographic areas, information is traditionally conveyed orally, rather than in writing. Access to computers, paper and pens may also be very limited.

Generally, however, documents provide the backbone of virtually all types of investigation, including human rights investigations.

2. TYPES OF DOCUMENTS

The type of documentation to be gathered will depend on the kind of investigation being conducted. During the course of an investigation, numerous types of documents will likely be gathered. These may include, but will not be limited to:

• policies and procedures	• previous investigations	• written orders and commands
• guidelines	• manifests	• letters
• customs and immigration papers	• identity cards and passports	• diaries
• memos	• personnel records	• criminal records
• minutes of meetings	• e-mails	• logs
• files	• internal policies	• briefing notes
• position papers	• reports	• medical records
• forensic reports	• training records	• investigation notes

The list is as numerous as the number of ways in which people transfer thoughts and actions into writing.

3. SEVEN STAGES OF DEALING WITH DOCUMENTS

Dealing with documentation involves the following seven stages:

1. **Determining what documents exist or should exist.**
2. **Obtaining those documents.**
3. **Reviewing them.**
4. **Assessing their authenticity.**
5. **Understanding them.**
6. **Assessing what weight to give them.**
7. **Identifying any gaps.**



3.1. Determining what documents exist or should exist

As an investigation is being planned, the investigator should consider what documents should exist that might be relevant to the issue being investigated. If the investigator has knowledge of the organization involved, he or she may know what type of documentation it typically produces in such circumstances.

The investigator should consider the following questions:

- What documents do exist?
- What documents should exist in these circumstances?
- What documents might exist, based on the investigator's knowledge of the organization?
- What documents could possibly exist, even though the investigator does not know whether they do or not?

3.2. Obtaining documents

Authority to require production of documents

Most NHRIs have powers in their establishing legislation to obtain whatever documents are required for an investigation, usually from government agencies. As long as those powers exist – and are respected – NHRIs should be able to obtain the documents they require. Hopefully, no NHRI is forced to use “access to information” legislation, or its equivalent, should such legislation exist in its jurisdiction.

Limitations

There may be limitations on what documents a government agency will provide. For example documents related to national security or those deemed to be Cabinet-in-confidence may be specifically excluded in the establishing legislation of the NHRI.

A refusal to provide documents should not be accepted at face value. If an agency refuses to release a document on the grounds of “confidentiality”, or some other specified privilege, then the justification for that refusal should be carefully explored.

If the NHRI does not have the authority to obtain particular documentation from an agency, there may be a workable compromise that could be reached. For example, the NHRI may be able to review the documents but not receive copies of them.

“Wish list” letters

Every document that is relevant and related to the issue being investigated should be requested. However, it can be a challenge keeping the request focused so that it is not seen as unreasonable. Investigators should not go on “fishing expeditions”. That can create unnecessary disruption in the organization supplying the documentation and, in turn, make the NHRI look unfocused and unprofessional. On the other hand, investigators do not want to miss any evidence because they did not ask for it.

A “wish list” letter can help strike this balance. This method of requesting documents is exactly what it says it is: a letter to the organization or person whom the investigators believe may have documentation relevant to the investigation. Such requests should always be put in writing so there can be no subsequent dispute as to who asked for what and when.

GENERAL TIPS

Ask the right people

The person to ask to is the person who has custody of the relevant documents and the authority to provide them. Asking someone too junior in the organization means the request will be forwarded up the hierarchy and this will inevitably lead to delays.

Scope

Investigators should establish what documents are required and include on their wish list everything that is relevant or thought to be relevant. The request should be focused and reasonable. If there is any doubt about the relevance of a document, it should be included in the wish list. A “since” date should also be set to ensure that all related documents after that time are included. It is preferable, however, not to request information or documents that are readily available from public sources.

Use their language

Investigators should ensure that the information sought is requested in a way that will be understandable to the individuals or agency to which the request is made. In other words, use their language. Different organizations use different language and terminology. Therefore, it may be advisable to contact whoever will be asked for documents beforehand to ensure that the wish list has the right wording to describe what is being requested.

Deadline

Ask for the documents to be supplied by a given date. Determine that date based on the amount of material requested and the timelines set out in the investigation plan. Investigators should not be overly generous in the timeframe they provide to the organization, especially if there are tight deadlines for completing the investigation.

Include the “basket clause”

End the letter with a request that the organization provide “any other document not previously referred to in the letter that may be relevant to the investigation”, or words to that effect. That makes it more difficult from the organization to argue later that it did not release a document because it was never requested.



3.3. Reviewing documents

All documents received by the NHRI must be read. That means actually reading every single word, of every single document. Do not skim or speed-read the document. It is easy to overlook or miss something. Put aside enough time to review the documents thoroughly. A key piece of evidence may be buried in a footnote or an appendix, as an aside in a footnote or as a “cc” in an e-mail.

If there is reason to believe that not all the documents requested have been received, then one option is to itemize every document provided, including the title, date, author, a précis of the subject matter and the number of pages. That list should be sent to the organization that provided the documents with a request that it confirm that there are no documents missing or that no further relevant documents are in its possession. This can require a lot of work, however it puts the onus on the organization to explain exactly what happened should a document later emerge that was not supplied.

3.4. Assessing authenticity

Forging documents, or creating them after the fact, is not unknown. It might be a false passport sold to a refugee or a memo placed in a file after an event intended to protect those who may be culpable.

If there are concerns about the authenticity of a particular document, investigators can ask the following questions to help determine whether those concerns are well founded:

- Is it a document that would normally have been created in these circumstances?
- When was it created?
- Is the document dated and, if so, what level of confidence can be placed on the accuracy of that date?
- Was it created before or after the event(s) under investigation?
- If it is not dated, why not?
- How does the document fit in with other related documents? If it is numbered, is it the right number for the sequence of documents in which it was found?
- How does the document fit in with all the other evidence that has been gathered?
- Are any signatures genuine?
- Does it have the “ring of truth” about it?

As discussed in other chapters, expert assistance may be needed to help determine whether a document is genuine or not. A computer forensic analyst may be able to pinpoint exactly when a Word document was created, added to or had material deleted. A handwriting expert can give an opinion on whether a confession is in the prisoner’s own handwriting. Similarly, a forensic document examiner may be able to identify any alterations, additions, deletions or substitutions to a document, or even if the same ink has been used throughout the document.

3.5. Understanding what the document says

An investigator should understand what he or she is reading. If what is written in the document does not make sense, or the jargon used makes it incomprehensible, it must not be glossed over it. Clarification must be sought.

Investigators need to become instant experts. If the document comes from an organization, they should educate themselves in how that organization operates. They should obtain an organization chart, understand the chain of command, identify the decision makers and know the different levels of authority. They should understand the terminology used by the organization; its acronyms, abbreviations and jargon. If they do not understand something, they should say so and find out what they need to know.

3.6. Assessing how much weight to give to the document

Even if a document is authentic, the contents cannot always be taken at face value. Questions an investigator may want to ask may include:

- Who wrote it?
- For what purpose was it written?
- Who was involved in drafting it?
- Who had input into it?
- Whose cause does it help?
- Who had an opportunity to change it?
- Is there bias in the way the document is written?
- Was it written under duress?
- How accurate are any facts included in the document? Does it contain information that is within the direct knowledge of the author or does it report what others have said – in other words, does it include hearsay evidence?
- Are there facts that the author should have known and included in the document but did not?
- What is the overall tone of the wording?
- Are any conclusions supported by the facts?
- Are there grounds to believe that it is a document created to protect certain people within the organization?

3.7. Looking for gaps

In addition to considering what has been received, investigators should look for anything that logically should be there, but isn't. They should ask whether documents that would normally be created in the circumstances are missing? For example, if the minutes of all meetings concerning a certain issue have been received, except for a meeting that is known to have taken place, then the investigator should find out why it was not provided.

Investigators should also look for missing pages. For example, does the document jump from page 160 to page 162? If so, why? It may be an unintentional photocopying error, or it may have been done deliberately in the hope it would be overlooked by the investigator reviewing it.

Investigators should make sure that any material that is cross-referenced in a given document has been provided. For example, if an e-mail is received with an attachment icon, they should make sure that the attachment was provided.

Investigators should use the documents to identify possible witnesses or other sources of evidence. They should look for any mention of individuals – in the “cc” space of a memo, for example – of whom they may not have previously been aware. They should follow their instincts. If they think something is missing or is not right, they should follow up on it.

4. E-MAILS AND TEXT MESSAGES

E-mails and text messages are a rich source of information to investigators. People can be remarkably candid in their communication and, once the send button is pressed, e-mails and text messages almost always last forever.

An email may have electronic information attached to it, including the date it was sent, replied to or copied (“cc” and “bcc”) to others. All this is potentially relevant evidence.

Looking through e-mail chains can be time-consuming and tedious. However, it has to be done. It involves cross-checking times, dates and “cc” information to determine if any segment of the correspondence may have disappeared, as well as looking for links between the responses.

Text messages can be more difficult to retrieve than e-mails, especially if someone doesn’t want them seen. However, they should always be requested, as with every other potentially relevant document. Even if the request is refused or ignored, the fact remains that the investigator has requested them, should they emerge later.

5. SOME GENERAL TIPS

Never mark original documents

Original documents should be kept untouched. They should be copied and then put them aside in a safe place. Under no circumstances should an original document be altered. In the event than an investigator wants to show it to someone, a copy should be made. Similarly, an original document should never be taken to an interview. It can be rather embarrassing when an interviewee reaches across the table, picks it up and eats it – as has happened.

Make working copies

Investigators should use working copies of documents for interviews, report writing and so on.

Look for annotations

People write on typed documents, they initial them, they doodle on them, they may even forget to take stick-it notes off before photocopying them. All of these annotations can be a valuable source of information.

Tracking

Creating an index of documents can prove useful, particularly in larger cases.

What if the provision of documents is refused?

There may be powers under particular legislation to compel the production of documents in certain circumstances. They should be used as appropriate. However, there may be exceptions included in the legislation. Alternatively, the particular organization to which the request is made may not recognize the authority of the NHRI or its powers may not apply in that region or to that organization.

All reasonable efforts should be made to get obtain the documents needed, either by litigation, persuasion or media pressure. A compromise may be offered, such as allowing the NHRI to view the documents but not take copies. The approach will likely depend on how vital the documentation is to the investigation and, of course, the seriousness of the issues under investigation.

In all cases, the onus should be on the organization to explain why it has refused to provide the documentation that has been requested. This approach is designed to protect the NHRI and the investigator against potential allegations that the investigation was not thorough or was missing crucial evidence.

Document imaging

Scanning documents and uploading them to a shared drive may be useful. NHRIs may receive documents in electronic format. In that case, a decision will have to be made as to whether there is a reason to request copies of the original documents. In cases where there are grounds to believe it is necessary, it may be desirable to obtain the original paper documents.

Protection of sensitive documents

Some of the documents gathered during an investigation may be sensitive to the degree that the NHRI needs to ensure tightly controlled access, sometimes known as “close hold”. For example, the documents may include information from a whistleblower within an organization being investigated or a victim who may be in physical danger.

It is important to have secure storage within the office, including filing cabinets that are only accessible to the investigative team.

Very sensitive documents should not be copied, unless there is a very good reason to do so. Only the investigators directly involved in the investigation should have access to these documents.

Considerable care should be exercised with regard to scanning and sending documents electronically. Once that has happened, the investigators will no longer have control over them. If it is essential, the electronic files should be encrypted if possible.

Organizing large quantities of documents

Document management in large investigations can be incredibly challenging. Thousands of documents may have been gathered during the investigation.

Those documents need to be organized so that nothing is overlooked and so that everyone involved in the investigation knows where everything is and can be easily accessed.

In major investigations conducted by a team of investigators, the goal is to ensure that every investigator involved in the investigation is aware of any information in any given document that may have a bearing on that part of the investigation for which he or she is responsible.

Document management systems can solve this problem. There are several computer-based document management systems that can help manage large quantities of documents. Most are designed for the case management of major criminal investigations, such as serial homicides. They have also been used in Canada for major public inquiries and Royal Commissions, as well tracking an outbreak of SARS in Ontario in 2003. Aspects of these systems may be useful in larger human rights investigations, particularly national inquiries.

These systems can help sort and analyze vast quantities of data generated by a major investigation, including:

- notes, statements, e mails, policies and procedures and so on
- detecting linkages, so that a name which appears in one document can be cross-referenced to another
- keeping track of exhibits
- canvassing of witnesses
- media relations
- victim/next-of-kin liaison
- investigation logistics
- documenting the investigation.

Some of the disadvantages of document management systems are that:

- they may need to be customized for human rights investigations
- significant time and effort may be required to enter the data and documentation
- they can also be expensive
- they are not geared towards identifying broad systemic issues.

THE MULRUNJI CASE

DOCUMENTS THAT COULD HAVE BEEN GATHERED

The following documents should, ideally, have been asked for in the Mulrunji case, if they existed. All should have been gathered virtually immediately (save for personal emails, which may have caused some issues), as the vast majority should have been readily available.

The documents that should have been gathered include:

- all notes made or anything else put into writing by any QPS officer directly involved in the incident
- the notebooks of all officers who were present at any of the scenes on the day of the incident⁶⁴
- any other written record of Mulrunji's custody that day
- all notes from any officer who had contact with any involved officer in the 48-hour period after the incident
- print-outs from any QPS computer system that had information concerning the incident
- phone records from the police station for the day, including local and long-distance calls
- mobile phone records of all officers and civilian witnesses involved, including police-issued and personal phones⁶⁵
- all written records of any other person in custody at Townsville police station that day or the day after
- all documents relating to which officers were on duty and when in the period 24 hours prior to the death and 48 hours after it, including duty rosters
- all e-mails sent from or to any QPS officer concerning Mulrunji in the same period
- any e-mail sent on any personal e-mail account by any involved officer concerning Mulrunji in that same period
- all records of previous incidents involving Mulrunji
- all records of previous incidents involving S/Sgt. Hurley and Mulrunji
- all records of previous incidents involving S/Sgt. Hurley making arrests in similar circumstances
- background and antecedent information on Mulrunji, including any previous arrests and/or criminal record



⁶⁴ In the chapter on physical evidence, several scenes were identified including the place of arrest, the vehicle in which Mulrunji was transported and the police station itself.

⁶⁵ There may be obstacles to obtaining personal phone records from various parties. Always request. If your request is denied, use what legal powers you have, as necessary.

6. ARCHIVING

So what does an organization do with thousands of pages of documents when the report has been submitted and the recommendations have been accepted and implemented? Storing documents takes up a large amount of space and it can be expensive.

However, many investigators have learned the hard way that the moment they shred their files, even if it is years later, is the moment that those documents will be required for another purpose, such as a lawsuit, a national inquiry or a follow-up investigation.

A lot of investigative agencies have retention policies. The general rule is to keep everything for as long as possible. Scanning documents and keeping them on a hard drive can be an acceptable alternative to retaining mountains of boxes.

Very sensitive documents require special handling. They should be archived in a secure location for a lengthy period of time.

KEY POINTS: CHAPTER 24

- **Documents are the backbone to nearly all investigations.**
- **There are seven steps involved in obtaining and reviewing documents. Investigators should:**
 - **determine what documents exist or should exist**
 - **obtain those documents**
 - **review them**
 - **assess their authenticity**
 - **understand them**
 - **assessing what weight to give them**
 - **look for any gaps.**



Chapter 25:

Assessing the adequacy and quality of evidence

KEY QUESTIONS

- **How does an investigator assess the evidence gathered during the investigation?**
- **Is it always possible to reach a conclusion?**
- **What should be done about conflicting evidence?**
- **Is it particularly difficult to assess evidence in some NHRI cases?**



1. INTRODUCTION

There are three basic stages in an NHRI investigation:

- establishing what has happened, based on the facts
- determining whether what happened is a violation of someone's human rights
- developing recommendations to provide a remedy and/or address the violation, if it was found that one had occurred.

Once an investigator has gathered all the evidence it is reasonably possible to gather in the circumstances, that evidence must be reviewed in order to see what, if any, conclusions can be drawn from it. It is a crucial part of the investigative process. The investigator could have done a meticulous investigation but if his or her assessment of the evidence is not supported by the facts, or if it is biased or incomplete, then the previous stages are worthless.

Each case will be different. But there will be one constant in every case. In order to make a reasonable, informed and fair decision, then the fact-finding portion of the process must be as thorough as is possible in the circumstances. If the investigator does not have all the facts that could reasonably have been gathered, then the conclusion will not withstand scrutiny.

2. WHAT EVIDENCE CAN THE INVESTIGATOR CONSIDER?

In some kinds of proceedings, such as criminal trials, there are often strict rules on what evidence is admissible. For example, hearsay evidence is usually not allowed. In most circumstances, if the accused has a previous criminal history, that information will also be inadmissible as it is considered too prejudicial. Evidence gathered without due process – for example, an illegal search conducted by police – will not be allowed in many instances.

NHRI investigators are generally not bound by rules of admissibility, as they are not conducting criminal investigations. They can consider whatever evidence is available to them. However, they are bound by rules of ethics and common sense. They are responsible for weighing all the evidence carefully and objectively. They must assess how the evidence was obtained and what impact, if any, it is likely to have on how true it is. For example, evidence obtained by the State from someone who has been tortured while in State custody should be given little or no weight.

3. SUFFICIENCY

A single piece of evidence in and of itself does not necessarily prove anything, particularly when the issue under investigation is complex and multifaceted. The investigator must be satisfied that there is enough evidence to prove or disprove whatever fact is being tested.

On occasion, it may be impossible, however hard an investigator tries, to gather enough evidence to conclude anything. The investigators may face significant obstacles. For example, key witnesses may have disappeared or they refuse to cooperate. Documents may have gone missing. The scene may have been destroyed before it could be processed for evidence.

A POLICE SHOOTING

In a shooting in Canada, two police officers encountered a man during a routine patrol. Some kind of interaction occurred. Both officers fired their weapons. One bullet hit the man but it was impossible to determine forensically which officer fired it. A non-police issue firearm was found in the suspect's hand. It had not been fired.

There were no witnesses to the shooting. The physical evidence recovered at the scene was inconclusive. The officers declined to be interviewed, as was their right under Ontario law. There was no evidence about any utterances the officers made immediately after the shooting. The radio communications tape was not helpful.

As a result, it was impossible to reach any kind of conclusion as to whether the shooting was justified. There was insufficient evidence to either exonerate the officers or to charge them with a criminal offence.



In cases where an investigator cannot reach a decision because he or she simply does not have enough evidence to do so, the investigator should say so and explain why.

4. ASSESSING THE RELIABILITY OF EVIDENCE

Assessing the reliability of witness evidence was discussed in Chapter 17, in particular the ADVOKATE process to help investigators attach weight to eyewitness evidence.

Following are some questions that investigators should consider as they assesses the reliability of witness evidence:

- How able is the witness to observe, recall and communicate the evidence? Age and/or disability may be factors.
- How direct was the witness's evidence? Direct evidence is something the witness personally saw, felt, heard, touched or smelled.
- To what extent is the evidence corroborated? Did other witnesses see, hear or experience the same or similar things? Do other sources of evidence – documentary, physical or digital – support or contradict what the witness is saying?

Of course, an investigator must be confident that any corroboration is genuine. Similar evidence given by individuals who have a similar interest in the investigation and a motive to influence the outcome may not be as reliable as similar evidence from witnesses who are totally independent of each other.

- When was the first statement taken from the person? The sooner a statement was taken from a witness, the fresher the event will be in his or her mind. Were witnesses segregated immediately after an event?
- How was the statement taken? Who was present? Is it in the person's own words or was it written for him or her?
- Was the witness forthcoming? Is there any evidence of collusion, such as using similar phrases or wording as other statements? Were important lines of questioning avoided?
- Does the witness have a personal interest in the outcome of the investigation? Do they have a bias? If so, is that reflected in the statement?
- Are there any inconsistencies in the person's statement? In other words, does it have the "ring of truth"?

An investigator will probably have to decide if a witness is credible. Some techniques for assessing witness credibility, such as body language, are also discussed in Chapter 17.

Assessing the reliability of other types of evidence – digital, physical and documentary, often known as "real evidence" – depends on a number of factors. Investigators should consider the following questions:

- Is it authentic?
- Is there any indication it has been altered, tampered with or fabricated?
- Is there a chain of custody that may lessen the chances of it being altered, tampered with or fabricated?
- How and when was it collected?
- Is it supported by other sources, including witness evidence?

Some possible pitfalls with real evidence are discussed below.

THE MULRUNJI CASE

COLLUSION BETWEEN THE QPS AND S/SGT. HURLEY

The Coroner and the CMC both concluded there was collusion between the QPS investigators and S/Sgt. Hurley. They believed that S/Sgt. Hurley was given information about what Roy Bramwell had told investigators, prior to S/Sgt. Hurley's second interview.



