



Australian Government
Office of the Australian Information Commissioner



6 July 2020

Quick guide to managing unacceptable conduct

Be familiar with the OAIC's 'Policy for Managing Unacceptable Conduct from External Parties'.

Responding to threats of self-harm

Do your best to keep the person safe by following this process.

By phone

- If a person advises that they may self-harm, treat them seriously. Tell them that you are.
- Alert your supervisor (eg by email or direct message) so they can provide urgent assistance
- Keep calm. Gather information that can assist the OAIC to take appropriate action. Clarify the person's phone number and ask the exact address where they are right now.
- Ask them: what do you mean? Have you hurt yourself already? Do you have a plan? Is there anyone with you?
- Tell them: we will alert the authorities to make sure that you are ok.
- Ask them: would you like to speak to someone who can help you? (Lifeline: 131114)
- If you feel unable to continue the conversation, transfer the call to your supervisor.
- After the call has ended:
 - immediately speak to your supervisor, who will contact Emergency services
 - make a contemporaneous written file note with as much detail as you can remember (eg I said, he said) and place it on the relevant Resolve file.

In writing

- If the threat is made in writing, immediately alert your supervisor and provide a copy.

Role of supervisor

- Where a supervisor has been alerted of a threat of self-harm, they should:
 - contact Emergency services by phone on 000
 - make a contemporaneous written file note of the call to Emergency services, noting exceptions under the Privacy Act permitting the disclosure of personal information in the circumstances (see s16A and APP 6.2).
 - log details of the call in the OAIC Emergency Services Call Register [D2019/015195](#).

- alert the Assistant Commissioner or Principal Director and discuss if further action is required.

Responding to threats to staff or others

Protect yourself and others by following this process.

By phone

- If a person threatens harm to you or another person, immediately repeat their statement to make the threat overt.

For example, ‘Excuse me Ms Smith, I have to stop you and confirm that you have threatened to hurt someone if your complaint is not dealt with.’

- Tell the person that because of the threat you will end the call and advise your supervisor.
- Take full notes of all that is said and make a contemporaneous file note of the interaction.
- Immediately alert your supervisor.

In writing

- If a threat is made in writing, immediately alert your supervisor and provide a copy.

Role of supervisor

- Once alerted to a threat, a supervisor should advise the Assistant Commissioner or Principal Director and discuss if further action is required. If police are contacted, log details of the call in the OAIC Emergency Services Call Register [D2019/015195](#).

Aggressive, abusive, or harassing phone calls

Do not accept aggressive, abusive or harassing behaviour.

- Try to calm the person.
- Stay calm yourself. Try to keep your voice even in tone and volume.
- Try to distinguish reasonable frustration from unacceptable conduct. Acknowledge frustration and show appropriate empathy. For example, do not jump in too quickly if someone is venting frustration about the circumstances leading to their complaint.
- If frustration escalates to aggressive, abusive or harassing behaviour, explain that it is unacceptable, and **ask them politely to stop**.
Eg, ‘I am happy to speak to you but you will need to lower your voice’ or ‘It may be hard to speak to you if you continue to swear. Would you mind please not using that word.’
- If the conduct continues, end the call. See ‘Ending a Call’ below.

Ending a call

- If appropriate, warn the person that you will end the call if they do not stop the conduct.
- In general, provide a warning before ending the call, unless the person has threatened harm to you or another person, in which case, see above.
- If the conduct continues, tell the person that you will have to end the call, then hang up.
- In all cases, make a file note of the interaction with as much detail as you can remember (eg I said, he said), and alert your supervisor.

Ongoing management of the conduct

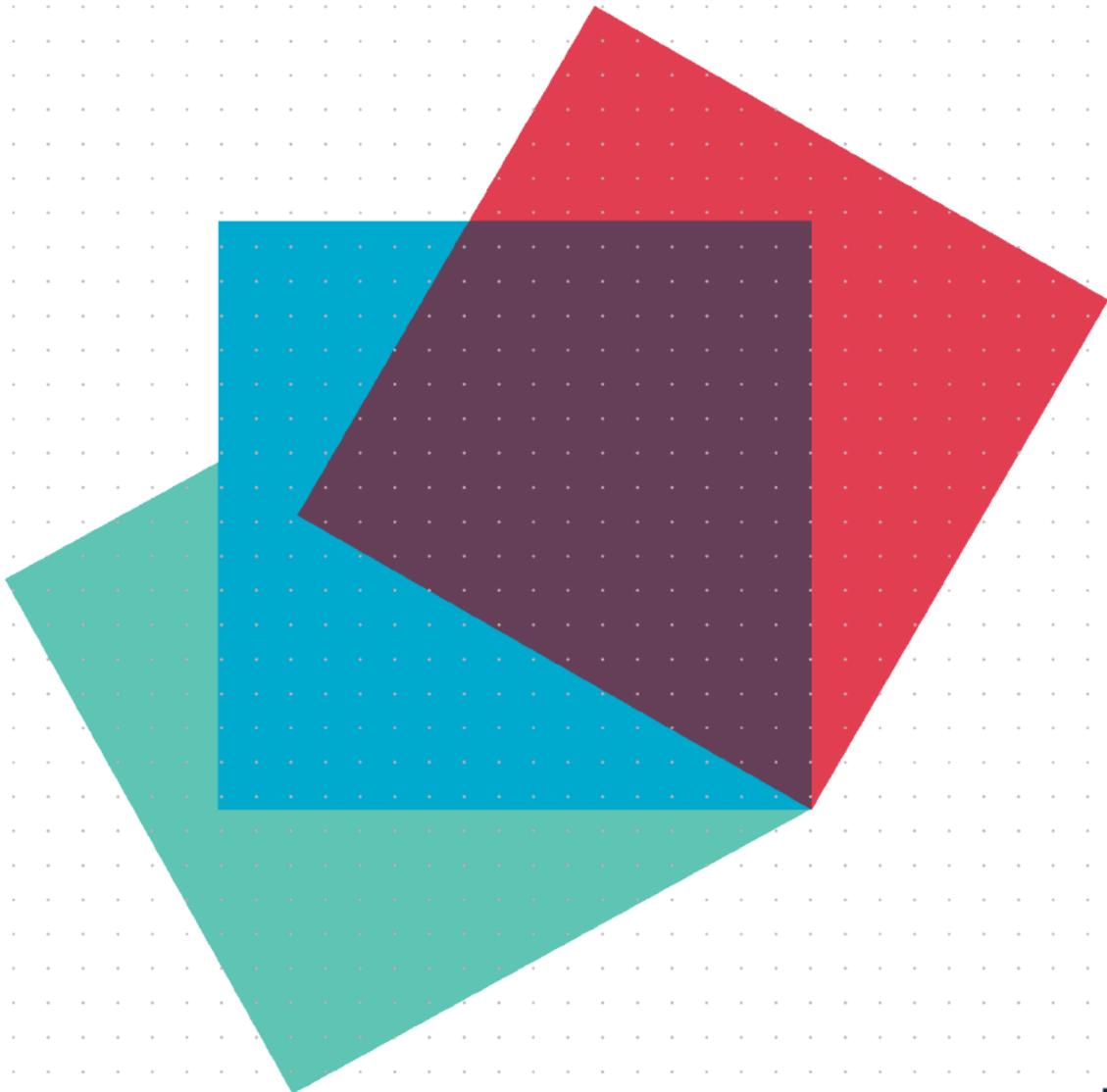
- If a person repeatedly is aggressive to OAIC staff on the phone, a supervisor may decide that all contact with that person will be in writing only, and staff will be instructed to terminate any phone calls from the person. This must be communicated to the person, and must be for a reasonable period (ie not indefinitely)
- A person who has had their contact restricted or who has received a warning letter about their conduct, will have an alert flagged in their client record in Resolve. Speak to your supervisor if you believe that an alert should have been flagged but has not been.
- Where a call is a breach of a contact restriction, immediately remind the person of their restriction and end the call.
- If a person has previously received a warning letter about their conduct but continues the conduct, consider ending the call, and flag the matter to a supervisor.



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Privacy regulatory action policy

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Overview of approach and guidance

1. The *Privacy Act 1988* (Privacy Act) confers on the Commissioner a range of privacy regulatory powers. These include powers that allow the Office of the Australian Information Commissioner (OAIC) to work with entities to facilitate legal compliance and best privacy practice, as well as investigative and enforcement powers to use in cases where a privacy breach has occurred.
2. The *Privacy regulatory action policy* explains the OAIC's approach to using its privacy regulatory powers and communicating information publicly. The policy relates to the OAIC's regulatory powers rather than its full range of regulatory functions. In particular, the purpose of this policy is to allow entities and the community to understand the OAIC's range of powers, and its regulatory strategy, approach and priorities.
3. The OAIC's preferred regulatory approach is to facilitate voluntary compliance with privacy obligations and to work with entities to ensure best privacy practice and prevent privacy breaches. When resolving matters brought to its attention, the OAIC will take into account the steps taken by an entity to comply with its privacy obligations, in addition to considering the factors outlined in this policy.
4. This policy also outlines the manner in which privacy regulatory activity is undertaken and the circumstances in which information about regulatory activity may be communicated publicly.

Guide to privacy regulatory action

5. A more detailed explanation of each privacy regulatory power is given in the *Guide to privacy regulatory action*. The guide will be a useful resource for stakeholders, as well as providing practical guidance for staff exercising privacy regulatory powers. The guide is available on the OAIC's website.¹

The OAIC and its jurisdiction

6. The OAIC has a range of functions and powers directed towards protecting the privacy of individuals by ensuring the proper handling of personal information. These functions and powers are conferred by the Privacy Act and by other legislation containing privacy protection provisions.
7. This policy relates to the use of regulatory powers conferred on the Commissioner by the Privacy Act and other legislation. These include powers that allow the OAIC to engage and work with regulated entities to facilitate compliance and best practice privacy practice, as well as investigation and enforcement powers to redress privacy breaches. Most of the Commissioner's powers can be delegated to and exercised by staff of the OAIC.
8. Entities that are regulated by the Privacy Act are required to comply with relevant provisions in that Act and in legislative instruments made under that Act. This obligation applies to: agencies and organisations that must comply with the Australian Privacy Principles (APPs) in Schedule 1 or a registered APP code; credit reporting participants that must comply with Part IIIA (relating to credit reporting) and the registered CR Code; and tax file number recipients that must comply with Tax File Number Guidelines 2011 issued under s 17. A breach of any of these provisions is an 'interference with privacy'. An 'interference with privacy' can also arise from breaches of

¹ See [Guide to Privacy Regulatory Action](#).

particular provisions in other legislation.² The OAIC can investigate an alleged interference with privacy (and certain other privacy breaches),³ either following a complaint⁴ or on the Commissioner's own initiative (Commissioner initiated investigation (CII)). A complaint or CII may result in enforcement action being taken.

9. The Commissioner also has privacy regulatory responsibilities in relation to the My Health Record system. The information in this policy is also relevant to the OAIC's regulatory action in connection with the My Health Record system. However, the *My Health Records (Information Commissioner Enforcement Powers) Guidelines 2016*⁵ prevail over the terms of this policy in the event of any inconsistency between those two documents.

The goals of taking privacy regulatory action

10. The goal of the OAIC in taking privacy regulatory action is to promote and ensure the protection of personal information, consistent with the objects of the Privacy Act.
11. Regulatory action may also aid the OAIC's role as privacy regulator by:
 - ensuring compliance by entities with personal information handling obligations
 - increasing public knowledge of personal information handling rights and obligations and the Commissioner's privacy regulatory powers
 - assisting and influencing entities to adopt best practice personal information handling practices
 - deterring conduct that contravenes privacy obligations (both specifically and generally)
 - securing an appropriate remedy for an aggrieved person where a privacy contravention has occurred
 - addressing systemic issues (see paragraphs 12-13) in personal information handling
 - instilling public confidence in the OAIC's role of ensuring the protection of personal information.

Systemic privacy issues

12. A systemic privacy issue is a privacy issue that may have implications or an effect beyond a particular incident. This may occur where an incident indicates there is an ongoing or underlying problem with practices, procedures or systems that relate to privacy compliance, adherence to those practices, procedures or systems, or with attitudes to privacy compliance.
13. A privacy issue may be systemic within a single entity, or more broadly within an industry sector. A systemic privacy issue may be identified from an incident which is brought to the OAIC's attention by a single complaint, multiple complaints of a similar nature, or through other

² For example, the *Data-matching Program (Assistance and Tax) Act 1990*, the 135AA guidelines issued under the *National Health Act 1953*, the *Healthcare Identifiers Act 2010*, the *My Health Records Act 2012*, the *National Cancer Screening Register Act 2016*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, and the *Personal Property Securities Act 2009*. Further information on the OAIC's role in investigating breaches of privacy provisions contained in other legislation is available at [Other Legislation](#).

³ The OAIC can also investigate breaches of the Spent Convictions scheme set out in the *Crimes Act 1914* (Cth).

⁴ The OAIC can accept a complaint from an individual, or from an individual on behalf of a group of individuals (known as a 'representative complaint').

⁵ See [Federal Register of Legislation](#).

avenues such as a data breach notification to the OAIC or a report from an informant or a recognised external dispute resolution (EDR) scheme.

Regulatory action principles

14. The OAIC will be guided by the following principles when taking privacy regulatory action:
 - Independence — the OAIC will act independently and take action that is impartial and objective.
 - Accountability — the OAIC is accountable for its privacy regulatory action through a range of review and appeal rights, and will ensure stakeholders are aware of those rights⁶.
 - Proportionality — the OAIC’s privacy regulatory action will be proportionate to the situation or conduct concerned.
 - Consistency — the OAIC will strive to act consistently in a manner that is guided by and reflects this policy.
 - Timeliness — the OAIC will strive to conduct and finalise regulatory action as promptly as practicable.
 - Transparency — the OAIC will be open about how it uses its privacy regulatory powers, including by publishing relevant guidance (including this policy and the *Guide to privacy regulatory action*) and about the regulatory action it takes.
15. When taking privacy regulatory action the OAIC will act consistently with general principles of good decision making, as explained in the *Best Practice Guides* published by the Administrative Review Council in 2007.⁷ In particular, the OAIC will act fairly and in accordance with principles of natural justice (or procedural fairness).
16. When dealing with an alleged contravention of the Privacy Act or other legislation, the OAIC will give individual consideration to that alleged contravention and have regard to all relevant circumstances.
17. In any litigation, the OAIC will act in accordance with its obligation to act as a model litigant in accordance with the *Legal Services Directions 2005*.

Commissioner’s powers

A range of regulatory responses

18. The Privacy Act confers a range of regulatory powers on the Commissioner, including investigation and enforcement powers, which are based on an escalation model.
19. Privacy regulatory powers that allow the OAIC to work with an entity to facilitate compliance with privacy legal obligations and best practice privacy practice, include powers to:
 - request an entity, group of entities, body or association to develop an APP code, or the CR code, and apply to the Commissioner for the code to be registered, or for the Commissioner to develop the code and register it (ss 26E(2), 26G, 26P(1) and 26R)

⁶ The available review and appeal rights are set out in the *Guide to privacy regulatory action*.

⁷ The Administrative Review Council *Best Practice Guides* are published at [Other ARC publications](#).

- direct an agency (but not an organisation) to give the Commissioner a privacy impact assessment (PIA) (s 33D)
 - monitor, or conduct an assessment of, whether personal information is being maintained and handled by an entity as required by law (ss 28A and 33C)
 - direct a regulated entity to notify individuals at risk of serious harm, as well as the Commissioner, about an eligible data breach under Part IIIC of the Privacy Act (s 26WR).
20. Privacy regulatory powers that can be used to investigate or otherwise deal with an alleged interference with privacy are contained in Part V of the Privacy Act and include powers to:
- investigate a matter following a complaint (s 40(1)) or on the Commissioner's own initiative (referred to as a 'Commissioner initiated investigation' (CII)) (s 40(2))
 - attempt to conciliate a complaint (s 40A)
 - decline to investigate, or further investigate, a complaint (s 41)
 - conduct preliminary inquiries to determine whether or not to open an investigation (s 42)
 - decide whether or not to hold a hearing in response to a request from a complainant or respondent (for a complaint) or the respondent (for a CII) (s 43A)
 - require information or a document to be produced, or a person to attend before the Commissioner to answer questions under oath or affirmation (ss 44–45)
 - direct a complainant, respondent or other relevant person to attend a conference presided over by the Commissioner related to a complaint (failure to comply with the direction is an offence) (s 46)
 - refer a complaint to an alternative complaint body specified in s 50.
21. Enforcement powers, that range from less serious to more serious regulatory action, include powers to:
- accept an enforceable undertaking (s 33E)
 - bring proceedings to enforce an enforceable undertaking (s 33F)
 - make a determination (s 52)
 - bring proceedings to enforce a determination (ss 55A and 62)
 - report to the Minister in certain circumstances following a CII, monitoring activity or assessment (ss 30 and 32)
 - seek an injunction including before, during or after an investigation or the exercise of another regulatory power (s 98)
 - apply to the court for a civil penalty order for a breach of a civil penalty provision (s 80W).
22. It is open to the OAIC to use a combination of privacy regulatory powers to address a particular matter.

Approach to using privacy regulatory powers

Working with entities

23. The preferred regulatory approach of the OAIC is to work with entities to facilitate legal and best

practice compliance. This will often be a more efficient and effective means of pursuing the objects of the Privacy Act. The OAIC can use a range of steps as part of this approach, only some of which involve the use of regulatory powers.

24. The range of available steps include:

- engaging with regulated entities to provide guidance, promote best practice compliance, and identify and seek to address privacy concerns as they arise. This engagement may occur in different ways, including by providing policy guidance to entities, directing entities to relevant OAIC resources, conducting open dialogue between the OAIC and specific entities, and notifying an entity of any concerns held by the OAIC that the entity may not be complying with privacy obligations and allowing the entity an opportunity to respond to those concerns
- engaging with regulated entities who notify the Commissioner of a data breach incident to ensure compliance with relevant reporting obligations
- conducting an assessment of whether personal information is being maintained and handled by entities in accordance with applicable privacy legislative obligations, such as the APPs (s 33C). An assessment may enable the OAIC to identify privacy risks and areas of non-compliance, and may include recommendations as to how an entity might reduce risks or address areas of non-compliance
- recommending that an entity conduct a PIA where the entity proposes to engage in a new activity or function involving the handling of personal information about individuals, or when a change is proposed to information handling practices. A PIA is a systematic written assessment of an activity or function that identifies the impact that the activity or function might have on the privacy of individuals, and sets out recommendations for managing, minimising or eliminating that impact
- formally directing an agency to conduct a PIA where the entity proposes either to engage in a new activity or function involving the handling of personal information about individuals, or to make a substantive change to information handling practices, and the OAIC considers that the activity or function might have a significant impact on the privacy of individuals (s 33D).

25. The fact that an entity has engaged cooperatively with the OAIC will be taken into account in deciding whether to take regulatory action and what regulatory action to take.

Investigating an alleged interference with privacy

26. An investigation may be commenced by the OAIC into a suspected or alleged interference with privacy, either on receipt of a complaint or as a Commissioner initiated investigation (CII).

27. The OAIC is required to investigate a complaint made under the Act about an act or practice that is alleged to be an interference with the privacy of an individual or class of individuals, if certain conditions are satisfied (ss 36, 40), and the complaint is not declined under s 41⁸ or referred to an alternative complaint body under s 50.

⁸ The OAIC's approach to using the decline powers in s 41 is outlined in the *Guide to privacy regulatory action*. Examples of where a complaint may be declined include where it is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; an investigation is not warranted having regard to all the circumstances; the complaint was made more than 12 months after the complainant became aware of the relevant act or practice; and the complaint would be more effectively or appropriately dealt with by a recognised external dispute resolution scheme.

28. When investigating a complaint, the OAIC must make a reasonable attempt to conciliate the complaint (s 40A). Most complaints are resolved in this way. The OAIC may decline to investigate or further investigate a complaint if there is no reasonable likelihood of a conciliated outcome (s 40A(4)).
29. The Commissioner may, on his or her own initiative, decide to investigate an act or practice that may be an interference with the privacy of an individual or a breach of APP1 (s 40(2)). The Commissioner may decide to commence a CII following a complaint or notification of a data breach incident, or may commence a CII independently of any complaint or notification.⁹
30. When deciding whether or not to open a CII, the OAIC may consider whether the entity has complied with data breach notification requirements, has taken appropriate steps to respond to a breach, and has cooperated with the OAIC in remedying any breach.
31. In investigating a complaint or conducting a CII the OAIC will seek to work with the parties concerned. If necessary the Commissioner may use the formal powers conferred by the Privacy Act to require an individual or entity to provide information and documents (s44).

Exercising enforcement powers

32. Following a complaint investigation or CII, the Commissioner may decide to take enforcement action against an entity.
33. The available enforcement powers escalate from less serious to more serious options as outlined in paragraph 21 above.

Selecting appropriate privacy regulatory action

34. Alleged interferences with privacy or other privacy concerns may come to the OAIC's attention through a range of avenues that include:
 - a complaint by an individual, or a representative complaint
 - a data breach notification
 - engagement with stakeholders
 - a referral from another regulator or external dispute resolution scheme
 - media and social media
 - information provided by an informant
 - information provided by a law enforcement agency
 - during the course of an assessment or investigation conducted by the OAIC.
35. As noted above, the OAIC is required to investigate a complaint if certain conditions are satisfied, but has a discretion to take other privacy regulatory action, including commencing a CII.
36. Noting its preferred approach to work with entities in the first instance, the OAIC will use discretion to select and target matters that warrant privacy regulatory action, and to decide what action to take in those matters. This involves considering both the risk that a matter poses

⁹ For more information on when a CII may be commenced, see paragraphs 34-41 of this policy and Chapter 3 of the *Guide to privacy regulatory action*.

to the goal of promoting and ensuring personal information protection, and the opportunity that taking action presents.

37. For example, risk is likely to be greater where the personal information of a larger number of people is involved, while the opportunity might be greatest where an alleged contravention is suspected to be systemic within an industry and regulatory action can deliver a targeted compliance message to that industry.

Factors taken into account

38. Where it has a discretion as to whether to take regulatory action, the OAIC must prioritise matters for privacy regulatory action and select the most appropriate power in the circumstances. Factors the OAIC will take into account in deciding when to take privacy regulatory action, and what action to take, include the following (as applicable):
- the objects of the Privacy Act (set out in s 2A)
 - the seriousness of the incident or conduct to be investigated (or the potential impact of a proposal), including:
 - the number of persons potentially affected
 - whether the matter involves ‘sensitive information’¹⁰ or other information of a sensitive nature, the adverse consequences caused or likely to be caused to one or more individuals arising from an incident or conduct
 - whether disadvantaged or vulnerable groups may have been or may be particularly adversely affected or targeted
 - whether conduct was deliberate or reckless
 - the seniority and level of experience of the person or persons responsible for the conduct
 - the level of public interest or concern relating to the conduct, proposal or activity (with regulatory action more likely to be taken where significant public interest or concern exists)
 - whether the burden on the entity likely to arise from the regulatory action is justified by the risk posed to the protection of personal information
 - the specific and general educational, deterrent or precedential value of the particular privacy regulatory action, including whether pursuing court action (where applicable) would test or clarify the law
 - whether the entity responsible for the incident or conduct has been the subject of prior compliance or regulatory enforcement action by the OAIC, and the outcome of that action
 - the likelihood of the entity contravening the Privacy Act, or other legislation that confers functions relating to privacy on the Commissioner, in the future
 - whether the conduct is an isolated instance, or whether it indicates a potential systemic issue¹¹ (either within the entity concerned or within an industry) or an increasing issue which may pose ongoing compliance or enforcement issues

¹⁰ ‘Sensitive information’ is defined in s 6 of the *Privacy Act 1988* (Cth).

