Investigations and Evidence Quick Guide

REGULATORY PRACTICE ESSENTIALS

At a glance

Investigation is a tool used to address non-compliance, hold regulated parties accountable and prevent further harm. Regulators gather and use evidence to determine the facts. Good regulatory outcomes depend on the quality of investigations and evidence.

Investigations

An investigation is a purposeful, structured process to find out what has happened, who is responsible and what enforcement action (if any) is needed. It is used where regulators suspect non-compliance.

Evidence

Evidence is facts, information, items or an observation that can be used to prove or disprove something. It can be data that proves that something exists (or existed) or is true.

The principles of an effective investigation

Regulators have a responsibility to act ethically and with integrity. The principles of an effective investigation are:

- **Objective, fair and impartial:** The principles of natural justice and the New Zealand Bill of Rights Act 1990 require regulators to make fair and just decisions.
- **Work within legal powers:** People doing investigations must know the scope of their powers and how to lawfully apply them.
- **Consistent:** Each investigation is unique, however, the principles and approach must remain consistent within an organisation.
- **Confidential:** Sharing names or information about an investigation could impact the outcome.
- **Considered and complete:** Evidence and analysis should be considered carefully and lead logically to a decision.

The investigation process

Planning is an important first step before starting an investigation. A plan covers the purpose of the investigation along with the tasks, timelines, roles and responsibilities in the investigation and risks.

Check points during an investigation help to keep it on track.

Investigations

An investigation is a purposeful, structured process to find out what has happened, who is responsible and what enforcement action (if any) is needed. It is used where regulators suspect non-compliance. People doing investigations gather evidence to understand whether a breach or incident has occurred, assess the impact and make recommendations on the outcome. They may also be triggered where there is potential of harm.

Investigations help regulators address non-compliance, hold regulated parties accountable and prevent further harm. At a system level, they can identify trends or issues that may need immediate action. They highlight the effectiveness and risks within the regulatory system. Investigations differ from inspections or audits which are used to check that regulatory standards are being met.

People carrying out investigations look at information, examine scenes, ask questions and collect evidence to determine the facts. They analyse whether the evidence proves there has been non-compliance.

The results of an investigation may be used to establish liability and enforce the law. They may be used to identify opportunities for improvement such as improved guidance or education. They may reveal that further work is needed or that new information leads to a new line of enquiry. An enquiry is the process of assessing the facts to determine whether a formal investigation is needed.

Investigation is an important tool in the regulatory compliance activities toolbox. (see Regulatory Compliance Activities – Quick Guide).

Mandate for investigating: Regulators have lawful powers to investigate potential breaches of the law or non-compliance with regulations. Some legal frameworks apply broadly across investigations including the Evidence Act 2006, Human Rights Act 1993, New Zealand Bill of Rights Act 1990, Privacy Act 2020, Public Service Act 2020, and Search and Surveillance Act 2012.

Regulators conduct investigations under powers written in the law they administer. These powers enable regulators to gather evidence, access premises, request or seize documents and interview people. Some of these powers are written in the law while others require people doing an investigation to have a warrant.

Evidence

Evidence is facts, information, items or an observation that can be used to prove or disprove something. It can be data that proves that something exists (or existed) or is true. This can include conversations, discussions, documents, records, statements and testing results. Evidence might be one word that a person says to another person. It might be a ship.

In a court of law evidence is used to prove or add weight to a point in a contested matter. It is presented to a judge or jury as a document, testimony or exhibit.

If you carry out or support regulatory work the information you create or handle may be used as evidence. It must be able to withstand scrutiny from regulated parties, the public and the court, if needed. For this reason people doing regulatory work must take time and care to record and manage information accurately.

There are different standards of proof that evidence must meet. In criminal prosecution cases this may be 'beyond reasonable doubt'. This means the court must be sure that the person breached the law. In disciplinary or civil proceedings the standard is

usually on 'the balance of probabilities.' This is a lesser standard and means that something is more likely than not to have occurred.

A regulator has policies and procedures for gathering, storing and using evidence. These are based on the Evidence Act 2006. There are four types of evidence:

- **Direct evidence:** Direct proof of a fact, usually by a witness.
- **Documentary evidence:** A document can be as varied as a sound or an image, a label or a book, a drawing or a film.
- **Real evidence:** An exhibit presented directly to the Court.
- **Circumstantial evidence:** Proof of a fact which leads you to conclude another fact.

The principles of an effective investigation

Regulators have a responsibility to act ethically and with integrity. The principles of effective investigation are:

- **Objective, fair and impartial:** The principles of natural justice and the New Zealand Bill of Rights Act 1990 require regulators to make fair and just decisions.