5. RELEVANCE OF THE EVIDENCE

The evidence has to be relevant to the issue being investigated. It has to have what is often called "probative value", which means that it proves or demonstrates something. It has to render a fact at issue more or less probable.

If evidence is not relevant then investigators cannot consider it when they formulate any conclusions. It can sometimes be a difficult issue to determine. For example, how much weight should an investigator give to what is sometimes called "similar fact" evidence? This when a person – or an organization – is known to have done something similar in the past to what they may have done in the case under investigation.

Just because someone has a history of doing something, does it mean that he or she has done it again in this instance? It would be unfair to make this connection unless the investigator can articulate good reasons why.

For example, if an organization has a history of torturing prisoners in detention, then does that automatically mean that this particular person was tortured on this particular occasion, as he or she alleges? Or does it make it more likely that that person is telling the truth? That is the question that an investigator will have to answer, based on the totality of the circumstances, the corroborating evidence, the credibility of all involved and his or her common sense.

Balance of probabilities

In many jurisdictions, finding that someone is guilty of a criminal offence depends on the court concluding that that person is guilty “beyond a reasonable doubt”.

In most other types of fact-finding – including most human rights investigations – the test is whether or not something is more likely to be true; in other words, the “balance of probabilities” test. Does the weight of evidence lead an investigator to conclude something? If the investigator – or anyone else assessing the evidence – is more than 50 per cent sure that something is true, then that is sufficient to pass that test.

Clear and convincing evidence

In some jurisdictions, the test may be that there is “clear and convincing” evidence to support a given conclusion. That test falls somewhere between the “balance of probabilities” test and the “beyond reasonable doubt” test.

6. DEALING WITH CONTRADICTIONARY EVIDENCE

There may be evidence that does not support what the investigator has concluded, at least to some degree. It might be conflicting witness evidence or experts who have differing opinions (or “dueling experts” as they are sometimes known).

That is not unusual. Not everybody has the same perspective. Reasonable people can reasonably differ. They can logically reach dissimilar conclusions, based on the same set of facts.

Investigators must be in a position to show why they accepted certain evidence and rejected other evidence. They must be able to articulate why they prefer a given piece of evidence to another piece of evidence that may contradict it. That choice cannot be based on speculation, “gut instinct” or bias. It must be based on a transparent and rational assessment of the evidence.

7. DIRECT AND INDIRECT/CIRCUMSTANTIAL EVIDENCE

Direct evidence is when the person giving it has direct knowledge of what happened. Indirect evidence – or circumstantial evidence – is where the person assessing the facts is asked to draw an inference.

For example, the evidence of a prison officer who was present when a prisoner was water-boarded is direct evidence, even if he or she did not actually take part. The evidence of another prison officer who knew that water-boarding was common at the prison and saw a prisoner taken away and return in a distressed condition, but was not actually present when the alleged abuse took place, is circumstantial evidence.

Direct evidence is usually better, but not always. If someone admits to personally doing something, that is often great from an investigator’s perspective. However, if that confession is the result of torture, inducement, threats or oppression then the evidence has no credibility.

8. REAL EVIDENCE

Real evidence is anything that is tangible, including documents, videos, photographs, hard drives and so on.

As discussed in previous chapters, this type of evidence can be very helpful in investigations as it is not usually as subjective as witness evidence. However, there are possible drawbacks. Just as investigators have to assess the credibility and reliability of witness evidence, they also have to carefully examine the origin of any real evidence before reaching any conclusions.

Real evidence has to be authenticated. It may have been fabricated or changed after the fact. Investigators have to be confident that it is genuine. The degree of authentication will generally depend on the purpose for which the evidence is being used and what is at stake.

Notes and other documents are notoriously easy to create or alter after the fact. Photographs can be altered using Photoshop and similar software. Video can be edited. If investigators have concerns about the origin of a given item, they should do everything possible to establish that it was, in fact, created when someone claims it was created and that it is in its original state. If it was created on a computer, it may be possible to establish exactly when this occurred. If it is a written document, a forensic document examiner may be able to determine when it was made or changed.

Investigators should look at the evidence they receive very carefully. They should check to see whether pages have been torn out or are missing from a document. They should consider the history of the organization or the individual who is providing the item. If the reputation of either is questionable, or if a document or other item contradicts every other piece of credible evidence, then they should consider that evidence very carefully. Above all, they should look for corroboration.

9. PLUGGING GAPS

A major benefit for investigators as they assess the evidence is that they will immediately note any gaps in their investigation. This gives them an opportunity to go back and get the facts necessary to plug those holes.

10. CONCLUSION

Investigators have to be able to explain why they reached a certain conclusion. That reasoning has to be capable of withstanding objective criticism. It is highly likely that somebody, somewhere, will not be happy with the conclusion that has been reached. An investigator's defence in those circumstances is that the conclusion was based solely on the evidence and the law, without any kind of bias or prejudice.

Investigators should try and look at the matter from the perspective of those who may be affected by their conclusions and then ask themselves whether those people would think that the way the evidence was assessed was fair. While others may not like the conclusion, it is the investigator's job to ensure that they cannot find fault with the thoroughness of the fact-finding on which it was based or the fairness by which it was reached.

THE MULRUNJI CASE

CRITICISM OF THE WAY EVIDENCE WAS ASSESSED

The CMC report was critical of how the IRT assessed the evidence in its review of the initial QPS investigation. In particular, it noted that the IRT:

- justified the conduct of the QPS investigation team on doubtful grounds
- suggested explanations for the investigating officers' conduct, which was not advanced by the officers themselves
- accepted evidence without testing it
- failed to look at the totality of the investigating officers conduct and dealt with each allegation separately.

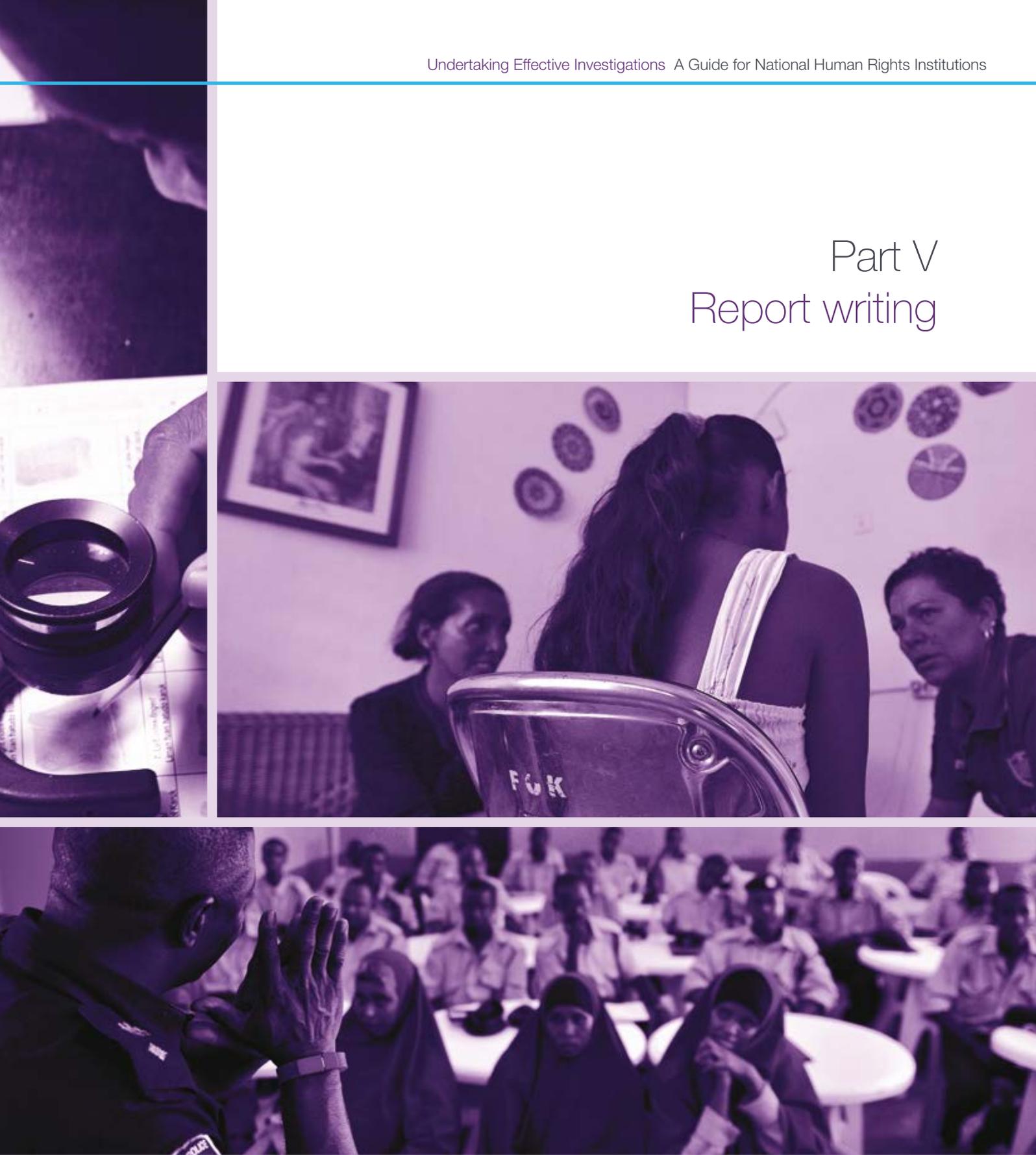


KEY POINTS: CHAPTER 25

- It can be very challenging to assess evidence in some NHRI investigations.
- Assessing evidence is based on three factors:
 - sufficiency
 - reliability
 - relevance.
- Investigators must have sufficient, reliable and relevant evidence to reach a conclusion.
- Investigators can reach a conclusion if they think something is more likely than not to have happened.
- On occasions, there may be insufficient evidence available to reach a conclusion.
- Good investigators keep an open mind as the evidence is assessed.
- Investigators should identify and fill any gaps in the evidence that may prevent a fair conclusion from being reached.
- Investigators must assess the evidence thoroughly and objectively.



Part V Report writing



Chapter 26: Report writing

Chapter 26: Report writing

KEY QUESTIONS

- **What is the purpose of a report?**
- **What are the basic principles of good report writing?**
- **How should reports be structured?**
- **What is the “IRAC” structure for reports?**



1. INTRODUCTION

The fact-finding has been done, often under very difficult conditions. The investigation has left no stone unturned. The case is compelling. The findings are unassailable. The recommendations are solid and realistic. If implemented, they will make things better for people who need support or protection. These changes may even save lives.

But if no one reads the report, it is all for nothing.

This part of the Manual looks at ways to increase the likelihood that people will:

- pick up or download the report
- read all, most or some of the report
- agree that the conclusions are evidence-based and accurate, even if grudgingly
- support – or, at least, not oppose – some or all of the recommendations.

2. PURPOSE OF A REPORT

The NHRI will write a report for two primary reasons:

To educate and inform

The NHRI investigation shines a spotlight on a human rights violation. It tells people what has happened or what is happening.

To persuade

Once the NHRI has convinced the reader of the facts, the next step is to persuade the reader that its findings are sound and that the recommendations are valid and should be implemented. This is where the NHRI becomes an advocate, based on the facts and the law.

3. BASIC PRINCIPLES OF REPORT WRITING

Decision makers and the public are inundated with reports and information. Why should anyone care about a report prepared by the NHRI? Here are a few basic principles that can help in the preparation of a clear and compelling report.

- Think strategically, including by writing in a way that appeals to your intended audience.
- Investigators should understand what they are writing about before they start writing.
- If the investigator has done a thorough job gathering the evidence, the report will be far easier to write.
- Create a framework before you start to write the report.
- Write as you go. Add content to the framework as the investigation progresses.
- Leave the analysis and recommendations until the end.

4. WRITING AS QUALITY CONTROL

Writing a report is an excellent way of identifying what the investigator has missed in the fact-finding phase of the investigation. There will usually be something missing, even for the very best investigator. It might be questions that a witness was not asked or a document that was overlooked. Any gaps and shortcomings will quickly become apparent as an investigator begins to write the report.

Go back and fill those gaps. Then continue to write.

5. STRUCTURING REPORTS

Organize the report so that it is easy to read, easy to understand and easy to find specific information.

Many agencies have developed investigation report templates, which are tailored to the types of investigations they conduct. These templates can be very helpful. They are generally divided into telling the story of what happened – the narrative – and then explaining any findings and recommendations – the analysis.

6. HOW TO STRUCTURE THE NARRATIVE

While no two investigative reports are exactly the same, if the goal is to describe what happened during a specific incident, then the structure used for writing the report is usually reasonably straightforward.

Tell the story of what happened, as chronologically as possible. Focus on the evidence that is relevant to the incident being investigated. Ignore everything else.

The framework below provides a useful approach to structuring a report. It gives the reader the context for the investigation, explains how the evidence was collected, tells the story of the incident under investigation and then provides a conclusion.

This structure has a beginning, middle and an end. It is simple, effective and flexible.

- Introduction
- How the evidence was gathered
- Background
- What happened before the incident?
- What happened during the incident?
- What happened after the incident?
- Findings and recommendations

The report should focus on the actual facts of the investigation until the final section on findings and recommendations. Avoid opinion and adjectives.

The preface to this Manual is a narrative account of what happened in the Mulrunji case. It follows this model.

Introduction

This section lets the reader know what the report is about. It explains what is being investigated and why.

How the evidence was gathered

While brevity is normally a good thing when writing a report, this section is the exception to that rule. Include as much detail as possible. This demonstrates to the reader that the investigation was thorough, professional and fact-based.

A good example is a summary of a report into the shooting deaths of a woman and two children in March 2010 at Bardiya National Park by Nepalese army soldiers. The investigation was conducted by the [National Human Rights Commission of Nepal \(NHRC\)](#). The summary sets out in some detail how the facts were collected.

During the investigation the NHRC team inspected the incident site and spoke to Bardiya National Park personnel, those attached to patrol units, the commanding officer, high-ranking officials, eyewitnesses, victims' family members, locals of Hariharpur, Surkhet and doctors of the Bardiya district hospital. The NHRC team also verified the information gathered from police personnel who examined the incident site and the victims' bodies, civil society representatives and others concerning the incident. The NHRC employed forensic experts sent from the Tribuwan University-affiliated Teaching Hospital in Kathmandu to conduct an additional post-mortem of the victims' bodies.

The investigation team studied the post-mortem report prepared by the doctors of the Bardiya district hospital, the additional post-mortem report prepared by the forensic experts and the police report on the incident site and the victims' bodies. In the process, the NHRC communicated with the Office of the Prime Minister and Council of Ministers, the Home Ministry, the Nepal Army (NA), the Bardiya district administration office and the Bardiya National Park and asked for information about the incident.

The report goes on to set out the facts relating to the incident and then provides an analysis. It makes five recommendations to redress the human rights violations it identifies. In setting out what the NHRC actually did to arrive at those conclusions, the reader has confidence that they have been based on a thorough investigation.



Background

Give some brief overall context for the investigation and include any relevant background information. Explain why the NHRI launched the investigation.

What happened before the incident?

Give a brief account of any relevant events leading up to the incident.

What happened during the incident?

This section is the most detailed. As far as possible, provide a chronological account of what happened during the incident.⁶⁶

One option is to structure this section using each source of evidence; for example, including a summary or excerpts of what each witness said, followed by what any physical, digital or other source of evidence showed.

What happened after the incident?

Describe what happened to all parties immediately after the incident. Who spoke to whom? What utterances did anyone make? Who wrote what and when?

This section should also include the details and results of any forensic processing and results, including the post-mortem if one was conducted.

Findings and recommendations

This is where the investigator analyses the evidence, perhaps using the criteria set out in the previous chapter on assessing evidence.

7. HOW TO STRUCTURE YOUR ANALYSIS

It can be quite a challenge to organize the evidence and develop a clear rationale for reaching findings and proposing recommendations, particularly in complex, multifaceted cases where there are a number of competing interests.

The IRAC methodology is used by the Ontario Ombudsman, who teaches it to investigative agencies across the world. IRAC stands for Issue, Rule, Analysis and Conclusion.

Issue

What is the issue that is the subject of the report?

Rule

What is the rule that applies to the issue?

The investigators should set out any human rights laws and standards that are relevant to what is being investigated.

Rules don't just include laws, policies, protocols and standards, though those are extraordinarily important. They also include common sense, but only where it is reasonably obvious to or indisputable by anyone.

Analysis

The investigator sets out the relevant facts and then applies the rule(s) to them. As this is done, the investigator will be able to develop an answer to the issue, based on the rule. As the analysis is developed, the reader should be persuaded to agree with the ultimate conclusion.

Conclusion

What is the conclusion that deals with the issue?

⁶⁶ This was not possible in the description of the Mulrunji case in the preface of this Manual, due to lack of space and the unavailability of original documents. Anyone who had access to all the QPS, CMC and other material should have been able to write a very detailed, possibly second-by-second, account of what went on, from the moment of arrival at the police watch-house to the point where an ambulance was called.

It is important to note that different people can reasonably conclude different things, based on the same set of facts. The report should clearly explain why the conclusion was reached, based on the evidence and the rule(s).

THE MULRUNJI CASE

HOW IRAC WOULD WORK IN THIS CASE

Issue

Did any officer use excessive force on Mulrunji during his time in custody?

Rule

Police officers who are lawfully executing their duties can only use the minimum amount of force required in the circumstances.

Analysis

The analysis should include all the evidence that was gathered in relation to the level of any force used, including witness evidence, documentary evidence, physical evidence and any evidence from the CCTV in the police station. It might also include any training in the use of force received by the involved officers and possibly previous instances when an officer used force.

The focus should be what happened at the time Mulrunji went to the ground. Who saw what, when? What does the forensic evidence show?

Consider the criteria discussed in the section on assessing evidence: sufficiency, reliability and relevance. For example, if the investigator concluded that there was evidence of collusion between two witnesses, he or she may have discounted some or all of the evidence of either party, or both of them, on the basis that it was not reliable.

Conclusion

The conclusion will depend on the analysis. The jury in the criminal trial concluded that S/Sgt. Hurley had not committed a criminal offence. The Coroner in the second inquest concluded that S/Sgt Hurley's use of force had caused the death.

Different investigators can reach different conclusions. As long as they can set out their reasons for accepting and rejecting evidence – and those reasons are reasonable in and of themselves, even though you may disagree with the conclusion – then they are entitled to reach whatever conclusion they consider to be correct.



8. WRITING A REPORT OF AN INVESTIGATION INTO A SYSTEMIC ISSUE

Writing a report of an investigation into a systemic issue can be more complex. The investigator will likely have to juggle multiple issues, some of which overlap. Any number of separate events may have to be explained and analysed.

One approach is to organize the report by themes, each of which may include a number of interrelated issues.

The report prepared by the **Afghanistan Independent Human Rights Commission** into human rights issues involving the Afghan Local Police is a good example of how this can be done. The central theme of the report is the current performance of the Afghan Local Police. The report then isolates and discusses several components that have a bearing on that theme, including:

- lack of ethnic inclusion
- high rates of illiteracy
- interference of foreign forces in the recruitment process.

The end result is a report that is clear and easy to follow.⁶⁷



IRAC is a particularly useful approach when writing reports of this nature. It is logical, it educates and it persuades. It can be used as a tool to discuss each theme, as well as any overall conclusion.

9. GENERAL APPROACH

Getting noticed counts. NHRIs do not have executive power. They need to persuade decision makers to consider and act on the recommendations they make. This requires a degree of pressure. Pressure can be generated by the report itself, by the way the public and the media react to the report or by a combination of these factors.

Who is the report being written for?

Before beginning to write the report, know your audience. Is it the Government? Is it the public? Is it a certain part of the community? Is it the media? Is it academia? Is it anyone else?

It may be all, or some, of these groups. In that case, who takes priority?

Then ask these questions. What is the level of understanding of the issue among the audience? What will make them want to continue reading? What will resonate with them?

Consider targeting those who have the authority to implement the report's recommendations. What is the best way to present the report so that it maximizes the chances of the recommendations, or even some of them, being adopted?

Whatever the answer is, write in a way that will resonate with the audience, especially the decision makers.

Keep any report as short as possible

Brevity is a good thing. Good investigators have the ability to summarize large amounts of evidence into the key essentials.

Keep it simple

Simplify the content as much as possible, no matter how complex the case may be. It often helps to break complex issues down into discrete sections or themes and then use the IRAC approach with each of these sections.

Write an executive summary

It is likely that only a few people will read every single word of your report, no matter how well it is written.