¹¹ See paragraphs 12–13 of this policy.

- action taken by the entity to remedy and address the consequences of the conduct, including whether the entity attempted to conceal a contravention or a data breach, and whether the entity cooperated with the OAIC and notified affected individuals if appropriate
 - the time since the conduct occurred
 - the cost and time to the OAIC in order to achieve an appropriate remedy through enforcement action
 - whether there is adequate evidence available and admissible in a court to prove a contravention on the balance of probabilities
 - that a new personal information handling activity or function or change to an existing personal information handling activity or function is planned, or a new personal information handling practice has been recently implemented or an existing practice changed
 - any other factors which the OAIC considers relevant in the circumstances, including factors which are relevant to the specific regulatory power being used.
39. The OAIC may also undertake an assessment of an entity where it is specifically funded to do so under a memorandum of understanding (MOU). The OAIC is a party to MOUs with various government agencies. The MOUs are published on the [OAIC website](#). Details about funding for assessments are contained in the Office's annual report.

Sources of information

40. The OAIC will use the approach and factors outlined above to decide when to take privacy regulatory action in a particular matter, and what action to take. However, the OAIC will also seek to identify both systemic issues¹² and serious issues that can be targeted for privacy regulatory action. The OAIC will use a range of sources for this purpose, including:
- individual complaints and data breach notifications
 - complaint and data breach notification trends
 - international developments
 - media reports
 - informants
 - surveys
 - privacy assessments
 - Commissioner initiated investigations
 - credit reporting body annual reports
 - information from recognised external dispute resolution schemes, including in annual reports provided to the OAIC
 - reports from APP code administrators.
41. The information may also be used to identify particular sectors in government or industry, or recurring acts or practices, that warrant privacy regulatory action. These sectors or acts or

¹² See paragraphs 12–13 of the policy.

practices are areas where the OAIC believes privacy regulatory action is necessary in order to have a significant impact on the protection and handling of personal information. For example, if its complaints statistics showed that a significant number of complaints relate to a particular industry, that industry may be identified for privacy regulatory action. In addition to using the prioritisation factors in the above list, the OAIC will also prioritise matters that fit within any identified sector or involve an identified act or practice. Where sectors or acts or practices are identified from time to time they will be noted on the OAIC's website.

Working with other complaint and regulatory bodies

Interaction with recognised EDR schemes

42. Under s 35A of the Privacy Act, the Commissioner may recognise an external dispute resolution (EDR) scheme to handle particular privacy related complaints. EDR schemes constitute the second tier of a three-tiered complaint process:
 - an individual should first make a complaint in writing to a respondent entity and allow the entity a reasonable time to respond
 - an individual who is not satisfied with the response or outcome may complain to a recognised EDR scheme of which the entity is a member (if any)
 - an individual who is not satisfied with the outcome of the EDR process may complain to the OAIC. The OAIC will consider whether to accept the complaint or to decline to investigate under s 41 of the Privacy Act.
43. A complainant who has not first complained to a recognised EDR scheme of which the respondent entity is a member will generally be advised to do so before the OAIC will accept the complaint.¹³ Otherwise, the OAIC will generally use its power to decline complaints that are being or could be dealt with by a recognised EDR scheme (ss 41(dc) and (dd)), in preference to formally referring the matter to the recognised EDR scheme (s 50).
44. Generally, the OAIC will seek to work in partnership with recognised EDR schemes, with a view to achieving consistent and efficient regulatory outcomes. The OAIC will seek to implement open communication practices to ensure information and experience is shared between the OAIC and the schemes, and that clear procedures are established to enable information about complaints to be transmitted.

Interaction with domestic regulators and alternative complaint bodies

45. A matter may fall within the jurisdiction both of the OAIC and of another Australian regulator, including State and Territory privacy regulators, regulators in other sectors and law enforcement agencies.
46. The OAIC will seek to work in partnership with other regulators, recognising the practical and

¹³ The Privacy Act s 40(1A) similarly provides that the OAIC shall not investigate a complaint if the complainant has not first complained to the respondent entity and allowed a reasonable time to respond, unless the OAIC decides that it is not appropriate to require the complainant to take that step (see also s 41(2)).

resource advantages in doing so. This may include agreeing to a written protocol or principles for collaboration, regular communication about privacy issues, sharing information and experience, and coordinating the regulatory processes of the OAIC and other regulators. However, the OAIC will always operate independently within its legislative framework, including limits on its ability to share information.

47. Where the OAIC receives a complaint, it may not always be the most appropriate body to investigate and resolve that complaint. It has various powers to decline to investigate where there is an alternative applicable law or complaint handling body, or to refer complaints to other complaint bodies in certain circumstances. Decline powers will generally be used in preference to formally referring matters. In addition, before formally referring a matter where a decline power does not apply, the OAIC may suggest that the complainant make a complaint or application to the alternative complaint body.

Interaction with foreign regulators

48. Many privacy threats and challenges extend beyond national boundaries. A coordinated and consistent global response can be an effective regulatory response to a global privacy issue.
49. In dealing with an interference with privacy or potential privacy risk that operates across national boundaries, there can be a practical and resource advantage in liaising with other privacy regulators to avoid duplication, share information and coordinate the release of investigation findings.
50. The OAIC will seek to work in partnership with privacy regulators in foreign jurisdictions where there is a shared interest in working together to address privacy breaches, threats and risks. Through such partnerships, the OAIC will share knowledge and expertise with a view to ensuring a consistent and harmonised approach to regulatory action in a particular matter. If appropriate, it may also seek to coordinate regulatory activities and share investigative information with foreign privacy regulators. However, the OAIC will always operate independently within its legislative framework, including limits on its ability to share information. In addition, where information is shared, only necessary information will be shared and the information exchange will occur under an information sharing arrangement which protects the confidentiality of the information.
51. As part of this commitment to international cooperation and privacy enforcement, the OAIC will continue to actively engage with global privacy networks, including the Asia Pacific Privacy Authorities Forum (APPA), the OECD Global Privacy Enforcement Network (GPEN) and the APEC Cross Border Privacy Enforcement Arrangement.

Public communication as part of privacy regulatory action

52. Public communication of the work of the OAIC is an important element in privacy regulatory action and fulfilling the objectives of the Privacy Act. This includes:
 - encouraging privacy compliance by increasing awareness and knowledge of privacy rights and obligations, and deterring contravening conduct
 - promoting public confidence in the regulatory activities of the OAIC, by publicising actions taken to address privacy breaches and deal with entities that are not complying with privacy obligations, and

- ensuring transparency and accountability around the OAIC's use of its privacy regulatory powers.

Communications approach

53. A decision to communicate information publicly will be guided by the principles identified in this policy under the heading 'Regulatory action principles': see paragraph 14. In addition, the OAIC will strive to ensure that:
- all public statements are accurate, fair and balanced
 - it is clear that an allegation of an 'interference with privacy' is no more than an allegation until substantiated by the OAIC, a tribunal or a court
 - a comment on a court proceeding involving a Privacy Act issue, prior to the resolution of the proceedings, will generally be confined to the history of the proceedings and any earlier findings by the OAIC or an alternative complaint body
 - all public statements comply with the OAIC's legal obligations, including privacy, confidentiality and secrecy obligations and court or tribunal orders
 - if the OAIC has previously commented publicly that it is investigating an alleged privacy breach by an entity, and later finds that a privacy breach was not substantiated, a public statement to that effect will generally be made.
54. The OAIC is committed to dealing fairly with any entity that may be the subject of privacy regulatory action when making any public statement relating to that regulatory action. The OAIC is mindful of the negative inferences and reputational damage to an entity that may arise from the fact that an investigation has been opened or that an 'interference with privacy' has been alleged.
55. Where making a public statement in connection with privacy regulatory action, the OAIC will aim to contact the respondent entity in advance of making the statement if it is possible and appropriate in the circumstances. However, it will generally not provide an individual or entity with an assurance that the OAIC will not publicise its regulatory action or that it will give advance warning.
56. To the extent possible, the OAIC will publish reports and other documents relevant to the exercise of regulatory powers in full or in an abridged version on the [OAIC website](#). It is sometimes inappropriate to publish all or part of a report or document because of statutory secrecy provisions or for reasons including privacy, confidentiality, commercial sensitivity, security or privilege.¹⁴

Examples of communications

57. The OAIC may communicate publicly the outcome of privacy regulatory action, including in the following ways:
- issuing a public report following an assessment
 - publishing a PIA direction issued to an agency
 - publishing a determination made by the Commissioner

¹⁴ Section 33 of the Privacy Act is also relevant to the inclusion of certain matters in reports to the Minister.

- publishing an enforceable undertaking accepted by the Commissioner
 - issuing a public statement at the commencement and conclusion of a CII
 - issuing a public statement where the OAIC commences court proceedings and upon finalisation of those proceedings.
58. The OAIC generally will not comment publicly about ongoing complaint investigations, complaint conciliations, CIIs, the content of data breach notifications or the exercise of investigative powers. However, where a particular incident is of community concern and has already been reported in the media, the OAIC may confirm publicly that it is investigating or making inquiries in relation to the matter, but will not comment further until the inquiries or investigation is complete. The OAIC may also comment publicly on a particular incident where there is a public interest in it doing so, for example to enable members of the public to respond to a data breach.
59. The OAIC will publish general statistics which reflect both its privacy regulatory action processes and regulatory outcomes. These statistics will be contained in the annual report, and include statistics on:
- complaints received
 - the stage at which complaints were closed
 - complaints declined via the various decline powers contained in s 41
 - complaint outcomes
 - CIIs undertaken
 - data breach notifications received
 - assessments undertaken.



Australian Government

Office of the Australian Information Commissioner

Guide to privacy regulatory action



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Introduction

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Purpose of the Guide to privacy regulatory action

The *Guide to privacy regulatory action* consists of different chapters, each relating to a regulatory power under the *Privacy Act 1988* (Cth) (Privacy Act), the *My Health Records Act 2012* (Cth) (My Health Records Act), the Consumer Data Right (CDR) scheme set out in Part IVD of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act), and other legislation that confers functions relating to privacy on the Commissioner.¹ Each chapter includes information about the legislative framework, purpose and procedural steps for exercising the regulatory power.

The purpose of this guide is to:

- be a source of information for entities about the Office of the Australian Information Commissioner's (OAIC's) exercise of particular regulatory powers
- provide OAIC staff with practical guidance about exercising a particular regulatory power
- promote consistency and transparency in the OAIC's exercise of its regulatory powers
- facilitate efficient and effective regulatory action.

Other documents relating to regulatory powers

The *Guide to privacy regulatory action* is one of a suite of documents that relate to the OAIC's use of its regulatory powers:

- The *Privacy regulatory action policy* explains the OAIC's approach to using its regulatory powers under the Privacy Act and other legislation, and communicating information publicly. This includes the considerations the OAIC will take into account in deciding when to take privacy regulatory action and what action to take. This document also explains the principles which will guide the OAIC when taking regulatory action, and the circumstances in which information

¹ For example, Part VIIC Division 5 of the *Crimes Act 1914* (Cth) confers on the Commissioner regulatory powers in relation to spent convictions.

about regulatory activity may be communicated publicly. The chapters in this guide should be read in conjunction with the policy.

- The *My Health Records (Information Commissioner Enforcement Powers) Guidelines 2016* (My Health Records Enforcement Guidelines) is a registered legislative instrument which explains the OAIC's approach to using its enforcement powers in its role as regulator of the My Health Record system. These guidelines are made by the Commissioner under s 111 of the My Health Records Act.
- The *CDR regulatory action policy* explains the OAIC's approach to using its regulatory powers in relation to the CDR scheme. Like the *Privacy regulatory action policy*, the *CDR regulatory action policy* outlines the matters the OAIC will consider when deciding to take regulatory action, the principles it is guided by, and the circumstances in which information about regulatory activity may be communicated publicly. The *CDR regulatory action policy* can also be read in conjunction with the joint *Australian Competition and Consumer Commission (ACCC) and OAIC Compliance and Enforcement Policy for the Consumer Data Right (ACCC and OAIC Compliance and Enforcement Policy)*.
- Some of the OAIC's guidance material relates to the OAIC's regulatory powers. This is designed to provide targeted information about specific regulatory powers to the OAIC's various stakeholders, including complainants and regulated entities.

Regulatory powers available

As outlined in the *Privacy regulatory action policy* and the My Health Records Enforcement Guidelines, the Privacy Act, My Health Records Act and Part IVD of the Competition and Consumer Act confer a range of enforcement and other regulatory powers on the Commissioner, which are based on an escalation model. These include the following powers:

- directing an agency (but not an organisation) to give the Commissioner a privacy impact assessment (Privacy Act s 33D)
- monitoring, or conducting an assessment of, whether personal information or CDR data is being maintained and handled by an entity as required by law (Privacy Act ss 28A and 33C; Competition and Consumer Act s 56ER)
- conciliating a complaint (Privacy Act s 40A)
- investigating a matter (either in response to a complaint (Privacy Act s 40(1)) or on the Commissioner's own initiative (Privacy Act s 40(2)), and various related powers including to decline to investigate a complaint (s 41), to refer the matter and discontinue an investigation where certain offences may have been committed (s 49), and to refer a complaint to a specified alternative complaint body (s 50) (see generally Privacy Act Part V)
- reporting to the Minister in certain circumstances such as following an investigation, monitoring activity or assessment (Privacy Act ss 30 and 32), or report to the Minister, the ACCC or the Data Standards Chair in relation to assessments conducted under the CDR scheme (Competition and Consumer Act s 56ER(3))
- accepting an enforceable undertaking (Privacy Act s 80V; My Health Records Act s 80; Competition and Consumer Act s 56EW)
- bringing proceedings to enforce an enforceable undertaking (Privacy Act s 80V; My Health Records Act s 80; Competition and Consumer Act s 56EW)

- making a determination (Privacy Act s 52)
- bringing proceedings to enforce a determination (Privacy Act ss 55A and 62)
- seeking an injunction (Privacy Act s 80W; My Health Records Act s 81; Competition and Consumer Act s 56EX)
- applying to the court for a civil penalty order (Privacy Act s 80U; My Health Records Act s 79; Competition and Consumer Act s 56EU)
- directing an entity to make a notification under the Notifiable Data Breaches scheme (NDB scheme) (Privacy Act s 26WR) or CDR scheme (Competition and Consumer Act s 56ES), or declaring the notification is not required or can be delayed (Privacy Act s 26WQ).

Contraventions of certain provisions of the My Health Records Act are ‘interferences with privacy’ for the purposes of the Privacy Act and the OAIC may investigate those contraventions either under the Privacy Act (using the investigative provisions in Part V of the Privacy Act) or under the My Health Records Act. The My Health Records Enforcement Guidelines provide guidance about the OAIC’s approach to investigating these My Health Records Act contraventions.

Section 56ET(3) of the Competition and Consumer Act extends the application of the OAIC’s regulatory powers under Part V of the Privacy Act to include the enforcement of privacy safeguards and privacy or confidentiality related CDR Rules under the CDR scheme. Therefore, the Commissioner can investigate an act or practice that may be a breach the privacy safeguards and privacy or confidentiality related CDR Rules under the CDR scheme.

It is open to the OAIC to use a combination of privacy regulatory powers to address a particular matter.

Regulatory action principles

The *Privacy regulatory action policy* sets out the principles which will guide the OAIC when it takes privacy regulatory action. These principles are independence, accountability, proportionality, consistency, timeliness and transparency.

Similarly, the *CDR regulatory action policy* and the *ACCC and OAIC Compliance and Enforcement Policy* set out the principles which will guide the OAIC when it takes regulatory action in relation to the CDR scheme. These principles are accountability, efficiency, fairness, proportionality and transparency.

The OAIC will take regulatory action in accordance with the principles set out in the *Privacy regulatory action policy* and, where relevant, the *CDR regulatory action policy* and the My Health Records Enforcement Guidelines.

Importantly, when taking privacy regulatory action, the OAIC will act consistently with general principles of good decision making, as explained in the *Best Practice Guides* published by the Administrative Review Council in 2007.² In particular, the OAIC will act fairly and in accordance with principles of natural justice (or procedural fairness).

In addition, in any litigation, the OAIC will act in accordance with its obligations to act as a model litigant in accordance with the *Legal Services Directions 2017*.

² The Administrative Review Council *Best Practice Guides* are published at [Other ARC publications](#).

Approach to using regulatory powers and selecting appropriate action

An investigation may be commenced by the OAIC into a suspected or alleged interference with privacy, either on receipt of a complaint or as a Commissioner initiated investigation (CII).

Following a complaint investigation or CII, the Commissioner may decide to take enforcement action against an entity. The available enforcement powers escalate from less serious to more serious options.

The *Privacy regulatory action policy*, the *CDR regulatory action policy* and My Health Records Enforcement Guidelines provide further guidance about how the OAIC decides whether to take privacy or CDR regulatory action and what action to take, including:

- the steps the OAIC can use to facilitate legal and best practice compliance
- the factors taken into account in deciding when to take privacy or CDR regulatory action, and what action to take
- the sources of information the OAIC will consider in seeking to identify both systemic issues and serious issues that can be targeted for privacy or CDR regulatory action.

When making a decision as to whether or not to exercise a regulatory power, the OAIC will be guided by the *Privacy regulatory action policy*, the *CDR regulatory action policy* or My Health Records Enforcement Guidelines as appropriate.

Chapter 1: Privacy complaint handling process

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Legislative framework

- 1.1 Section 36(1) of the Privacy Act provides for an individual (the complainant) to complain to the Commissioner about an interference with their privacy by certain Australian Government agencies or private sector organisations (the respondent).¹
- 1.2 A complaint about an act or practice that may be an interference with privacy can be made by an individual on their own behalf, and on behalf of other individuals with their consent.
- 1.3 The Privacy Act also provides for representative complaints to be made on behalf of a class of people where all the class members are affected by an interference with privacy (s 38(1)).
- 1.4 Section 13 of the Privacy Act sets out the acts and practices that may be an interference with the privacy of an individual. These include:

¹ The Privacy Act also covers the Norfolk Island public sector. For information about what agencies and organisations are covered by the Privacy Act see [Rights and responsibilities](#).

- a breach of an Australian Privacy Principle (APP) or a registered APP privacy code²
 - a breach of rules under s 17 in relation to tax file number information
 - a breach of a provision of Part IIIA or the registered CR code,³ and
 - a breach of prescribed NDB scheme requirements.⁴
- 1.5 Other legislation can also provide that an act or practice is an interference with privacy and therefore can be investigated by the Commissioner:
- s 73 of the *My Health Records Act 2012* (Cth)
 - s 29 of the *Healthcare Identifiers Act 2010* (Cth)
 - s 35L of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
 - s 135AB of the *National Health Act 1953* (Cth)
 - s 173 of the *Personal Property Securities Act 2009* (Cth), and
 - s 22A of the *National Cancer Screening Register Act 2016* (Cth).
- 1.6 Section 56ET(3) of the Competition and Consumer Act extends the Commissioner’s investigative powers under Part V of the Privacy Act to apply to the handling of CDR data for CDR consumers, which includes individuals and small businesses.⁵ This means the Commissioner can investigate an act or practice that may be a breach of a Privacy Safeguard and privacy or confidentiality related CDR Rules under the CDR scheme.
- 1.7 The Commissioner also has power to investigate complaints made under Part VIIC of the *Crimes Act 1914* (Cth) concerning the Commonwealth spent convictions scheme and s 13 of the *Data-Matching Program (Assistance and Tax) Act 1990*, and exercises some of the functions of the ACT Information Privacy Commissioner under the *Information Privacy Act 2014* (ACT).
- 1.8 Further information on the OAIC's role in investigating breaches of privacy provisions contained in other legislation is available at [Other legislation](#).⁶
- 1.9 Part V of the Privacy Act outlines the processes by which privacy complaints can be handled. This may include one or more of the following steps — conducting preliminary inquiries, opening an investigation, attempting to conciliate a complaint, and making a determination.
- 1.10 The Commissioner has a wide range of powers relating to the privacy complaint handling process including to:
- assist a person to formulate and make a complaint (s 36(4))
 - make preliminary inquiries of any person (s 42)

² For acts that occurred on or after 12 March 2014. For events that occurred prior to 12 March 2014 the relevant principles are, for government agencies, the Information Privacy Principles and, for organisations, the National Privacy Principles.

³ For acts that occurred on or after 12 March 2014. For events that occurred prior to 12 March 2014 the law as it was at 11 March 2014 applies.

⁴ Contained in s 26WH(2), s 26WK(2), s 26WL(3), and s 26WR(10).

⁵ Note that this only applies in relation to CDR complaints, and that small businesses cannot make complaints about any other act or practice that may be an interference with privacy as defined in s 13 of the Privacy Act, as individuals can under s 36 of the Privacy Act. “Individual” is defined in s 6 of the Privacy Act to mean a natural person.

⁶ How a complaint is handled under legislation other than the Privacy Act may vary according to any specific handling requirements of that legislation.

- transfer matters to an alternative complaint body in certain circumstances (s 50)
 - attempt to conciliate the complaint (s 40A)
 - conduct an investigation into the complaint (s 40)
 - at any stage, not investigate, or cease to investigate or not investigate further, the complaint on various grounds (generally referred to as a ‘decline’) (ss 41, 49, 49A)
 - require a person to give information or documents, or to attend a compulsory conference (ss 44, 45, 46, 47)
 - enter premises to inspect documents (s 68)
 - accept an enforceable undertaking (s 80V)
 - make a determination about the complaint (s 52)
 - seek to enforce a determination in a court (s 55A).
- 1.11 Not all of these powers will be used in resolving any particular complaint. These powers are explained further throughout this Chapter or elsewhere in this Guide.
- 1.12 To facilitate the complaint handling process the Commissioner delegates complaint handling functions to OAIC staff, other than the s 52 power to determine a matter. Throughout the rest of this Chapter we have used ‘the OAIC’ unless the power or function can only be performed by the Commissioner.
- 1.13 The Commissioner also has an agreement with the ACT Government to handle complaints under the *Information Privacy Act 2014* (ACT) about breaches of the Territory Privacy Principles by ACT public sector agencies. The powers in relation to handling those complaints are outlined in the ACT legislation and, in some respects differ from the Privacy Act powers. For more information see [Privacy in the ACT](#).

General approach to handling privacy complaints

- 1.14 The OAIC provides a free, informal and accessible complaint process. Parties do not require legal representation to participate in the complaint handling process or the determination process.⁷ Parties generally bear their own costs in the complaint handling process, including any legal expenses.
- 1.15 Where appropriate, the OAIC endeavours to resolve complaints through conciliation. Generally, where a complaint is not declined for some reason, or it cannot be resolved through conciliation, the complaint may be determined by the Commissioner under s 52.
- 1.16 The OAIC has an impartial role so does not advocate for any party in handling a privacy complaint.
- 1.17 In carrying out the OAIC 's functions to investigate and, if appropriate, to attempt to resolve privacy complaints through conciliation, the OAIC will:
- use a process that is accessible, flexible and timely, and done in accordance with the principles of natural justice and procedural fairness

⁷ For more information about the determination process see Chapter 4.