  An important skill for people doing investigations is to keep an open mind and ask questions that challenge your views. It means separating yourself from situations where you may be influenced towards presenting information that favours one point of view.
- **Work within legal powers:** Regulatory leaders develop strategy and policy to ensure investigations are conducted lawfully, effectively and align with their mandated powers. A regulator delegates their legal powers to people doing investigations in their organisation. These powers are written in their 'statutory delegated authority'. Operational policies, procedures and internal delegations give information on powers and how to apply them. There are different types of powers, for example, a warrant or legal authorisation.
- **Consistent:** Each investigation is unique, however, the principles and approach must remain consistent within an organisation.
- **Confidential:** Sharing names or information about an investigation could impact the outcome. People doing regulatory work need a good understanding of the Privacy Act 2020, the Official Information Act 1982 and the Public Records Act 2005. Regulators have policies on confidentiality and security of information that apply to their organisation.

  The law may give specific instructions about sharing information during an investigation. For example, the Commerce Act 1986 section 100 allows the Commerce Commission to issue Confidentiality Orders that prevent information or documents from being published, communicated or given in evidence. In other circumstances a regulated party's lawyer may be able to view information while the regulated party cannot.
- **Considered and complete:** Evidence and analysis should be considered carefully and lead logically to a decision. People doing investigations need to question assumptions and interpret all relevant evidence to make logical inferences. This requires logical reasoning and deduction skills along with clarity of thinking.

The investigation process

1. Triggering

An investigation can start for many reasons including:

- A notification, complaint or issue raised, such as someone contacting the regulator about a possible compliance breach, ethical challenge or allegation of misconduct.
- Information gathered by a regulator such as an enquiry, audit or inspection which may reveal actual or suspected non-compliance.
- An event such as an incident, accident, explosion or outbreak of a disease.
- Information shared during an education initiative.
- Referrals from other regulators
- Issues raised by the media or other court cases.

Each trigger is screened to decide whether it should be investigated. Sometimes new information resolves the issue or there isn't enough information and the decision is made not to progress.

2. Planning

Just like planning a software project, an investigation plan is a roadmap that sets the standards, anticipates risks, and keeps the team focussed on the outcomes. A good plan considers the moving parts of an investigation and is flexible and responsive to change. It records decisions you made at the start which is valuable if challenged at the end. Your organisation may have a planning template to guide you.

Investigations vary in complexity and length sometimes lasting a year or more. These will need more planning. Knowing the criteria for how decisions are made at the end helps you to plan what information is needed at the start.

Some questions to address in your plan are:

Purpose and scope: What is the purpose of the investigation? What do you know about the situation and people involved? What has triggered the investigation? What is the scope and scale? What facts do you need to prove? What evidence is needed to prove those facts? What challenges and risks can you predict?

Legal powers: What law applies to this work? What legal conditions do you need to satisfy? Are there legal timeframes that apply? How will you ensure that regulated parties are kept fully informed about timeframes, risks and obligations?

Resources: What equipment or transport do you need? What health and safety risks do you need to think about? What other resources are needed?

People, roles and responsibilities: Who needs to lead and approve the investigation? Who will be involved and what are their roles? How will the team communicate with each other? What support services are needed, for example, an interpreter or Police assistance?

Enquiries and evidence: What evidence is needed for decision making? Think strategically about the enquiry and timing, for example, does the sequence and timing matter? Is expert advice needed? Are there witnesses or victims?

Analysis: How will you analyse the evidence? How can you ensure your analysis is comprehensive? Outcomes and decision-making: Are there organisational templates to guide decision-making? What criteria do you need to meet? Who makes the decisions about the outcome of the investigation and how will these be made?

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Working with other regulators: Several regulators may have shared interests in an investigation. Shared planning helps to avoid gaps and overlaps. A memorandum of understanding (MoU) documents roles and responsibilities, how to work together, share and record information.

3. Carrying out

Like a jigsaw puzzle, people doing investigations gather and organise information to create a picture. They use analysis and logical reasoning to form a view based on evidence.

Gathering information: Information can be gathered from regulated parties, the public, witnesses and experts. It can be gathered using desktop research, for example, searching online registries, sourcing data and websites. Information can come from internal sources such as intelligence or data and insights teams. Record keeping is key and may be used in legal proceedings. This may happen long after the investigation has finished and highlights the need for timely and accurate records. Records may be written, audio or visual.