⁶⁷ From *Arbaki to Local Police: Today's Challenges and Tomorrow's Concerns*; Afghanistan Independent Human Rights Commission; 2012; available at www.aihrc.org.af/en/research-reports.

If the report is longer than a few pages, consider drafting a brief – but strong – executive summary. It should be short and cover the key findings. Make it the first thing that readers see when they open the report.

The Ombudsman of New South Wales recently published a guide to dealing with unreasonable complainant conduct. At the beginning is a page entitled, “If you read nothing else, read this page”. It is a one-page, dot-point summary of the entire 132-page document. It works exceedingly well.⁶⁸

Tell the story chronologically, if possible

Things are generally easier to follow if they follow a chronological framework. It is not always possible. In some cultures, it is not always desirable. In most cases, however, describing an event or series of events from beginning to end makes it easier to understand what happened.

Tell someone’s story

Put a human face on the issue you are describing. Tell someone’s story.

Generating empathy can be a very effective way of engaging readers in the report. It can also help in having the recommendations considered and implemented.

One of the ways to do this is to personalize the report. Investigations by NHRIs often involve people who have been through, or are going through, traumatic experiences. Describe what has happened to them and others in a similar situation. Invite the reader to see the issue from their perspective. Persuade decision makers about the importance of making changes to remedy those situations so that people aren’t forced to experience those things again.

For example, in 2006, the [New Zealand Human Rights Commission](#) published a digest of human rights cases. Each case study had a short description of what had allegedly happened to the complainant and how the case was resolved.⁶⁹ The cases covered a host of issues, including discrimination based on age, sex, religious belief and disability.

Another example is the 2012 report of the [Afghanistan Independent Human Rights Commission](#) into the Afghan Local Police, mentioned previously. It includes many stories of people whose human rights had been abused, up to and including being killed. The stories very effectively illustrate seriousness of the human rights situation in the country.



Tell someone’s story FIRST

It can be very effective to make a person’s story one of the very first things that readers encounter in the report. It helps to grab their attention and encourages them to go further.⁷⁰

Write clearly and simply

It is essential to write clearly and simply. Use words that the audience will understand and that help communicate the issue in a way that will make sense to them.

68 *Managing Unreasonable Complainant Conduct: Practice Manual*; 2012; available at www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/unreasonable-complainant-conduct-manual-2012.

69 *10 Human Rights Cases that Made a Difference*; available at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/12-Dec-2006_12-35-21_DRT_Booklet_Final.pdf.

70 Examples of this approach are available at www.ombudsman.on.ca/Investigations/SORT-Investigations.aspx.

Avoid jargon and acronyms, as far as possible. NHRIs often work in environments where acronyms are common. If they are used, explain what they mean and keep their use to a minimum. Consider preparing a glossary.

Don't ambush the reader with new evidence at the conclusion

Never present evidence in the conclusion that hasn't been discussed previously in the report. The evidence should be set out in the narrative itself or, if unavoidable, referred to in the analysis.

Don't include anything that is not supported by the facts

If in doubt, take it out. A person who wants to be critical of your investigation can take one small factual error and use it to discredit the entire report. It can even be something as minor as getting someone's title wrong or misspelling a name. Sloppiness is not a good thing in a report, nor during any aspect of an investigation.

Be careful using absolutes

It is unwise to use words like "never", "worst-ever" and "always". They give very little room for manoeuvre, should an exception emerge.

Use a neutral and balanced tone, particularly when setting out the evidence

Set out the facts of the case, horrific as they may be, clearly and without comment. They often speak most strongly for themselves.

Wait until the analysis section of the report before adding opinion. Otherwise, the reader may conclude that the investigator has already reached his or her conclusion before assessing the facts.

Use quotes

Using direct quotes from those involved can be very powerful, as discussed in Chapter 17.

Titles

Give the report a short title that grabs peoples' attention and gets to the heart of the issue being investigated. For example, the Human Rights Watch report into Muammar Gaddafi's demise did both. It was entitled:

Death of a Dictator: Bloody Vengeance In Sirte

This title is far more likely to engage people and get them to read the report, as opposed to:

Communique 325/11. A review and report into the multifaceted circumstances concerning the loss of life involving the National Transitional Council of various parties including Muammar Muhammed Abu Minyar al-Gaddafi, (1942–2011), otherwise known as Colonel Gaddafi, the former leader of the Jamahiriya Republic of Libya, in Sirte, Republic of Libya, on or about October 20, 2011

Use photographs and maps/diagrams

Photographs can be very compelling. *Death of a Dictator* uses them very effectively. Human Rights Watch even produced a separate document full of photographs, with a brief summary of the case and recommendations.⁷¹ It is a very effective way of presenting information.

Maps and diagrams can give context to the issue or incident and may also help to simplify complex situations. Google Earth can be a great tool for investigators.

71 Available at www.hrw.org/sites/default/files/reports/libya1012_brochure_low.pdf.

If an electronic version of the report will be posted on the NHRI website, include links to any web-based video or other materials referred to in the report.

Covers

NHRIs want people to read their reports, especially their major ones. A strong cover, with images and graphics that illustrate the main theme of the report, can immediately engage people on the topic.

Make report covers attractive in the broadest sense of the word. They should entice. They should capture the imagination. They may shock. They should always communicate a key aspect of the issue that has been investigated.

10. GENERAL TIPS FOR GOOD WRITING

Good writing is all about communicating clearly with your audience. Here are some general tips for writing an accurate and effective report.

- Use short words.
- Use short sentences.
- Use short paragraphs.
- Use “active” language where possible; for example, “The investigator writes the report” is better than “The report is written by the investigator”.
- Use headings, subheadings and text boxes to break up the text.
- Have someone else read the draft report, especially someone unfamiliar with the investigation, to ensure that the information is clear and the analysis and recommendations make sense.
- Edit ruthlessly to ensure accuracy and clarity.

KEY POINTS: CHAPTER 26

- **NHRI reports should use their reports to educate and persuade.**
- **Reports should follow a clear framework, such as “IRAC”:**
 - Issue
 - Rule
 - Analysis
 - Conclusion.
- **Explain why conclusions have been reached.**
- **Keep the report as simple, short and clear as possible.**
- **Avoid any hint of bias.**



Part VI Special investigations



Section I: Investigations of multiple complaints

Section II: Investigations of correctional institutions, the police and the military

Introduction to Part VI

This section deals with the specialized area of investigation work involved with multiple complaints relating to the same or similar fact situations or arising out of the same or related incidents. For clarity, the section has been divided into three chapters. Chapter 27 defines what issues are classified as “multiple complaint investigations”, how they are identified and why they should be investigated together. The chapter then goes on to describe the two main ways in which such investigations can be undertaken and how they should be planned and conducted.

It is an investigative approach that is complimentary to the national inquiry process, set out in the APF manual on national inquiries⁷² and referred to extensively in the following chapters. The manual describes the national inquiry process.

A national inquiry is an inquiry into a systemic human rights problem in which the general public is invited to participate. National inquiries are conducted in a transparent, public manner. They involve public evidence from witnesses and experts, directed towards the investigation of systemic patterns of human rights violation, and the identification of findings and recommendations. National inquiries require a wide range of expertise within the institution, including researchers, educators, investigators and people with experience in policy development.

National inquiries implement a variety of functions of NHRIs, including investigation, analysis, reporting, advice and recommendations, public awareness raising and human rights education. One reason why the methodology is so creative is that it involves the implementation of all these functions, in a comprehensive, integrated manner, through the single process of a national inquiry.⁷³

Complaint investigations, both individual complaints and multiple complaints, can also deal with systemic issues but they arise from one or more individual complaints of the direct experience of a human rights violation. They are generally not conducted publicly. They are directed to the resolution of the individual complaints, although they may also, where relevant, make recommendations to address any systemic issues identified during the course of the investigations.

Because of the specialized nature of this work, many oversight agencies (including Ombudsman and anti-corruption offices around the world, some of which deal with human rights issues) recognize that there are considerable benefits to be achieved by setting up dedicated teams of investigators whose primary responsibility is to conduct multiple complaint investigations that may involve systemic issues. This approach was pioneered by the Canadian Military Ombudsman in the early 2000s and has now been adopted, very successfully, by the Office of the Ontario Ombudsman, which is the second largest in North America. In summary, the team identifies possible systemic issues in complaints and then plans and executes investigations into those issues. At the Office of the Ontario Ombudsman, the team is known as the Special Ombudsman Response Team (SORT).

Section I [Investigations of multiple complaints](#)

Chapter 27: Multiple complaint investigations

Chapter 28: Creating a team to conduct multiple complaint investigations

Chapter 29: The Major Case Management model

Chapter 30: The G20 Summit investigation

Section II [Investigations of correctional institutions, the police and the military](#)

Chapter 31: Investigating the security and detention sectors

⁷² *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*; Asia Pacific Forum of National Human Rights Institutions and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law; 2012.

⁷³ *Ibid*; p. v.

Section I

Investigations of multiple complaints



Chapter 27: Multiple complaint investigations

Chapter 28: Creating a team to conduct multiple complaint investigations

Chapter 29: The Major Case Management model

Chapter 30: The G20 Summit investigation

Chapter 27:

Multiple complaint investigations

KEY QUESTIONS

- **What are systemic issues in complaints?**
- **How are they identified?**
- **Why should they be investigated?**
- **What are the different approaches to carrying out these investigations?**
- **How are these investigations planned and conducted?**



1. WHAT ARE SYSTEMIC ISSUES IN COMPLAINTS?

A systemic issue may be the root cause of a human rights violation. Systemic problems may be factors across the entire range of human rights issues, including, but not limited to:

- economic cultural and social rights
- discrimination
- torture
- migration
- gender
- freedom of opinion and expression
- treatment of older people
- treatment of people with disabilities
- trafficking in persons.

There could be any number of root causes that create, encourage, fail to deal with or permit breaches of human rights, such as:

- laws, regulations, policies or procedures that have an adverse impact on human rights, intentionally or otherwise
- lack of laws, regulations, policies or procedures that promote or protect human rights
- a culture, history and/or tradition of discrimination or inequality
- lack of training or education
- a failure to communicate.

For example, an investigation by a mental health group in the United Kingdom looked at avoidable deaths in the health care system among people with disabilities. That investigation identified a range of underlying systemic issues, including:

- little concern among professionals regarding equity
- the knowledge and input of parents was ignored
- health professionals had limited knowledge and understanding of disability
- poor inter-agency relationships and communication
- the prevalence of discrimination, abuse and neglect

- the “invisibility” of people with disabilities, especially in primary care
- poor monitoring and recording of data
- inadequate appropriate training of the health sector workforce.

2. IDENTIFYING WHICH ISSUE TO INVESTIGATE

The first step is to identify the right issue arising from the complaints and to frame it properly. If this is not done correctly, the whole investigation will be in jeopardy.

Of course, the issue must have a strong and clear connection with an apparent breach of human rights disclosed by the complaints.

Select carefully. Look for the underlying issue in the complaints that would appear to have given rise to the violation. The issue must:

- have a systemic component
- be revealed by considerable evidence already available as almost certainly underlying a serious violation of human rights.

The second step is to assess whether or not it is an issue that the NHRI can realistically investigate and address. The investigation must be “big enough to matter, small enough to win”.

In other words, the issue selected must be relevant to a significant number of people and it must be “winnable”. What does winnable mean? It may mean taking a short step toward a long-term goal. There must be a reasonable chance that the investigation will lead to some tangible improvement in the situation being investigated. Improvement can be defined in many ways. It may be that the NHRI’s recommendations are accepted and implemented. It might be the mere fact that an investigation is taking place lessens the frequency of any violation of human rights, at least while the investigation draws attention to the issue.

The investigation should be realistic. NHRIs should not be drawn into investigating very large-scale issues where there are no clear solutions. For example, a multiple complaint investigation into “why the government allows child poverty” will likely never be finished, nor is it likely that any eventual recommendations would be seriously considered.

This does not mean that complex, systemic patterns of human rights violation should not be addressed by NHRIs. On the contrary, NHRIs must protect and promote all human rights and, according to their strategic priorities, they must address serious human rights situations. The national inquiry process has been developed for this purpose. Systemic issues that are too complex for multiple complaint investigations may be suitable for national inquiries.

Issues for multiple complaint investigation should be chosen – or an aspect of them – that can be investigated within a reasonable time. Complaint investigations that take too long do not do anyone any good, however worthy they may be.

For example, instead of investigating excessive use of force in the entire detention system because of a number of individual complaints, it may be better to focus on investigating the allegations at the particular detention centre where the complaints arose. If there is enough evidence to substantiate the allegations, the NHRI should determine if there are any underlying issues that may be applicable throughout the broader detention system and possibly other parts of the criminal justice process.

Use the evidence to develop recommendations that address the underlying issues. Care must be taken that the behaviour at the particular detention centre is not an anomaly. However, that should be reasonably straightforward to establish, especially if the root cause of what is happening in the detention centre is based on system-wide policies and procedures. It may be prudent to visit one or two other facilities, for example, although but there is no need to examine every single one. That would likely take far too long.

Before the broader investigation begins, the investigators should have fairly strong grounds that there is, in fact, a systemic issue. For example, there should be a measure of certainty that excessive use of force is endemic and that what is happening at that particular detention centre is symptomatic of a system-wide problem.⁷⁴ If there is no indication of a system-wide problem then the NHRI should investigate the complaints individually.

3. WHY CONDUCT MULTIPLE COMPLAINT INVESTIGATIONS?

Unlike some other complaints, complaints that give rise to systemic issues are unlikely to be resolved informally because:

- the facts are often in dispute, or are required to provide support for any recommendations
- the stakes may be very high; for example, there may be significant costs involved in providing remedies that deal with the underlying problem
- politicians may have a stake in the issue, as may special interest groups
- no one in authority likes to admit doing something wrong.

So why should the NHRI bother with conducting multiple complaint investigations? The answer is that dealing with individual complaints in isolation does not usually deal with the underlying causes of those complaints.

Conducting multiple complaint investigations is a very effective use of resources. Tackling the fundamental problem – and coming up with solutions to remedy it – may prevent dozens, hundreds or perhaps thousands of similar complaints from being made. For example, changing a law or a policy to make it fairer to a disadvantaged group will hopefully prevent, or at least reduce, any future complaints on the same issue.

Another benefit is that resolving the underlying issues frees an NHRI to concentrate on other complaints and on systemic issues suitable for a national inquiry. It is a very effective use of limited resources.

There are two other significant advantages to this approach.

Positive change

Any recommendations, if and when implemented, will make things better for the complainants, as well as others in the same or similar circumstances. It may be incremental change, however the investigation will have achieved something tangible that goes beyond dealing with the individual complaints.

Demonstrating value

It can sometimes be difficult to convince stakeholders of the value of an oversight agency, such as an NHRI. A multiple complaint investigation is an excellent way of showing how an NHRI can make a genuine, positive difference by identifying and addressing systemic issues.

74 The APF manual on conducting national inquiries includes criteria for choosing issues that are suitable for a national inquiry (see page 13). They are applicable in many respects to selecting issues to be the subject of multiple complaint investigations. The criteria include:

- how strong public perception is of the significance of the issue
- whether the issue has been the subject of previous intensive investigation
- how much external commitment there is to the issue
- what the potential is to build broader, long term public interest in the issue.

4. QUESTIONS TO CONSIDER WHEN DECIDING WHETHER OR NOT TO LAUNCH A MULTIPLE COMPLAINT INVESTIGATION

- Does the issue fall within the jurisdiction of the NHRI?
- Does the NHRI have the authority to investigate?
- How many complaints have been received on the same or similar issues?
- Is there a systemic issue clearly underlying these complaints?
- Is it an issue that can be investigated within a reasonable time with the resources available to the NHRI?
- Are a large number of people affected or likely to be affected?
- Is there an apparent flaw in any law, regulation, policy or procedure, including systemic discrimination?
- Are there any compelling circumstances? Is there a degree of urgency? Is the apparent breach of human rights so severe that action should be taken as soon as possible to remedy the situation?
- Is it in the public interest to conduct a multiple complaint investigation?
- Is another agency or group currently doing something to tackle the problem? If so, how credible is that process?
- Does the issue have a high level of awareness in the community?
- What opposition or support will there likely be for the investigation?
- What is the likelihood that the investigation will result in positive change, however incremental it may be?



Photo by David Jackmanson.

THE MULRUNJI CASE

IDENTIFYING SYSTEMIC ISSUES

What happened in the Mulrunji case clearly had potential systemic implications.

This was not an isolated incident. It raised issues about deaths in custody, the relationship between the police and the Aboriginal community and a host of other related questions.

It needed investigating from a human rights perspective. Somebody had to do something.

In fact, somebody had done something over a decade previously. A Royal Commission into Aboriginal Deaths in Custody in the 1980s had concluded that Aboriginal people were grossly over-represented in prison and that the number of deaths of Aboriginal people while in custody was “unacceptable”. It noted that the death rate “would not be tolerated if it occurred in the non-Aboriginal community”. It also found that many Aboriginal people were in custody for relatively minor offences, including public intoxication.

In its submission to the Coroner in the Mulrunji case, the **Australian Human Rights Commission** identified several issues that arose from the arrest. Several had a systemic component:

- Was the decision to arrest Mulrunji appropriate?
- What were the alternatives to arrest?
- What alternatives should be available on Palm Island?
- Once arrested, what assessment was undertaken of Mulrunji’s fitness and suitability to be incarcerated?
- Was Mulrunji properly supervised while he was in the watch-house cell?
- Were Mulrunji’s relatives informed of his condition and death by police in a timely and appropriate fashion?
- Was Mulrunji’s death properly investigated from the outset?
- Are there any recommendations from the Royal Commission into Aboriginal Deaths in Custody that are relevant to Mulrunji’s death?



All did prove to be relevant issues, however not all were dealt with at the inquests.

The Commission was given standing at the second inquest. It made 40 recommendations in a detailed submission, based on the systemic issues it had identified. The recommendations included:

- ensuring the independence and integrity of the investigative process when a death in custody occurs
- appropriate training for officers policing Aboriginal communities
- alternatives to incarceration for public intoxication
- monitoring of persons in custody
- cross-cultural communication issues between the police and Aboriginal communities
- provision of resources for community justice groups and community patrols.



THE MULRUNJI CASE**IDENTIFYING SYSTEMIC ISSUES (CONTINUED)**

For example, the Commission argued that there were serious communication problems during police interviews of Aboriginal witnesses. Police did not arrange for interpreters or witness assistants – someone from the Aboriginal community who could facilitate communication and support the witness – to be present. As it recommended in its submission:

Significant attention should be given by the Police Commissioner to the training of officers, particularly those who are working in or near large Indigenous communities such as Palm Island in relation to communication with Indigenous people and the use of support persons and interpreters. This is a matter that is fundamental to the effective and fair administration of justice in Queensland.⁷⁵

As noted, all of the Commission's recommendations were adopted by the Coroners in both inquests.



5. THE PURPOSE OF MULTIPLE COMPLAINT INVESTIGATIONS AND THE APPROACHES AVAILABLE

The purpose of a multiple complaint investigation is to determine what evidence exists to support or refute whether an underlying systemic issue exists. If it does, the next step is to develop recommendations to tackle the issue. For example, a change in policy may be recommended to make a situation fairer for everyone, creating or abolishing legislation to prevent further injustice or establishing training programmes to remedy an identified deficiency.

There are two approaches to investigating systemic issues: conducting a national inquiry or conducting a multiple complaint investigation. These are discussed below.

National inquiries

One approach that NHRIs can take to investigate a systemic issue is to conduct a national inquiry. The APF manual on national inquiries describes a process that revolves around gathering evidence, primarily through public hearings.⁷⁶ It sets out a methodology that includes:

- choosing the issue
- preparing background (scoping) papers
- consultations with stakeholders
- drafting terms of reference
- finalizing a plan for the inquiry
- obtaining information, research and evidence
- conducting public hearings
- developing recommendations
- preparing the report
- releasing the report
- follow-up activities
- evaluation.

⁷⁵ See Recommendation C39; www.humanrights.gov.au/commission-submissions-mulrunji-1.

⁷⁶ Available at www.asiapacificforum.net/support/resources.

Public hearings distinguish national inquiries from the other investigative and complaint resolution methodologies that NHRIs use.

While they are very effective in dealing with broad, complex human rights issues, national inquiries require a large investment of financial resources and staff time. They need significant funding for premises, administrative assistance, outreach, experts, special advisors and so on. They are suitable, therefore, for very broad investigations into a wide pattern of human rights violation.

Multiple complaint investigations

Multiple complaint investigations have the same overall purposes as national inquiries – that is, identifying and addressing systemic issues – but they tend to involve narrower issues, require less resources, are less formal and operate more quickly. They are also sometimes known as “thematic investigations”.