- focus on providing an opportunity for the parties to resolve complaints through conciliation.

How the OAIC handles privacy complaints

- 1.18 Complaints must be in writing and must identify the person making the complaint, the respondent and the alleged act or practice that is an interference with privacy. The OAIC cannot accept anonymous complaints.
- 1.19 Complaints are assessed on receipt. If the complaint does not reach the threshold required because it does not identify an interference with privacy the OAIC will contact the complainant and advise them why their matter cannot be dealt with as a complaint. The OAIC may provide appropriate assistance to the complainant to help formulate the complaint. Where appropriate the OAIC may refer the complainant to another agency or organisation that may be able to assist them.⁸
- 1.20 Where a matter reaches the required threshold to be a complaint under s 36 the OAIC will consider how best to deal with it. The OAIC can, at any stage of the process, attempt to conciliate the complaint or decline to investigate the complaint based on the information available to the OAIC.
- 1.21 Generally a complainant must have complained to the respondent⁹ and given them a chance to respond to the complaint before the OAIC can investigate (s 40(1A)).¹⁰ In limited circumstances the OAIC may decide to investigate the complaint if it is considered that it is not appropriate for the complainant to first complain to the respondent, for example:
- where there is a significant power differential between the complainant and respondent and the complainant may be disadvantaged in a direct approach to the respondent to resolve the issues in the complaint
 - where there is a history of similar issues associated with the respondent
 - where the complaint identifies a systemic issue.¹¹
- 1.22 Section 40(1B) of the Privacy Act also provides for additional circumstances in which the OAIC can investigate a complaint without requiring a complainant to first complain to the respondent. This relates to complaints about access to and correction of credit reporting information.
- 1.23 Where a complaint raises an issue that could be an interference with privacy the OAIC may conduct preliminary inquiries to obtain relevant information of any person to assist with the handling of the complaint.¹² These inquiries may be made, for example, to clarify the allegations in the complaint or to confirm that the OAIC has jurisdiction.

⁸ See the 'Referral of matters' section towards the end of this Chapter.

⁹ Organisations and agencies may find our resource [Handling privacy complaints](#) useful in dealing with privacy complaints.

¹⁰ In addition, complainants are encouraged to use the services of a [recognised EDR scheme](#), of which the respondent is a member, before approaching the OAIC, but this is not mandatory. The Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 stated (on page 4) that (*relevant*) amendments proposed to the Privacy Act (*and now enacted*) were intended to recognise and encourage the use of external dispute resolution services.

¹¹ See definition of systemic privacy issues in the *Privacy regulatory action policy* (paras 12–13).

¹² Section 42 of the Privacy Act.

- 1.24 Where the OAIC is unlikely to open an investigation for a reason provided for by s 41 of the Privacy Act¹³ the OAIC will contact the complainant and advise them of our view. The OAIC will generally write to the complainant outlining our reasons for that view and ask if they have any further relevant information that they wish to provide. In these cases the OAIC does not generally advise the respondent of the complaint unless a decision to proceed to investigation is made.
- 1.25 The Privacy Act obliges the OAIC to make a reasonable attempt to conciliate the complaint where the OAIC is of the view it is reasonably possible that a complaint could be successfully conciliated (s 40A). Conciliation can be attempted at any stage of the complaint handling process.
- 1.26 When the OAIC has opened an investigation into the complaint, under s 40, the OAIC can compel the production of relevant documents and information or require witnesses to attend and answer questions (s 44), if that will assist the investigation. Where a complaint is not declined or finalised on some other basis, and cannot be resolved through conciliation, and an investigation has been opened, the Commissioner may determine the complaint under s 52 of the Privacy Act.
- 1.27 A complainant can withdraw a complaint at any time without penalty.

Representative complaints

- 1.28 The Privacy Act allows for representative complaints to be made where an act or practice may be an interference with the privacy of a number of individuals. Particular conditions apply to a representative complaint and these are outlined in ss 38 to 39 of the Act. A representative complaint does not need to identify the class members by name or specify how many class members there are, however, an individual who is part of a class where a representative complaint has been lodged cannot bring an individual complaint unless they withdraw from the representative complaint.
- 1.29 Conditions for making a representative complaint include:
- that the class members have a complaint against the same respondent
 - the complaints all arise out of the same or similar circumstances, and
 - the complaints give rise to a substantial common issue of law or fact.
- 1.30 A representative complaint must address each of these conditions in the complaint and also identify the remedy or relief sought. A representative complaint may be lodged by a complainant who is a class member or a person or organisation who is not a class member.
- 1.31 The OAIC may not accept or continue with a representative complaint where the OAIC is not satisfied the complainant can adequately represent the interests of the class members.

Confidentiality

- 1.32 The OAIC is bound by the APPs when handling complaint related personal information, and manages complaints confidentially. As such, the OAIC does not disclose the particulars of a complaint during the complaint handling process to persons other than the parties to a

¹³ For more information about the OAIC's power to decline a complaint see 'Deciding not to investigate a complaint' later in this Chapter.

complaint or third parties with information relevant to the inquiry that can assist the inquiry. This is to ensure that parties will participate fully and frankly in the complaint process.

- 1.33 The Privacy Act does not impose an obligation of confidentiality on the parties to a complaint. However, APP obligations do apply to APP entities and information they obtain during the course of a complaint. If the parties have settled the matter with an agreement that includes a confidentiality clause they may be bound by that agreement.
- 1.34 In addition, conciliation, where that is occurring, works best in an atmosphere where parties can raise issues in a frank way without fear of the information being disseminated further and the OAIC encourages parties not to disseminate information while involved in the conciliation process.

Investigating privacy complaints

- 1.35 Where possible the OAIC tries to handle privacy complaints informally and flexibly. In some cases, before commencing an investigation under s 40 of the Privacy Act, the OAIC may conduct preliminary inquiries and obtain information that will assist the OAIC to explain an issue to a complainant that may resolve an issue or lead the complainant to withdraw the complaint on the basis they are satisfied with the explanation that has been provided.
- 1.36 Where the OAIC has established jurisdiction to investigate it will generally notify a respondent of the complaint under the investigation power (s 40). The respondent will be provided with a copy of the complaint, asked to respond to the specific issues in the complaint and to tell the OAIC whether they are willing to try to resolve the complaint through conciliation.
- 1.37 In many cases a complaint can be quickly resolved prior to a detailed written response being provided. This occurs in circumstances where a respondent is willing to try to resolve the complaint on the terms the complainant has identified, or is willing to negotiate terms of resolution with the complainant.
- 1.38 For procedural fairness and transparency, generally any substantive information provided by a party to a complaint will be provided to the other party to facilitate the handling of the complaint. This includes the complaint, the respondent's response, offers of resolution and other relevant information.
- 1.39 Generally the OAIC does not accept confidential submissions. If information that is commercially sensitive or is sensitive for some other reason has to be provided to assist the OAIC with its investigation the OAIC will usually ask that the information be provided in a form that can be provided to the other party.¹⁴
- 1.40 At each stage of the complaint process the officer handling the matter will assess the available information and keep the parties advised of the OAIC's views on the matter. Where an investigation has been commenced the OAIC may decline to continue to investigate a matter, or attempt to conciliate a matter, at any stage during the investigation where that appears to be the appropriate course of action.
- 1.41 Where the OAIC's investigation indicates that it is likely that an interference with privacy has occurred and conciliation is not considered appropriate or conciliation has been attempted without resolution, then the OAIC may investigate the matter and will consider what

¹⁴ See Chapter 4 as well in relation to confidential information, in the context of making a determination.

enforcement action to take. The OAIC will review the matter against either the *Privacy regulatory action policy* or the *CDR regulatory action policy* or the *My Health Records Enforcement Guidelines 2016* as applicable to assess the appropriate enforcement response.

- 1.42 Generally the appropriate enforcement response for a complaint, where an investigation has been opened, conciliation has not resolved the matter and the complaint has not been declined, will be a determination under s 52. However other enforcement action may also be considered appropriate, in addition to a determination, for example seeking a civil penalty for a serious or repeated interference with privacy.
- 1.43 Where the OAIC considers that there is a likelihood that it will decide to seek a civil penalty for a serious or repeated interference with privacy, the complaint investigation will be conducted with a view to ensuring that sufficient admissible evidence will be available to allow that case to be pursued in court if necessary. For more information see Chapter 6 on civil penalties.

Conciliating a complaint

- 1.44 Where the OAIC considers it is reasonably possible a complaint may be conciliated successfully there must be a reasonable attempt to conciliate (s 40A(1)).
- 1.45 The OAIC is not required to attempt to resolve the complaint through conciliation where the OAIC has decided not to investigate, or not to further investigate, a complaint.
- 1.46 Factors the OAIC may take into account in assessing whether it is possible to successfully conciliate a complaint may include:
 - the approach taken by the parties to conciliation i.e. willingness to discuss conciliation, whether resolution proposals are generally appropriate and proportionate to the nature of the complaint and outcomes generally applicable to privacy complaints
 - previous resolution attempts and any outcomes achieved or actions taken by either party regarding the complaint
 - the responsiveness of the parties to the OAIC's attempts to assist the parties to resolve a complaint, and
 - the length of time the OAIC and the parties have taken to try to resolve a complaint.
- 1.47 The OAIC will generally ask the complainant to outline what they are seeking to resolve the complaint and ask the respondent to consider that proposal or propose an alternative basis for resolution.

Types of outcomes in conciliated matters

- 1.48 Outcomes that may be achieved in privacy complaints may include:
 - change in practice, procedure or policy
 - access to information
 - staff training
 - review of privacy policies and procedures
 - statement of regret or a private or public apology

- financial compensation.
- 1.49 Parties will be advised of resources and information to help them develop or respond to a proposal for resolution, for example, determinations by the Commissioner, information about conciliated matters the OAIC has published in annual reports or on its website, and complaint outcomes in similar jurisdictions, for example, New Zealand and New South Wales privacy jurisdictions and the Commonwealth discrimination jurisdiction.

How the OAIC tries to conciliate matters

- 1.50 The OAIC generally tries to resolve privacy complaints through conciliation by:
- phone and email based shuttle negotiations - where the parties are separately communicated with
 - teleconferences involving all parties
 - face to face meetings with the parties (where practicable and appropriate).
- 1.51 In each case the officer handling the matter will contact the parties to discuss the issues in the complaint and the outcome being sought. The officer will try to assist the parties to negotiate a satisfactory resolution to the complaint.
- 1.52 Where a matter is resolved the parties may enter into a conciliation agreement or deed of release prepared by one of the parties to the complaint or the OAIC. In limited situations the Commissioner may accept an enforceable undertaking from the respondent as part of the resolution of a complaint (for more information see Chapter 3 Enforceable undertakings).
- 1.53 Sometimes a party to a complaint may be legally represented. To ensure fairness in the process the OAIC may recommend to the parties that they get legal or other professional advice if they are entering into a legal deed or agreement.
- 1.54 Where conciliation is successful the file will be closed on the basis the matter has been adequately dealt with.
- 1.55 Where a complaint is not able to be resolved through conciliation the matter will generally move to determination under s 52 or be declined under the powers available in s 41. Although the matter could be finalised under s 40A on the basis there is no reasonable likelihood that the matter will be resolved by conciliation, this discretionary power would only be used in limited circumstances.

Compulsory conciliation conference

- 1.56 The OAIC can require a complainant or respondent or other relevant party to attend a conciliation conference (s 46). A person who has been directed to attend and fails to attend is guilty of an offence.
- 1.57 Generally, the OAIC relies on voluntary participation in a conciliation process as resolution generally relies on the understanding that parties are participating in good faith to genuinely resolve the matter.
- 1.58 In some cases where a matter is not able to be resolved through voluntary participation the OAIC may consider compelling a person to attend a conciliation conference where the OAIC is of the view the matter may be able to be resolved if the parties were to deal directly with each other over the complaint. Factors that may contribute to this view are where:

- the proposals for resolution are appropriate to the interference with privacy raised by the complaint
 - a party indicates they are willing to resolve a complaint but are unwilling to commit to a resolution process or outcome
 - the parties have been involved in extended negotiations and it is likely the matter may resolve if the parties are required to deal with the remaining issues at hand.
- 1.59 The OAIC may advise the parties of the intention to issue a notice compelling their attendance at a conciliation conference where the matter has been unable to be resolved through usual conciliation processes.
- 1.60 The OAIC may take into account the parties' circumstances in issuing a notice to compel attendance at a conciliation conference, for example, whether the parties are legally represented, geographic considerations, and constraints on time to ensure the parties are able to comply with the notice to attend.

Use of conciliation information

- 1.61 Anything said or done in the course of conciliation cannot be used in any legal proceedings or in any hearing before the Commissioner (including where the Commissioner decides to determine the matter under s 52 of the Privacy Act), except where the parties otherwise consent. Conciliation information may also be used in circumstances where something was said or done to advance the commission of a fraud or an offence, or renders a person liable to a civil penalty.
- 1.62 Generally this will mean that the Commissioner will not consider anything said or done in conciliation in any determination hearing or determination decision. If a party seeks a review, by the AAT or Federal Court, of a decision in a determination the Commissioner cannot refer to information about the conciliation process in those proceedings.

Deciding not to investigate a complaint

- 1.63 The OAIC may at any time during the complaint process exercise the discretion not to investigate a complaint or not to investigate a complaint further for a reason provided for in s 41 of the Act. This is commonly referred to as 'declining a complaint'.
- 1.64 The OAIC will consider all the information provided by the parties and any other relevant information in deciding whether to decline to investigate or further investigate a complaint.
- 1.65 The Commissioner or delegate may decide not to investigate or investigate further for a range of reasons provided for by s 41 which include where he or she is satisfied that:
- the act or practice is not an interference with privacy
 - the complaint was made more than 12 months after the complainant became aware of the act or practice
 - the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
 - a recognised external dispute resolution scheme has dealt with, or would more effectively deal with, the act or practice, for example, the Telecommunications Industry

Ombudsman, Financial Ombudsman Service, Credit & Investments Ombudsman or a state or territory based energy, water or transport related Ombudsman

- the act or practice is subject to an application, or would be more appropriately dealt with, under another Commonwealth, state or territory law, for example, this might include discrimination law or other court proceedings, or
- the respondent has dealt with, or is adequately dealing with the complaint, for example, where a deed of release about the same subject matter has previously been entered into.

- 1.66 A decision to decline a complaint for one of the reasons in s 41 is a discretion exercised by the Commissioner or the Commissioner's delegate and consequently subject to review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. Given this, there is a requirement that a decision to decline a complaint is subject to due care and based on information that can withstand rigorous review.
- 1.67 Where the OAIC is intending to decline a complaint the OAIC will advise the complainant, in writing, of that view and the reasons for it and provide an opportunity for the complainant to provide any further information they think is relevant. The OAIC will consider any additional information before making a final decision on how to proceed with the complaint.

Referral of matters

- 1.68 Section 50 of the Privacy Act allows the OAIC to not investigate, or not investigate further, a matter and to transfer it to an 'alternative complaint body' where the OAIC forms the opinion that:
- a complaint (or application where applicable) relating to that matter has been, or could have been, made by the complainant to the alternative complaint body, and
 - the matter could be more conveniently or effectively dealt with by that alternative complaint body.
- 1.69 The 'alternative complaint bodies' to which the OAIC can transfer matters include the Australian Human Rights Commission, the Commonwealth Ombudsman, and an external dispute resolution scheme recognised by the Commissioner under s 35A of the Privacy Act.

Purpose of the OAIC's complaint referral powers

- 1.70 Referral of a complaint to an alternative complaint body is likely to arise in very limited cases where the OAIC's jurisdiction overlaps with that of an alternative complaint body, and the complaint (or application) may be made about the act or practice to either the OAIC or the other body and the referral will ensure that the complaint is dealt with in the most convenient and effective manner.
- 1.71 The OAIC will generally only use the referral power where:
- it considers that a complaint or application relating to the matter has been, or could have been made, to an alternative complaint body which provides a better or more effective remedy for the subject matter of the complaint, and
 - there is no relevant ground on which the OAIC should decline to investigate the complaint, and

- the complainant does not accept the OAIC’s advice to withdraw their complaint and make a complaint or application to the alternative complaint body.
- 1.72 Affording an individual the opportunity to first withdraw their complaint and make a complaint or application to the alternative complaint body themselves is intended to allow an individual to, as much as possible, retain responsibility and control over how their matter is dealt with.
- 1.73 From 1 July 2020, the OAIC may transfer CDR complaints to the ACCC, or to a recognised EDR scheme, if it considers the matter is best dealt with by such entities. The transfer of complaints to the ACCC is permitted by s 29(2)(aa)(iv) of the *Australian Information Commissioner Act 2010*, and to EDRs under s 50 of the Privacy Act as outlined above. This is also in line with the ‘no wrong door’ policy of the CDR scheme, whereby if the OAIC or ACCC, as co-regulators of the scheme, receive a matter that is best dealt with by the other, or by an EDR scheme, the matter is transferred across to that body.

Chapter 2: Commissioner initiated investigations and referrals

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Legislative framework

- 2.1 Section 40 of the Privacy Act gives the Commissioner the power to conduct investigations.
- 2.2 Section 40(2) of the Privacy Act enables the Commissioner to commence an investigation on the Commissioner's own initiative, where:
- an act or practice may be an interference with the privacy of an individual or a breach of Australian Privacy Principle (APP) 1; and
 - the Commissioner thinks it is desirable to do so.
- 2.3 The Commissioner can also commence investigations into the privacy aspects of the CDR scheme. This is because s 56ET of the Competition and Consumer Act provides that s 40(2) of the Privacy Act extends to a possible breach of a privacy safeguard, or a privacy or confidentiality related CDR Rule, and a data breach made under Part IIIC of the Privacy Act relating to the CDR scheme.
- 2.4 Investigations conducted under s 40(2) are known as 'Commissioner initiated investigations' (CIIs).
- 2.5 Prior to commencing an investigation, the Commissioner may conduct preliminary inquiries under s 42(2) of the Privacy Act, to determine whether to commence a CII. Once a CII has been commenced, the OAIC will conduct its investigation in accordance with Part V of the Privacy Act.
- 2.6 Where the Commissioner has identified an interference with privacy, there are a number of enforcement powers available to the Commissioner.

- 2.7 The Commissioner endorses a focus on engagement, advice and support in preference to deterrence and punishment where appropriate.
- The Commissioner’s powers, ranging from less serious to more serious regulatory action, include the ability to:
 - conduct an assessment of an entity’s privacy practices (s 33C of the Privacy Act; s 56ER of the Competition and Consumer Act) and provide non-binding recommendations
 - accept an enforceable undertaking (s 80V of the Privacy Act; s 56EW of the Competition and Consumer Act)
 - make a determination (s 52 of the Privacy Act) directing an entity to take certain steps
 - bring proceedings to enforce an enforceable undertaking (s 80V of the Privacy Act; s 56EW of the Competition and Consumer Act)
 - bring proceedings to enforce a determination (ss 55A and 62 of the Privacy Act)
 - seek an injunction to prevent conduct that would constitute a contravention of the Privacy Act (s 80W of the Privacy Act), and against CDR participants to enforce the privacy safeguards (s 56EX of the Competition and Consumer Act)
 - apply to a court for a civil penalty order for a breach of a civil penalty provision (s 80 U of the Privacy Act), and seek civil penalties for certain contraventions of the privacy safeguards (s 56EU of the Competition and Consumer Act), which includes serious or repeated interferences with privacy.
- 2.8 The Commissioner may, at any time, also decide to discontinue an investigation where the Commissioner is satisfied that no further regulatory action is warranted in the circumstances. This may occur where the Commissioner decides that the entity has not breached the Privacy Act or the requirements of the privacy safeguards and CDR Rules, or if the Commissioner considers there has been a breach that is immaterial or has been adequately dealt with.

Referral of allegations to the OAIC

- 2.9 The OAIC becomes aware of matters that may warrant the commencement of a CII through a number of channels, including:
- a complaint by an individual, or a representative complaint (under the Privacy Act), or a CDR consumer (under the Competition and Consumer Act)
 - a referral from another regulator or external dispute resolution (EDR) scheme
 - media reports and social media commentary
 - a referral from a member of the community or information provided by an informant
 - information gathered in the course of other regulatory activity of the OAIC (for example, privacy assessments, data breach notifications, and engagement with the ACCC in relation to the CDR scheme).

OAIC framework for considering referrals

- 2.10 The OAIC has a range of options available to respond to referrals, including no action, provision of general guidance or preliminary inquiries for the purpose of deciding whether to commence a CII. The OAIC will consider each referral it receives against its strategic regulatory priorities.
- 2.11 In deciding how to respond to a referral, the key considerations are the likelihood that the allegation referred to the OAIC is accurate, and the seriousness of the alleged breach. The OAIC may also consider the other matters outlined in the *Privacy regulatory action policy*, or the *CDR regulatory action policy* for CDR matters. In deciding whether to take any action in response to an alleged breach of the Privacy Act, the OAIC will consider the likelihood of an allegation, and its seriousness. The OAIC’s response will be based on an evaluation of each allegation with reference to its potential seriousness, as summarised in the table below.

↑ Seriousness	No action	Commence CII (or preliminary inquiries)	Commence CII (or preliminary inquiries)
	No action	Advise respondent of allegation and provide general guidance	Advise respondent of allegation and provide general guidance
	No action	No action	Advise respondent of allegation and provide general guidance
		→ Likelihood	

- 2.12 If an allegation is both serious and likely, the OAIC will commence preliminary inquiries and may recommend the Commissioner conduct a CII.
- 2.13 If an allegation appears likely to be accurate, but is less serious, the OAIC will typically write to the respondent to advise that an allegation has been made, and provide general guidance to allow the respondent to address the issue itself.
- 2.14 In other cases the OAIC will not take action in response to a referral. However, the OAIC will keep a record of the referral and may refer to it in future.
- 2.15 The OAIC will not usually reveal the name of the person who made the referral to the respondent.
- 2.16 Where referrals relate to allegations about compliance with the CDR scheme, the OAIC may provide the ACCC with details of the allegation and any action the OAIC has taken in response.

Considerations in opening a CII

- 2.17 The Commissioner's primary objective when undertaking a CII is improving the privacy practices of investigated entities and the regulated community generally.
- 2.18 When deciding whether to commence a CII, the OAIC will consider the factors identified in the OAIC's *Privacy regulatory action policy*, and where appropriate, the *CDR regulatory action policy* and its strategic regulatory priorities.
- 2.19 The Commissioner will also consider the specific and general educational, deterrent or precedential value of commencing a CII, and whether it presents an opportunity to provide guidance to industry, Government or the public on better privacy practice and acceptable privacy standards.

Procedural steps in conducting a CII

- 2.20 Where the OAIC decides to commence a CII, the following four steps will be taken.