Chain of evidence (sometimes called chain of custody)**:** The chain of evidence shows an uninterrupted chain of an exhibit from the moment it is seized or received until it is produced in court and then disposed of. It establishes continuity, reliability and integrity of the evidence.

Only some investigations go to court, however, it's important to look after all evidence with care. Evidence may be physical, electronic or biological. The chain of evidence covers eight stages:

1. **Obtaining evidence:** Is it relevant to the investigation? Can it be taken by consent or does it need legal power? Are there hazards involved? Has it been examined by an expert, moved or interfered with? Has it been photographed where it was found?
2. **Securing:** Does the scene of an incident need securing to prevent contamination, interference or loss of critical information? Some examples are restricting unauthorised access or guarding the site, using digital forensic tools to prevent tampering with electronic evidence, covering or isolating hazardous materials to prevent exposure or degradation.

   How will the evidence be secured, for example, a restricted-access storage facility or an approved laboratory? Digital evidence may need to be forensically preserved, logged into a document management system or secured with encryption to maintain integrity.
3. **Identifying:** Does it need to be assessed? Have you accurately identified the evidence?
4. **Record keeping:** Has everyone involved recorded information and details about the evidence in a timely and accurate way?
5. **Storage and access:** Is it stored securely? Can it only be accessed by authorised people? Does it need to be sealed? Do you need expert advice on storing the item, for example, for a dangerous good? Are there civil liabilities that apply to storing regulated parties' property, for example, a business computer or a plane containing fuel?
6. **Presentation:** How will it be presented in court? For example, the court may allow a summary of a complex or lengthy document.
7. **Disposal:** What approval is needed to dispose of the exhibit? How will you dispose of it, for example, at an approved waste facility? Can you return it to the owner?
8. **Destruction:** Evidence that can't be disposed or returned must be destroyed. For example, biosecurity items are incinerated.

Check points: Reviewing an investigation helps to keep it on track and adapt it to change. Some questions to ask are: Is there new evidence that changes the purpose? Has the scale and scope changed? Have there been changes in risk, for example, health and safety, risk of harm or non-compliance? Is it appropriate for another regulator to pick up the investigation? Alternatively, you may close the investigation.

Analysis: This can happen during the process as information is gathered. The analysis should lead to a logical and well supported theory about what has happened.

Reporting: An investigation report documents the issue, evidence, findings and recommendations. It provides a formal record of the investigation for decision makers. Findings are based on a careful balanced assessment that links directly to the facts, evidence and analysis. It addresses each issue and records any missing or inconsistent information. The recommendations must be based on the evidence that is relevant to the issue.

4. Closing

Investigations are closed when the purpose has been achieved or when the team decides the objectives aren't going to be met. Closing an investigation doesn't necessarily mean that all work stops. It may be re-opened if there is new information.

Debriefing afterwards gives people the opportunity to reflect on lessons learnt and develop their skills. It gives regulators the opportunity to learn about any regulatory system insights. Learning opportunities also arise following the outcome of a court decision regardless of the decision. Some court decisions inform precedent and have consequences for the investigation process.

Decision making: Many regulators have templates that guide decision-making. These support people doing investigations to be thorough and consider the relevant evidence needed for a robust decision. A decision-making panel may review the investigation report, along with a statement from the legal team and decide on the regulatory outcome.

Got questions? Get in touch

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What you can do to learn more about investigations and evidence

- Talk to your manager about investigations in your organisation. How is the chain of evidence managed?
- Work alongside senior colleagues who carry out investigations. What resources can they share to help you learn more about investigating?
- Review your organisation's investigation guidelines and procedures for managing evidence.
- Some techniques that help you learn investigating skills are learning about your personal biases, speaking up when you hear judgemental work chat or gossip about an investigation, participating in team check-ins to review work, asking questions and being curious about assumptions.

Resources

↗ The Paul and Henry Show, Episode 6: Planning. Ministry for Regulation Te Manatū Waeture (Sep 2023) (YouTube, 25 mins)

↗ The Paul and Henry Show, Episode 4: Evidence. Ministry for Regulation Te Manatū Waeture (Jun 2024) (YouTube, 26 mins)

↗ Competition and Consumer Investigation Guidelines. Commerce Commission Te Komihana Tauhokohoko (Jul 2018)

↗ Regulatory Compliance Activities Quick Guide. Ministry for Regulation Te Manatū Waeture (2024)

↗ Integrity Town Quiz. Office of the Auditor General (2020)

↗ Te Pouārahi | The Judge over your shoulder. Crown Law Te Tari Ture o te Kauruna (2019)