The investigators assigned to the case are responsible for researching and planning the investigation.

A very significant difference is that multiple complaint investigations do not involve public hearings. Witnesses are selected and interviewed on the criteria set out in the chapters on investigation planning and investigative interviewing. While that has disadvantages in terms of transparency, it does make the investigative process more focused and less resource intensive.

A multiple complaint investigation does not have the profile or the authority of a national inquiry. It is also not a suitable approach for tackling very broad human rights issues. Those are best suited to the national inquiry methodology.

EXAMPLES OF MULTIPLE COMPLAINT INVESTIGATIONS IN THE APF REGION

Include:

- the investigation of the **National Human Rights Commission of Mongolia** into mining sector development
- the review of the **Australian Human Rights Commission** into the treatment of women in the **Australian Defence Force**
- the investigation of the **Afghanistan Independent Human Rights Commission** into issues involving the **Afghan Local Police**
- the investigation of the **New Zealand Human Rights Commission** into the treatment of juveniles in police custody.



Making recommendations that address systemic issues

It is important that the NHRI formulates recommendations that tackle any underlying systemic issues that an investigation may have revealed.

The investigation of the **Human Rights Commission of Nepal** into the shooting of three civilians by the Nepal Army in Bardiya National Park in 2010 was discussed in the chapter on report writing. In its report, the Commission made a number of recommendations to the Government of Nepal, most relating to the actual incident. However, one recommendation was considerably broader:

The victims belonged to a poor family and were killed when they went to collect the bark of kaulo trees to make a living. In this context, the Government should coordinate with concerned agencies and implement programmes to improve the economic and social condition of people, particularly Dalits, in the future.⁷⁷

77 The case study is provided in Appendix 4 of this Manual.

6. PLANNING AND CONDUCTING MULTIPLE COMPLAINT INVESTIGATIONS

Planning an investigation was discussed in Part II of this Manual. The planning template set out in Chapter 5 includes eight categories:

- What is being investigated?
- What is the overall approach to gathering the evidence?
- What and where is the evidence?
- What problems might arise during the investigation?
- What resources will be required need?
- How are internal and external communications going to be managed?
- What are the milestones and timelines?
- When will the investigation be completed?

These same categories apply when planning multiple complaint investigations.

The first step is to determine what is – and what is not – being investigated. Clearly define the issue. Everything else in the investigation plan flows from that.

Other considerations include:

- developing an investigative strategy
- identifying sources of evidence
- anticipating obstacles and coming up with solutions to deal with them
- determining what resources are required, including time, money and expertise, and whether the NHRI has those resources
- developing a communications and outreach plan so that all stakeholders are aware of the investigation, including the public
- setting milestones and a realistic completion date.

An example of an investigation plan into a systemic issue is included in Chapter 29.

When planning the investigation, NHRIs should see whether other NHRIs or investigative agencies have addressed a similar issue. Drawing on or adapting the approaches used by others can greatly enhance the planning process.

7. HOW LONG SHOULD A MULTIPLE COMPLAINT INVESTIGATION TAKE?

A minimum of 12 months is required to properly conduct a national inquiry, up to a maximum of two to three years. Multiple complaint investigations can normally be done far more quickly. This is because they do not tackle the very broad issues that national inquiries traditionally do. They do not require the same infrastructure and resources as a national inquiry. While they are far less formal, the investigators can use the same powers as a national inquiry, including any powers of subpoena and powers of entry that the NHRI has at its disposal.

The timeframe for the investigation will obviously depend on the complexity of the issue chosen. The more straightforward, the faster the investigation will be. Investigators should consider how much evidence will have to be gathered, how long the report will take to write and any obstacles or difficulties that the investigation is likely to encounter. The other factor to consider is the resources available to conduct the investigation.

8. SIMILAR METHODOLOGIES

There are many different approaches for conducting multiple complaint investigations. The methodology used by the **Australian Human Rights Commission** in its review of the treatment of women in the Australian Defence Force is an example of effective gathering evidence.

REVIEW OF THE TREATMENT OF WOMEN IN THE AUSTRALIAN DEFENCE FORCE (ADF)

The investigation was sparked by a series of incidents of sexual harassment but the Commission looked more broadly at what it identified as “the underlying culture and structures”⁷⁸ that impacted women serving in the ADF. They included marginalization, general attitudes within the ADF, flaws in the recruitment and retention process and the under-representation of women at the senior leadership level.

The fact-finding part of the investigation used a targeted methodology, set out below.

Focus groups, meetings and confidential interviews

Investigators visited various locations, including ADF units deployed overseas. They held 128 focus groups with over 1200 personnel. They met with over 350 senior ADF officers and stakeholders and conducted 13 confidential interviews with ADF members deployed in Afghanistan and the United Arab Emirates.

Written submissions

Investigators invited written submissions and set a firm deadline for responses. They received 61 submissions.

Requests for input via a free-call phone line

A free-call phone line was established. Calls resulted in “a number” of interviews and submissions.

Individual approach

The investigators travelled to various ADF bases. They met with individuals who raised concerns.

Survey

The investigators developed a survey on the key issues. It was given to over 500 focus group members and made available online to a selected sample of ADF members. Nearly 5000 responses were received. They also amended a national survey on sexual harassment conducted by the Commission at the time to include members of the military.

Document and literature reviews

The investigators requested and reviewed nearly 400 documents from the ADF.



78 *Review of the Treatment of Women in the Australian Defence Force*; 2012; p. 2; <http://defencereview.humanrights.gov.au/sites/default/files/community-guide.pdf>.

Reviews of best practices in other nations

The investigators reviewed how other nations dealt with similar issues, including meeting with United States military officials and conducting an analysis of comparable international militaries

Previous reviews

The investigators studied previous reviews relating to the issue under investigation.

The report of the investigation, which was released in late 2012, included 21 recommendations. Whether or not they will be implemented remains to be seen. The Commission used a methodical and exhaustive process to gather the facts about the issue under investigation. No one appears to have argued with them – and that is the test that an investigator must apply to his or her work. Whether or not recommendations are implemented is normally well beyond the control of the investigator or the NHRI.



9. DEVELOPING RECOMMENDATIONS

As with any other NHRI investigation, recommendations arising from a multiple complaint investigation must be:

- evidence-based
- based on international human rights law and principles
- directed towards the right people
- clear
- practical
- offer redress where appropriate
- clear about who is responsible for implementing them
- measurable, with timelines for implementation.

10. JOINT INVESTIGATIONS

NHRIs may at times decide to team up with agencies that have similar or overlapping mandates to conduct joint investigations into systemic issues. For example, in 2012, the **New Zealand Human Rights Commission** joined with the Office of Children's Commissioner and the Independent Police Conduct Authority to review issues about young people in police detention.⁷⁹

11. FOLLOW-UP

If recommendations are accepted by the Government or other stakeholders, they should be monitored to assess whether they have been implemented in practice and how effective they have been. This may mean regular follow-up reviews at suitable intervals, or even a renewed investigation.

⁷⁹ *Joint Thematic Review of Young Persons in Police Detention*; available at www.hrc.co.nz/wp-content/uploads/2012/10/IPCA-121002-JTR-Report-Web-Final-2.pdf.

KEY POINTS: CHAPTER 27

- **Multiple complaint investigations aim to tackle the systemic issues that underlie a number of similar complaints.**
- **Multiple complaint investigations by NHRIs compliment the national inquiry methodology by dealing with narrower issues.**
- **They can be done quickly, cheaply and effectively by small teams, using existing resources.**
- **Multiple complaint investigations should focus on issues that are “big enough to matter but small enough to win”**
- **They should be based on realistic investigation plans.**
- **Recommendations should fact-based and focused on addressing the systemic issue, even if positive change is incremental.**



Chapter 28:

Creating a team to conduct multiple complaint investigations

1. INTRODUCTION

Multiple complaint investigations into systemic issues must be properly resourced. That means assigning a sufficient number of investigators to gather all the relevant evidence within a reasonable amount of time. As multiple complaint investigations usually involve a lot of evidence-gathering, it follows that there must be enough investigators assigned to meet that goal. Appointing a single investigator to conduct a multiple complaint investigation rarely works. The NHRI needs to establish a dedicated team.

2. THE SORT MODEL

The Office of the Ontario Ombudsman has established a specialist team to deal with complaint investigations into systemic issues. The team is known as the Special Ombudsman Response Team (SORT). At the time of writing, SORT comprised seven investigators and one administrative assistant, led by a Director.⁸⁰

SORT focuses exclusively on investigations that involve systemic issues. The investigators do not carry an individual caseload. When necessary, they have access to other resources within the Office, including legal counsel, investigators who conduct general investigations and intake staff. They also work closely with media relations/communications staff.

It is an approach to conducting major investigations that works. The SORT methodology has been taught to investigative agencies around the world, including many in the Asia Pacific region. It has been adopted and adapted to conduct major investigations, many of which have a systemic issue at their core.

SORT conducts between three and four concurrent investigations a year. Most take between six to nine months from start through to public report, although some have taken as little as 45 days. More complex investigations can last over a year, although the fact-finding part of the investigation very rarely takes over six months.

SORT's methodology is fairly simple. All operational personnel in the Office are expected to identify complaints that potentially give rise to systemic issues and bring them to the attention of management. Complaint intake staff play a crucial role; they are the ones who often identify a broader issue when dealing with individual complaints. Using a matrix developed by the Ombudsman, SORT investigators conduct a preliminary evidence-based assessment to determine what the issues are and whether or not an investigation is warranted. In some cases, that may involve months of research. In others, SORT has begun major investigations within hours of an issue being identified, often by the media.

Senior management then selects which matters will be investigated.

Once approved, SORT assigns a lead investigator, assisted by however many additional personnel are deemed necessary. The lead investigator is responsible for the day-to-day running of the investigation in the field. The structure is similar to the Major Case Management model discussed in the next chapter, with the Director acting in a similar capacity to the Senior Investigating Officer.

80 For full disclosure, the current Director of SORT is the author of this Manual.

The team then drafts an investigation plan with input from everyone involved, including intake staff and other investigators, using an investigation planning template very similar to that set out in Chapter 5. Experience has shown that the broader the input, the better the plan.

Once the issue(s) is determined, the next step is to decide what evidence will need to be gathered, where that evidence is, what resources are available to collect it and, finally, how long it will likely take to collect, given the resources available. The next decision is when the investigation will start and when it will be completed. As noted previously, it is always a good idea to build some flexibility into the plan in order to deal with unexpected circumstances.

Once the plan is completed, the Ombudsman announces the investigation publicly and requests anyone who has any relevant information to contact the Office. This is, in essence, the consultation part of the process. The team reviews any information received and decides what, if any, follow-up is needed. This might include arranging face-to-face or telephone interviews, a request for documentation or a polite thank you for contacting the Office.

The investigation then follows the plan, which is updated as new information comes in. The team meets regularly, often daily, to make sure that everyone is aware of all developments. Progress reviews occur weekly at senior management meetings.

The team works closely with senior counsel, who normally drafts the report and recommendations.

SORT is funded from existing resources, reallocated from other areas of the Office. It has not cost the taxpayer any additional money.

Chapter 29:

The Major Case Management model

1. INTRODUCTION

All investigations need some kind of structure. The more serious and complex the investigation, the more rigorous that structure needs to be.

The Major Case Management (MCM) model for conducting serious, complex investigations has been developed to provide a structure for major investigations. It was originally created by for use by police in homicide and sexual assault investigations. However, MCM is used by many other investigative agencies, including in anti-terrorism and air crash investigations. MCM techniques have also been used as part of non-criminal investigations, such as investigating an outbreak of Severe Acute Respiratory Syndrome (SARS).

MCM owes its existence to investigative failings in the 1970s, 1980s and 1990s, mainly in homicide investigations. Innocent people were convicted, while those who were guilty escaped detection or walked free. The very expensive public inquiries that invariably followed exposed huge miscarriages of justice.

Those public inquiries found that:

- investigators often made up their minds about who was guilty early on, based on “gut instinct”, and then tailored the rest of the investigation to confirm what they had already concluded
- investigators had ignored or missed obviously crucial evidence
- suspects were wrongly convicted
- major investigations needed objectivity built into them, along with control, structure and rigour
- multiple agencies often refused to share vital information with each other
- no information management systems were employed to handle the large volume of data generated by major investigations or, if there were any, they were inadequate or non-compatible with the systems of other involved agencies
- there was no independent review of how the investigation was going as it progressed.

MCM is designed to rectify these deficiencies.⁸¹

2. WHAT IS MAJOR CASE MANAGEMENT?

MCM is a methodology for conducting major investigations. It maximizes investigative efficiency, minimizes the chance of important evidence being missed and has an external person or group evaluate how the investigation is going.

MCM is based on the following components.

The command triangle

Three executive functions are responsible for conducting the investigation. In a non-complex investigation, a single person may perform these functions. As the complexity of the investigation increases, one or more individuals will perform these functions.

81 A key reference on the MCM model is *Criminal Investigation: In Search of the Truth* (2007), edited by retired Detective Inspector Bill Van Allen.

- **Senior Investigating Officer (SIO):⁸² Case management**

He or she is responsible for the broad strategic direction of the investigation.

- **Primary Investigator: Primary investigation**

He or she runs the investigation at the tactical level, providing day-to-day coordination, guidance and control for everyone else involved in the fact-finding process.

- **File Coordinator: File coordination**

He or she coordinates the vast amounts of documentation gathered and generated during a major investigation.

Depending on the type, size and scope of the investigation, there may be other personnel involved, including

- specialist interviewers
- exhibits officers
- forensics specialists
- family liaison officers
- media and communications staff
- lawyers
- surveillance and undercover personnel
- administrative and clerical staff.

Partnerships

NHRIs may sometimes collaborate with other agencies to conduct investigations. That requires coordination and cooperation. MCM can help in these situations. It is targeted at working collaboratively with outside agencies to progress the investigation.

One important aspect of the MCM model is that linked investigations involving one or more jurisdictions or agencies must be under a unified command and control. That avoids duplication of effort and helps to coordinate information gathered in one case that might be vital to another linked investigation.

Software

The MCM system usually includes a database to process information. It is invaluable in organizing, retrieving and analyzing large volumes of investigative data. Computer software may also assist the SIO to manage a major investigation, including resource deployment. Computerization can help identify commonalities and avenues of potential investigation. Arguably, the best-known system is “HOLMES”, which is used by police services in the United Kingdom.

Review of the investigation

A key component of the MCM model is an independent review of the investigation’s progress, should it not result in a timely, favourable outcome, such as an arrest.

Lessons learned

At its conclusion, everyone involved in the investigation discusses what went wrong and what went right and then applies those lessons learned to the next investigation.

82 Or “Team Commander, Case Manager” which is the term more commonly used in North America.

3. HOW DOES MCM APPLY TO HUMAN RIGHTS INVESTIGATIONS?

The MCM system can be easily adapted for major investigations of human rights violations.

When embarking on a major investigation, the NHRI should consider using aspects of the MCM model, including:

- creating a simple, transparent and accountable command structure
- putting someone in overall control of the investigation
- appointing a lead investigator to carry out the investigation in the field
- designating an investigator to coordinate documentation and other information received
- having a defined process for working with other agencies
- if the investigation is not going to plan, have someone from the NHRI who is not involved review what has been done to date and offer constructive advice
- identifying and applying the lessons learned after every major investigation.

The NHRI does not necessarily need expensive software to conduct a major investigation. It does not need a large number of investigators or specialists. However, it does need to make sure the investigation is intelligently structured and efficiently executed. One that draws on the MCM model will help achieve that goal.

THE MULRUNJI CASE

FAILURE TO USE A MCM-TYPE APPROACH

There is no evidence apparent that the MCM model was used to investigate the death of Mulrunji.



Chapter 30: The G20 Summit investigation

“BY FAR THE LARGEST VIOLATION OF CIVIL RIGHTS IN MODERN CANADA.”

Andre Marin, Ombudsman of Ontario

Speaking at the press conference to release *Caught In The Act*, the report of his investigation into events related to the G20 Summit. The video of the press conference, held on 7 December 2010, is available at www.youtube.com/watch?v=EmG8kFrE1iQ.



1. INTRODUCTION

The investigation by the Special Ombudsman Response Team (SORT) into a “secret law” that resulted in over 1000 arbitrary detentions during the 2010 G20 Summit in Toronto is a good example of how an investigation that had a systemic component can be done reasonably quickly and economically, if the opportunity, the will and the resources exist.

2. THE FACTS

In June 2010, the G20 Summit – a meeting of world leaders – was held in Toronto, Canada.

In the lead-up to the Summit, the local police requested that the Government create a Regulation that expanded police powers to stop and search people within a certain distance from the meeting location. The Regulation would be added to a law that had been enacted in 1939, at the beginning of World War 2, to deal with threats by fascist saboteurs to government buildings. The Regulation would last for the duration of the Summit.

The Summit cost taxpayers nearly one billion dollars, with the vast majority of it spent on policing and policing-related activities.

The Government agreed to create the Regulation. It allowed police to stop and search anyone who approached a fence constructed in downtown Toronto, around the area where the Summit was taking place.

The Government did not publicize the Regulation and failed to advise key groups, including civil liberties and human rights groups who were coordinating citizen protests. The protest organizers had no opportunity to contest it in the courts. To compound matters, the local police force did not tell other police forces involved in security for the Summit.

The Summit, which lasted three days, attracted very large public demonstrations, as was expected. The vast majority of them were peaceful, with the exception of some rioting and the burning of three police vehicles by a small group of “black bloc” anarchists, late on the second day of the event. There were no serious injuries. The rioting, while troubling, was relatively limited, although it did result in significant property damage, including smashed windows.

After the rioting, police arrested hundreds of people, detaining them in what many described as appalling conditions in a facility that became known as “Guantanamo Bay North”. In total, over 1000 people were taken in custody. Very few of those arrested were ultimately charged with any offence. Virtually all of them were released a day or so after the Summit finished.



Photo by Steve Hoang.

The local police force that had requested the Regulation had also been severely criticized in the media for a number of other things in the days before and during the Summit, including:

- needlessly “kettling” or containing groups of peaceful protesters and innocent passers-by for hours on end, in appalling weather
- excessive use of force
- lack of preparation
- holding media “photo ops” with weapons that were presented as being related to the Summit protests but which later turned out to belong to a mentally ill person who had no apparent connection to the protestors
- generally heavy-handed policing.

Word of the Regulation had leaked out as the Summit was getting underway. Dubbed “the secret law” by the media, it resulted in very significant public concerns. Those concerns were exacerbated by events that took place as the Summit progressed. There were reports of peaceful citizens being arbitrarily stopped and searched by police, sometimes several kilometres from the Summit location.

Within a day of the Summit concluding, the Ombudsman began to receive dozens of complaints about the police use of “stop and search” powers. Several were from civil liberties groups. They alleged that police had detained and searched hundreds of people across Toronto using the power provided in the Regulation, not just those seeking access to the fenced-off area. Citizens were stopped for no apparent reason, asked for identification (which there is no requirement to carry in Canada), told to leave an area, were searched or were not given the option to leave; all of which police officers are not allowed to do normally, save in specific circumstances.

Many of those detentions occurred miles away from the fenced area. Some officers had apparently quoted the Regulation as their authority to do so, notwithstanding that the Regulation did not actually give it to them in the vast majority of cases.

In total, the Ombudsman received over 250 complaints, including complaints from politicians, community groups and the Canadian Civil Liberties Association.

3. WHY DID THE OMBUDSMAN DECIDE TO INVESTIGATE?

Somebody had to. There was huge public interest in how and why the “secret law” came about and the role it played in what transpired during the Summit.

The Government rebuffed demands for a public inquiry. A public inquiry is a very formal mechanism, not unlike a national inquiry process used by NHRIs. Led by a judge and involving public hearings, a public inquiry can take years and can cost millions of dollars.

The Ombudsman does not have jurisdiction over the police in Ontario. He could not investigate the conduct of the police. However, he could investigate the role of the Government in passing the Regulation and how the Government had decided to communicate its existence to the public.

SORT conducted an initial assessment to determine if an investigation into the underlying issues was warranted. It began the day the Summit ended and took four days, over a weekend. There was ample evidence that an investigation would be in the public interest, given:

- the number of complaints
- there was no information about the Regulation on the websites of the police force or the relevant Ministry
- there was abundant *prima facie* evidence that something had gone wrong
- the public believed something had gone wrong and wanted to know why
- the high level of media interest in the issue
- that the issue was being debated at all levels of government.

The case easily met the SORT test; it was big enough to matter, but small enough to win.

Less than a week after the conclusion of the Summit, the Ombudsman publicly announced the investigation. He stated that the evidence-gathering would be completed in 90 days.