1. Notification to respondent

- 2.21 The OAIC will notify the respondent in writing about its decision to commence a CII, and the initial scope of the investigation. If during the course of the investigation other issues arise in relation to the respondent's compliance with the APPs or the privacy safeguards and CDR Rules, these may be considered as part of the investigation. After notifying the respondent of the investigation, the OAIC will typically place a notice on its website stating that it is commencing an investigation. However, the OAIC will not comment further until the investigation is complete.

2. Information gathering

- 2.22 The OAIC will correspond with the respondent to gather information. The OAIC will seek the cooperation of the respondent in the provision of necessary information, and the respondent is typically the OAIC's primary source of relevant information.
- 2.23 The OAIC may gather information from other sources as required, such as the ACCC for CDR matters.
- 2.24 The Commissioner may issue a notice under s 44 of the Privacy Act requiring a person to provide information or produce documents, or to give evidence to the Commissioner in person.

3. Decision making

- 2.25 The Commissioner will consider the information provided to the OAIC and form a preliminary view in relation to the matter.
- 2.26 The Commissioner may decide to exercise a discretionary power under s 41 of the Privacy Act to discontinue an investigation, including where the Commissioner is satisfied that no breach has occurred or that the breach has been adequately dealt with by the respondent and no further regulatory action is warranted in the circumstances.

- 2.27 Where the Commissioner forms a preliminary view that the respondent has failed to meet the requirements of the Privacy Act or the requirements of the privacy safeguards or CDR Rules, the Commissioner may take further regulatory action, including the following:
- The Commissioner may seek an enforceable undertaking from the respondent under s 33E of the Privacy Act and s 56EW of the Competition and Consumer Act. More information about enforceable undertakings is available in Chapter 3 of this guide.
 - The Commissioner may make a determination under s 52(1A) of the Privacy Act. The determination, including the Commissioner's reasons for the determination, will be published on the OAIC's website. More information about determinations is available in Chapter 4 of this guide.
 - The Commissioner may seek an injunction against a person to enforce the Privacy Act (s 80W of the Privacy Act) and against CDR participants to enforce the privacy safeguards (s 56EX of the Competition and Consumer Act). More information about injunctions is available in Chapter 5 of this guide.
 - Where a civil penalty provision has been breached, the Commissioner may apply to the court for a civil penalty order under s 80U of the Privacy Act and s 56EU of the Competition and Consumer Act. More information about civil penalties is available in Chapter 6 of this guide.
 - The Commissioner may report to the Minister about a CII under s 30 of the Privacy Act. In certain circumstances, the Commissioner is required to report to the Minister.
- 2.28 The Commissioner may decide that although the entity has breached the Privacy Act or the requirements of the privacy safeguards and CDR Rules, no further action is required. This will depend on the specific circumstances of the matter, and if the Commissioner forms this view, the Commissioner may send a warning letter to the entity which sets out the OAIC's awareness of acts or practices of the entity that may not be compliant with its privacy obligations, and warns the entity that the OAIC may take future privacy regulatory action if it does not improve its compliance.

4. Conclusion and publication

- 2.29 At the conclusion of a CII, the OAIC will typically place a notice on its website advising of the conclusion of the investigation.
- 2.30 Where the Commissioner considers there is sufficient public interest in an incident, the Commissioner may publish a report of the investigation, which would be published alongside or as part of any enforceable undertaking or determination.
- 2.31 The OAIC will make decisions about communications in connection with CIIs in accordance with the considerations set out in the 'Public communication as part of regulatory action' sections of the *Privacy regulatory action policy*, and where appropriate, the *CDR regulatory action policy*.

Chapter 3: Enforceable undertakings

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Legislative framework

- 3.1 An enforceable undertaking is a written agreement between an entity or person (the respondent) and the Commissioner, which is provided under either the Privacy Act, the My Health Records Act or the Competition and Consumer Act, and is enforceable against the respondent in the courts.

Enforceable undertaking under the Privacy Act

- 3.2 Section 114 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) empowers the Commissioner to accept a written undertaking given by an entity that it will either:

- take specified action in order to comply with the Privacy Act
 - refrain from taking specified action in order to comply with the Privacy Act
 - take specified action directed towards ensuring that the entity does not contravene a provision under the Privacy Act, or is unlikely to contravene such a provision in the future.
- 3.3 An enforceable undertaking may be varied or withdrawn with the consent of the Commissioner (s 114 (3) of the Regulatory Powers Act), or cancelled by the Commissioner (s 114 (5) of the Regulatory Powers Act).
- 3.4 If the Commissioner considers that an entity has breached an undertaking, the Commissioner may apply to the Federal Court or Federal Circuit Court to enforce the undertaking (ss 113 and 115 of the Regulatory Powers Act, s 80V of the Privacy Act).

Enforceable undertaking under the My Health Records Act

- 3.5 Under s 114 of the Regulatory Powers Act, the Commissioner may accept a written undertaking in relation to the My Health Records Act given by a person that the person will:
- take specified action in order to comply with the My Health Records Act
 - refrain from taking specified action, in order to comply with the My Health Records Act
 - take specified action directed towards ensuring that the person does not contravene the My Health Records Act, or is unlikely to contravene the My Health Records Act, in the future.
- 3.6 Section 80 of the My Health Records Act triggers the provisions of Part 6 of the Regulatory Powers Act which provides a framework for accepting and enforcing undertakings relating to compliance with legislative provisions. This means that the Commissioner may accept an undertaking relating to compliance with a My Health Records Act provision that is enforceable under Part 6 of the Regulatory Powers Act.
- 3.7 An enforceable undertaking may be varied or withdrawn with the consent of the Commissioner, or cancelled by the Commissioner.
- 3.8 If the Commissioner considers that a person has breached an undertaking accepted under s 80 of the My Health Records Act and that undertaking has not been withdrawn or cancelled, the Information Commissioner may apply to the relevant court for an order directing the person to comply with the undertaking (or one or more of the orders listed in Part 6 of the Regulatory Powers Act).

Enforceable undertaking under the Competition and Consumer Act

- 3.9 Under s 114 of the Regulatory Powers Act, the Commissioner may accept a written undertaking in relation to the CDR scheme as set out in the Competition and Consumer Act, given that the person will:
- take specified action in order to comply with the privacy safeguards
 - refrain from taking specified action, in order to comply with the privacy safeguards

- take specified action directed towards ensuring that the person does not contravene the privacy safeguards, or is unlikely to contravene the privacy safeguards, in the future.
- 3.10 Section 56EW of the Competition and Consumer Act triggers the provisions of Part 6 of the Regulatory Powers Act which provides a framework for accepting and enforcing undertakings relating to compliance with legislative provisions. This means that the Commissioner may accept an undertaking relating to compliance with a privacy safeguard provision that is enforceable under Part 6 of the Regulatory Powers Act.
- 3.11 An enforceable undertaking may be varied or withdrawn with the consent of the Commissioner, or cancelled by the Commissioner.
- 3.12 If the Commissioner considers that a person has breached an undertaking accepted under s 56EW of the Competition and Consumer Act and that undertaking has not been withdrawn or cancelled, the Commissioner may apply to the relevant court for an order directing the person to comply with the undertaking (or one or more of the orders listed in Part 6 of the Regulatory Powers Act).

Which Act to use?

- 3.13 Acts or practices that interfere with an individual's privacy but do not relate to a contravention of the My Health Records Act, or to a privacy safeguard set out in Part IVD of the Competition and Consumer Act, are governed by the Privacy Act and an enforceable undertaking that relates to those acts or practices will be accepted by the Commissioner under the Privacy Act.
- 3.14 Acts or practices that contravene certain provisions of the My Health Records Act are deemed by s 73 of that Act to be an interference with an individual's privacy for the purposes of the Privacy Act. Depending on the circumstances, an enforceable undertaking in relation to these contraventions may be able to be accepted under the My Health Records Act or the Privacy Act.
- 3.15 Sub-section 80(2) of the My Health Records Act also empowers the My Health Record System Operator¹ to accept enforceable undertakings. The Commissioner may consult with the System Operator when investigating a complaint and considering accepting an undertaking, in line with the *Agreement for information sharing and complaint referral relating to the personally controlled electronic health (eHealth) record system between the OAIC and the System Operator*.²
- 3.16 For conduct that is a breach of a privacy safeguard, the Commissioner may accept an enforceable undertaking under the Competition and Consumer Act.

¹ 'System Operator' is defined in s 14 of the My Health Records Act.

² The [agreement](#) can be viewed on the OAIC's website.

Purpose and key features of an enforceable undertaking

- 3.17 An enforceable undertaking is an important enforcement tool for use in situations where there has been or appears to have been an interference with the privacy of an individual³ and the Commissioner considers an agreed change to future behaviour offers the most appropriate regulatory outcome in the particular circumstances.
- 3.18 Generally, an enforceable undertaking seeks to have a respondent voluntarily agree to:
- modify its acts, practices, procedures or behaviour to ensure it complies with the law (for example, ceasing the practice that led to the breach or implementing new policies for handling personal information)
 - remedy the damage any breach has caused (for example making an apology or making a payment to an individual or individuals to rectify damage)
 - commit to certain future compliance measures (for example conducting reviews and audits, providing training for managers and staff and implementing a compliance monitoring and reporting framework).

Who can give an enforceable undertaking?

- 3.19 An enforceable undertaking for conduct under the Privacy Act can only be given by ‘an entity’. The term ‘entity’ means an agency, an organisation or a small business operator (these terms are further defined in s 6(1) of the Privacy Act). The term ‘organisation’ can include an individual (including a sole trader).
- 3.20 An enforceable undertaking for conduct under the My Health Records Act and the Competition and Consumer Act can be given by ‘a person’.⁴ This term captures both individuals and participants in the My Health Record system, such as registered repository operators, portal operators and healthcare provider organisations.
- 3.21 For each undertaking, the individual giving and executing the undertaking must have the authority to negotiate on behalf of, and bind, the respondent entity or person.

At what point can an enforceable undertaking be accepted?

- 3.22 The Commissioner may accept an enforceable undertaking given by an entity or person where the Commissioner considers there is a reasonable basis to suggest that the entity or person has interfered with the privacy of an individual. For example, an enforceable undertaking may be accepted during a complaint investigation, an enquiry into a data breach incident, or a Commissioner initiated investigation.

³ The *Privacy regulatory action policy* and the My Health Records (Information Commissioner Enforcement Powers) Guidelines 2016 outline the range of avenues through which the OAIC may become aware of alleged interferences with privacy or other privacy concerns.

⁴ The term ‘person’ is not defined in the My Health Records Act and the Competition and Consumer Act, so the meaning is drawn from the *Acts Interpretation Act 1901* (Cth). That Act states that expressions used to denote persons generally, such as ‘person’, include a body politic or body corporate as well as an individual (s 2C).

- 3.23 An enforceable undertaking may form part of a conciliated outcome following a complaint. Section 40A of the Privacy Act requires the Commissioner to make a reasonable attempt to conciliate a complaint where the Commissioner considers there is a reasonable possibility that the complaint can be conciliated successfully.

Enforceable undertaking terms and requirements

- 3.24 The Privacy Act, the My Health Records Act and Part IVD of the Competition and Consumer Act do not impose a particular structure for an enforceable undertaking. However, an undertaking must be written and must be expressed to be an undertaking under s 114 of the Regulatory Powers Act.
- 3.25 In addition, the OAIC expects that the terms of any undertaking will usually (at a minimum):
- state the name of the respondent, the date the undertaking was accepted by the Commissioner and the date when the undertaking comes into effect
 - be signed by the CEO or other senior executive of the respondent and the Commissioner (or approved delegate) – without the signature of both parties, the undertaking has no effect
 - describe and acknowledge the act(s) or practice(s) about which the OAIC is concerned
 - outline specified steps the respondent will take to rectify the act or practice, and ensure that it is not repeated or continued. This will usually include a requirement for the respondent to complete reviews and establish a monitoring and reporting framework. Specifically, the respondent will usually be required to:
 - nominate in writing a representative responsible for overseeing compliance with the undertaking and reporting to the OAIC
 - engage, in consultation with the OAIC, an appropriately experienced and qualified third party to review the act or practice and make recommendations to improve the respondent's compliance with the Privacy Act (the Independent Expert)
 - ensure that the OAIC receives a copy of the Independent Expert's report, including a copy of the Independent Expert's draft report prior to engagement with the respondent
 - implement the recommendations in that report
 - provide a certification by the Independent Expert to the OAIC that the respondent has implemented the recommendations and rectified the deficiencies identified by the review
 - outline what, if any, steps the respondent will take to notify individuals affected by the act or practice, where it has not already done so
 - contain dates by which the respondent must complete each step
 - be readily understood; for example, an undertaking that deals with complex and technical issues may have a glossary to define the terms used
 - be capable of implementation and include action which is capable of being measured or tested objectively
 - be certain and capable of enforcement; for example, each step that the respondent is required to complete must be clear and unambiguous

- contain the respondent's agreement to material that arose in conciliation (if conciliation occurred) being submitted in any proceeding to enforce the undertaking.⁵ Where an undertaking forms parts of a conciliated outcome, this could be achieved by a statement of agreed facts being attached to the undertaking with the consent of both the respondent and complainant
 - outline what, if any, steps the respondent will take to resolve the matter with individuals affected by the act or practice; for example, payment the respondent will make by way of compensation for any loss or damage suffered by reason of the act or practice of concern
 - contain the respondent's acknowledgement that the OAIC may publish the undertaking in full (see 'Publication' below for further information). Any concerns the respondent has about publication should be raised and resolved as the terms of the undertaking are being negotiated.
- 3.26 For undertakings relating to the My Health Record system, reference should also be made to ss 8 and 9 of the My Health Records Enforcement Guidelines when considering the terms of an undertaking.
- 3.27 The Commissioner will not accept an undertaking that:
- denies responsibility for the act or practice of concern⁶
 - merely undertakes to comply with the law without explaining how compliance will be achieved
 - seeks to impose terms or conditions on the OAIC or Commissioner (however, the undertaking may include an acknowledgement that certain information provided to the OAIC pursuant to the undertaking is communicated in confidence).

Procedural steps

- 3.28 When the acceptance of an enforceable undertaking is a possible regulatory outcome in a matter, the OAIC will generally follow the process set out below.

Raising the possibility of an enforceable undertaking

- 3.29 The possibility of an enforceable undertaking may arise where either:
- the respondent suggests to the OAIC that it gives an undertaking in relation to a matter
 - the OAIC raises the possibility of an undertaking with the respondent as a potential option in relation to a matter.
- 3.30 Before the OAIC raises the possibility of an undertaking, or when the respondent suggests giving an undertaking, the OAIC must assess whether an undertaking offers an appropriate

⁵ This is necessary because s 40A(5) of the Privacy Act limits the circumstances in which evidence of anything said or done in the course of the conciliation can be relied upon in legal proceedings. Such material can be used for this purpose where both the respondent and complainant agree. The OAIC would also need to obtain the complainant's agreement before material from a conciliation can be used in enforcement proceedings.

⁶ This does not preclude the possibility of an enforceable undertaking being accepted on a 'without prejudice' basis in circumstances where the OAIC considers that it would provide an effective regulatory outcome.

regulatory outcome in a matter, or whether an alternative regulatory outcome would be more appropriate. In making this assessment, the OAIC will refer to the factors set out in the [Privacy regulatory action policy](#), the [CDR regulatory action policy](#) or the [My Health Records Enforcement Guidelines](#) as applicable.

Negotiating the terms of the enforceable undertaking

- 3.31 Where the Commissioner considers that an undertaking may be an appropriate regulatory outcome in the matter and the respondent will consider giving an undertaking in relation to the matter, the OAIC and respondent can commence negotiation of the terms of that undertaking.
- 3.32 When negotiating the terms of the enforceable undertaking, the Commissioner (through the OAIC) will have regard to:
- the requirements for the terms of an undertaking set out above in this chapter or, if the undertaking is related to the My Health Records Act, ss 8.4 and 8.5 and ss 9.3 and 9.4 of the My Health Records Enforcement Guidelines
 - the interests of individuals who have been the subject of an interference with privacy
 - the OAIC's goal of taking enforcement action and how an undertaking will contribute to fulfilling the OAIC's regulatory role in the particular matter (see the [Privacy regulatory action policy](#) and [CDR regulatory action policy](#))
 - the principles guiding regulatory decisions and action outlined in the [Privacy regulatory action policy](#) or the [CDR regulatory action policy](#) if applicable, or if the undertaking is related to the My Health Records Act, the My Health Records Enforcement Guidelines.
- 3.33 Until an undertaking is accepted and signed by the Commissioner, the Commissioner retains the discretion to accept or not accept the undertaking when it is submitted for final approval. Any agreement on terms between OAIC staff and the respondent is 'in principle' agreement only and subject to final acceptance by the Commissioner.
- 3.34 At the outset of negotiations, the OAIC will identify a reasonable time frame within which any undertaking should be negotiated. If an agreed undertaking cannot be negotiated within that time, the OAIC will consider pursuing alternative enforcement mechanisms such as potential for the Commissioner to make a determination in respect of the matter.

Commissioner considers whether to accept the enforceable undertaking

- 3.35 Where OAIC staff and the respondent have agreed on terms, the proposed undertaking to be given by the respondent will be submitted to the Commissioner for consideration.
- 3.36 The decision to accept an undertaking in the terms given by the respondent will be made by the Commissioner.
- 3.37 Whether the Commissioner accepts an undertaking will be determined on a case by case basis, with reference to the [Privacy regulatory action policy](#), the [CDR regulatory action policy](#) or the My Health Records Enforcement Guidelines (as applicable), and whether the Commissioner believes that the respondent has the ability to, and genuinely intends to, comply with the terms of the undertaking.

Approval of the Independent Expert

- 3.38 The Independent Expert is expected to provide assurance to the Commissioner that the steps planned or taken by the respondent satisfy the terms of the undertaking. The Independent Expert must be competent to undertake the role and independent from the respondent, such that he or she can bring objective and impartial judgment to the role. It is important that the Independent Expert is, and is seen to be, independent.
- 3.39 It is the responsibility of the respondent and the proposed Independent Expert to demonstrate competence and independence. The Commissioner may make any inquiries considered necessary in order to be satisfied that the proposed Independent Expert brings the requisite competence and independence to the role.
- 3.40 Factors the Commissioner may consider when determining whether a proposed Independent Expert is competent to undertake the role:
- the qualifications, experience and technical expertise of the proposed Independent Expert, or the senior staff within the relevant entity who will be engaged in the work
 - whether the Independent Expert has adequate resources to perform the necessary work
 - where appropriate, references from entities regarding the proposed Independent Expert's demonstrated experience in related work.
- 3.41 Factors the Commissioner may consider when determining whether a proposed Independent Expert is sufficiently independent to undertake the role:
- whether the fees and remuneration received by the proposed Independent Expert from the respondent in the previous two years are material (materiality should be considered in the context of the Independent Expert's Australian-based revenue)
 - what other work senior staff proposed to conduct the work of the Independent Expert, have been engaged in for or on behalf of the respondent in the previous two years
 - whether there are any staff from the Independent Expert's entity embedded in the respondent's organisation, or otherwise operating under a co-sourcing arrangement
 - whether the senior staff proposed to conduct the work of the Independent Expert have ever previously worked for the respondent
 - whether the senior staff proposed to conduct the work of the Independent Expert have a financial or other interest in the respondent's business, such as shares
 - whether the senior staff proposed to conduct the work of the Independent Expert have previously audited, reviewed, planned, advised or implemented any systems and processes of the respondent, and if so, whether there is a nexus between those systems and processes and the undertaking
 - any joint ventures between the proposed Independent Expert and the respondent
 - whether the Independent Expert has satisfactory policies and processes in place to ensure that any conflict of interest that arises during the course of the undertaking is managed appropriately and reported to the Commissioner.

Decision communicated to the respondent

- 3.42 The OAIC will communicate the Commissioner's decision in writing to the respondent.

- 3.43 Where the Commissioner has agreed to accept the undertaking, this written correspondence will request the respondent to arrange signing of the undertaking by the CEO or other senior executive of the respondent, before returning the signed copy to the OAIC for execution by the Commissioner.
- 3.44 Where the Commissioner has not agreed to accept the undertaking, the written correspondence will advise the respondent of the OAIC's next steps in the matter. This may involve further negotiations in relation to the proposed undertaking, or consideration of alternative enforcement action.

Undertaking published

- 3.45 Once the undertaking has been executed by both the respondent and the Commissioner, the OAIC will generally publish the undertaking (see the 'Publication' heading below).

Ongoing monitoring

- 3.46 It is the respondent's responsibility to ensure it complies with the terms of the undertaking. The OAIC will maintain contact with the respondent and monitor the respondent's compliance, including by ensuring that required reports and notifications are provided in accordance with the timeframes outlined in the enforceable undertaking. If the respondent breaches the undertaking, the OAIC may take further action (see below).

Varying, withdrawing and cancelling an enforceable undertaking

- 3.47 A respondent can vary or withdraw an enforceable undertaking, but must have the consent of the Commissioner in order to do so.⁷
- 3.48 The decision as to whether or not to allow a respondent to vary or withdraw an undertaking will be made by the Commissioner on a case-by-case basis.
- 3.49 The Commissioner generally will only consent to the variation or withdrawal of an undertaking if:
- compliance with the enforceable undertaking is subsequently found to be impractical, or
 - there has been a material change in the circumstances which led to the undertaking being given, meaning that variation or withdrawal are appropriate in the circumstances.
- 3.50 In addition, the Commissioner will only consent to variation or withdrawal where satisfied that an appropriate regulatory outcome will still be achieved in the circumstances. In the case of the withdrawal of an undertaking, the OAIC may decide to take alternative enforcement action.
- 3.51 A respondent wishing to seek consent to varying or withdrawing an undertaking should make a request in writing to the OAIC. Where the Commissioner consents to the variation or

⁷ Privacy Act s 80V, My Health Records Act s80, which trigger Part 6 of the Regulatory Powers Act.

withdrawal of an undertaking, the OAIC will communicate this decision to the respondent in writing.⁸

- 3.52 In addition, the Commissioner may, by written notice given to the respondent, cancel an undertaking accepted under either the Privacy Act, the My Health Records Act or the Competition and Consumer Act.⁹ A decision to cancel an undertaking would normally only be made where subsequent information or conduct by the respondent leads the OAIC to consider that the undertaking is not an effective regulatory outcome in the circumstances. This is only expected to occur in exceptional circumstances, for example, if the Commissioner was misled about the extent of a particular breach.

Breach of an enforceable undertaking

- 3.53 Where the OAIC believes that a respondent has breached the terms of an enforceable undertaking, the OAIC will generally use the following procedure.
- 3.54 The OAIC will first bring the issue of suspected or actual non-compliance with the terms of the undertaking to the attention of the respondent and seek a response. This notification and response may be sufficient to resolve the breach.
- 3.55 The OAIC may decide to address non-compliance through the court enforcement mechanisms in Part 6 of the Regulatory Powers Act. This process is outlined below.
- 3.56 The factors which the Commissioner will take into account when deciding whether to seek an order from a court to enforce an undertaking are set out in the *Privacy regulatory action policy* and, where applicable, the *CDR regulatory action policy* or the My Health Records Enforcement Guidelines. In addition, the Commissioner will also consider the following factors:
- the nature and length of non-compliance
 - the reason for non-compliance
 - whether the non-compliance was inadvertent
 - whether the respondent had previously not complied with the terms.
- 3.57 In limited circumstances, the OAIC may initiate further negotiations with the respondent to expand or otherwise vary the terms of the undertaking.
- 3.58 For an undertaking relating to compliance with the My Health Records Act, the OAIC may also refer the issue to the My Health Record System Operator who has the power to take administrative action against the respondent.

Enforcement through the Court

- 3.59 Where the OAIC decides to address non-compliance through the court enforcement mechanisms in Part 6 of the Regulatory Powers Act, the Commissioner may apply to a relevant court for one of a number of orders.

⁸ See s 114(3) of the Regulatory Powers Act.

⁹ See s 80V of the Privacy Act, s 80 of the My Health Records Act and s 56EW of the Competition and Consumer Act, which trigger Part 6 of the Regulatory Powers Act; also see s 8.8 of the My Health Records Enforcement Guidelines.

3.60 In general terms, a court may make any or all of the following orders:

- directing the respondent to comply with the undertaking
- directing the respondent to pay compensation
- any other kind that the court thinks appropriate.

Publication

3.61 The OAIC may publish an enforceable undertaking on the OAIC's website (s 80V (4) of the Privacy Act and s 80 (4) of the My Health Records Act).

3.62 Generally, the OAIC will publish an undertaking on its website <www.oaic.gov.au>. An undertaking will usually contain an acknowledgement from the respondent that the undertaking may be published, unless the OAIC has agreed otherwise with the respondent when the undertaking terms were being negotiated (see above). The OAIC may agree otherwise where it is inappropriate to publish all or part of an undertaking because of statutory secrecy provisions or for reasons of privacy, confidentiality, commercial sensitivity, security or privilege.

3.63 The publication of an undertaking may be accompanied by other communications such as a media release, media interview or social media posts. The OAIC generally will also publicly communicate:

- a decision by the Commissioner to vary, withdraw or cancel a published undertaking
- the initiation of court proceedings to enforce an undertaking.

3.64 In addition, before court proceedings are initiated, the OAIC may publicly communicate the fact that a respondent has breached the terms of an undertaking and that the OAIC is making inquiries with the respondent.

Chapter 4: Determinations

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Legislative framework

- 4.1 After investigating a complaint,¹ the Commissioner may make a determination which either dismisses the complaint or finds that the complaint is substantiated (s 52(1)).
- 4.2 The complaint handling process under the Privacy Act is free and informal. Parties do not require legal representation to participate in the complaint handling process or the determination process. Parties generally bear their own costs in the complaint handling process.²
- 4.3 The Commissioner can also make a determination after conducting an investigation on his or her own initiative (s 52(1A)).³

¹ Information about our complaint handling process can be found in Chapter 1.

² Where a matter is determined s 52(3) provides for the Commissioner to award an amount to reimburse a complainant for expenses reasonably incurred by the complainant in connection with the making of the complaint and the investigation of the complaint.

³ Information about Commissioner initiated investigations can be found in Chapter 2.

When will a determination be made?

Following an investigation of a complaint

- 4.4 The Commissioner generally tries to resolve complaints through conciliation as provided for by the Privacy Act (s 40A). Sometimes where a matter cannot be resolved through conciliation, and where the complaint is not able to be finalised on some other basis (for example, because the complaint is declined under s 41(1)), the Commissioner may make a determination under s 52.
- 4.5 When deciding whether to make a determination in response to a complaint under s 36, the Commissioner will take into account a number of factors. Factors that would weigh in favour of a determination include that:
- it appears there is a prima facie interference with privacy,⁴ the parties are unable to resolve the matter through conciliation, and the matter cannot otherwise be finalised
 - one or both parties has requested that the matter be finalised by way of a determination and the Commissioner considers that making a determination would be the appropriate resolution in the particular circumstances
 - the issues raised by the complaint are complex and/or systemic⁵
 - the investigation process has not been able to resolve whether an interference with privacy has occurred, and it is likely that the determination process would resolve that question.
- 4.6 The OAIC will also review the matter against either the *Privacy regulatory action policy*), the *CDR regulatory action policy* or the My Health Records Enforcement Guidelines as applicable when considering whether to make a determination.

Following an investigation on the Commissioner's own initiative

- 4.7 Following an investigation on the Commissioner's own initiative, the Commissioner may make a determination under s 40(1A).
- 4.8 A determination is one of several possible outcomes of a Commissioner initiated investigation where a breach appears likely to have occurred. Rather than finalising an investigation by determination, the Commissioner might, for example, accept an enforceable undertaking offered by the respondent. The possible outcomes are discussed in Chapter 2 – Commissioner initiated investigations.
- 4.9 When deciding whether to make a determination, the Commissioner will take into account a number of factors. Factors that would weigh in favour of a determination include that:
- it appears there is a prima facie interference with privacy
 - the respondent has not cooperated with the Commissioner's inquiries or investigation, and the Commissioner believes that it is necessary to make formally binding

⁴ As explained in the Introduction, an 'interference with privacy' includes contraventions of certain provisions of the My Health Records Act.

⁵ See definition of systemic privacy issues in the *Privacy regulatory action policy* (paras 12-13).

declarations that the respondent must take certain steps to address the interference with privacy

- there is a disagreement between the Commissioner and the respondent about whether an interference with privacy has occurred, and the determination would allow that question to be resolved, and
- there is a public interest in the Commissioner making a declaration setting out his or her reasons for finding that an interference with privacy has occurred, and the appropriate response by the respondent.

4.10 The OAIC will also review the matter against either the *Privacy regulatory action policy*, the *CDR regulatory action policy* or the My Health Records Enforcement Guidelines as applicable when considering whether to make a determination.

Procedural steps in making a determination

4.11 In making a determination, the Commissioner may conduct further investigation, and consider additional submissions and information provided by the parties.

4.12 The procedural steps below relate to a determination following investigation of a complaint, but will generally apply in the case of a determination following a Commissioner initiated investigation. However, some steps may not be relevant to a Commissioner initiated investigation, given there is no ‘complainant’ or conciliation process.

4.13 Where a matter is to proceed to determination the OAIC will generally take these steps:

- The OAIC will notify the parties in writing about its decision to make a determination and the basis for that decision. The notice will state how to make submissions, if the parties wish to do so, and the timeframe for making any submissions. In limited cases oral submissions may be sought. The Commissioner may also seek specific information about the remedies sought by the complainant.
- The Commissioner cannot consider any action done or information provided during the course of conciliation unless the complainant and respondent both agree (s 40A).
- If the Commissioner requires further information, and it is not voluntarily forthcoming on request, the Commissioner may, under s 44 of the Privacy Act, require the production of that information from the complainant, the respondent or a third party. The Commissioner may also, under s 45, require a witness to attend and answer questions.
- The Commissioner will adhere to the principles of natural justice and procedural fairness in determining a matter. Those principles include the parties having the opportunity to examine and comment on the information the Commissioner relies on in making the determination. On this basis, the OAIC will provide each party with the submissions and information received from the other party.
- Submissions will generally not be accepted on a confidential basis. This is because any determination made by the Commissioner would not be able to explicitly refer to the contents of such a submission and, in addition, a determination based on material in the submission would generally not satisfy the ‘procedural fairness’ principle unless the other party has been given a chance to respond to it.
- In exceptional circumstances where confidential or commercially sensitive information is essential to the determination process, the Commissioner will accept that information

on a confidential basis and provide access to a summary of that material to ensure the other party is not disadvantaged.

- Parties may request that the Commissioner hold a hearing before making a determination under s 43A of the Act. However, whether a hearing is held is at the discretion of the Commissioner (s 43A(2)(c)). Where a party has requested a hearing, the Commissioner will give all interested parties a reasonable opportunity to make a submission about the request (s 43A(2)(b)).
- Where the Commissioner has allowed an oral submission to be made or a hearing to be held, both parties will generally be invited to participate. The format of a hearing generally comprises the parties providing their oral submissions and responding to questions that the Commissioner may have. The format will also depend on a range of matters including whether the hearing is held by phone, by video conference or at the OAIC's, or another, premise.
- The Commissioner may seek external expert opinion, independent of the parties and at no cost to them, where a matter arising from the determination process raises issues that would benefit from specific technical or other expertise. In those cases, the parties will be advised of the name and qualifications of the external expert and their role in the proceedings.
- In making the determination, the Commissioner will determine whether, on the balance of probabilities, an interference with privacy occurred, having regard to all information available to the Commissioner.

Content of determinations

4.14 A determination will generally contain the following information:

- the relevant parties, including, where relevant, the class members who are to be affected by the determination in relation to a representative complaint (s 53)
- the background to and summary of the complaint or Commissioner initiated investigation, which may include a chronology of events
- the OAIC's investigation process
- the legislative framework
- a summary of the parties' submissions
- any findings of fact (s 52(2))
- whether the complaint is substantiated (s 52(1)(b)) or is dismissed (s 52(1)(a)) following an investigation of a complaint
- any relevant declarations or orders which may include:
 - a declaration that the respondent has engaged in conduct that interfered with the privacy of an individual and that the respondent should not repeat or continue the conduct (s 52(1)(b)(i); s 52(1A)(a))
 - a declaration that respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued (s 52(1)(b)(ia); s 52(1A)(b))

- a declaration that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii)), or with a Commissioner initiated investigation, any loss or damage suffered by one or more individuals whose privacy has been interfered with (s 52(1A)(c))
- a declaration that the complainant (or a Commissioner initiated investigation, one or more individuals whose privacy has been interfered with) is entitled to compensation (s 52(1)(b)(iii); s 52(1A)(d))
- a declaration that it would be inappropriate for any further action to be taken in the matter (52(1)(b)(iv); s 52(1A)(e))
- for determination following a complaint, a declaration that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred by the complainant in connection with making the complaint and the investigation of the complaint (s 52(3))
- in relation to representative complaints, the Commissioner may specify amounts or a way to work out amounts for payment to the complainants concerned (s 52 (4)) and may make directions in relation to the manner in which a class member is to establish his or her entitlement to the payment of an amount under the determination; and the manner for determining any dispute regarding the entitlement of a class member to the payment (s 52(5))
- the relevant review and enforcement mechanisms (discussed below).

Compensation

Following an investigation of a complaint

4.15 Where the Commissioner makes a declaration that a complainant is entitled to an amount of compensation, the Commissioner is guided by the following principles on awarding compensation, drawn from a Federal Court decision:

- where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
- awards should be restrained but not minimal
- in measuring compensation the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute
- in an appropriate case, aggravated damages may be awarded
- compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.⁶

4.16 In addition, the Commissioner is also guided by the principle that once loss is proved, there would need to be good reason why compensation for that loss should not be awarded.⁷ Loss

⁶ *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 as referred to in *Rummery and Federal Privacy Commissioner* [2004] AATA 1221, [32]-[35].

⁷ *Rummery and Federal Privacy Commissioner* [2004] AATA 1221 [34].

or damage in this context can include hurt feelings and/or humiliation suffered by the complainant. The Commissioner may also award an amount to reimburse the complainant for expenses reasonably incurred in connection with the making of the complaint and the investigation of the complaint.

- 4.17 In deciding whether to award compensation and in assessing the appropriate amount of compensation, the Commissioner will consider the information submitted by the parties and previous privacy determinations.
- 4.18 The Commissioner can also award aggravated damages as well as general damages where he or she is of the view it is warranted.⁸ The principles for awarding aggravated damages, drawn from Federal Court decisions, include:
- aggravated damages may be awarded where the respondent behaved ‘high-handedly, maliciously, insultingly or oppressively in committing the act’ complained about⁹
 - the ‘manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages’.¹⁰

Following an investigation on the Commissioner’s own initiative

- 4.19 The Commissioner also has power to award compensation following a determination made after an investigation conducted on the Commissioner’s own initiative.
- 4.20 However, a Commissioner initiated investigation is less likely to determine the quantum of loss or damage suffered by individuals affected by an interference with privacy. Rather than awarding compensation by determination, the OAIC would typically inform affected individuals to make a complaint about the act or practice if the individual believes he or she has suffered compensable loss or damage.

Publication of determinations

- 4.21 Once made, and sent to the parties, determinations will be published on the OAIC’s website and on the AustLII website.¹¹
- 4.22 The Commissioner will generally publish the name of the respondent. However, the Commissioner will generally not publish the names of complainants, respondent individuals or any third party individuals.

Review rights

- 4.23 A party may apply under s 96 of the Privacy Act to have a decision under subsection 52(1) or (1A) to make a determination reviewed by the AAT. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm a privacy

⁸ *Rummery* [2004] AATA 1221 [32].

⁹ *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].

¹⁰ *Elliott v Nanda & Commonwealth* [2001] FCA 418 [180].

¹¹ [Australian Information Commissioner on AustLII](#).

determination. An application to the AAT must be made within 28 days after the day on which the person is given the privacy determination (s 29(2) of the *Administrative Appeals Tribunal Act 1975* (Cth)). An application fee may be payable when lodging an application for review to the AAT.

- 4.24 A party may also apply under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to have the determination reviewed by the Federal Circuit Court or the Federal Court of Australia. The Court may refer the matter back to the Commissioner for further consideration if it finds the decision was wrong in law or the Commissioner's powers were not exercised properly. An application to the Court must be lodged within 28 days of the date of the determination. An application fee may be payable when lodging an application to the Court.

Enforcement of determinations

- 4.25 Under s 55 of the Privacy Act, where a determination applies to a respondent that is not a government agency, the respondent must comply with any declarations made in the determination within the period specified in the determination.
- 4.26 Under s 58 of the Privacy Act, where a determination applies to a government agency it must comply with any declarations made by the Commissioner in that determination.
- 4.27 Either the complainant or Commissioner may commence proceedings in the Federal Court or the Federal Circuit Court for an order to enforce a determination. However different rules apply depending on who the respondent is, for example, if the respondent is not a government agency the Court will re-examine whether there has been an interference with privacy.

Chapter 5: Injunctions

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Legislative framework

- 5.1 An injunction is a Court order directing a person to do a specific thing or, more commonly, to not do a specific thing.
- 5.2 The Privacy Act, the My Health Records Act and the Competition and Consumer Act empower the Commissioner to apply to a federal Court for an injunction against a person. This chapter relates to an injunction application made by the Commissioner.

Injunctions under the Privacy Act

- 5.3 Section 80W of the Privacy Act with Part 7 of the Regulatory Powers Act empowers the Commissioner (or any other person) to apply to the Federal Court or Federal Circuit Court for an injunction.
- 5.4 Where a person has engaged, is engaging, or is proposing to engage, in any conduct that constituted or would constitute a contravention of the Privacy Act, the Court may grant an injunction:
 - restraining a person from engaging in the conduct; and
 - if in the Court’s opinion it is desirable to do so, requiring the person to do an act or thing (s 121(1) of the Regulatory Powers Act).

- 5.5 The Court may also grant an injunction requiring a person to do an act or thing where the person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do that act or thing where that refusal or failure was, is, or would be a contravention of the Privacy Act (s 121(2) of the Regulatory Powers Act).
- 5.6 Where an application is made to a Court for an injunction under s 80W, the Court may, if in the Court's opinion it is desirable to do so, grant an interim injunction restraining a person from engaging in conduct pending the determination of the application (s 122 of the Regulatory Powers Act).
- 5.7 'Person' in Part 7 of the Regulatory Powers Act includes natural persons, bodies politic, corporations, companies and bodies corporate.¹

Injunctions under the My Health Records Act

- 5.8 Under s 81 of the My Health Records Act, the Commissioner (or the My Health Record System Operator²) may apply to a Court for an injunction. Section 81 of the My Health Records Act triggers the provisions of Part 7 of the Regulatory Powers Act which deals with obtaining, imposing and discharging injunctions to enforce legislative provisions.
- 5.9 If a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of the My Health Records Act, a Court may grant an injunction:
- restraining the person from engaging in the conduct; and
 - if in the Court's opinion it is desirable to do so, requiring the person to do any act or thing.
- 5.10 The Court may also grant an injunction requiring a person to do an act or thing if the person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do that act or thing and that refusal or failure was, is, or would be a contravention of the My Health Records Act.
- 5.11 Under the My Health Records Act, a 'Court' means the Federal Court of Australia, the Federal Circuit Court, or a court of a State or Territory that has jurisdiction in relation to matters arising under the My Health Records Act (s 81(3)).
- 5.12 If an application is made to a Court for an injunction under s 81 of the My Health Records Act (see also Part 7 of the Regulatory Powers Act), the Court may grant an interim injunction restraining a person from engaging in conduct or requiring a person to do a thing, before considering the application and pending the determination of the application. See below for further information about interim injunctions.
- 5.13 'Person', for the purpose of s 81 of the My Health Records Act, includes natural persons, bodies politic, corporations, companies and bodies corporate.³

¹ Section 2C of the *Acts Interpretation Act 1901* and s 6(4) of the Privacy Act.

² 'System Operator' is defined in s 14 of the My Health Records Act.

³ Section 2C of the *Acts Interpretation Act 1901*.

Injunctions under the Competition and Consumer Act

- 5.14 Under s 56EX of the Competition and Consumer Act, the Commissioner may apply to a Court for an injunction. Section 56EX of the Competition and Consumer Act triggers the provisions of Part 7 of the Regulatory Powers Act.
- 5.15 If a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of a privacy safeguard, a Court may grant an injunction:
- restraining the person from engaging in the conduct; and
 - if in the Court's opinion it is desirable to do so, requiring the person to do any act or thing.
- 5.16 The Court may also grant an injunction requiring a person to do an act or thing if the person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do that act or thing and that refusal or failure was, is, or would be a contravention of a privacy safeguard.
- 5.17 Under the Competition and Consumer Act, a 'relevant court' means the Federal Court of Australia, the Federal Circuit Court, or a court of a State or Territory that has jurisdiction in relation to the matter (s 56EX(3)).
- 5.18 If an application is made to a Court for an injunction under s 56EX of the Competition and Consumer Act (see also Part 7 of the Regulatory Powers Act), the Court may grant an interim injunction restraining a person from engaging in conduct or requiring a person to do a thing, before considering the application and pending the determination of the application. See below for further information about interim injunctions.
- 5.19 'Person', for the purpose of s 56EX of the Competition and Consumer Act, includes natural persons, bodies politic, corporations, companies and bodies corporate.⁴

Which Act to use?

- 5.20 Conduct that interferes, or would interfere, with an individual's privacy, but does not relate to a contravention of the My Health Records Act or to a privacy safeguard set out in Part IVD of the Competition and Consumer Act, is governed by the Privacy Act, and the Commissioner may apply to a Court for an injunction under that Act.
- 5.21 Conduct that contravenes certain provisions of the My Health Records Act are deemed by s 73 of that Act to be an interference with an individual's privacy for the purposes of the Privacy Act. Depending on the circumstances, the Commissioner may apply to a Court in relation to conduct that contravenes or would contravene certain provisions of the My Health Records Act, for an injunction under the My Health Records Act or the Privacy Act.
- 5.22 Section 81 of the My Health Records Act also empowers the My Health Record System Operator to make an application for an injunction. The OAIC may consult with the System Operator when investigating a complaint and considering whether to apply for an injunction, in line with the *Agreement for information sharing and complaint referral relating to the personally controlled electronic health (eHealth) system between the OAIC and the System Operator*.⁵

⁴ Section 2C of the *Acts Interpretation Act 1901*.

⁵ The agreement can be viewed on the [OAIC's website](#).

- 5.23 For conduct that is a breach of a privacy safeguard, the Commissioner may apply to a Court for an injunction under the Competition and Consumer Act.

Purpose and key features of an injunction

- 5.24 Injunctions are an important enforcement tool for compelling a person to modify their behaviour in order to prevent them from contravening, or from continuing to contravene, the Privacy Act, the My Health Records Act, or a privacy safeguard set out in Part IVD of the Competition and Consumer Act.
- 5.25 Generally, an injunction may be appropriate if the conduct:
- is serious or has had, or is likely to have, serious or extensive adverse consequences
 - is systemic or poses ongoing compliance or enforcement issues
 - is deliberate or reckless or where the entity involved is not being cooperative, or
 - raises significant concerns of public interest.
- 5.26 The Commissioner may seek an injunction on its own or with civil penalty proceedings, or other enforcement action.

Interim injunctions

- 5.27 The OAIC may seek and obtain a temporary injunction (known as an ‘interim injunction’) on an urgent basis pending the Court’s determination of an application for a permanent injunction under s 80W of the Privacy Act, s 81 of the My Health Records Act or s 56EX of the Competition and Consumer Act (see also Part 7 of the Regulatory Powers Act). An interim injunction may prevent further harm or maintain the status quo. The interim injunction will be effective from the time the interim injunction is granted to the time that the Court’s final decision is made.
- 5.28 The OAIC may seek an interim injunction on an ‘ex parte’ basis, meaning that the Court may consider whether to make the order without the respondent participating. Ex parte interim injunctions will generally be sought by the OAIC at the start of Court proceedings and in urgent circumstances, where an injunction is required as soon as possible and it is not practicable for the OAIC to first contact the respondent. This type of injunction will usually only be effective for a short period – typically no more than one week. After this period, the OAIC will have to participate in a further Court hearing with the respondent present.
- 5.29 Under s 122(1) of the Regulatory Powers Act, the Court has a general power to grant interim injunctions — meaning that an interim injunction restraining a person from engaging in conduct or an interim injunction compelling a person to do a particular act or thing may be possible depending upon the circumstances.
- 5.30 To obtain an interim injunction under s 80W of the Privacy Act, s 81 of the My Health Records Act or s 56EX of the Competition and Consumer Act, the Commissioner must establish that:
- there is a serious question to be tried in relation to the facts asserted to support the injunction application
 - the balance of convenience favours granting an injunction, in that the harm or inconvenience caused by the refusal of an injunction outweighs the harm or inconvenience that the respondent would suffer if the injunction were granted, and

- it is desirable in all the circumstances to grant the interim injunction.
- 5.31 Factors relevant to the balance of convenience include:
- the strength of the Commissioner’s case
 - the purpose served by the interim injunction (for example, is it designed to prevent the respondent from taking an action that would render granting a final injunction futile)
 - the effect of the injunction on the respondent and any third parties
 - the availability of alternative remedies
 - any delay in making the application, and
 - any undertakings offered by the respondent to cease (or not to commence) the relevant conduct.⁶
- 5.32 Where the Commissioner is applying for an ex parte interim injunction, the Commissioner will also be subject to a special ethical obligation usually described as the ‘duty of utmost disclosure’. This means that the Commissioner must disclose all factors relevant to a consideration of whether to grant an interim injunction – especially those factors which go against granting an injunction.
- 5.33 This duty is treated most seriously by the Court, and a failure to comply will normally result in a discharge of the injunction, with costs ordered against the applicant. A failure by the Commissioner to disclose relevant factors would also be a breach of the Commonwealth’s obligation to act as a model litigant under the Legal Services Directions.

Permanent injunctions

- 5.34 For a permanent injunction, the Commissioner must establish on the balance of probabilities that the facts asserted to support the injunction are made out.
- 5.35 The power to grant an injunction is a discretionary power and the Court will also consider whether it is desirable in all the circumstances to exercise that power having regard to the scope and purpose of the relevant Act.