4. THE INVESTIGATION PLAN

SORT put together a team of investigators to conduct the investigation. The Director had overall responsibility.

The approach was the same as in most SORT investigations. “Blitz” the case, as discussed in Chapter 3. In other words, assemble as many investigators as possible to gather the evidence while it was still fresh.

The lead investigator drafted the investigation plan, assisted by everyone on the team. The investigation planning template set out in Chapter 5 was used as a guide.

What was being investigated?

The issue was framed as follows:

How and why did the Government create and enact a regulation that appeared to curtail the right of citizens to freedom from arbitrary detention, using legislation that was designed to fight Nazis – and then not communicate that to the public?

The systemic component of the investigation was the overall process by which the Regulation had been made by the Government and then not publicized. If the Government could do that in this case, then it was perfectly possible that it could do it in other similar situations. There was an apparent flaw in the process by which the Government could pass and impose regulations that restricted civil liberties without anyone knowing.

Care had to be taken as to how the issue was presented because the Ombudsman's jurisdiction did not extend to the conduct of police officers. Other oversight agencies investigated allegations of excessive use of force and unlawful detention.

What was the overall approach to gathering the evidence?

The investigative strategy was simple. It involved:

- sending a “wish list” letter to the Minister with an eight-day deadline to obtain any document that related to the issue⁸³
- selecting which complainants to speak to and starting the interviews
- searching the Internet for evidence
- ensuring the team had the technical capacity to preserve any evidence discovered on the Internet
- visiting the scene before the fence was dismantled, taking photos and video if necessary and canvassing for witnesses
- contacting police forces involved in the Summit to invite them to participate in the investigation, even though they did not fall within the inquiry's jurisdiction
- reviewing the documents received and starting interviews with decision makers.

The team was very conscious of the potential for “issue creep”,⁸⁴ which is where the investigation goes beyond its initial parameters once it has begun. It anticipated pressure from several sectors, including civil liberties groups, to expand the investigation into other areas, including Government oversight of the whole Summit.

What and where was the evidence?

The usual potential sources of evidence were reviewed.

- **Witnesses**

The team identified a core group of potential people it wanted to interview. They included City of Toronto staff, police officers, complainants, NGO staff and officials at the Ministry, including advisors to the Minister and the Commissioner for Public Safety.

- **Documents**

In addition to documents from the Ministry, the team also requested documents from three police forces involved in the Summit, as well as from an NGO that had some involvement with the issue, including taking statements from people who had been detained.⁸⁵

- **Physical and digital evidence**

The team anticipated gathering a lot of digital evidence, including video taken on mobile phones. It knew that there was a lot of evidence already available on the Internet and that more would be received directly. It acquired software to download and preserve anything on the Internet that was relevant, before it was taken down.

83 “Wish list” letters are discussed in more detail in Chapter 24.

84 “Issue creep” is discussed in more detail in Chapter 5.

85 Some documentation was received from two of the three police forces, but not from the police force that had requested the Regulation.

- **Best practices**

The team reviewed what powers had been given to police forces involved in other G20 Summits and similar events.

What problems should be anticipated during the investigation?

The team anticipated reluctance or refusal from some police forces to cooperate with the investigation. It planned strategies to deal with those obstacles, should they occur. It decided to offer police officers an opportunity to give their side of the story but not to use the power to summons witnesses unless their evidence was absolutely essential. The team also brainstormed how it would deal with any whistleblowers who may come forward.

What resources were required?

In total, seven SORT investigators were assigned to the team. Several of those were only involved in this investigation for the first three or four weeks, mainly conducting witness interviews. Two intake staff helped marshal phone calls from the public and conduct research.

How were internal and external communications managed?

As with any major investigation, communications staff at the Office issued a press release announcing what was being investigated – and what was not being investigated – including the limitations of the Ombudsman’s mandate. The press release included a request for anyone who had any information to contact the Office.

Investigators and communications staff worked in tandem to scan traditional media for anything that might be useful, including possible witnesses.

The team knew that it was likely to receive a lot of calls. It had to make sure that it had the resources available to handle them. It provided background information and guidance to intake staff in order to help prioritize complaints, while still providing quality customer service.

Managing expectations was a key issue, especially letting people know that the Office did not have the authority to investigate allegations of excessive use of force by police. It was made clear what the Office was investigating and what it was not investigating. That message was central in every contact the Office had with the media.

What were the milestones and timelines?

It was estimated that the evidence-gathering part of the investigation would take roughly 60 days. It was thought that nearly all the documents needed could be obtained from the Government within a month and that most interviews could be done within 45 days. Some additional time was included in the plan given it was the start of the summer holiday season and not everyone might be available when they were needed. As a result, the Office publicly announced that the evidence-gathering part of the investigation would take 90 days.



Photo by Steve Hoang.

5. WHAT HAPPENED IN PRACTICE?

Witness canvass

Witnesses were canvassed. Investigators knocked on doors in the area where the fence had been erected to locate potential witnesses who might have useful evidence.

Social media

Social media was used extensively to let people know about the investigation. This approach worked very well. Many of those who had been involved in the Summit protest were users of social media, as were some police officers. Word about the investigation quickly spread through Twitter, Facebook and the blogosphere. Many potential witnesses, with much useful information, came forward as a result.

Digital evidence

The Office appealed for any relevant photographs, audio or video. In response, it received a great deal of digital evidence through social media. The team gathered, or was sent, thousands of items, including from people who were too frightened of reprisal to give what they had recorded to anyone else.

Inexpensive, commercially-available software was used to download and preserve video evidence from the Internet, in case it was later taken down. TinEye – an Internet-based tool – was used to do a “reverse search” for images and identify their origin.⁸⁶

86 More information on collecting digital evidence is available in Chapter 21.

Twitter was of great assistance in establishing timelines, as each Tweet is time-stamped.

The SORT investigators searched social media sites for possible evidence. YouTube was a rich source of relevant video, with thousands of people having uploaded videos, some of it directly relevant to the investigation. In fact, a search of YouTube by investigators found over 5000 hits using the search criteria “G20 Toronto”. The investigators then narrowed the search further for the most relevant videos.

Witness interviews

Investigators conducted 49 face-to-face digitally voice recorded interviews.

Interviewees included:

- senior police officers responsible for overall policing at the Summit (though not from the police force that had requested the Regulation, as it declined to cooperate and the investigators decided not to compel their evidence as it was not required)
- Ministry officials, up to and including the Commissioner for Public Safety, the most senior bureaucrat at the Ministry, with responsibility for all aspects of public safety across the province
- municipal officials
- civil rights organizations, lawyers and academics
- security experts.

A review was also carried out as to what had happened in previous G20 Summits and similar events in London and elsewhere, insofar as it had any relevance to what was being investigated.

Finding a “smoking gun” e-mail

In a batch of e-mails received from the Ministry, investigators found an e-mail from a very senior police officer to a very senior government official setting out his concerns about the police force that had requested the Regulation. The Ombudsman concluded that it was a damning condemnation of what the local police force had done. It also noted that the local police force had attempted to shift the blame for the enactment of the Regulation on to other police agencies, after information about it had come to light and was being heavily criticized. It was very powerful evidence and featured prominently in the final report. The media immediately seized upon it when the report was published.⁸⁷

The e-mail, of course, led to interviews with the senior police officer and the senior government official concerned.

Was the completion date met?

The anticipated 60-day target was not met but the investigating team did meet the publicly announced 90-day timeframe.

The 60-day target was not met because the team was inundated with far more digital evidence than it anticipated. It took a while to determine how best to organize and review all the material. The investigating team did not want to miss a piece of evidence that may have proven crucial to its findings.

87 *Caught In The Act: Investigation into the Ministry of Community Safety and Correctional Services' conduct in relation to Ontario Regulation 233/10 under the Public Works Protection Act*; para. 203; available at www.ombudsman.on.ca/Investigations/SORT-Investigations/Completed/G20-summit--Caught-in-the-Act-br--December-2010.aspx?lang=en-CA.

6. FINDINGS AND RECOMMENDATIONS

In December 2010, the Ombudsman released his report of the investigation, *Caught In The Act*. He found that:

- the Government had given police unreasonable and arbitrary powers, resulting in large numbers of grave violations of civil rights
- martial law had, in effect, been imposed
- the Regulation was probably illegal
- it had been passed for an improper purpose
- the Government had exceeded its authority
- the Regulation had been misinterpreted by police
- the Regulation had been kept secret
- the public, NGOs and other stakeholders had not been informed about the Regulation
- other police forces involved in the Summit had also not been informed about the Regulation
- had NGOs been aware of the Regulation, it would have probably been challenged in the courts.

The Ombudsman recommended that the Government:

- repeal the legislation under which the Regulation was enacted
- develop a process to let the public know when police powers were modified, especially in relation to public order and demonstrations.

The report garnered national and international attention. The video of the press conference was viewed over 10,000 times.

The report includes many photos from the Summit. The electronic version of the report has links to some of the video used as evidence to support its findings.

The Government accepted all the recommendations. The law was ultimately repealed. A protocol was developed to be used in similar situations. Given the level of public awareness that resulted from the investigation, it is hoped that there will be no more “secret laws”.

7. CONCLUSION

Caught In The Act is one of dozens of investigations into systemic issues conducted by SORT in the last few years. It has examined issues such as:

- how the Government determines disabilities
- support for children with special needs
- how victims of crime are compensated
- the use of force in prisons
- how the Government decides whether or not to fund cancer drugs.

These investigations have led to major changes in the way that the Government deals with citizens, making processes and policies fairer and more transparent.

The methodology developed by SORT to conduct these investigations can be easily adapted for human rights investigations.

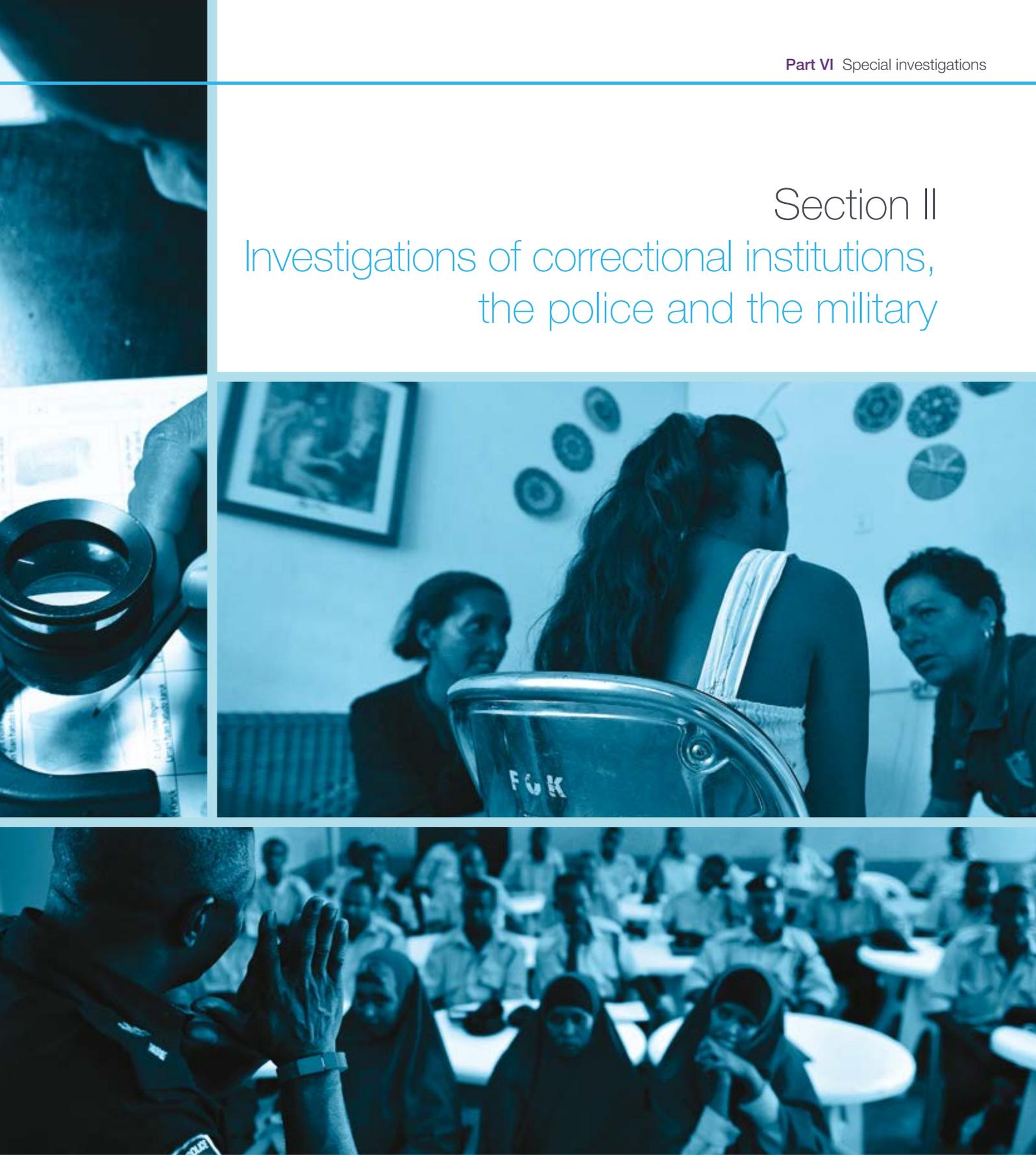
KEY POINTS: CHAPTER 30

- **Systemic investigations into complaints raising systemic issues can do much good, for many people.**
- **They can lead to change in laws, policies and processes.**
- **Pick the right issue.**
- **Prepare a realistic investigation plan.**
- **Set realistic timelines.**
- **Ensure the investigation has the necessary resources.**



Section II

Investigations of correctional institutions, the police and the military



Chapter 31:

Investigating the security and detention sectors

KEY QUESTIONS

- **What are the special obstacles and difficulties that can be experienced when investigating the security and detention sectors?**
- **What techniques are available for overcoming these or minimizing their effects?**



1. INTRODUCTION

The security and detention sector (SDS) comprises the military, the police, paramilitaries, detention centres and prisons. It can be a very challenging environment in which to conduct human rights investigations. Access, organizational culture, resources, national security, politics, safety, chains of command, confidentiality, obedience to orders, codes of silence and a myriad of other considerations may have to be considered when conducting investigations.

SDS organizations generate a lot of work for some NHRIs. In 2006, the United Nations Development Programme (UNDP) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) conducted a survey of Ombudsman's offices in former Soviet states in Eastern Europe and Central Asia. All of these offices have a mandate to conduct human rights investigations. The survey found that approximately 27 per cent of their total caseloads involved SDS agencies. In Georgia, it was as high as 59 per cent. In general, most alleged human rights violations involved the police or the prison system, with some variations by nation.⁸⁸

2. INVESTIGATIVE BARRIERS

Listed below are some factors that may adversely impact NHRI investigations into SDS agencies. Not all factors may be directly applicable to all agencies and some factors overlap. Possible strategies to address these barriers are discussed later in the chapter.

2.1. Access

It may be difficult for the NHRI to access people within the SDS system, both those running it, those employed in it and, in the detention system, those who are incarcerated. Even though the NHRI may have the authority to enter premises, including detention centres, in practice that authority may be challenged. Personnel are often deployed, sometimes out of country. Rank-and-file personnel may not be aware that the NHRI exists, let alone what it does. Leaders may be "too busy" to deal with the NHRI.

Another aspect of access is security clearance, if national security is an issue. National security is often a very convenient reason to refuse access. Investigators at the Canadian Military Ombudsman have security clearances up to the Top Secret level, which covers virtually any possible situation that would fall within its mandate.

88 *Monitoring and Investigating the Security Sector*; available at www.dcaf.ch/Publications/Monitoring-and-Investigating-the-Security-Sector.

2.2. Chain of command and obedience to orders

SDS organizations usually have strong and defined chains of command and those within it are expected to abide by those chains of command. It is a hierarchical structure that discourages independent thinking and initiative, other than within well-defined parameters. There may also be an expectation that orders from superiors will be obeyed without question.

At the very highest levels, however, the line of command between the military and politicians can become blurred and this can also cause significant problems. Who gave orders to do what, when – and who is accountable for them – may be extremely difficult to establish.

2.3. Suspicion of external oversight

No one enjoys being investigated, especially when an external body undertakes the investigation. No one relishes losing control of the process and SDS agencies are no exception. As the DCAF noted in a 2006 report, arguably with no little understatement:

*Security sector agencies remain relatively closed institutions that are reluctant to allow civilian oversight.*⁸⁹

Some SDS organizations perceive any external investigation or scrutiny as an insult to their ethics and integrity. They may give any number of reasons for not cooperating. For example, SDS organizations may claim that oversight can threaten the authority of the chain of command, which in turn could lead to the breakdown of command and control, with dire consequences in urgent situations. They may also suggest that it could lead to members hesitating when those situations arise, the inference being that members could be killed or seriously injured as a result.

An SDS organization may also believe that the agency charged with the investigation simply does not have the experience or knowledge to understand its culture and context. If the investigators have not “walked a mile in our shoes” they are in no position to judge whether or not a member had failed to meet a certain standard.

It is an argument that does not withstand scrutiny, once dissected. For example, in 1996 the Special Investigations Unit (SIU), a Canadian civilian police oversight agency, charged a police detective with manslaughter after he shot and killed a 16-year old boy in a stolen car. The detective was acquitted. He then sued the SIU for \$30 million for malicious prosecution and negligent investigation. In a civil trial that heard 34 days of evidence, the plaintiff argued that the SIU (and, by inference, civilian oversight agencies in general) simply did not have the skills or experience to conduct investigations of police, nor was it impartial. Police officers and union officials were called give evidence to that effect.

The judge hearing the case commented on this argument in his judgment:

Evidence given by (the officer) and other police witnesses at trial that they believed the SIU to be incompetent and incapable of carrying out a fair investigation must be given little weight. The witnesses fail to cite any examples of negligent or incompetent behaviour on the part of SIU or any basis on which their opinions were formed.

*There appears to be, on the part of certain police witnesses and certain police associations, an almost Pavlovian reaction against a civilian agency investigating the conduct of police officers in carrying out their duties and against the idea that such an agency could conduct an investigation which would be fair to police officers. This is particularly surprising when the statistics given in evidence establish that in 97% of cases, the investigation exonerates the subject police officer.*⁹⁰

Resistance to civilian oversight by SDS organizations takes many forms.

⁸⁹ Ibid; p. 27.

⁹⁰ *Wiche v Ontario* (2001), 38 Admin. L.R. (3rd) 194, 9 C.C.L.T. 93d 72 (Ont. S.C.J.), affd 57 W.C.B. (2nd) 111 Ont. (C.A.). The plaintiff lost the case, both at trial and on appeal.

It can be strategic. They may do everything they can to limit the mandate of an NHRI. For example, the military fought very hard to prevent the Canadian Military Ombudsman from being given investigative powers when it was set up. They failed in their efforts, but only just. Some police special interest groups, including unions and senior management associations, have also lobbied aggressively against the creation of civilian oversight agencies.

It can also be tactical. SDS organizations may fail to cooperate or obstruct a specific investigation, for example, by refusing to provide access to people or documents. They may delay, evade and obfuscate; all of which may impede an investigation. They may fail to acknowledge the authority of the NHRI, at least until circumstances suit them. They may orchestrate media campaigns to undermine the NHRI or leak information as it suits them.

2.4. Culture of the organization

SDS organizations have specific cultures and traditions. That said, there are common characteristics that underpin virtually all of them and these can impact on NHRI investigations.

Loyalty and the “code of silence”

Many organizations expect loyalty from their members, both to the organization as a whole and to fellow members. That is especially true for SDS agencies. The importance of loyalty towards one’s unit, regiment, police force, platoon or group of colleagues is instilled in members from the day they join.

“Loyalty” can manifest itself any number of ways. It might be wilful blindness, where a witness “just happens” to be looking the other way when something unlawful happens. It may also be something more proactive, such as engaging in a cover-up or complicity in the wrongdoing itself.

There is also an expectation that members of the organization will be loyal to each other in virtually all circumstances, even if it is to their own detriment.

The “blue code of silence” is a term used to describe a similar phenomenon among police officers. The author of this Manual was told on his first day of training at police college that the golden rule was “never rat on a fellow officer”.⁹¹

That is not just anecdotal evidence. The Christopher Commission investigated systemic issues within the Los Angeles Police Department (LAPD) in the aftermath of the Rodney King incident. An African American man had been severely beaten by LAPD officers. The Commission reported that:

Perhaps the greatest single barrier to the effective adjudication of complaints (against police officers) is the officer’s unwritten code of silence... (the principle) that an officer does not provide adverse information on a fellow officer.