Injunctions restraining a person from engaging in conduct

- 5.36 To grant an injunction restraining a person from engaging in conduct, the Court must be satisfied that:
- a person has engaged, is engaging in or is proposing to engage in conduct in contravention of either the Privacy Act, the My Health Records Act or a privacy safeguard set out in Part IVD of the Competition and Consumer Act.
- 5.37 The Court may grant an injunction restraining a person from engaging in conduct whether or not:
- it appears to the court that the person intends to engage again in conduct of that kind,
 - the person has previously engaged in conduct of that kind, and

⁶ See *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148.

- there is an imminent danger of substantial damage to any person if the first mentioned person were to engage in conduct of that kind (s 124(1) of the Regulatory Powers Act).
- 5.38 Where the Court grants an injunction restraining a person from engaging in conduct that is, or would be, a contravention of the Privacy Act, or the My Health Records Act or a privacy safeguard as set out in Part IVD of the Competition and Consumer Act, the Court may also make an order requiring the person to do any act or thing, if it is in the Court's opinion desirable to do so (s 80W of the Privacy Act, and s 81 of the My Health Records Act and s 56EX of the Competition and Consumer Act (see also Part 7 of the Regulatory Powers Act)).
- 5.39 For example, a Court may grant a permanent injunction restraining a person from collecting certain information about consumers and requiring them to put in place specified risk management practices to prevent similar breaches from occurring again.

Injunctions requiring a person to do a thing

- 5.40 To grant an injunction requiring a person to do a thing, the Court must be satisfied that:
- a person has refused or failed, or is proposing to refuse or fail, to do a thing; and
 - the refusal or failure was, is, or would be a contravention of either the Privacy Act, the My Health Records Act or a privacy safeguard set out in Part IVD of the Competition and Consumer Act.
- 5.41 The Court may grant an injunction requiring a person to do a thing whether or not:
- it appears to the Court that the person intends to refuse or fail again to do the thing,
 - the person has previously refused or failed to do that thing, and
 - there is an imminent danger of substantial damage to any person if the first mentioned person were to refuse or fail to do that thing (s 124(2) of the Regulatory Powers Act).
- 5.42 For example, a Court may grant a mandatory injunction requiring a person to correct personal information it holds about individuals.

The content of injunctions

- 5.43 The form of any injunction sought must be certain and capable of enforcement. It must be clear and unambiguous to the affected person, and to the Court, what it is that they must do or not do.
- 5.44 The Court will not grant an injunction that simply requires a person to 'comply with the Act'. An injunction must set out the specific acts that the person must do or not do.
- 5.45 An injunction should not prohibit conduct falling outside the boundaries of s 80W of the Privacy Act, s 81 of the My Health Records Act or s 56EX of the Competition and Consumer Act. That is, an injunction cannot operate on conduct that is not related to ensuring compliance with the Privacy Act, My Health Records Act, or a privacy safeguard set out in Part IVD of the Competition and Consumer Act.

Procedural steps in seeking an injunction

- 5.46 When seeking an injunction, the OAIC will generally use the following steps:

- Where the OAIC becomes aware that an entity might have engaged, be engaging, or proposes to engage in conduct that would contravene the Privacy Act, My Health Records Act or a privacy safeguard set out in Part IVD of the Competition and Consumer Act, the OAIC will make preliminary inquiries about the matter.
- The OAIC will review the matter against the *Privacy regulatory action policy* (including the factors set out in paragraph 38) or s 7.1 of the My Health Records Enforcement Guidelines or the *CDR regulatory action policy* as applicable, as well as the additional factors outlined above, in paragraph 25, to assess whether seeking an injunction is an appropriate regulatory response, either by itself or in conjunction with other remedies.
- Where an injunction is identified as an appropriate regulatory response in the circumstances, the OAIC will assess the matter to determine whether enough admissible evidence and arguments exist to satisfy the Court of the matters it must consider in determining whether to grant an injunction. The amount and type of evidence required to support an application for an injunction will depend on the type of injunction being sought (see above). External legal counsel may be briefed at this time.
- Where the available evidence and arguments are considered sufficient, the Commissioner will consider and decide whether to commence proceedings. To make this decision, the Commissioner will refer to either the *Privacy regulatory action policy* (including the factors set out in paragraph 38) or s 11.3 of the My Health Records Enforcement Guidelines or the *CDR regulatory action policy* as applicable. Where proceedings are to be commenced, external legal counsel will usually be engaged to run the matter.
- The appropriate Court documents to initiate proceedings will be prepared and lodged with the Court, and served on the respondent entity.
 - Generally, only persons who are parties to the legal proceedings in which an injunction is granted will be bound by the injunction. It is important to ensure that all persons the Commissioner seeks to bind by an injunction are joined as respondents in the proceedings.
 - This application must generally be accompanied by a supporting affidavit of the Commissioner, setting out:
 - the conduct, refusals or failures the Commissioner considers is, or would be, a breach of the Privacy Act, the My Health Records Act or a privacy safeguard set out in Part IVD of the Competition and Consumer Act
 - the evidence on which the Commissioner bases this view, and
 - the specific orders that the Commissioner is seeking from the Court.
 - In very urgent circumstances, including where a matter is heard on an *ex parte* basis, (such as where the need for an injunction becomes apparent a matter of hours before the conduct is likely to occur), the Commissioner may provide the above information orally at hearing.
- Following receipt of the Commissioner's application, the Court will set down a time to hear the application for an injunction.
- The OAIC will pursue the application in accordance with its model litigant obligations, any relevant Court rules and procedures, and any directions or orders issued by the Court.

- Following judgment in the matter, the OAIC will generally publicly communicate the outcome of the proceedings.
- If the OAIC is dissatisfied with the Court's decision (for example, if the Court refused to grant an injunction), the OAIC may consider the possible grounds for appeal and whether or not to institute appeal proceedings. In making this decision, the OAIC will act in accordance with its model litigant obligations.
- If the respondent appeals the decision, the OAIC will participate in the appeal proceedings and will act in accordance with its model litigant obligations.

After an injunction has been granted

- 5.47 The Court may discharge or vary an injunction granted under s 80W of the Privacy Act, s 81 of the My Health Records Act or s 56EX of the Competition and Consumer Act (see also Part 7 of the Regulatory Powers Act).
- 5.48 If a person who is the subject of an injunction breaches the injunction, they may be held in contempt of Court, which is punishable by fines and/or imprisonment.
- 5.49 Where the OAIC believes that a respondent has breached an injunction, the OAIC will generally first bring suspected or actual non-compliance to the attention of the respondent and seek a response. This notification and response may resolve the breach.
- 5.50 If the breach remains unresolved, the OAIC may then consider whether it would be appropriate to bring proceedings for contempt of Court. This process requires the OAIC to apply to the Court, supported by evidence and submissions. The burden of proof for contempt proceedings is the criminal standard: the breach must be proven beyond reasonable doubt. Legal advice should be sought before any decision is made to bring contempt proceedings.

Publication

- 5.51 Generally, the OAIC will publicly communicate the following information in connection with an injunction application:
- that proceedings seeking an injunction against a particular respondent have been initiated⁷
 - the outcome of the injunction proceedings
 - where an injunction is granted, the orders made by the Court (subject to any limitations placed on the publication of the orders by the Court)
 - the lodgement of appeal proceedings by either the OAIC or the respondent, and
 - the outcome of any appeal proceedings.
- 5.52 Where an interim injunction has been granted, the OAIC will take care in its communications to avoid any suggestion that a finding has been made that a person has breached the relevant Act or privacy safeguard. By their nature interim injunctions are granted without the

⁷ The initiation of proceedings will not be publicly communicated in the event an ex parte injunction is being sought (an injunction granted by a Court without notice to the respondent who will be bound by the injunction).

Court having yet decided about whether there has been a breach of the relevant Act or privacy safeguard.

- 5.53 Where a Court grants an injunction, the OAIC will, on its website <www.oaic.gov.au>, either publish, or provide a link to, the orders made by the Court. Where the Court has placed limitations on the publication of the orders, the OAIC may publish a redacted version of the orders, or a summary of the orders.
- 5.54 In addition, the OAIC may publicly communicate the fact that the respondent has breached the injunction, and any fine or other punishment meted to the respondent in connection with that breach.

Chapter 6: Civil penalties — serious or repeated interference with privacy and other penalty provisions

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Legislative framework

- 6.1 Section 80W of the Privacy Act empowers the Commissioner to apply to the Federal Court or Federal Circuit Court for an order that an entity, that is alleged to have contravened a civil penalty provision in that Act, pay the Commonwealth a penalty.
- 6.2 Each civil penalty provision specifies a maximum penalty for contravention of that provision. The penalty is expressed in ‘penalty units’. The value of a penalty unit is contained in s 4AA of the *Crimes Act 1914* (Cth).¹
- 6.3 The ‘civil penalty provisions’ in the Privacy Act include:
 - a serious or repeated interference with privacy (s 13G) – 2000 penalty units

¹ The value of a penalty unit as at July 2017 is \$210 — see <https://www.legislation.gov.au/Series/C1914A00012>

- various civil penalty provisions set out in Part IIIA – Credit reporting, with penalties of either 500, 1000 or 2000 penalty units.²
- 6.4 Under s 79 of the My Health Records Act, the Commissioner may apply to a court for an order that a person who is alleged to have contravened a civil penalty provision in that Act pay the Commonwealth a civil penalty. Section 79 triggers the provisions of Part 4 of the Regulatory Powers Act which deals with seeking and obtaining a civil penalty order for contraventions of civil penalty provisions.
- 6.5 The ‘civil penalty provisions’ in the My Health Records Act include:
- unauthorised collection, use or disclosure by a person of health information included in a healthcare recipient’s My Health Record, where the person knows or is reckless as to the fact the collection, use or disclosure is not authorised (s 59(1) and (2)) – criminal offence penalty is 120 penalty units or imprisonment for 2 years, or both. The civil penalty is 600 penalty units.
 - use or disclosure by a person of health information included in a healthcare recipient’s My Health Record where the information was disclosed to the person in contravention of s 59(2) and the person knows or is reckless as to that fact (s 60(1)) – criminal offence penalty is 120 penalty units or imprisonment for 2 years, or both. The civil penalty is 600 penalty units.
 - five other civil penalty provisions set out in Part 5 that relate to:
 - failing to provide required information to the My Health Record System Operator – 100 penalty units
 - failure by a registered healthcare provider organisation, registered repository operator, registered portal operator or a registered contracted service provider to notify a data breach, including a potential data breach, to the OAIC and/or My Health Record System Operator as soon as practicable after becoming aware of the breach – 100 penalty units.
 - failure by a registered healthcare provider organisation, a registered repository operator, a registered portal operator or a registered contracted service provider to notify the System Operator of ceasing to be eligible to be registered – 80 penalty units.
 - holding or taking records outside Australia – criminal offence penalty of 2 years imprisonment or 120 penalty units, or both, civil penalty of 600 penalty units.
 - certain contraventions of the My Health Records Rules – 100 penalty units
- 6.6 Similarly, under s 56EU of the Competition and Consumer Act, the Commissioner may apply to a court for an order that a person who is alleged to have contravened a civil penalty provision in that Act pay the Commonwealth a civil penalty. Section 56EU triggers the provisions of Part 4 of the Regulatory Powers Act which deals with seeking and obtaining a civil penalty order for contraventions of civil penalty provisions.
- 6.7 The ‘civil penalty provisions’ under s 56EU of the Competition and Consumer Act are subsections:
- 56ED(3)

² Some credit reporting civil penalty provisions have analogous ‘offence’ provisions. Sections 80ZD-80ZF of the Privacy Act outline when civil proceedings can be commenced and continued where criminal proceedings may also be initiated.

- 56EF(1)
 - 56EG(1)
 - 56EH
 - 56EI(1) or (2)
 - 56J(1) or (2)
 - 56EK(1)
 - 56EL(1) or (2)
 - 56EM(1) or (2)
 - 56EN(1), (2), (3) or (4)
 - 56EO(1) or (2)
 - 56EP(1) or (2).
- 6.8 The maximum amounts of penalties, as outlined in s 56EV of the Competition and Consumer Act, are:
- For a body corporate, the greater of either: \$10,000,000; the value of any benefit the relevant court has determined of the body corporate, or any body corporate related to it, obtained directly or indirectly that is reasonably attributable to the contravention, multiplied by three; or if the court cannot determine the value of that benefit, 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the contravention happened or began.
 - For a person other than a body corporate, the maximum penalty amount is \$500,000.
- 6.9 Particular conduct may contravene both a civil penalty provision in the My Health Records Act and the ‘serious or repeated interference with privacy’ civil penalty provision in the Privacy Act (s 13G). This is because contraventions of the My Health Records Act are interferences with privacy for the purposes of the Privacy Act, and so the OAIC may be able to seek a civil penalty for contravention of s 13G of the Privacy Act where the interference with privacy arises from a breach of the My Health Records Act.
- 6.10 An entity (or person) will also contravene a civil penalty provision, and be liable to pay a penalty, if it:
- attempts to contravene a civil penalty provision
 - aids, abets, counsels or procures a contravention of a civil penalty provision
 - induces a contravention of a civil penalty provision
 - is knowingly concerned in or a party to a contravention of a civil penalty provision, or
 - conspires with others to effect a contravention of a civil penalty provision.³
- 6.11 Under s 80U(2) of the Privacy Act, the Commissioner’s application to the court for a civil penalty order must be made within six years of the alleged contravention.

³ Section 80U of the Privacy Act and s 79 of the My Health Records Act (see also Part 4 of the Regulatory Powers Act, s 92).

- 6.12 If the court is satisfied that the entity (or person) has contravened the civil penalty provision (taking into account the relevant matters set out in the applicable legislation), it may order the entity (or person) to pay such penalty as the court determines appropriate.
- 6.13 For civil penalties of the Privacy Act and My Health Records Act, the maximum penalty that the court can order is the amount listed in the civil penalty provision or, for a body corporate, five times that amount (Privacy Act s 80U, Regulatory Powers Act s 82(5), and My Health Records s 79 (see also Part 4 of the Regulatory Powers Act)).
- 6.14 Where conduct contravenes more than one civil penalty provision, proceedings may be commenced in relation to each contravention; however, the entity (or person) cannot be liable for more than one penalty in relation to that conduct (Privacy Act s 80U; My Health Records Act s 79 and s 56EU(6) of the Competition and Consumer Act (see also Part 4 of the Regulatory Powers Act)).
- 6.15 Where an entity (or person) contravenes a single civil penalty provision multiple times, the court may award a single civil penalty order. However, the amount of that penalty cannot exceed the sum of the maximum penalties that could be ordered if a separate civil penalty order was made for each contravention (Privacy Act s 80U; My Health Records Act s 79 and s 56EV(1) of the Competition and Consumer Act (see also s 85 of the Regulatory Powers Act)).

Purpose and key features of seeking a civil penalty order

- 6.16 By requiring the payment of a penalty to the Commonwealth, a civil penalty order financially penalises an entity or person. A civil penalty order does not compensate individuals adversely affected by the contravention.⁴
- 6.17 The OAIC will not seek a civil penalty order for all contraventions of a civil penalty provision in the Privacy Act, My Health Records Act or the privacy safeguards. The OAIC is unlikely to seek a civil penalty order for minor or inadvertent contraventions, where the entity or person responsible for the contravention has cooperated with the investigation and taken steps to avoid future contraventions.

Who can be liable for a civil penalty?

- 6.18 A civil penalty order under the Privacy Act can only be made against ‘an entity’. The term ‘entity’ means an agency, an organisation or a small business operator (these terms are further defined in s 6(1)). The term ‘organisation’ can include an individual (including a sole trader).

⁴ While a civil penalty order does not compensate individuals, sections 25 and 25A of the Privacy Act do permit an individual to recover compensation or other remedies where a civil penalty order is made against an entity for a contravention of a civil penalty provision contained in Part IIIA (Credit reporting) of the Privacy Act.

- 6.19 A civil penalty order under the My Health Records Act can only be made against ‘a person’.⁵ This term includes both individuals and participants in the My Health Record system, such as registered repository operators, portal operators and healthcare provider organisations
- 6.20 A civil penalty order under s 56EU of the Competition and Consumer Act can be made against a body corporate, and a person other than a body corporate.

Applicable mental elements

- 6.21 For certain civil penalty provisions under the My Health Records Act,⁶ a person can only be liable for a penalty where a particular mental element (knowledge or recklessness) is made out.
- 6.22 There are no applicable mental elements for civil penalty provisions in the Privacy Act.

Determining the penalty to impose

- 6.23 In determining the penalty to be imposed, s 80U of the Privacy Act, s 79 of the My Health Records Act and 56EU of the Competition and Consumer Act (see also s 82(6) of the Regulatory Powers Act) provide that the court must take into account all relevant matters, including:
- the nature and extent of the contravention
 - the nature and extent of any loss or damage suffered because of the contravention
 - the circumstances in which the contravention took place
 - whether the person has previously been found by a court to have engaged in any similar conduct.

Serious or repeated interference with privacy

- 6.24 Section 13G of the Privacy Act is a civil penalty provision for cases of serious or repeated interference with privacy by an entity.
- 6.25 An ‘interference with privacy’ is defined in s 13 of the Act, and is a breach of the Privacy Act or of a privacy-related provision in certain other legislation.⁷
- 6.26 The phrases ‘serious interference with privacy’ and ‘repeated interference with privacy’ are not defined in the Privacy Act. The Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*⁸ which introduced these terms into the Privacy Act states that the ordinary meaning of the terms ‘serious’ and ‘repeated’ will apply.

⁵ The term ‘person’ is not defined in the My Health Records Act, so the meaning is drawn from the *Acts Interpretation Act 1901* (Cth). That Act states that expressions used to denote persons generally, such as ‘person’, include a body politic or body corporate as well as an individual (s 2C).

⁶ My Health Records Act ss 59 and 60.

⁷ For example, the *Data-matching Program (Assistance and Tax) Act 1990*, the s 135AA guidelines issued under the *National Health Act 1953*, the *Healthcare Identifiers Act 2010*, the *Personally Controlled Electronic Health Records Act 2012*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, and the *Personal Property Securities Act 2009*.

⁸ See <https://www.legislation.gov.au/Series/C2012A00197>

6.27 ‘Serious interference with privacy’ and ‘repeated interference with privacy’ are two distinct concepts, either of which may lead the OAIC to seek a civil penalty against an entity. However, in some cases, acts or practices may meet the requirements for both concepts, for example where a single incident that forms part of a repeated interference with privacy is also a serious interference with privacy.

Serious interference with privacy

6.28 Whether an interference with privacy is ‘serious’ is an objective question that will reflect what a reasonable person would consider serious. This means that what is considered a serious interference with privacy may vary and evolve over time as technology and community expectations regarding privacy protections change.

6.29 The following factors are relevant in considering whether a particular interference with privacy is serious:

- the number of individuals potentially affected
- whether it involved ‘sensitive information’ or other information of a sensitive nature
- whether significant adverse consequences were caused or are likely to be caused to one or more individuals from the interference
- whether vulnerable or disadvantaged people may have been or may be particularly adversely affected or targeted
- whether it involved deliberate or reckless conduct
- whether senior or experienced personnel were responsible for the conduct.

6.30 The OAIC will not seek a civil penalty order in all matters involving a ‘serious’ interference with privacy. The OAIC is more likely to seek a civil penalty in a particular matter where one of the following factors is present:

- the serious interference with privacy is particularly serious or egregious in nature. This may arise because a number of different indicators of seriousness are present (for example, the breach involved the health information of a large number of individuals and significant adverse consequences have arisen or are likely to arise), or because one particular indicator of seriousness is present to a significant extent, such as a very large number of individuals being affected, or very substantial detriment having occurred
- the entity has a history of serious interferences with privacy
- the OAIC reasonably considers the serious interference with privacy arose because of a failure by the entity to take its privacy obligations seriously, or a blatant disregard by the entity for its privacy obligations.

6.31 In addition, when deciding whether to commence proceedings against an entity seeking a civil penalty for serious interference with privacy, the OAIC will take into account the factors outlined in the *Privacy regulatory action policy* and where appropriate, the *CDR regulatory action policy*.

6.32 While a history of serious contraventions can be a relevant factor, it is not a prerequisite to the OAIC seeking a civil penalty for serious interference with privacy, and it is possible for a single breach by an entity to be the catalyst for the commencement of proceedings.

Repeated interference with privacy

- 6.33 ‘Repeated interference with privacy’ means that an entity has interfered with the privacy of an individual or individuals on two or more separate occasions. These repeated interferences with privacy could arise from:
- the same act or practice done on two or more occasions
 - different acts or practices done on two or more occasions.
- 6.34 The relevant acts or practices must have occurred on separate occasions. This means that an act or practice that simultaneously results in the interference with privacy of several individuals – such as a mail merge error leading to the personal information of multiple individuals being disclosed to third parties – will not in itself constitute a ‘repeated’ interference with privacy. Similarly, a single act which results in the breach of multiple APPs will not in itself be a ‘repeated’ privacy interference.⁹
- 6.35 The OAIC will not seek a civil penalty order in all matters involving repeated interference with privacy. The cases in which the OAIC is more likely to seek a civil penalty for repeated interference with privacy are those where:
- the entity failed to take reasonable steps to correct and improve its privacy practices following earlier interferences with privacy. The reasonable steps in a particular circumstance will depend on the nature and causes of the earlier interferences with privacy, but may include having conducted an audit of privacy practices and implementing audit findings, conducting staff privacy training, updating entity policies and procedures relating to personal information handling, and improving information security measures
 - the repeated privacy interferences demonstrate a failure by the entity to take its privacy obligations seriously, or a blatant disregard by the entity for its privacy obligations
 - the contraventions comprising the repeated privacy interferences are more serious in nature (whether or not a penalty for serious interference with privacy has previously been imposed)
 - interferences with privacy have occurred on a greater number of occasions
 - the repeated privacy interferences occur within a short period of time.
- 6.36 In addition, when deciding whether to commence proceedings against an entity seeking a civil penalty for repeated interference with privacy, the OAIC will take into account the factors outlined in the *Privacy regulatory action policy* and where appropriate, the *CDR regulatory action policy*.
- 6.37 While the seriousness of the contraventions comprising the repeated interference with privacy will be taken into account, the separate contraventions comprising the sequence of repeated interferences with privacy do not need to be serious for the OAIC to seek a civil penalty. If the OAIC is satisfied that another aspect of the contraventions justifies the seeking of a civil penalty order (such as an apparent blatant disregard by the entity for its privacy obligations) then the OAIC may decide to seek a civil penalty order.

⁹ While these examples would not in themselves constitute repeated interferences with privacy, depending on the circumstances the incidents could still constitute a serious interference with privacy or, if it is one incident in a series of other contraventions committed by the same entity, it could constitute repeated privacy interference together with those other contraventions.

Serious or repeated privacy interference and pre-12 March 2014 conduct

- 6.38 Item 6 of Schedule 6 to the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* provides that s 13G applies in relation to an act done, or a practice engaged in, after 12 March 2014.
- 6.39 This means that where the OAIC applies to a court for a civil penalty order against an entity for serious or repeated interference with privacy, the OAIC can only lead evidence relating to interferences with privacy that have occurred since 12 March 2014 to establish its case.