Retaliation

The consequences of breaking the code of silence can be severe. Giving evidence against a colleague is usually a career-ending move, as discussed in the section on whistleblowers in Chapter 17.

The investigation by the **Australian Human Rights Commission** into the treatment of women in the Australian Defence Force in 2012 heard evidence that lodging a formal complaint “was not an option” for some members who alleged sexual harassment and sexual assault by their colleagues. They did not do so because they believed that, if they did, they would be victimized by their peers and supervisors and it would have a “detrimental impact” on their careers.⁹²

91 There were instances when it was acceptable, including corruption, sexual assault and theft. Questionable or excessive use of force, however, was not an exception, when it was believed that the force was warranted.

92 *Review into the Treatment of Women in the Australian Defence Force*; 2012; available at www.defencereview.humanrights.gov.au.

THE MULRUNJI CASE

INVESTIGATION INTO POLICE CORRUPTION IN QUEENSLAND

In 1988, a major inquiry was conducted into corruption in the Queensland Police Service. It uncovered instances of very serious corruption by police officers, several of whom were of a very senior rank. It examined police culture and how police investigated themselves. It made the following findings:

The unwritten police code is an integral element of police culture and has been a critical factor in the deterioration of the Police Force. It has allowed two main types of misconduct to flourish. A practical effect of the code is to reduce, if not almost to eliminate, concern at possible apprehension and punishment as a deterrent to police misconduct. The code exaggerates the need for, and the benefits derived from, mutual loyalty and support

Under the code it is impermissible to criticize other police. Such criticism is viewed as particularly reprehensible if it is made to outsiders. Any criticism which does occur is kept under the control of those who have the authority and influence within the Force. Any dissidents are able to be dealt with for a breach of the code, with the approval of other police.

The police code also requires that police not enforce the law against other police, nor co-operate in any attempt to do so, and perhaps even obstruct any such attempt ... Since the Police Force is responsible for the enforcement of the criminal law and police misconduct must be dealt with internally, the practical result of a failure by police to investigate allegations against police is an ineffectual Internal Investigations Section of the Police Force.⁹³

Parts of this passage were quoted by the Coroner in the third Mulrunji inquest, as background for his observations of police culture and as the basis for his recommendation that the CMC be given the exclusive mandate to investigate deaths in custody.



In some cases, there can be physical repercussions. For example, there have been incidents where colleagues in the corrections system have not responded to “rats” who call for help, or police officers have deliberately delayed helping a fellow officer who has requested urgent assistance.

Investigating the police is not easy anywhere, but is even more difficult in areas of conflict. A 2012 review of the Afghanistan Local Police (ALP) by the **Afghanistan Independent Human Rights Commission** illustrated why such investigations are so important. The Commission set out compelling evidence of significant human rights abuses by some elements within the ALP, including murder, assaults, extortion and abduction. These abuses have undermined public confidence in the ALP, as well as in local and central government. One of the key findings was that citizens were concerned at growing crime and human rights violations by the ALP. Another was that they were afraid to report those abuses, because of a well-founded fear of retaliation if they did so.⁹⁴

93 *Fitzgerald Inquiry*; Crime and Misconduct Commission, Queensland; available at www.cmc.qld.gov.au/about-us/our-organisation/our-background/fitzgerald-inquiry; p. 202.

94 *From Arbaki to Local Police: Today's Challenges and Tomorrow's Concerns*; Afghanistan Independent Human Rights Commission; 2012; available at www.aihrc.org.af/en/research-reports.



Photo by Crown Copyright (www.defenceimagery.mod.uk).

With us, or against us

A strong part of the culture of SDS organizations is that members can believe that you are either “with them or against them”. That attitude can make it even more difficult for investigators from the NHRI to gain the confidence of those whom they are investigating. The NHRI investigator may be perceived as an advocate for, or a friend of, the “bad guy”. In some cases, that may be perceived as providing comfort to the enemy or even treason. As a result, those members may attempt to undermine or discredit the NHRI investigator.

“Noble cause” brutality

Sometimes a perpetrator may genuinely believe that his or her actions were in the best interests of whomever he or she feels loyalty to – colleagues, country or anything in between. He or she may feel ethically justified in circumventing those processes or protections in place, particularly human rights safeguards, on the grounds that those processes are:

- too biased in favour of the suspect
- take too long
- do not provide sufficient punishment
- an ineffective deterrent.

Legally unsanctioned or otherwise unauthorized retaliation for something that has happened, perhaps to a colleague, may be argued as being justified on the basis of an “eye for an eye”. That type of conduct may be found in campaigns against those considered to be “terrorists” or insurgents. Torture or extrajudicial executions may be justified by those who perpetrate them as being necessary for the common good. The same applies to the torture of detainees in detention facilities and prisons, often involving those accused or convicted of particularly heinous crimes.

Situations where “noble cause” brutality is a factor can make NHRI investigations even more difficult. It will be even more unlikely that colleagues will provide evidence to the investigator. Those in power, while stating that normal procedures will be followed, may turn a blind eye. Internal investigations may be very limited. There may even be public support for what has been alleged to have occurred. All of which makes the investigator’s task that much more difficult.

Tradition

Tradition is valued in many SDS bodies, particularly military organizations. Some of those traditions can even amount to human rights violations in their own right. For example, bullying, initiations and systemic discrimination based on gender, ethnic origin, sexual orientation, religion and other personal characteristics were not unknown in previous years. It is clear that they still exist in many SDS organizations today.

2.5. Concealing and moving evidence and people

It is generally very easy for SDS organizations under investigation to control or conceal evidence as they see fit. People, including their own personnel or those in their custody, can be moved or transferred reasonably easily. This can significantly hamper an investigation.

2.6. Size, acronyms and processes

SDS organizations tend to be relatively large. That can make it difficult for an investigating NHRI to understand who does what within the organization, how it is done and who is responsible to whom. SDS organizations also tend to use many acronyms, which can add to the level of confusion. The Canadian military, for example, has a whole site on its Intranet devoted to explaining to its own members what the hundreds of acronyms it uses actually mean.⁹⁵

2.7. Confidentiality

Confidentiality is an important component of many investigations. It can be difficult for an NHRI investigator to protect confidentiality when working in organizations where everyone knows what everybody else is doing, as is often the case in SDS organizations.

2.8. Private military and security companies

In recent years, some functions traditionally performed by agencies of government have been privatized. A large number of private military and security companies (PMSCs) provide services to Governments and NGOs across the world. While over 50 have signed a Code of Conduct, their existence may present huge challenges to NHRI investigations, particularly as far as cooperation and access to potential witnesses and documents is concerned.

⁹⁵ A former Canadian Air Force Brigadier General estimates that the Department of National Defence and Canadian Forces (DND/CF) uses about 1000 acronyms. Once those of allied militaries are included, the total rises to nearly 5000.

THE MULRUNJI CASE

CRITICISMS REGARDING POLICE INVESTIGATING POLICE

At the second inquest, the Coroner made a number of findings that have a bearing on police investigating police when someone dies in custody. She was very critical of what she believed to be the lack of independence and impartiality of the initial QPS investigation. Several of her comments were included in previous chapters, but they are worth repeating:

- “The involvement in the investigation of Mulrunji’s death of officers who knew Senior Sergeant Hurley personally, or were friends with him, was inappropriate and compromised the integrity of the investigation.”
- “(Police procedure) should be amended to make explicit the need to consider, when selecting officers for involvement in an investigation of a death in custody, the impartiality and the appearance of impartiality in the conduct of the investigation.”

The Coroner at the third inquest stated that he “was in agreement with her comments”.⁹⁶ He then made additional criticisms, including:

- strongly inferring that S/Sgt. Hurley had been given information about what another witness had said by a colleague who was present at the interview
- that officers got together and spoke about what happened before the QPS investigators arrived
- that the evidence of several police officers was “improbable”
- that a QPS officer failed to reveal important information to CMC investigators and to the Crown prosecuting S/Sgt. Hurley. He admitted he did so because the defendant was a fellow police officer. The Coroner noted that this officer “had lost all objectivity and was prepared to fashion his evidence to support Hurley”.



3. POSSIBLE SOLUTIONS

3.1. The NHRI’s mandate to investigate must be clear

It should be crystal clear in its establishing legislation that the NHRI has the authority to investigate alleged human rights violations involving SDS organizations, even though there may be some limits. For example, there may be very rare occasions where the NHRI investigation may impact on ongoing military operations. If limits are put on the mandate, it should be clearly explained why. For example, governing directives of the Canadian Military Ombudsman set out a process for conducting investigations involving units deployed on international operations. They note the need to carry out investigations in a “credible, responsive independent and professional manner”, while at the same time “being sensitive to the need to minimize impact on the operational effectiveness of the (deployed unit)”. They also factor in the physical safety of all involved, which is a reasonable consideration in many operations.⁹⁷

96 The report of the third inquest is available at www.courts.qld.gov.au/__data/assets/pdf_file/0008/86858/cif-doomadgee-mulrunji-20100514.pdf.

97 Available at www.ombudsman.forces.gc.ca/au-ns/man/md-dm-eng.asp.



UN Photo by Victoria Hazou.

3.2. Use the powers available

If the NHRI has the power to do something, then that power should be used when appropriate. It sends a message to the SDS organization that the NHRI is prepared to do its job. The power to monitor places of detention, to engage in unannounced visits to prisons and other places of detention, to hear complaints and petitions from those who feel their human rights have been abused and to obtain documents should all be used by the NHRI as required.

The Human Rights Commission of Sri Lanka, in its 2010 annual report, lists the unannounced visits it made to juvenile justice institutions. Its visits to prisons and police stations produced evidence of human rights abuses, including unlawful detention, overcrowding, assaults in custody and delays in detainees being brought before a court.



3.3. Sanctions for non-cooperation or obstruction

A clear mandate is useless if it can be ignored with impunity. Members of an SDS organization should not do any of the following when involved in the NHRI investigation:

- fail to cooperate
- mislead or make a false statement to NHRI investigators
- intercept any communication to the NHRI from any person, including anyone in custody
- make comments that are likely to prejudice the integrity of the investigation
- obstruct the investigation
- retaliate against anyone involved in the investigation.

3.4. Get support from the top

It is particularly important for the NHRI to get support, or “buy-in”, for the investigation from senior leaders. Without it, the NHRI will face an uphill struggle. As DCAF notes:

... the success of investigations very much depends on the willingness of security sector officials to bring forward the investigation. When there is pressure from high-ranking officials, investigations are often carried out faster and in a more effective way.⁹⁸

Support can be sought either by dealing with them directly or by ensuring that there is a clear direction from those to whom they may be ultimately accountable.

One example of the latter is the Directions issued by the President of Sri Lanka to the Heads of the Armed Forces and Police on 22 July 1997. The purpose of the Directions was:

... to enable the Human Rights Commission of Sri Lanka ... to exercise and perform its powers, functions and duties and for the purpose of ensuring that fundamental rights of persons arrested or detained are respected and such persons are treated humanely.

The Directions gave clear instructions that the military and police shall:

- assist and facilitate the Commission in its work
- inform the Commission “forthwith” of individuals who have been detained under the Prevention of Terrorism Act
- provide Commission investigators with access to individuals in detention “at any time”.

There are advantages when working with a culture that is geared toward obeying orders. If a strong message is sent by senior leaders to their subordinates about genuinely cooperating with the NHRI, then it is more likely to be followed.

The UNDP-DCAF survey referred to earlier in this chapter noted that most of the Ombudsman's offices found it easier to build relationships with police and prison officials than with military or paramilitary agencies. It was noted that this may be because those offices and the public have more frequent contact with police and prison officials and the complaint resolution mechanisms are far more developed.

3.5. Build relationships – but don't make them too close

It can be good to build productive working relationships with SDS organizations that come within the jurisdiction of the NHRI. That can be done in many ways. Informal contact at senior levels is usually the best, as it sets the tone for the relationship. Formal protocols, such as standard operating procedures may also help, if they are clear and do not hinder the work of the NHRI. In the corrections sector, meeting with union officials and other representative groups, should they exist, can be useful.

98 Ibid; p. 27.

Investigators should not, however, develop relationships with those individuals involved in an investigation, difficult or tempting though it may be. Some people may try to take advantage of an investigator's natural empathy.

3.6. Don't be an advocate

As discussed in the chapter on assessing evidence, NHRI investigators are not advocates, at least not during the fact-finding part of the investigative process. They are – and should be perceived to be – impartial. They have to be completely neutral. They cannot take a position, unless there is sufficient, reliable and relevant evidence to support that position. That does not normally occur until the evidence has been assessed and report has been written. In many cases, investigators may not have the authority to advocate, as that is the generally the role of the NHRI members or its leadership group.

Any indication that an investigator has made up his or her mind, or is prematurely acting as an advocate, will quickly spread among members of the SDS organization. The investigator will lose his or her credibility and the level of cooperation will suffer as a result.

Obviously, there are exceptions. An investigator may not have the luxury of time. If an investigator comes across a situation that needs to be addressed immediately, such as a threat to life, action may be needed quickly.

3.7. Harness their resources

SDS organizations often have massive resources at their disposal. Make use of them, if practical. The Canadian Military Ombudsman used military transport to get to Afghanistan, even though it would have been possible to use commercial carriers. It proved a great opportunity to meet the troops. Perception and investigative integrity issues must, of course, be kept in mind. For example, those troops would not have much faith in the impartiality or integrity of the investigators if they shared the same accommodation and facilities as the generals.

3.8. Get expert help to understand context and culture

As noted, one of the main criticisms made by SDS organizations against external investigators is that they cannot possibly conduct a fair investigation because they have no experience of what it is like to a soldier, police officer or prison official.

They may have a small point. It is always helpful to have as much knowledge as possible of the organization that being investigated. That may mean becoming an “instant expert” in the area, at least to the extent that time permits. NHRIs can do this by seeking guidance and advice from those who have worked within the sector and are familiar with it.

When the first Canadian Military Ombudsman's office was set up, the decision was made by the first Ombudsman that the Office would have no serving military members on staff, in spite of pressure from the military to do so. However, that didn't mean it could not make use of military experience. It appointed three newly-retired members of the armed forces as Special Advisors to the Ombudsman. One was a senior officer from the Air Force, one was a senior officer from the Army and one was a senior non-commissioned officer from the Navy.

They were very carefully chosen. They were also very carefully monitored. They had no executive function and were not empowered to make any decisions. Initially, they did not participate directly in investigations, except in limited circumstances, and only then at the discretion of the Ombudsman. Once a level of trust was established, they did become more actively involved in fact-finding, but working with senior investigators and never in charge of investigations themselves.

The benefits were significant. They provided valuable advice and guidance to investigators in the field, perhaps about the history of the unit or the background of personnel involved in the investigation. They educated staff about how the military functioned, including how to navigate complex and convoluted chains of command. They also helped secure access to senior members.

Additionally, their presence gave the Ombudsman's office some credibility with senior members of the organization it was overseeing, without compromising its independence and impartiality.

3.9. Make it as easy as possible for anyone to contact you

Providing a “free call” telephone line to receive complaints will be of some assistance. The **Human Rights Commission of Sri Lanka** provides a 24-hour “hotline” that anyone can call to provide information.

3.10. Do whatever possible to protect confidentiality

As discussed previously in this Manual, protecting confidentiality can be very difficult. It can be even more difficult in a military or quasi-military environment, where the movements of individuals tend to be much more controlled. In some situations, such as in a custodial environment, it may be impossible.

Strategies to protect whistleblowers were discussed in Chapter 17, including how to establish and maintain contact and choose appropriate locations to meet. Those strategies may be adapted to the SDS environment. In the most serious cases, witness protection of some kind might be a consideration, should it be available.

The **Commission on Human Rights of the Philippines** points out in its **Investigations Manual** that:

... as circumstances require, the [Commission] shall, in coordination with appropriate agencies or organizations, ensure that adequate security measures are in place for ... vital witnesses, even after disposition of their case by competent fora.



That is an extremely useful proviso to have available. It also requires a significant investment of resources.



UN Photo by Fardin Waezi.

3.11. Identify the issues, plan the investigation and gather all relevant evidence

As mentioned in previous chapters, key elements of the investigative process include identifying the issue(s) to be investigated and then thoroughly planning the investigation so that all relevant evidence is gathered.

The Investigation Techniques policy developed by the **National Human Rights Commission of India** sets out the potential issues that may be involved in the case of a police shooting and what evidence should be considered and collected, as well as the need to attend the scene.

ENQUIRY IN CASES OF DEATH IN POLICE FIRING

- During enquiry of such cases, following important aspects need to be ascertained:
 - (i) whether the assembly was declared 'unlawful' by the authorities present on the spot
 - (ii) whether sufficient warning was given before use of force
 - (iii) whether minimum force was used, and
 - (iv) whether the use of force was justified.
- The following points be taken into consideration while conducting enquiry into deaths in police firing:
 - The following documents be carefully examined:
 - (i) Magisterial Enquiry Report (MER)
 - (ii) Post Mortem Report (PMR)
 - (iii) Inquest report (whether prepared at the spot or in the hospital)
 - (iv) Medico-legal certificate (MLC) records/treatment records of the civil/police personnel injured during the incident
 - (v) relevant entries in the General Diary of the police station, Vehicle Log-book entries and wireless message records.
 - (vi) details of weapons used by the police party and number of ammunition used by them along with number of empty cases recovered.
- The place of incident should be visited and a site plan be prepared.
- Civil/police personnel involved in the action should be separately examined, preferably at the site of incident; their statements should be recorded, and contradiction, if any, should be carefully noted.
- Statements of independent witnesses to the incident and close relatives of the deceased should be recorded.
- Any video film or audio-visual recording of the incident be collected and examined.
- The Medical Officer(s) who conducted post mortem examination of the deceased be examined, especially with reference to the injuries caused to the deceased/injured persons and range of firing.



4. THE ULTIMATE SOLUTION

The introduction to this Manual sets out the eight principles that underpin any investigation. It is fitting to end by referring to them once more. They are particularly important when investigating SDS organizations. If NHRI investigators follow these principles, they will not go far wrong.

EIGHT PRINCIPLES OF EXCELLENT INVESTIGATION

Good investigations are based on eight fundamental principles.

1. **Investigators must be as independent as possible.**
2. **Investigators must be trained and experienced.**
3. **All potentially relevant issues must be identified and, where appropriate, pursued.**
4. **Investigations must be sufficiently resourced.**
5. **All relevant physical and digital evidence must be identified, preserved, collected and examined as necessary.**
6. **All relevant documentation must be secured and reviewed.**
7. **All relevant witnesses must be identified, segregated where practical and thoroughly interviewed.**
8. **The analysis of all the material gathered during the investigation must be objective and based solely on the facts.**



KEY POINTS: CHAPTER 31

- **There are a number of barriers that NHRIs may face in carrying out effective investigations of SDS organizations.**
- **These barriers can be the result of the traditions, culture and working practices of these organizations or the attitudes and sociology of those who work in them.**
- **These obstacles need to be recognized, respected and understood if they are to be addressed constructively by the NHRI.**
- **Overcoming these obstacles can be achieved, both through the mandate and powers of the NHRI and through the actions of the NHRI and its investigators.**
- **When undertaking investigations involving SDS organizations, investigators should follow the eight principles of excellent investigation.**



Summary

Chapter 1

- NHRIs must be, and must be seen to be, independent and impartial. If not, they risk having their investigations challenged and their recommendations ignored.
- The key elements for the independence and impartiality of NHRIs are set out in the Paris Principles.
- Powers to conduct effective investigations should be set out in the NHRI's establishing legislation.
- Those powers should be used robustly, as and when necessary.

Chapter 2

- Conducting investigations is a challenging task.
- Investigators need to be appropriately trained.
- Investigators need an appropriate level of experience.
- Investigators need a range of personal and professional skills.

Chapter 3

- Investigations require resources and NHRIs need stable and sufficient funding to undertake them.
- Investigators need to be given enough time and resources to conduct investigations properly.
- Investigators must have a realistic workload. If there are delays or backlogs in investigating complaints, the credibility of the NHRI will be at risk.

Chapter 4

- Identify what issues the complaint raises.
- Decide which issues, if any, will be investigated.
- Be able to justify the reasons for that decision.
- Determine if there are any underlying systemic issues.

Chapter 5

- An investigation plan should be completed for every investigation.
- The plan will help investigators focus on the issue(s) to be investigated, avoid obstacles and “issue creep”, identify the evidence to be collected, estimate the resources required and set realistic targets for completing the investigation.
- Each investigation is unique and each investigation plan will be subject to many different variables.
- The plan should provide a roadmap for the investigation; it does not have to be a detailed document.
- Prepare an investigation plan template tailored to the mandate of the NHRI.

Chapter 6

- Every effort must be made to identify possible witnesses. Failure to do so may compromise the investigation.
- It is important to document the steps taken to identify and contact possible witnesses in order to demonstrate that every effort was made by the NHRI.
- Use a broad range of canvassing techniques to identify possible witnesses.
- Where circumstances prevent all those identified from being interviewed, interview those people whose evidence will have the greatest significance.

Chapter 7

- In most circumstances, face-to-face interviews are the ideal method for gathering evidence.
- Where face-to-face interviews are not possible or practical, consider conducting interviews using Skype, telephone, written questions, questionnaires, surveys or e-mail.
- Where a method other than a face-to-face interview is chosen, assess the evidence gathered accordingly.

Chapter 8

- While face-to-face is the preferred interview method, issues such as the importance of the evidence, its availability elsewhere, credibility, safety and cost have to be taken into account when making the decision.
- In certain circumstances where the person to be interviewed cannot be physically present, there may be no alternative but to choose another interview method.

Chapter 9

- Good preparation is key to conducting effective interviews.
- Learn as much as possible about the issues being investigated.
- Consider the interview from the interviewee's perspective. Prepare your approach and questions accordingly.
- As an organization, consider selecting interviewers with whom the person being interviewed is likely to feel most comfortable.
- Anticipate and address any potential concerns before they arise.

Chapter 10

- When preparing to interview a witness, investigators should identify if there are any special circumstances that might apply. If so, it should consider whether the interview should be conducted at all and, if it is, what special arrangements will be necessary.
- Factors where special arrangements may be necessary include the physical or mental fitness of the witness; cultural or religious issues; witnesses who may be at risk or vulnerable; and those who do not speak the investigator's language.
- Particular care needs to be taken when interviewing children and other vulnerable people.

Chapter 11

- Segregate witnesses as soon as possible after an event in order to preserve the integrity of their evidence.
- Interview witnesses as soon as possible after an incident.
- In some cases, it may be prudent to interview witnesses immediately after each other.
- Investigators should consider the most effective order in which to interview witnesses.
- NHRIs may need to use any powers that they have to compel a reluctant witness to give evidence.

Chapter 12

- Setting up an interview provides an opportunity to establish rapport with the witness.
- Confidentiality is a major issue and must be taken into account when making initial contact with a witness.
- If someone else is allowed to be present at the interview, ground rules must be established as to what he or she may or may not do.
- Documentary and other relevant evidence should be requested from the witness when the interview is being arranged.
- The safety of those taking part in the interview should always be the main consideration. However, thought also should be given to issues such as convenience, comfort, cost and confidentiality.

Chapter 13

- Ideally there should be two interviewers, one to lead the interview and one to support.
- The lead interviewer should have relevant knowledge, expertise and status.
- All documents should be organized before the interview starts, as well as any equipment, video recordings or notes that may be used during the interview.
- The interviewer should dress appropriately and consideration should be given to seating arrangements and the physical set-up of the interview room.
- Interviews should take no more than three hours or so. Include time for breaks if it is necessary for the interview to be longer.

Chapter 14

In the course of an investigation, the six principles of effective interviewing should be considered every time an interview is prepared. If this is ignored, investigators may:

- fail to gather important information
- not understand what is happening
- overlook relevant issues
- fail to identify avenues of resolution
- miss important facts
- undermine their own credibility and that of the NHRI
- allow an injustice to continue.

Chapter 15

- As a general rule, every interview has 12 separate stages:
 1. Introduction by the lead interviewer
 2. Establishing the background
 3. The opening question
 4. Asking specific questions
 5. Clear-up questions by second interviewer
 6. Brief summary
 7. Is there anyone else who should be interviewed?
 8. Is there any other relevant evidence that should be gathered?
 9. Is there anything that has been missed or anything the interviewee would like to add?
 10. Thank you and what happens next
 11. Do not discuss with anyone else
 12. Contact us if anything else comes up
- The interview does not always end when it has formally been closed. Further evidence may be offered “off the record”. There may also be the need for a follow-up interview.
- Consideration needs to be given to supporting the emotional well-being of those who are interviewed and the investigators who interview them.

Chapter 16

- Interviewing is an important skill that must be developed if all relevant evidence is to be collected in a credible form and used to produce an effective result. The key is to establish rapport with the interviewee so that he or she is encouraged to provide relevant and truthful information.
- To achieve that requires a good understanding of interpersonal relations, including:
 - behaviour
 - being prepared to admit when the evidence is not clear
 - recognizing when questions are not being answered or being answered as opinion, rather than fact
 - framing questions appropriately to exclude bias or suggested answers
 - being prepared to ask difficult questions
 - treating the interviewee with respect, regardless of the circumstances.

Chapter 17

- No two witnesses are the same. Some witnesses need special treatment.
- Some witnesses have been through traumatic situations. Care should be taken to not re-traumatize them.
- Whistleblowers can be a valuable resource. Investigators need to plan how best to support people who ask for protection and the extent to which their evidence can be kept confidential.
- Do not believe everything that an expert witness says. Test, question and evaluate how objective and knowledgeable they actually are.

Chapter 18

- Digitally recording interviews is considered best practice. It is an efficient and effective method of recording interviews.
- Written statements are time-consuming and laborious. They are best restricted to those occasions when recording the interview is not possible or not acceptable to the interviewee.

Chapter 19

- A number of techniques have been developed to assist investigators assess witnesses credibility, such as interpreting body language, Scientific Content Analysis and the use of hypnosis and polygraphs.
- While each has some merit, the conclusions reached by such methods should be supported wherever possible by corroborating evidence, before giving weight to them.

Chapter 20

- Investigations into a death where human rights violations are alleged or apparent can be a very difficult and sensitive process.
- Proper processing of the scene where the body is found is crucial.
- Communication between the NHRI investigators and experts should be seamless.

Chapter 21

Investigators should:

- Think of a “scene” in the broadest sense possible
- consider that there may be more than one scene
- visit scenes whenever possible
- make safety the top priority when deciding whether or not to visit a scene
- document the visit.

Chapter 22

- Digital evidence may be the most valuable evidence in an investigation.
- NHRI investigators have to consider what digital evidence may be available, where to find it and how to preserve it so that extracting this evidence is done properly, particularly if data is hidden.
- The NHRI may need to seek expert help to retrieve this evidence.

Chapter 23

- The Internet is a hugely valuable resource for investigators. It can help uncover evidence and let people know about an investigation.
- Online searches should be included in an investigation plan.
- Be smart and focused when you search.
- Search for information ethically.
- Do not accept everything found on the Internet at face value.
- Use social media as an investigative tool.
- Be aware of new tools and new ways to search for information online.

Chapter 24

- Documents are the backbone to nearly all investigations.
- There are seven steps involved in obtaining and reviewing documents. Investigators should:
 - determine what documents exist or should exist
 - obtain those documents
 - review them
 - assess their authenticity
 - understand them
 - assessing what weight to give them
 - look for any gaps.

Chapter 25

- It can be very challenging to assess evidence in some NHRI investigations.
- Assessing evidence is based on three factors:
 - sufficiency
 - reliability
 - relevance.
- Investigators must have sufficient, reliable and relevant evidence to reach a conclusion.
- Investigators can reach a conclusion if they think something is more likely than not to have happened.
- On occasions, there may be insufficient evidence available to reach a conclusion.
- Good investigators keep an open mind as the evidence is assessed.
- Investigators should identify and fill any gaps in the evidence that may prevent a fair conclusion from being reached.
- Investigators must assess the evidence thoroughly and objectively.

Chapter 26

- NHRI reports should use their reports to educate and persuade.
- Reports should follow a clear framework, such as “IRAC”:
 - Issue
 - Rule
 - Analysis
 - Conclusion.
- Explain why conclusions have been reached.
- Keep the report as simple, short and clear as possible.
- Avoid any hint of bias.

Chapter 27

- Multiple complaint investigations aim to tackle the systemic issues that underlie a number of similar complaints.
- Multiple complaint investigations by NHRIs compliment the national inquiry methodology by dealing with narrower issues.
- They can be done quickly, cheaply and effectively by small teams, using existing resources.
- Multiple complaint investigations should focus on issues that are “big enough to matter but small enough to win”.
- They should be based on realistic investigation plans.
- Recommendations should fact-based and focused on addressing the systemic issue, even if positive change is incremental.

Chapter 30

- Systemic investigations into complaints raising systemic issues can do much good, for many people.
- They can lead to change in laws, policies and processes.
- Pick the right issue.
- Prepare a realistic investigation plan.
- Set realistic timelines.
- Ensure the investigation has the necessary resources.

Chapter 31

- There are a number of barriers that NHRIs may face in carrying out effective investigations of SDS organizations.
- These barriers can be the result of the traditions, culture and working practices of these organizations or the attitudes and sociology of those who work in them.
- These obstacles need to be recognized, respected and understood if they are to be addressed constructively by the NHRI.
- Overcoming these obstacles can be achieved, both through the mandate and powers of the NHRI and through the actions of the NHRI and its investigators.
- When undertaking investigations involving SDS organizations, investigators should follow the eight principles of excellent investigation.

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Appendix 1: Manual on Investigative Techniques and Complaints Handling

National Human Rights Commission of India

A. INVESTIGATION TECHNIQUES

Procedures to be adopted for conducting spot enquiries by Investigating Officers.

1. Enquiry into cases of encounter killings

During an enquiry into encounter killing cases, the following aspects are to be ascertained:

- whether the force was used by the police in “self-defence”
- whether sufficient warning to surrender was given by the police before use of force
- whether minimum force was used, and
- whether the use of force resulting in the death of the deceased was justified.

The enquiry is conducted in two stages.

Initial study of case file

Before commencing the enquiry, the following points may be ascertained after studying the case file:

- If the case is registered on a complaint alleging fake encounter, the relationship of the petitioner with the victim; in case the complainant is a non-governmental organization (NGO), then the source of the allegation and the main allegation levelled in the complaint. In case any enquiry report is attached, the same may be examined and material facts noted down.
- If the case is registered on intimation from the police authorities, then following points be noted: place, date and time of the encounter, number of criminals killed, type of vehicle used by the criminals, criminal background of the deceased, etc. Any complaint regarding the encounter, apart from this intimation, should also be carefully examined.

During the enquiry

The following documents should be carefully examined:

- magisterial enquiry report
- post-mortem report
- inquest report (whether it was prepared at the spot or in the hospital may also be noted)
- medico-legal certificate records/treatment records of the police personnel injured during the encounter
- relevant entries in the General Diary of the police station, vehicle Log-book entries and wireless message records
- inspection report(s) of vehicle(s) used by the deceased
- details of weapons used by the police party and number of rounds fired by them, along with number of empty cases recovered

- type of weapons used by the deceased and number of rounds fired, along with number of empty cases recovered
- ballistic examination report of the weapons allegedly seized from the site of encounter
- forensic examination report of the hand wash of the deceased.

The place where the encounter took place should be visited and a site plan prepared.

Each member of the encounter team should be separately examined, preferably at the site of encounter; their statements should be recorded and contradictions, if any, be carefully noted.

Statements of independent witnesses to the incident and close relatives of the deceased should be recorded.

The Medical Officer(s) who conducted the post-mortem of the deceased should be examined, especially with reference to the ante-mortem injuries to the deceased, if any, as well as the range of firing and the track of the bullets inside the body of the deceased.

2. Enquiry in cases of death in police firing

During enquiry of such cases, the following important aspects need to be ascertained:

- whether the assembly was declared “unlawful” by the authorities present on the spot
- whether sufficient warning was given before use of force
- whether minimum force was used, and
- whether the use of force was justified.

The following documents should be carefully examined:

- magisterial enquiry report
- post-mortem report
- inquest report (whether it was prepared at the spot or in the hospital may also be noted)
- medico-legal certificate records/treatment records of the civilian/police personnel injured during the incident
- relevant entries in the General Diary of the police station, vehicle log-book entries and wireless message records
- details of weapons used by the police party and number of rounds fired by them, along with number of empty cases recovered.

The place of incident should be visited and a site plan prepared.

Civilian/police personnel involved in the incident should be separately examined, preferably at the site of incident; their statements should be recorded and contradictions, if any, should be carefully noted.

Statements of independent witnesses to the incident and close relatives of the deceased should be recorded.

Any video film or audio visual record of the incident be collected and examined.

The medical officer(s) who conducted the post-mortem examination of the deceased should be examined, especially with reference to the injuries caused to the deceased/injured persons and range of firing.

B. PROTECTION OF HUMAN RIGHTS: COMPLAINTS HANDLING

Scrutiny and registration of complaints: Complaints are first examined by legally qualified officers and consultants and then registered, with a unique computer-generated number given to each case. The relevant particulars of the complainants are entered in a database of the Complaint Management and Information System (CMIS). The Commission has assigned numerical codes for every incident of human rights violation, which are entered into the database along with various other parameters. This helps in retrieval of very useful data with a click of button which can be used for research purposes, analysis, preparation of reports etc.

Linking database with other agencies: The database in the CMIS is made available to the State Human Rights Commissions and other National Commissions to avoid the duplication of complaints and parallel proceedings.

Online registration and 24-hour information service: Complaints can be registered online through the website of the National Human Rights Commission. The Commission has also started to send information regarding complaints – such as case number etc – to complainants' mobile phones/email addresses if provided. This is done automatically by the CMIS. Complainants or human rights defenders can approach the Commission through a widely publicized 24-hour dedicated mobile phone number.

Suo motu cognizance of complaints: The Commission takes *suo motu* cognizance of news reports in the media which *prima facie* disclose incidents of human rights violations. Complaints are also received from human rights defenders working in different parts of the country. The status of *suo motu* cases and the cases of human rights defenders are posted separately on the Commission's website and are regularly updated. The Commission's annual report has a separate chapter dedicated to human rights defenders and their cases.

Procedure regulations: The Commission has made internal regulations to guide its work. As per Regulation 9, certain complaints – for example, those pertaining to matters which are *sub judice*, those which do not contain allegations against public servants, complaints of a frivolous nature, anonymous complaints, complaints pertaining to service matters, civil disputes and complaints on incidents which took place more than one year before the date of the complaint – are not ordinarily entertained. The complaints which are not entertained under Regulation 9, being outside the purview of the Commission, are dismissed in *limini*.

Dealing with actionable complaints: The complaints which *prima facie* appear able to be entertained by the Commission are placed before the individual Members of the Commission separately. Each Member, including the Chairperson, has a separate Section in the Law Division which processes these complaints from the beginning until they have been concluded.

Transfer of complains: The Commission transfers some complaints to concerned State Human Rights Commissions, if it considers it necessary or expedient to do so. Of the remaining cases, the Commission either transmits them to concerned authorities or issues notices and calls for information or a report from the concerned public authorities within a stipulated time.

Inquiry by Investigation Division and specialized agencies: As and when the Commission deems necessary, complaints are inquired into by its own Investigation Division through "on the spot" inquiries and the case decided on the basis of its report. If the Commission deems it necessary, it can also utilize the services of any officer or investigation agency of the Central Government or any state Government. The Commission has utilized the services of Central Bureau of Investigation, the top independent investigative agency in the country.

Inquiry by Special Rapporteurs: The Commission's Special Rapporteurs, who are appointed on a geographic and thematic basis, are also entrusted with inquiring into complaints when it is deemed necessary. Their expert advice is also taken in resolving some rights issues.

Powers for inquiry of complaints: The Commission has the powers of a civil court when inquiring into complaints and can summon any person to furnish information in connection with the inquiry. The Commission uses this power when there is a delay or failure on the part of the concerned Government or authority to send the requested reports within the set time. If the reports are not received within the set time, the Commission may proceed to inquire into the complaint on its own.

Recommendations in cases of violations of human rights: If on receipt of the report, the violation of human rights, or negligence in the prevention of such violation, by a public servant comes to light, the Commission may recommend to the concerned Government or authority to initiate prosecution proceedings or other such action as the Commission may deem fit against the concerned persons. In appropriate cases, the Commission can also approach the Supreme Court or the High Court concerned for suitable orders.

Grant of interim relief/monetary compensation: In cases where a violation of human rights is established, the Commission recommends that the concerned Government or authority grant immediate interim relief to the victim or the members of his/her family. Such compensation cases are closed only after the payment is made to the victim or to the next of kin and proof of payment is received. The particulars of such cases are included in the monthly newsletter of the Commission, which helps create awareness among the people and has a deterrent effect on the public servants.

Constitution of Division Benches/Full Commission/Open Court: Although ordinarily the complaints are considered and directions are passed by single Members, from 2009–10, to expedite the disposal of cases relating to alleged killings in police custody and police encounters, the Commission has constituted two Division Benches of two Members each, which hold two special sittings each week.

Important and sensitive cases, especially those involving the public at large, are considered by the Full Commission (the Chairperson and all four Members sitting together), which generally holds one sitting each week. There is a separate Section in the Law Division which deals with cases of the Full Commission and Division Benches.

In some important and sensitive cases, the Commission conducts hearings in Open Court, where the complainant and the respondent parties are heard.

Camp Sittings/Open Hearings: To reach out to complainants in different states of the country and to speed up the disposal of their cases, the Commission has held Camp Sittings in different state capitals such as Lucknow, Patna, Bengaluru, Bhubaneswar and in the north-eastern states.

In pursuance of the recommendations made in a study sponsored by the Commission on the atrocities against the persons belonging to Scheduled Caste, the Commission has held Open Hearings in various parts of the country. Hearings have so far been held in Orissa, Gujarat, Tamil Nadu, Rajasthan and Maharashtra. Prior to the hearings, the Commission seeks complaints through public notification and reports are also called for from the authorities. During the hearings the complainants and the concerned authorities are called and matters are settled. These hearings have created a positive impact and served as much needed relief to disadvantaged sections of society.

Camp Sittings and Open Hearings by the Commission have also been a very useful tool for awareness raising.

Illustrative cases: Brief summaries of important cases are always included in the annual reports of the Commission, available on Commission's website: www.nhrc.nic.in.

Important guidelines/instructions: In order to sensitize public officials towards human rights and to address any loopholes in the implementation of laws and regulations, the Commission has, from time to time, issued a number of guidelines. A compilation of such important guidelines is available on the Commission's website. These guidelines have created a visible impact on enforcement of human rights, especially in prisons and on police actions.

Appendix 2:

Case study: The investigation of the rights of children living and studying in religious institutions

National Human Rights Commission of Mongolia

In 2012, the National Human Rights Commission of Mongolia initiated an investigation into the rights of children living and studying in religious institutions. The Commission decided to investigate this particular issue following a complaint that was submitted to an NGO, dealing with rights of children and jointly settled by the Commission.

As part of the information-gathering process, the Commission surveyed religious institutions across the country, including 26 Buddhist monasteries in eight districts of Ulaanbaatar and 28 monasteries in 12 provinces nationally. Seven Christian and one Islamic institution were included in the survey. In addition, the voices of 290 children were heard through interviews and focus groups, where they discussed their living conditions, education and treatment.

Under the Mongolian law governing the relationship between the State and religious institutions, religious institutions must provide children with a general education, in addition to their religious education. It is the responsibility of the State to provide funding, staff and monitoring of religious institutions to ensure that all school-aged children receive a general education.

The Commission's investigations revealed that many children living and studying in religious institutions were not receiving a general education at all, or were receiving sub-standard general education, as compared to non-religious schools. As a result, the child's basic right to education was being denied and many children were being left behind, unable to fully participate in modern society.

The investigation also found that the conditions in many religious institutions were inadequate for children. Expert reports condemned some buildings and recommended that they be demolished. In other buildings, there was no appropriate lighting, water and sanitation, as well as overcrowding in dormitories, limited outside space for sport or recreation and inadequate classroom furniture and learning resources.

In addition, it was found that there was inadequate healthcare and limited access to professional medical services. In focus groups and individual interviews, children told investigators that they were often insulted, harassed and punished, sometimes violently. Many children also carried a heavy domestic workload. Finally, and of significant concern, many children had no regular contact with their families.

Following the Commission's investigation, a report was prepared detailing the various rights of the child that had been violated. The report recommended, among other things, that the State establish schools in each district to teach both a national, standardized general curriculum alongside religious studies.

The issue of the rights of children in religious institutions was included in the Commission's *12th Report on Human Rights and Freedoms in Mongolia*, in order to draw the Government's attention to this urgent issue. The Commission is currently awaiting a response from the Government.

Appendix 3:

Case study: The investigation of violations of human rights by mining companies

National Human Rights Commission of Mongolia

Mongolia is currently experiencing an unprecedented mining boom. While the operation of large mines, such as Oyutolgoi, will bring economic development to Mongolia, there are a number of potential negative effects on the environment, affecting the rights of many Mongolians to a healthy and safe environment.