Procedural steps

- 6.40 When seeking a civil penalty order from the courts is a possible regulatory outcome in a matter, the OAIC will generally use the following process:
- The OAIC will first investigate the matter, either in response to a complaint or on the Commissioner's own initiative. Information on complaint investigations is contained in Chapter 1 of this guide, while information on Commissioner initiated investigations is contained in Chapter 2.
 - Where the OAIC's investigation indicates that it is likely that an interference with privacy has occurred, the OAIC will consider whether to take enforcement action and, if so, what enforcement action to take. The OAIC will review the matter against either the *Privacy regulatory action policy*, the *My Health Records Enforcement Guidelines* or the *CDR regulatory action policy* as applicable to assess the appropriate enforcement response.
 - Where seeking a civil penalty order is identified as the appropriate regulatory response in the circumstances, the OAIC will assess the matter to determine whether or not sufficient evidence exists to take successful court action. External legal counsel may be briefed. This includes evaluating:
 - whether there is sufficient admissible evidence for each element of the alleged contravention to successfully establish the case on the balance of probabilities
 - the availability, competence and credibility of witnesses
 - any mitigating factors that might reasonably be raised before the court by the respondent
 - the possibility that any evidence might be excluded by a court.
 - Where the available evidence is sufficient, the Commissioner will consider and decide whether to commence proceedings. To make this decision, the Commissioner will use the *Privacy regulatory action policy*, the *My Health Records Enforcement Guidelines* or the *CDR regulatory action policy* as applicable. Where proceedings are to be commenced, external legal counsel will usually be engaged to run the matter.
 - The court documents to initiate proceedings will be prepared and lodged with the court, and served on the respondent entity.
 - The OAIC will pursue the court proceedings in accordance with its model litigant obligations, any relevant court rules and procedures, and any directions or orders issued by the court.

- Following judgment, the OAIC will generally publicly communicate the outcome of the proceedings.
- If the OAIC is dissatisfied with the court's decision (for example, if the court refused to impose a penalty, or the OAIC considers the imposed penalty inadequate), the OAIC may consider the possible grounds for appeal and whether or not to institute appeal proceedings. In making this decision, the OAIC will act in accordance with its model litigant obligations.
- If the respondent appeals the decision, the OAIC will participate in the appeal proceedings and will act in accordance with its model litigant obligations.

Publication

6.41 The OAIC will publicly communicate the following information in connection with civil penalty proceedings:

- civil penalty proceedings against a particular respondent have been initiated
- the outcome of civil penalty proceedings
- the lodgement of appeal proceedings by either the OAIC or the respondent
- the outcome of any appeal proceedings.

6.42 Where it is appropriate for the OAIC to comment on civil penalty proceedings prior to their resolution, such comment will generally be restricted to the history of the proceedings and any earlier findings by the OAIC or an alternative complaint body.

6.43 Any publications relating to civil penalty proceedings will comply with any relevant court orders.

Additional resources

- Chapter 1 of this guide for information relating to the OAIC's complaint investigation procedures
- Chapter 2 of this guide for information relating to the OAIC's Commissioner initiated investigation procedures.

Chapter 7: Privacy assessments

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Legislative framework

- 7.1 Section 33C of the Privacy Act provides the Commissioner with the power to conduct assessments of APP entities about whether personal information they hold is being maintained and handled in accordance with the Australian Privacy Principles (APPs).
- 7.2 This section also empowers the Commissioner to conduct assessments of entities covered by the provisions of Part IIIA of the Privacy Act and the registered credit reporting (CR) code, tax file number (TFN) recipients, agencies conducting data matching programs under the *Data-matching Program (Assistance and Tax) Act 1990* (Cth), entities, including State and Territory health authorities, handling COVID app data and entities that handle information to which s 135AA of the *National Health Act 1953* (Cth) applies.
- 7.3 Additionally, s 28A of the Privacy Act states that the Commissioner’s monitoring functions include:
- monitoring the security and accuracy of information held by an entity that is information to which Part IIIA of the Privacy Act applies and examining entities’ records to ensure information is not being used for unauthorised purposes and is protected adequately against unlawful disclosure

- examining the records of the Commissioner of Taxation to ensure TFN information is being used for authorised purposes and adequately protected against unlawful disclosure
 - evaluating compliance with the TFN rules issued under s 17 of the Privacy Act and monitoring the security and accuracy of TFN information kept by file number recipients
 - ensuring that COVID app data is being managed in accordance with Part VIIIA of the Privacy Act
- 7.4 Section 33C(2) of the Privacy Act specifically states the Commissioner may conduct an assessment in a manner the Commissioner considers appropriate.
- 7.5 In addition to these functions and powers under the Privacy Act, s 309 of the Telecommunications Act 1997 (Cth) (Telecommunications Act) provides the Commissioner with the power to monitor telecommunications carriers, carriage service providers and number-database operators compliance with Part 13, Division 5 of the Telecommunications Act or Chapter 4 of the Telecommunications (Interception and Access) Act 1979 (Cth) (TIA Act). Specifically, this relates to these entities' obligations to record disclosures of personal information made under relevant sections of the Telecommunications Act and TIA Act.
- 7.6 In relation to the CDR scheme, the Commissioner may conduct an assessment under s 56ER of the Competition and Consumer Act, in a manner he or she sees fit, of whether a CDR participant is managing and handling CDR data in accordance with the privacy safeguards and privacy or confidentiality related CDR Rules. This is further discussed in the 'Consumer Data Right assessments and audits' section of this chapter.

Entry and inspection powers

- 7.7 Section 68 of the Privacy Act provides wide entry and inspection powers to the Commissioner (or delegates authorised by the Commissioner) to enter an agency, organisation, credit reporting body or credit provider premises and inspect any documents that are kept on the premises that are relevant to the performance of the Commissioner's functions.
- 7.8 Section 68 (2) of the Privacy Act provides that the occupier must provide reasonable facilities and assistance to the Commissioner or authorised delegates.
- 7.9 Under s 68A of the Privacy Act, the Commissioner must issue a person authorised for the purposes of s 68 with an identity card containing a recent photograph of the authorised person.

Reporting to the Minister

- 7.10 Section 32 of the Privacy Act provides that after conducting an assessment the Commissioner may report to the Minister about the assessment, and must do so if directed by the Minister. Further, if the Commissioner believes it is in the public interest to provide a further report about the assessment to the Minister to be tabled in Parliament, the Commissioner may do so.
- 7.11 Similarly, s 56ER(3) of the Competition and Consumer Act provides that the Commissioner may report to the Minister, the Commission [the ACCC] or the Data Standards Chair about an assessment conducted under s 56ER.

Requirement to give information or produce a document

- 7.12 Section 94T of the Privacy Act provides that , in relation to an assessment into the matters in s 94T(1) (relating to Part VIIIA), if the Commissioner has reason to believe that either an entity or a State or Territory authority being assessed has information or a document relevant to the assessment, the Commissioner may, by written notice, require the entity to give the information or produce the document within the period specified in the notice (which must be at least 14 days after the notice is issued).
- 7.13 This power only applies to assessments being conducted into matters under s 94T(1) (relating to the COVIDSafe app and COVID app data).
- 7.14 Unlike s 44 of the Privacy Act, a notice under s 94T(2) can only be given to the entity or authority that is the subject of the assessment, not a third party who may be able to provide relevant information.

Purpose and key features of privacy assessments

- 7.15 As outlined in the *Privacy regulatory action policy* and *CDR regulatory action policy*, the OAIC will use assessments to facilitate legal and best practice compliance by identifying and making recommendations to address privacy risks and areas of non-compliance. However, there may also be situations where assessments are used strictly to assess an entity's compliance with its legislative obligations.

Types of privacy assessments

- 7.16 The OAIC needs some flexibility in its approach to privacy assessments. To assist with this, the OAIC undertakes two types of assessments depending upon the circumstances:
- risk based assessments
 - compliance based assessments.
- 7.17 The OAIC expects the majority of privacy assessments it undertakes to be risk based assessments. However, the assessment type will be determined on a case by case basis.

Risk based assessments

- 7.18 A risk based assessment is an assessment that focuses on identifying privacy risks to the effective handling of personal information by an entity in accordance with relevant legislation (for example, APPs, credit provisions or code, TFN guidelines, privacy safeguards or privacy or confidentiality related CDR Rules, Part VIIIA). The privacy risks identified should directly relate to the entity's general compliance obligations.
- 7.19 Recommendations may be made based on the OAIC's estimates of the relative privacy risk against the relevant legislative requirements, with the aim of assisting entities to improve their observed privacy practices and procedures.
- 7.20 The primary outcome of a risk based assessment will be the identification and discussion of individual risks in relation to the entity's compliance with the specific legislation, with an acknowledgement (if appropriate) of any observed strengths of the entity in relation to its privacy practices. A risk based assessment will not provide an overall assessment of the

entity's compliance with its legislative obligations (for example, no overall assessment of 'compliant' or 'non-compliant' will be provided in relation to the entity).

Compliance based assessments

- 7.21 A compliance based assessment is a more specific assessment that focuses on identifying whether an entity has complied with an identified legislative obligation or explicit direction from the OAIC. Instead of identifying privacy risks to an entity's general compliance obligations, the compliance based assessment aims to provide an assessment of an entity's explicit compliance with specific requirements, which could include, for example:
- whether the Commissioner for Taxation meets obligations under s 28A of the Privacy Act in relation to use and disclosure of TFN information
 - an entity's compliance with an enforceable undertaking accepted by, or a determination made by, the Commissioner
 - the appropriateness of an entity's response to significant risk recommendations previously identified by the OAIC under a risk based assessment
 - whether telecommunications carriers, carriage service providers and number-database operators meet obligations under the Telecommunications Act in relation to any disclosures of the personal information held
 - whether a CDR participant is handling CDR data in accordance with the privacy safeguards or the privacy or confidentiality related CDR Rules
 - whether an entity is managing COVID app data in accordance with the requirements of Part VIIIA.
- 7.22 The primary outcome of a compliance based assessment will be an assessment of whether the entity is 'compliant' or 'non-compliant' with the specific identified obligation under the relevant legislation, or the explicit requirement that has been previously provided by the OAIC to the entity.

Assessments for data-matching activities

- 7.23 Under s 13(5)(a) of the Privacy Act, breaches of Part 2 of the *Data-matching Program (Assistance and Tax) Act 1990* (Cth) (DMP Act) or the rules issued under s 12 of DMP Act are also considered to be interferences with the privacy of an individual.
- 7.24 The OAIC has an agreement with the Department of Human Services (DHS)¹ to undertake assessments of DHS's compliance with its DMP Act obligations. The OAIC tailors its assessment steps and criteria for these assessments consistent with the requirements of the DMP Act.

Consumer Data Right (CDR) assessments and audits

- 7.25 As stated earlier in this chapter, s 56ER of the Competition and Consumer Act provides the Commissioner may conduct an assessment, in a manner he or she sees fit, of whether a CDR participant is managing and handling CDR data in accordance with the privacy safeguards and privacy or confidentiality related CDR Rules.

¹ The Department of Human Services (DHS) was renamed to Services Australia in May 2019. However, this guide refers to DHS where relevant, as it continues to be known in the DMP Act.

- 7.26 As the Commissioner can conduct an assessment of compliance with a privacy safeguard in any manner he or she sees fit, the Commissioner may be guided by the processes for privacy assessments completed under the Privacy Act, that are set out in this chapter.
- 7.27 In addition, CDR Rule 9.6(2) provides the Commissioner may, at any time, audit the compliance of any CDR participant with the privacy safeguards in Division 5 of Part IVD of the Competition and Consumer Act² and the CDR Rules to the extent that they relate to the privacy safeguards or the privacy and confidentiality of CDR data.
- 7.28 The Commissioner may also give a CDR participant a written notice that requests the CDR participant to produce copies of records or information from those records for audits that are conducted under CDR Rule 9.6.
- 7.29 The OAIC will work collaboratively with the ACCC in relation to its assessments and audits function. This is to ensure both agencies utilise the range of regulatory powers with a coordinated preventative and proactive approach to CDR compliance, ensuring efficient consideration of the risks while not over-burdening regulated entities with overlapping audit requirements.
- 7.30 More information on the OAIC and ACCC's joint approach to encouraging compliance and preventing breaches of the CDR regulatory framework can be found in the [ACCC and OAIC Compliance and Enforcement Policy](#).

When will the OAIC conduct a privacy assessment?

- 7.31 The OAIC will undertake privacy assessments where it will contribute to achieving its goal of promoting and ensuring the protection of personal information. When deciding whether it is appropriate to undertake a privacy assessment in a particular situation, the OAIC will refer to the 'Selecting appropriate privacy regulatory action' section of the *Privacy regulatory action policy*, or the 'Compliance and enforcement approach' section of the *CDR regulatory action policy*, including the 'factors taken into account' and the 'sources of information' sections.
- 7.32 Generally, the OAIC will undertake a risk assessment targeting exercise each financial year to identify possible industry sectors and/or entities that should be subject to a privacy assessment. An outline of the OAIC's risk assessment targeting process is provided below under the heading 'Targeting'.

Examples of when the OAIC may undertake privacy assessments could include where:

- existing legislation is impacting on sensitive privacy related issues
 - new legislation is implemented, which raise significant privacy issues
 - industries implement new technology or processes, which raise significant privacy issues
 - high risks to individuals' privacy are identified, through factors including the number and nature of privacy complaints to the OAIC and information from media sources or other privacy regulators.
- 7.33 The OAIC will also undertake privacy assessments where it is specifically funded to do so.

² Including Division 5 of Part IVD to the extent that it relates to the CDR Rules, see CDR Rule 9.6(1)(a).

Assessment outcomes

Recommendations

- 7.34 A recommendation is a suggested course of action or control measure that, if put in place by the assessed entity, will minimise the risks identified in relation to how personal information is handled against the relevant criterion.
- 7.35 Not all assessment findings will need to be reflected in a recommendation in an assessment report. Many findings, such as those that note good privacy acts or practices, may simply be noted in the assessment report. Conversely each recommendation needs to be supported by at least one finding.
- 7.36 Generally, recommendations will align with the terminology used in the APP guidelines or the Privacy Safeguards Guidelines when assessing compliance under the CDR scheme. The guidelines set out the mandatory requirements of the Privacy Act and the privacy safeguards and CDR Rules under the Competition and Consumer Act, where relevant, and are described by the words ‘must’ or ‘is required to’. Aspects of privacy practice that the Commissioner may take into account when considering entities’ compliance with the Privacy Act or the Competition and Consumer Act are indicated by the use of the words ‘should’ or ‘is expected to’, when handling personal information. And good privacy practices that may supplement compliance with the mandatory requirements in the APPs or the privacy safeguards and CDR Rules are generally indicated by ‘could’ in the APP guidelines³ and the Privacy Safeguard Guidelines.⁴
- 7.37 The OAIC will generally only make recommendations with regard to privacy practices that it considers entities ‘must’ or ‘should’ do. ‘Good privacy practice’ considerations will be detailed in the text of the report only.
- 7.38 The OAIC will only make recommendations on issues of particular significance or concern to the OAIC, and recommendations will be clear, targeted and actionable.
- 7.39 Specifically, for risk based assessments:
- the OAIC will not make recommendations against all privacy risks it observes but will do so where considered appropriate in the circumstances. Generally, the OAIC will make recommendations where it identifies medium to high level privacy risks. Further detail about this approach is provided in Appendix A which sets out the OAIC’s view of how it determines what constitutes a high, medium or low privacy risk and the action it considers needs to be taken by an entity to address the particular levels of risk.
 - for each observation the OAIC will consider:
 - relevant privacy risks, if any
 - the level of the risk; that is, what is the likely outcome for the entity if the identified risk is not addressed
 - the entity’s operational context and whether it is reasonable to require the entity to take steps to address the privacy risk.

³ Office of the Australian Information Commissioner, [Australian Privacy Principles guidelines](#), Chapter A, paragraph A.2

⁴ Office of the Australian Information Commissioner, Consumer Data Right Privacy Safeguard Guidelines, Chapter A, paragraph A.4

The content of the assessment report

7.40 Generally the OAIC will provide a report to an assessed entity. The report will detail the extent to which the relevant assessment criteria have been met, taking into account the information and background material collected, and the OAIC's observations.

7.41 The report will also:

- provide a fair and balanced assessment of the assessed areas of the entity, by clearly and concisely setting out the observations and information, privacy risks or findings and recommendations from the assessment
- lead logically to the identification of any privacy risks or areas of non-compliance from which specific recommendations may be developed
- identify and acknowledge any areas where the entity is performing well, and also acknowledge where actions have been taken to identify and address privacy concerns.

Assessment opinion limitations

7.42 The OAIC notes that any assessment opinions it expresses in its privacy assessment reports are limited by:

- the assessment scope and objectives
- the time period in which the assessment fieldwork was undertaken; that is, it is an opinion only applicable to the point-in-time of the fieldwork period
- the areas of the entity that were assessed; that is, the risks for risk based assessment, or findings for compliance based assessments, may not apply to areas of the entity that were not assessed.

7.43 There are limitations on how widely the risks or findings of an assessment can be extrapolated across the wider entity. The assessment report is not a definitive account of an entity's personal information handling acts or practices and does not fetter the Commissioner's discretion, if for example, a complaint is made.

Resolving a disagreement between the OAIC and an entity about the assessment report

7.44 The OAIC aims to achieve agreement with the assessed entity around the text of the report, and any identified risks from a risk based assessment or findings from a compliance based assessment and any recommendations from the assessment. The OAIC will therefore provide the entity with a draft report on which to comment. However, agreement between the OAIC and the assessed entity about the text of the report may not always be possible.

7.45 The OAIC will amend any factual inaccuracies clearly identified by the entity. However, disagreements may arise in relation to the findings (which may be based on disputed information and/or observations), the risks associated with these findings or any recommendations made in relation to the risks.

7.46 The OAIC will consider, in a balanced and fair manner, whether the information provided by the entity in relation to any disputed part of the report is sufficient to require a reassessment of a risk, finding or recommendation in the draft report. Any change to a risk, finding or recommendation in the report will only be made where supported by objective information.

7.47 The Commissioner or appropriate delegate has the ultimate discretion in determining the content of the report. Any outstanding disagreement between the OAIC and an entity in

relation to an assessment finding, recommendation or opinion will generally be brought to the Commissioner's attention before the report is published.

Further regulatory action

- 7.48 While the primary purpose of conducting a risk based assessment is to assist entities with their privacy practices, there may be circumstances where the OAIC considers it appropriate to take further regulatory action as a result of an assessment. For example, during a risk based assessment if the OAIC identifies significant issues of concern and the entity does not appear willing or capable of taking steps to address these concerns it may be appropriate for the OAIC to open a Commissioner initiated investigation (CII).
- 7.49 While the primary purpose of a compliance based assessment is to assess an entity's compliance with its legislative obligations, the OAIC will still aim to work co-operatively with an entity to rectify any non-compliance with the entity's legal obligations identified as a result of the assessment. However, there may be circumstances where further regulatory action is required from the OAIC to ensure an entity takes steps to address any issues associated with non-compliance.
- 7.50 Generally, the OAIC does not expect to take enforcement action directly or only as a result of an assessment outcome or finding. However, in limited circumstances, additional regulatory action may occur.
- 7.51 When deciding whether to take further regulatory action as a result of an assessment, the OAIC will refer to the factors set out in the *Privacy regulatory action policy* or the *CDR regulatory action policy*, where appropriate.

Reporting to the Minister

- 7.52 The Commissioner will not routinely report assessment outcomes to the Minister but would do so if directed to by the Minister or where the Commissioner believes a report to be in the public interest. However, assessment reports will generally be made public so will be available to the Minister in that form.
- 7.53 Where the Commissioner does report to the Minister about an assessment, the Commissioner will notify the assessed entity.

Procedural steps

- 7.54 There are four main stages commonly involved in assessments:
1. Targeting
 2. Planning
 3. Fieldwork
 4. Reporting.
- 7.55 This staged process is flexible and there may be situations that warrant the OAIC taking a different approach. For example, a compliance based assessment is unlikely to require as detailed a targeting process as a risk based assessment, given both the entity and the identified legislative obligation will already be established. As such, this stage may not be undertaken for a compliance based assessment.

Targeting

7.56 The OIAC will generally use the following procedure to identify assessment targets:

- Every year the OIAC will conduct initial background research using internally and externally available information from the preceding 12 months (including OIAC complaint and enquiries data, CII or data breach notification data, significant media coverage or information about new technologies, processes or legislation), as well as internal consultation across the OIAC, to identify a list of industry sectors and/or entities that pose the greatest risks to individuals' privacy.

More in depth background research and risk assessments of an agreed number of identified risk targets will subsequently be undertaken to determine in detail which targets either pose greatest risks to, or present the greatest opportunities for, assessment action.

- In some circumstances, it may be appropriate or necessary to conduct limited external consultation around possible risk targets (for example, with other regulators). The OIAC notes that any external discussion of potential risk targets could have commercially sensitive implications for some entities. For these reasons, it is not expected that external consultation would generally be required in determining risk targets, and would only be undertaken in very limited circumstances.
- Selecting assessment targets for funded assessments will involve undertaking targeting in the context of the agreement and involve consultation with the other party to the agreement.

7.57 Once the OIAC decides to assess a particular entity, the OIAC will also determine the initial scope and objective of the assessment:

- The **scope** of the assessment states which of the entity's functions, programs, activities, processes or systems are being considered in the assessment. The scope can also be limited to particular aspects of the entity's obligations such as one or more APPs or privacy safeguards or CDR Rules. Just as importantly, the scope should also clearly identify what will not be considered as a part of the assessment.
- The **objective** of the assessment is the purpose of the assessment — the reason why the assessment is being undertaken. An objective is usually phrased as a question that needs to be answered and may be broad, specific or a combination of those.
- The preliminary scope and objective/s may be further developed during the next stage of the assessment, after initial contact and consultation has occurred with the target entity.

Planning

7.58 Once the likely target entity has been determined, the OIAC will generally use the following procedure for the planning stage of privacy assessments:

- The OIAC will aim to make contact with an appropriate entity employee to discuss:
 - the OIAC's intention to undertake an assessment
 - the appropriateness of the proposed scope, objectives and methodology for the assessment

- the entity's current and near term operational and business environments, to identify when an assessment could best be undertaken and when relevant staff are likely to be available
- administrative detail relating to the proposed assessment, such as key contact officers, the proposed timing and length of the assessment, entity facilities or resources required for the OAIC on-site and the relevant location(s) or venue for the assessment.
- The OAIC will then determine in greater detail the assessment methodology including:
 - **assessment criteria** for the assessment. The assessment criteria clearly set out the standards of performance that are expected to exist. This is the standard against which the entity's performance is to be assessed. The assessment criteria will usually be drawn directly from the relevant legislative obligations for the entity.
 - **assessment techniques** available for the assessment and appropriate to collect sufficient information to allow the OAIC to make an assessment of the entity's performance against the identified objectives and assessment criteria. These techniques may include document review, interviews, direct observation/physical inspection, testing/checking of records/procedures and/or polls and survey research.
- The OAIC will then formally notify the entity by letter of the intention to undertake a privacy assessment. The notification letter will request the entity provide documentation to assist the OAIC prior to the assessment fieldwork.
- The OAIC aims to complete privacy assessments in a timely manner, within a six month period. As such, the OAIC requires entities to provide requested information, comments and responses within specified timeframes. However, the OAIC is willing to be flexible and discuss timeframes to take into account an entity's operational and resourcing considerations.