In September 2011, the National Human Rights Commission of Mongolia began investigating the human rights impacts of mining on the local population. It was conducted in partnership with the Mongolian Confederation of Trade Unions, the Confederation of Trade Unions for Energy, Geology and Mining, the Confederation of Trade Unions for Transportation, Communication and Oil, the Mongolian Environmental Civil Council NGO, Mongolian National Broadcasting Television, the National Post newspaper and other media.

The Commission carried out a number of field missions and inquiries in order to assess whether certain mining companies operating in the Umnugobi province were breaching the human rights of local Mongolians affected by their mining operations.

In carrying out the investigation, a number of meetings and discussions were held with locals, including traditional herders, people residing along the roads adjacent to mining operations and those living and working in mining settlements.

A number of human rights violations were identified, including the right to health, property and cultural rights.

In the course of investigation, consistent complaints were made regarding the vast amount of dust created and erosion to pastoral land, due to the number of 100-tonne capacity mining trucks using the roads. The significant air pollution and erosion of pastoral land have not only contributed to a high rate of respiratory disease, they have also impacted the livelihoods and traditional way of life for many nomadic herders. Other health concerns were raised with regards to gastrointestinal disease caused by contaminated drinking water.

In addition, the growth of the mining industry is also contributing to a number of social problems in mining settlements, including the prostitution of young women and minors and increased infection rates of sexually transmitted diseases.

Following the investigation, the Commission submitted its recommendations to the Prime Minister of Mongolia, with the aim of immediately addressing a number of issues raised. The Commission also followed the investigation with further research to examine in more detail the human rights issues and potential solutions, working with the United Nations Development Programme on the project “Strengthening national human rights oversight capacity in Mongolia”.

In 2012, the Commission hosted an international conference on Mining and Human Rights in Mongolia, where research from the investigation was shared and recommendations developed. The conference brought together all relevant stakeholders, including central and local administrative bodies, mining companies, international and national civil society organizations from the human rights and environmental fields, international and national media organizations, scientific researchers, communities/citizens, herders, artisanal miners, national human rights institutions from the Asia Pacific region, embassies and human rights experts from the United Nations.

The Commission included the issue of mining and human rights in its *12th Report on Human Rights and Freedoms in Mongolia*. The Commission is currently awaiting a response from the Government and will continue to focus on implementing recommendations to respond to human rights violations that are currently occurring due to mining.

Appendix 4:

Case study: Summary of the report on the 10 March 2010 incident in which a child and two women were killed in Banspani, Bardiya National Park, by a patrol of Jwala Dal Battalion, Nepal Army

National Human Rights Commission of Nepal

Background

Various media sources reported the 10 March 2010 incident in which a Nepal Army patrol of Jwala Dal Battalion, Thakurdwara, deployed in Bardiya National Park, shot dead two women and a child at Bardiya National Park at around 8.30 pm. Given the seriousness of the incident, the National Human Rights Commission of Nepal (NHRC) pursued a complaint *suo moto* and a team from the NHRC investigated the case from 12 to 19 March 2010.

During the investigation, the NHRC team inspected the incident site and spoke to Bardiya National Park personnel, those attached to patrol units, the commanding officer, high-ranking officials, eyewitnesses, victims' family members, locals of Hariharpur, Surkhet, and doctors of the Bardiya district hospital. The NHRC team also verified the information gathered from police personnel who examined the incident site and the victims' bodies, civil society representatives and others concerned with the incident. The NHRC employed forensic experts sent from the Tribhuvan University-affiliated Teaching Hospital in Kathmandu to conduct an additional post-mortem of the victims' bodies.

The investigation team studied the post-mortem report prepared by doctors of the Bardiya district hospital, the additional post-mortem report prepared by the forensic experts and the police report on the incident site and the victims' bodies. In the process, the NHRC communicated with the Office of the Prime Minister and Council of Ministers, the Home Ministry, the Nepal Army, the Bardiya district administration office and Bardiya National Park and asked for information about the incident.

Facts gathered during the investigation

According to the 12 March 2010 press release issued by Bardiya National Park, on 10 March 2010 when a joint team of Bardiya National Park personnel and Nepal Army personnel from Jwala Dal Battalion, Thakurdwara were patrolling the area, they heard gunshots near the Puranpur River around 5pm and again in the Basaha area around 6.30pm. Suspecting that poachers were hunting animals in the park, they began a search and, around 8pm, found five or six armed persons in Banspani. The press release states that the poachers were first asked to discard their weapons, that the security personnel were compelled to fire in self-defence but that they stopped firing immediately, as some of the persons started shouting and crying and some others fled. It went on to claim that the hunting dog kept by the poachers went to attack the security personnel as they approached the site so they had to fire and, unfortunately, two women were killed in the process and one woman was injured. She later died while undergoing treatment. One of the men was arrested and put in custody. The press release also states that three homemade guns, some bullets, explosives and other such materials were found on the site. However, this could not be confirmed by any evidence.

Analysis and conclusion

Facts and evidence gathered from eyewitness accounts, testimonies of locals from the victims' home village and the 17 March 2010 agreement signed in the Bardiya district administration office suggest that several people, including the victims, had gone to Banspani in the Bardiya National Park area to collect the bark of *kaulo* trees. There is no evidence to suggest that they were armed poachers. The same day, a team of 19 security personnel, including 15 Nepal Army personnel led by a Lieutenant and four personnel of Bardiya National Park, arrived at the site from the south-west. The Bardiya National Park personnel came from the hill on the upper side and firing by Nepal Army personnel killed a child and two women. Site inspection, eyewitness accounts, the condition of victims' bodies and autopsy reports contain no evidence that the people who were killed, arrested or escaped from the site fired gunshots. Post-mortem reports, photos related to the incident and the victims' bodies reveal that they were shot from behind. There is no evidence that there was an exchange of fire.

As the incident site is surrounded by hills on three sides, there was plenty of scope for the Nepal Army patrol to take the victims under their control. But the army personnel opened fire on them without following the rules of engagement. The NHRC investigation team found that excessive force was used to kill three people, including a child. Eyewitness accounts and other evidence suggest that the security personnel did not take the victims under their control before the incident took place. Autopsy reports also reveal that the victims were shot from a distance. The site should have been left untouched until the police examined it and gathered evidence but Army personnel had arranged the dead bodies before the police arrived. This suggests that the Army destroyed the evidence and issued a false claim that they opened fire in self-defence.

No evidence was found to suggest that the women were raped during the incident.

Security personnel used excessive force during the incident and violated the provisions of clauses 23 and 24 of the National Park and Wildlife Protection Act, 2029 B.S.

The security personnel opened fire and killed three women, including a child, in violation of the right to life enshrined in article 12 of the Interim Constitution of Nepal, 2063 B.S. and the right to life and individual liberty enshrined in clause 12 of Citizens' Rights Act, 2012 B.S. In the incident, the Army has also violated the right to life enshrined in article 3 of the Universal Declaration of Human Rights, 1948 and article 6 of the International Convention on Civil and Political Rights, 1966. Similarly, it has breached article 37 of the Convention on the Rights of the Child, 1989.

Recommendations

Based on an analysis of the available evidence, the following recommendations are made to the Government of Nepal:

1. Identify all those involved in the incident and file criminal cases against them in a regular court, including against the Nepal Army Lieutenant, who gave the order to open fire, killing three women, including a child, despite having sufficient scope to take the victims under their control. Identify those who tampered with evidence related to the incident and take action against them according to the law.
2. Provide Rs 300,000 (approximately USD 3,415) compensation to each victim's next of kin in accordance with National Human Rights Commission (Complaint, Action and Determination of Compensation) Rules, 2057 B.S. (2001)
3. The State should provide free education to the victims' children.
4. The victims belonged to a poor family and were killed when they went to collect the bark of *kaulo* trees to make a living. In this context the government should coordinate with concerned agencies and implement programmes to improve the economic and social condition of people, particularly Dalits, in this region.
5. To prevent such incidents in the future, train the personnel of all national parks in protecting human rights.

Appendix 5:

Complaint Handling and Action Guidelines (2013)

National Human Rights Commission of Nepal

Adopted by on 31 January 2013

Preamble

Chapter 1: Preliminary

1. Short title and commencement
2. Definition
3. Core value
 - a. Equality
 - b. Impartiality
 - c. Accessibility
 - d. Accountability
 - e. Confidentiality
 - f. Independence and autonomy

Chapter 2: Complaint handling

4. Complaint registration and management
5. Fill up the complaint form
6. Responsibility of the Complaint Handling Officer
7. Procedure to intake written and oral complaint
8. Procedure of complaint registration through telephone
9. Procedure of complaint registration through letter (post), fax and email
10. Procedure of complaint handling on the basis of sou motu cognizance
11. Complaint received out of jurisdiction
12. Priority based subject of complaint

Chapter 3: Monitoring, investigation and inquiry

13. Primary responsibility of the Thematic Officer
14. Planning of investigation
15. Formation of investigation team, committee or taskforce
16. Major functions during the investigation
17. Inspection and surveillance
18. Prescribed Member (describe the role of the assigned Member of the Commission)
19. Responsibility of the subordinate Commission offices

20. Opportunity to defend himself/herself
21. To be present at the Commission
22. Investigation/inquiry
23. Procedure of seize and seizure
24. File management
25. Subject relating to court permission for the investigation
26. Investigation report

Chapter 4: Collection of evidence and examination

27. Kinds of evidence and evaluation
28. Burden of proof
29. Procedure of taking statement and statement paper
30. Expert service and opinion
31. Major points to indicate in statement and statement paper
32. Submission of evidence
33. Safe custody of documents
34. Procedure of evaluation of evidence
35. Justification of evidence

Chapter 5: Procedure of decision

36. Procedure of complaint file submission (file and report) to the Commission
37. Provision of managing the complaint under consideration and repealing
38. Provision of reconciliation
39. Decision of the Commission
40. To inform about the decision
41. Implantation and the review of the decision

Chapter 6: Miscellaneous

42. To make the name public
43. Public hearing
44. Time frame to file complaint
45. Assistance to the victim
46. Merging the complaints
47. Prevention of arbitrary action on the complainant and witness
48. Procedure of remedies
49. Submission of progress report
50. Handover procedure
51. To be as per the rules
52. Amendment

Appendix 6:

Case study: The report of the inquiry into aged care workers

New Zealand Human Rights Commission

Introduction

In 2011, the New Zealand Human Rights Commission decided to hold an inquiry into equal employment opportunity in the aged care sector. This was not conducted in response to a complaint or series of complaints but arose instead out of two key concerns. The first related to the low pay and an undervaluing of what is generally seen as “women’s work” in the aged care sector. This issue had been highlighted in a major consultative project undertaken by the Commission on critical workplace/workforce issues in New Zealand over the previous two years (National Conversation about Work, 2010). The second concern was the nexus between the value that society places on the aged care workforce and the respect and dignity of older New Zealanders. The aged care sector had been the subject of numerous reports and reviews in the recent past. However, none of these reports had a singular focus on equal employment opportunities and the aged care workforce.

Mandate

The Commission has no specific power of investigation in its empowering legislation. Individual complaints that fall inside the discrimination provisions of the Human Rights Act 1993 are resolved through mediation. However, the Commission has a broad power to inquire more generally into systemic issues and other matters that may infringe human rights (section 5 of the Act). This inquiry power was used to investigate equal employment opportunities in the aged care sector.

Process of the inquiry

The inquiry was framed by the Terms of Reference and ten key issues were explicitly canvassed. These issues had been identified in the National Conversation about Work, in the literature and in conversations with thought leaders in the aged care sector. Participants in the inquiry were asked if the ten issues were the right issues and the consensus was that they were. The major section of the report (Part 3) was organised around the ten issues. The Commission made the decision to identify these key issues at the outset to clearly signal that the focus of the inquiry was on equal employment issues in the sector and to provide boundaries around the scope of the inquiry. This ensured that the inquiry added to, rather than duplicated, previous work relating to aged care.

The Commission determined to engage with all the key stakeholders, including carers, older people receiving care and their families, residential and home support care providers, funders, politicians, unions and civil society, in accordance with the human rights approach which values participation, empowerment and accountability. A marked feature of the inquiry was the degree of participation by all major stakeholders.

Engagement included meeting people in workplaces, in community settings and in their homes, as well as through electronic engagement and written submissions. The Equal Employment Opportunities Commissioner also undertook action research by working as an unpaid carer in an aged residential care facility for a week. Meetings were organised in a range of geographical regions, which were selected to represent a wide variety of circumstances. Rural/urban, provincial towns/cities and places with different

demographic and ethnic populations were all included. Public meetings were held from Invercargill (in the south of the South Island) to the most northern region of New Zealand.

The inquiry also featured the experiences of the aged care sector in Christchurch, following the devastating earthquakes that had hit the Canterbury region since September 2010.

Each stakeholder meeting was recorded and a full summary was sent back to participants for their endorsement. Participants were afforded the opportunity to correct the record and, if they wished, to change what they said. The website that the Commission co-hosts with the EEO Trust – www.neon.org.nz – made an online survey available to interested parties. People were also invited to write in, either by email or post, with their views. In all, almost 900 people participated in the inquiry.

The report of the inquiry discussed what the various stakeholders said about each of the ten issues. Participants' voices and their experiences were included to highlight issues and concerns. Views were integrated into a narrative, consensus identified where it existed and disparate views reported where there was division. The report also included the first-hand account of the Equal Employment Opportunities Commissioner's experience working as an unpaid carer in an aged residential care facility. Also included were recommendations for action, a chapter on the pertinent human rights underpinnings of the issues, a literature review, a section on methodology and financial modelling of the estimated cost of pay parity.

Many participants requested confidentiality and anonymity and the Commission made a commitment to provide a safe, private and accessible process so these voices could be heard. Those people who were identified by name were given the opportunity to approve and, if necessary, correct quotes attributed to them. A draft copy of the report was sent to all participants for feedback and comment. After that process, the report was put before the Commissioners for final sign-off.

Response to the inquiry

The account of the Equal Employment Opportunities Commissioner's experience in a rest home proved to be a compelling story and the report, *Caring Counts*, received nation-wide media attention over an extended period. There was particular public interest in the fact that carers were paid so poorly for very demanding and skilled work. The report was seen as speaking on behalf of groups who are often marginalised and therefore without voice, rather than as an academic or policy piece (with a higher likelihood of being ignored).

A summit was held to bring together representatives of the various stakeholders who participated in the inquiry. It considered how the sector might implement the recommendations. During the summit, the consensus that had emerged during the course of the inquiry about the inadequacy of pay was transformed into a shared commitment to address the issue.

In the Commission's experience, the methodology and manner of reporting was as important as the findings of the investigation in creating a climate for change. The inclusion of a wide range of stakeholders and emphasising the voice of the participants (plus the headlining "action research" of the Equal Employment Opportunities Commissioner) caught public attention and created a community of interest among participants.

Appendix 7:

Manual on Investigation and Case Management Process (2012)

Commission on Human Rights of the Philippines

Introduction

I. The Commission on Human Rights

A. The CHR as an independent office and as the national human rights institution of the Philippines

B. The role of the CHR as a national human rights institution

B.1. Effective performance of the role of an independent NHRI

C. The Commission *en banc*

D. The powers and functions of the CHR under the 1987 Constitution

E. The powers and functions of the CHR under Special Laws

E.1. Republic Act No. 7610, as amended by RA 7658

E.2. Republic Act No. 9262

E.3. Republic Act No. 9344

E.4. Republic Act No. 9372

E.5. Republic Act No. 9745

E.6. Republic Act No. 9851

E.7. Republic Act No. 9710

II. Investigation services

A. Investigation and monitoring of human rights violations

B. CHR organizational structure in relation to investigation services

B.1. Central office

B.2. The CHR organization at the regional level

B.3. CHR regional offices' territorial responsibilities

III. The role of the CHR investigators

IV. Investigation and case management process

A. Case activity flowchart

B. Case management process

Step 1: Complaints and reports

Step 2: Docket and record complaints and reports

Step 3: Initial evaluation of complaints and reports

Step 4: Call parties for a dialogue or preliminary conference, if required

Step 5: Planning the investigation

Step 6: Investigation or fact-finding proper

6.1. Investigation of violations of civil and political rights

6.2. Investigation and monitoring of economic, social and cultural rights

6.2.a. Investigation and monitoring of demolition and eviction incidents

6.3. Investigation of cases involving children and women

V. Post-investigation activities

A. Conclusions after investigation

Step 7: Final investigation report

B. CHR Resolution

Step 8: Evaluation of investigation reports and evidence; preparation of case resolution

Step 9: Review and approval of case resolution

Step 10: Notice of resolution to parties

Step 11: Motion for reconsideration; appeal; *motu proprio* review of CHR regional office resolutions

Step 12: Commission *En Banc* resolution on the appeal of regional offices' decisions; or subject to *motu proprio* review; notice to parties

Step 13: Official transmittal of CHR resolution and case records to competent fora

C. Monitoring the progress of investigation and status of cases; consolidated and special reports

Step 14: CHR offices responsible in case monitoring

D. Protection and other assistance to the victims, their families and witnesses

Step 15: Responsibility to facilitate protection and assistance

VI. Application of conciliation and mediation in certain human rights cases or issues

VII. Human rights cases of special concerns

A. Handling cases involving violations of women's rights

B. Handling cases involving violations/abuses against children

VIII. Internal reporting requirements

The Martus-Based Executive Information System (MAREIS)

Appendices

Appendix "A": Ethical Standards for CHR Investigators

Appendix "B": Tips on Investigation Methods and Techniques

Appendix "C": Abuses on the Rights of Women

Appendix "D": Abuses of the Rights of Children

Appendix "E": CHR Form No. 9

Appendix "F": CHR Form No. 9-A (BHRAC Endorsed Complaint)

Appendix "G": CHR Form 9-B (Motu Proprio)

Appendix "H": CHR Form No. 9-C (Investigative Monitoring)

Appendix "I": CHR Form No. 9-D (Request for Assistance)

Appendix "J": Intake Form (Template on Complaint for Child Rights Violations)

Appendix "K": Template on Investigation Plan

Appendix "L": Template on Subpoena (for Docketed Cases)

Appendix "M": Template on Subpoena (for Assistance)

Appendix "N": Template on Subpoena Duces Tecum

Appendix "O": Template on Notice of Mediation

Appendix "P": Template on Notice of Dialogue

Appendix "Q": Template on Minutes of Mediation Proceedings

Appendix "R": Template on Final Investigation Report

Appendix "S": Template on Case Resolution

Appendix "T": Template on Notice of Resolution

Appendix "U": Template on Transmittal of Resolution and certified copy of case records/evidence to Appropriate Agency

Commission *En Banc* Resolutions

CHR Resolution (IV) No. A2012-146-A, dated 28 June 2012

CHR Resolution (IV) No. A2011-115, dated 26 August 2011

Appendix 8:

Samples of complaint handling documents

Human Rights Commission of Sri Lanka

ATTENDANCE SHEET

Case No: Inquiry Date:

Complainants				
Name	Designation	Institution	Phone number	Signature
Respondents				
Name	Designation	Institution	Phone number	Signature

SUMMONS

As Proclaimed by the Human Rights Commission of Sri Lanka

Complaint No.

Petitioner/s

Vs.

Respondent/s

Please take notice the Petitioner/s and the Respondent/s above named

That the Petitioner/s above named has/have filed a complaint against the afore named Respondent/s on this Commission to

A copy of the Complaint is attached hereto.

And take notice under the Human Rights Commission of Sri Lanka Act No. 21 of 1996 that the said complaint will be investigated/inquired on

..... at am/pm,
to appear before

with all relevant documents.

It is further noticed to parties to provide with their addresses in writing (along with the telephone numbers) to forward all legal notices.

Failing to attend before this Commission shall constitute an offence of contempt against, or in disrespect of, the authority of the Commission.

Issued under the hand of the
Chairman of the Human Rights Commission of Sri Lanka

Secretary to the Human Rights Commission of Sri Lanka
No. 108, Barnes Place, Colombo 07

On this day of 20

Nota bene: Exercising the powers relating to inquiries under section 18 of the Human Rights Commission of Sri Lanka Act No. 21 of 1996, when summons were served to persons as stated under section 20(2) and have failed to attend before the Commission at the time and place mentioned therein, as stated under section 20(3) have failed to answer the questions put to him/her by the Commission or produce such documents or other things as are required of him/her and are in his/her possession or power, according to the tenor of the summon shall constitute an offence of contempt against, or in disrespect of, the authority of the Supreme Court of Sri Lanka and constitutes an offences that shall be punishable under section 21 of the Human Rights Commission of Sri Lanka Act.



ASIA PACIFIC FORUM
ADVANCING HUMAN RIGHTS IN OUR REGION

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