Fieldwork

- 7.59 The principal activity in the fieldwork stage is to collect, in a systematic and ordered way, sufficient information to enable the OAIC to identify how an entity is maintaining personal information in accordance with its obligations, in line with the scope, objectives and assessment criteria.
- 7.60 The OAIC will generally use the following procedure for the fieldwork stage of privacy assessments:
- The OAIC will review all of the information and documentation the entity provides in response to the formal notification letter. Generally, this material should enable the OAIC to understand:
 - what types of personal information the entity handles
 - how the personal information is collected
 - how the entity uses the personal information
 - what the internal flows of personal information within the entity look like
 - what disclosures of the personal information (if any) the entity makes, and to whom
 - what security measures are in place to protect the personal information

- any other relevant issues in relation to the entities handling of the personal information (including information specifically requested in relation to the agreed scope and objectives of the assessment).
- Staff from the OAIC will usually attend the entity's premises during the fieldwork stage over a set period of time (usually between one to three days) to undertake the assessment. There may be assessments where the OAIC does not need to attend the entity's premises during the fieldwork stage. For example, an assessment may only involve a desktop review of an entity's policies and procedures which are already publicly available (for example, the entity's APP 1 privacy policy or Privacy Safeguard 1 CDR policy).
- Where the OAIC is visiting the entity's premises to conduct assessment fieldwork the OAIC will make the necessary administrative arrangements with the entity such as establishing a time and attendees for the opening and closing conferences and developing an interview schedule for key staff.
- Generally the OAIC will conduct the fieldwork by:
 - holding a brief opening conference with key executive and/or senior staff to provide an overview of the assessment process including the scope, objectives, assessment criteria, assessment techniques and the general timeframe for reporting of assessment results
 - gathering information needed to assess the entity against each of the assessment criterion. Information usually collected includes documents (for example, the entity's process documents), interview responses and observations (for example, observing the acts and practices of the entity's staff undertaking normal business operations)
 - holding a brief closing conference with key executive and/or senior staff and other relevant staff, to discuss preliminary risks/findings and issues likely to be raised in the draft assessment report. The preliminary feedback provided at the closing conference may be subject to change after the OAIC reviews and considers all of the gathered information in the analysis stage. It is intended only to provide an early indication to the entity of any issues that may be identified in the draft assessment report.
- During the fieldwork stage, the OAIC will:
 - notify the entity of any areas of potential concern. By providing continuous and open feedback to the entity, the entity will have the opportunity to correct, amend or provide further explanatory information around the issues or concerns identified
 - consider whether it has collected and recorded a sufficient amount of reliable and valid information during the assessment process to allow it to make an adequate assessment against each of the assessment criterion.

Reporting

- 7.61 The final stage of a privacy assessment is reporting the results of the assessment formally to the Commissioner and providing the privacy assessment report to the entity.
- 7.62 The OAIC will generally use the following procedure for the reporting stage of privacy assessments:

- Develop and provide the entity with a draft assessment report for review (aiming to do this within eight weeks from the end of the fieldwork period).
- The entity will usually be requested to provide any comments, clarifications and/or a written response to the draft report including any recommendations within 3 weeks.
- The written response from the assessed entity may also:
 - include information on management initiated improvements since fieldwork
 - seek omissions from the report for privileged or confidential information
 - seek exclusions from the report under s 33 of the Privacy Act.
- The OAIC will review the entity's comments and response to the draft report and make any changes as appropriate. In some cases it may be necessary to hold further discussions between the OAIC and the entity to reach an agreed position on any outstanding matters.
- A final version of the assessment report will be issued to the entity, and the report will generally be published on the OAIC's website shortly afterwards.

Publication

7.63 Generally, the OAIC will publish all assessment reports. There may be circumstances when it would be inappropriate to publish all or part of an assessment report due to statutory secrecy provisions or reasons of privacy, confidentiality, commercial sensitivity, security or privilege. The OAIC will take these factors into account when deciding whether to publish an assessment report in full or in an abridged version. This will be determined upon a case by case basis.

Appendix A: Risk based assessments – privacy risk guidance

Privacy risk rating	Entity action required	Likely outcome if risk is not addressed
<p>High risks</p> <p>Entity must, as a high priority, take steps to address mandatory requirements of Privacy and related legislation</p>	<p>Immediate management attention is required.</p> <p>This is an internal control or risk management issue that if not mitigated is likely to lead to the following effects</p>	<ul style="list-style-type: none"> • Likely breach of relevant legislative obligations (for example, APP, TFN, Credit, privacy safeguard, Part VIII A) or not likely to meet significant requirements of a specific obligation (for example, an enforceable undertaking) • Likely adverse or negative impact upon the handling of individuals’ personal information • Likely violation of entity policies or procedures • Likely reputational damage to the entity, such as negative publicity in national or international media. • Likely adverse regulatory impact, such as Commissioner Initiated Investigation (CII), enforceable undertakings, material fines • Likely ministerial involvement or censure (for agencies)
<p>Medium risk</p> <p>Entity should, as a medium priority, take steps to address OAI C expectations around requirements of Privacy and related legislation</p>	<p>Timely management attention is expected.</p> <p>This is an internal control or risk management issue that may lead to the following effects</p>	<ul style="list-style-type: none"> • Possible breach of relevant legislative obligations (for example, APP, TFN, Credit, privacy safeguard, Part VIII A) or meets some (but not all) requirements of a specific obligation • Possible adverse or negative impact upon the handling of individuals’ personal information • Possible violation of entity policies or procedures • Possible reputational damage to the entity, such as negative publicity in local or regional media • Possible adverse regulatory impacts, such as Commissioner Initiated Investigation (CII), public sanctions (CII report) or follow up assessment activities • Possible ministerial involvement or censure (for agencies)
<p>Low risk</p> <p>Entity could, as a lower priority than for high and medium risks, take steps to better address compliance with requirements of Privacy and related legislation</p>	<p>Management attention is suggested.</p> <p>This is an internal control or risk management issue, the solution to which may lead to improvement in the quality and/or efficiency of the entity or process being assessed.</p>	<ul style="list-style-type: none"> • Risks are limited, and may be within acceptable entity risk tolerance levels • Unlikely to breach relevant legislative obligations (for example, APP, TFN, Credit, privacy safeguard, Part VIII A) • Minimum compliance obligations are being met

Chapter 8: Directing a privacy impact assessment

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Legislative framework

- 8.1 Section 33D of the Privacy Act empowers the Commissioner to direct an agency to give the Commissioner a privacy impact assessment (PIA).
- 8.2 The Act provides that where an agency proposes to engage in an activity or function involving the handling of personal information about individuals, and the Commissioner considers that the activity or function might have a significant impact on the privacy of individuals, the Commissioner may direct the agency to give the Commissioner a PIA about the activity or function.

Purpose and key features of the PIA direction power

- 8.3 A PIA is a written assessment of an activity or function that identifies the impact that the activity or function might have on the privacy of individuals, and sets out recommendations for managing, minimising or eliminating that impact (s 33D(3)). The OAIC will use the PIA direction power to ensure that, for proposed activities or functions that involve the handling of personal information and which the Commissioner considers might have a significant impact on privacy, the privacy risks inherent in that activity or function are identified and managed, minimised or eliminated before they materialise.

- 8.4 Typically, a PIA should be conducted when a particular activity or program is at the proposal stage. The findings of a PIA conducted at this stage can then be taken into account when designing the proposal before proceeding to implementation.
- 8.5 The OAIC expects an entity to consider conducting a PIA and publishing the final report whenever an entity proposes to engage in an activity or function involving the handling of personal information. Where the OAIC becomes aware of a proposal which may have a significant impact on the privacy of individuals, the OAIC will generally recommend that an entity undertake a PIA. Considering and conducting a PIA are intrinsically linked to an entity's obligations under APP 1.¹ Entities can obtain guidance on determining whether a PIA is necessary and on conducting PIAs from the *Guide to undertaking privacy impact assessments*.²
- 8.6 An agency should not wait for a recommendation or direction from the OAIC to conduct a PIA. The OAIC expects agencies will recognise the benefits of conducting a PIA and a PIA direction should not generally be required. A PIA direction should be a last resort, where the OAIC considers that a PIA is necessary to ensure that a proposed activity or function is appropriately balanced against the protection of the privacy of individuals and the agency is not already conducting a PIA.
- 8.7 This is consistent with the OAIC's preferred regulatory approach of working with entities to facilitate legal and best practice compliance. To assist with this approach in relation to agencies, the OAIC will use the Information Contact Officer Network to ensure agencies maintain an open dialogue with the OAIC so that the OAIC is aware of major projects or policies that are being proposed and that may require a PIA.

Proposed activities and functions for which the PIA direction power may be used

- 8.8 The PIA direction power may be used when an agency proposes to engage in an activity or function that the Commissioner considers might have a significant impact on the privacy of individuals. This includes when the agency proposes to:
- engage in a new activity or function, or
 - substantively change an existing activity or function. This includes a substantive change to the system that delivers an existing function or activity.
- 8.9 The Commissioner must also be satisfied that the proposed activity or function might have a significant impact on the privacy of individuals. In considering whether a proposed activity or function might have a significant impact on the privacy of individuals, the OAIC will take the following matters into account:
- the number of individuals whose personal information will be handled as a result of the proposed activity or function
 - the amount and sensitivity of the personal information handled as a result of the proposed activity or function

¹ See the [Australian Privacy Principles Guidelines](#), Chapter 1.

² See [Guide to undertaking privacy impact assessments](#)

- whether the proposed activity or function will be subject to the Privacy Act, or whether all or any part will be exempt
- whether the proposed activity or function involves a technology or the convergence of existing technologies
- whether the proposed activity or function involves the use of a technology in a new way
- any steps already taken by the agency to manage, minimise or eliminate the privacy impacts of the proposed activity or function
- any other matter the Commissioner considers relevant.

8.10 The PIA direction power only applies to the proposed functions or activities of an agency. Whether this power should be extended to apply to organisations subject to the Privacy Act is due to be reviewed by the Minister with responsibility for administering the Privacy Act by 12 March 2019 (s 33D(7)).

Circumstances in which the PIA direction power might be used

8.11 There are two main circumstances in which consideration is likely to be given to exercising this power:

- when the OAIC, in the course of providing guidance to an agency on a proposed agency activity or function, considers that the proposed activity or function might have a significant impact on the privacy of individuals and recommends a PIA be conducted, and the agency does not conduct one
- when the OAIC otherwise becomes aware of an agency's proposed activity or function (for example, through a media report) and considers that it might have a significant impact on the privacy of individuals and the agency has not conducted a PIA.

Procedural steps in issuing a PIA direction

8.12 Where the OAIC becomes aware of a proposed activity or function of an agency it may seek further information about the impact of the proposal on the privacy of individuals. The OAIC will generally use the following procedure:

- The OAIC may seek information from the agency in relation to the proposed activity or function to find out whether it involves the handling of personal information, and whether it might have a significant impact on the privacy of individuals.
- If so, the OAIC will generally suggest to the agency that it consider conducting a PIA, if it is not already doing so, to assist it in identifying and managing, minimising or eliminating privacy impacts. The suggestion to consider undertaking a PIA may be made by the OAIC in a public submission.
- If the agency does not plan to conduct a PIA and the OAIC continues to consider that the proposed activity or function might have a significant impact on the privacy of individuals, the OAIC will make a written recommendation that the agency undertake a PIA and give the PIA to the Commissioner.³ The recommendation generally will note that

³ A recommendation would be made in written correspondence to the agency and not in a public submission.

if the agency does not adopt the recommendation, the OAIC will consider whether a PIA direction should be issued.

- The OAIC will seek confirmation from the agency whether or not it intends to adopt the recommendation and conduct a PIA.
- Where the agency indicates it intends to conduct a PIA, the OAIC will maintain contact with the agency.
 - If it appears that the PIA is not being conducted in a timely manner, or is not conducted to a sufficient standard, the OAIC will notify the agency that it may consider issuing a PIA direction.
 - Where the agency does not progress the PIA in a timely manner following that notification, the OAIC will consider whether a PIA direction should be issued.
- If the agency does not intend to conduct a PIA, the OAIC will consider whether a PIA direction should be issued.
- The factors identified in paragraph 38 of the OAIC's *Privacy regulatory action policy* will be used to inform the decision. The OAIC may seek information from the agency to assist in making this decision.
- Where the decision is to issue a PIA direction, the direction to be issued will be prepared. The direction will generally:
 - include an explanation of PIAs
 - refer the agency to the *Guide to undertaking privacy impact assessments*
 - provide the timeframe in which the agency must give the Commissioner the PIA
 - outline how the PIA is to be provided to the Commissioner, and
 - outline the consequences of failing to comply with the direction.

The direction will be issued by the Commissioner.

- An agency may seek an extension of time in which to give the PIA to the Commissioner. The OAIC would generally grant an extension where:
 - the proposed function or activity will not be implemented during the time period of the extension
 - the extension will not otherwise impact the ability of the agency to adopt the recommendations in the PIA
 - it is satisfied that the agency's need for additional time in which to complete the PIA is reasonable in the circumstances.
- When the agency gives the Commissioner the PIA, the OAIC will review the PIA to ensure that:
 - it identifies impacts that the proposed activity or function might have on the privacy of individuals in accordance with the *Guide to undertaking privacy impact assessments*
 - it sets out recommendations for managing, minimising or eliminating that impact in accordance with the *Guide to undertaking privacy impact assessments*
 - the agency has responded to each recommendation in the PIA. In responding to each recommendation the agency should indicate whether it intends to implement (or has

already implemented) the recommendation or not, and the rationale for this decision.

- The OAIC may also provide comments to the agency on the PIA's adequacy and the agency's response to the recommendations. The OAIC expects the agency to review, and where necessary address, the OAIC's comments.
- The OAIC will seek confirmation from the agency that the agency has implemented the recommendations in the PIA in accordance with the agency's responses to those recommendations prior to the implementation of the activity or function. Where the OAIC continues to hold concerns about the impact of a proposed activity or function on the privacy of individuals, the OAIC will generally inform the Minister of the matter.

When is an agency considered to have complied with the PIA direction?

8.13 The OAIC will consider that an agency has complied with a PIA direction when the agency has given the PIA to the Commissioner in accordance with the direction and any extensions granted.

Steps the OAIC will take where an agency does not comply with a direction

8.14 Where an agency does not comply with a PIA direction, the OAIC will use the following procedure:

- If an agency has not complied with the PIA direction the OAIC will first contact the agency to determine the agency's progress and whether and when they intend to comply with the PIA direction.
- If the agency does not intend to comply with the PIA direction within a reasonable timeframe, the OAIC will consider this a failure to comply with the direction.
- Where an agency has failed to comply with a PIA direction, the OAIC will advise both the Minister responsible for administering the Privacy Act, and the Minister responsible for the non-compliant agency (as required by s 33D(6)).

Publication

8.15 The OAIC will generally publish all PIA directions issued, and will require the agency to publish all final PIAs prepared in response to a PIA direction. To the extent possible, the OAIC will publish PIA directions in full or in an abridged version on its website: www.oaic.gov.au. It is sometimes inappropriate to publish all or part of a PIA direction or PIA because of statutory secrecy provisions or for reasons including privacy, confidentiality, commercial sensitivity, security or privilege. The OAIC will take those considerations into account when deciding whether to publish a PIA direction, and whether to require an agency to publish their PIA.

- 8.16 Publication of PIA directions on the OAIC website may be accompanied by other communication such as a media release, media interview or social media. These communications will be made in accordance with the approach set out in the *Privacy regulatory action policy*.
- 8.17 The OAIC may refer to PIA directions in speeches and at other events such as Information Contact Officer Network meetings, Privacy Connections events and conferences.

Additional resources

- 8.18 The OAIC has published the *Guide to undertaking privacy impact assessments* which provides key guidance on conducting a PIA.

Chapter 9: Data breach incidents

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Notifiable Data Breaches (NDB) scheme

- 9.1 The OAIC administers a Notifiable Data Breaches (NDB) scheme under Part IIIC of the Privacy Act.
- 9.2 Under Parts IIIC and VIIIA, entities that have information security obligations under the Privacy Act¹ must generally notify individuals or consumers in relation to CDR data, whose information was involved and the Australian Information Commissioner (the Commissioner), about eligible data breaches (ss 26WK and 26WL and s 94S).
- 9.3 The Commissioner has the following functions under the scheme:
- offering advice and guidance to regulated entities, and providing information to the community about the operation of the scheme.
 - promoting compliance with the scheme
 - receiving notifications from entities
 - directing an entity to notify under s 26WR
 - declaring that notification need not be made, or that notification be delayed under s 26WQ
- 9.4 Section 56ES(1) and (2) of the Competition and Consumer Act provides that Part IIIC of the Privacy Act applies to accredited data recipients or designated gateways in relation to their

¹ For more information see [Entities covered by the NDB scheme](#)

handling of CDR data, within the CDR scheme. This means data breaches within the CDR scheme, that relate to the handling of CDR consumers (including individuals and small businesses), must be reported to the OAIC and are subject to the same requirements of Part IIIC of the Privacy Act.

- 9.5 There are specific requirements relating to the COVIDSafe app and COVID app data under Part VIIIA of the Privacy Act. Those specific requirements are outlined separately below.

Promoting compliance with the scheme

- 9.6 Section 13(4A) of the Privacy Act provides that if an entity contravenes any of the following requirements of the NDB scheme, the contravention is taken to be an act that is an interference with the privacy of an individual, subject to possible enforcement action:
- carry out an assessment of a suspected eligible data breach (s 26WH(2))
 - prepare a statement about the eligible data breach, and give a copy to the Commissioner as soon as practicable (s 26WK(2))
 - notify the contents of the statement to individuals whose personal information was involved in the eligible data breach (or, in certain circumstances, publish the statement) as soon as practicable (s 26WL(3))
 - comply with a direction from the Commissioner to notify the eligible data breach (s 26WR(10)).
- 9.7 The OAIC has developed guidance about the NDB scheme to assist entities.
- 9.8 The Commissioner may, on the Commissioner's own initiative, investigate an act or practice that may be an interference with privacy where the Commissioner thinks it is desirable to do so (s 40(2)). The Commissioner must also investigate complaints made by individuals where an act or practice may be an interference with the privacy of the individual (s 40(1)).
- 9.9 Where the Commissioner has identified an interference with privacy, there are a number of enforcement powers available to the Commissioner, ranging from less serious to more serious regulatory action depending on the relevant factors. These include powers to:
- accept an enforceable undertaking (s 80V of the Privacy Act and s 114 of the Regulatory Powers Act) and bring proceedings to enforce an enforceable undertaking (s 115 of the Regulatory Powers Act)
 - make a determination (s 52) and bring proceedings to enforce a determination (ss 55A and 62)
 - seek an injunction to prevent ongoing activity or a recurrence (s 80W)
 - apply to a court for a civil penalty order for a breach of a civil penalty provision (s 80U), which includes serious or repeated interferences with privacy.
- 9.10 In deciding whether an investigation or enforcement action is appropriate in the circumstances, the Commissioner will act in accordance with the OAIC's *Privacy regulatory action policy*, and the *CDR regulatory action policy* where applicable.

Receipt of notifications

- 9.11 The Commissioner will acknowledge receipt of all data breach notifications.

- 9.12 The Commissioner may or may not take any action in response to a data breach notification. The Commissioner will decide which notifications to respond to depending on available resources, and the Commissioner's evaluation of the extent to which taking action in response to the notification will further the objects of the Privacy Act and the objects of Part IVD of the Competition and Consumer Act for the CDR scheme where appropriate.
- 9.13 Some notifications may point to a possible interference with privacy. Under s 42, the Commissioner may make preliminary inquiries to determine whether to investigate an act or practice that may be an interference with privacy, or in relation to the CDR scheme, that may be a breach of a privacy safeguard or a privacy or confidentiality related Rule, where there has been a complaint or on the Commissioner's own initiative. In deciding whether to make preliminary inquiries or offer advice and guidance in response to a notification, the Commissioner may consider:
- the type and sensitivity of the personal information involved
 - the numbers of individuals or CDR consumers potentially at risk of serious harm
 - whether the data breach has been contained or is in the process of being contained where feasible
 - steps the notifying entity has taken, or is taking, to mitigate the impact on individuals or CDR consumers at risk of serious harm
 - measures that the entity has taken, or is taking, to minimise the likelihood of a similar breach occurring again.
- 9.14 The Commissioner may also inquire about the incident to determine whether the OAIC can provide assistance to the entity, such as best practice advice on data breach responses and the prevention of similar incidents in the future.

Declaration of Commissioner — exception to notification (s 26WQ)

- 9.15 The Commissioner may declare that an entity does not need to comply with the notification requirements in the NDB scheme in relation to an eligible data breach. Under s 26WQ the Commissioner may give written notice declaring that a statement to the Commissioner (under s 26WK) and notification to individuals or CDR consumers (under s 26WL) is not required,² or that notification to individuals or CDR consumers is delayed for a specified period.³
- 9.16 The Commissioner must not make a declaration unless satisfied that it is reasonable in the circumstances to do so, having regard to:
- the public interest (s 26WQ(3)(a))
 - any relevant advice given to the Commissioner by an enforcement body or the Australian Signals Directorate (ASD) (s 26WQ(3)(b)),⁴ and
 - such other matters (if any) as the Commissioner considers relevant (s 26WQ(3)(c)).

² Under s 26WQ(1)(c).

³ Under s 26WQ(1)(d).

⁴ The Commissioner may be given such advice or the Commissioner may or may not request such advice.

- 9.17 An entity that is considering applying to the Commissioner for a s 26WQ declaration should do so as soon as practicable after the entity is aware that there are reasonable grounds to believe an eligible data breach has occurred.
- 9.18 In deciding whether to make a declaration, and on what terms, the Commissioner will have regard to the objects of the Privacy Act and other relevant matters. The Commissioner will consider whether the risks associated with notifying of a particular data breach outweigh the benefits of notification to individuals or CDR consumers at risk of serious harm.
- 9.19 Given the clear objective of the scheme to promote notification of eligible data breaches, and the inclusion of exceptions in the scheme that remove the need to notify in a wide range of circumstances, the Commissioner expects that declarations under s 26WQ will only be made in exceptional cases and only after a compelling case has been put forward by the entity seeking the declaration.

Applying for a s 26WQ declaration

- 9.20 An entity considering making an application under s 26WQ should contact the OAIC in the first instance to discuss its intention.
- 9.21 If the entity decides to make an application, it should provide the following information and documents to the OAIC:
- a detailed description of the data breach
 - a statement outlining the entity's reasons for seeking a s 26WQ notice
 - a draft notice setting out the terms that it believes should be included in the notice issued by the Commissioner
 - relevant supporting documents and evidence (including, if applicable, relevant advice from an enforcement body or the ASD)
 - contact details of an employee or representative of the entity.
- 9.22 The onus is on the entity to demonstrate to the Commissioner that it is appropriate for the Commissioner to make a declaration. As such, the entity applying for a declaration will be expected to make a well-reasoned and compelling case detailing how the data breach is an eligible data breach, why any relevant exceptions do not apply, and why notification should not occur or should be delayed. The entity should provide detailed evidence or information in support of its application.
- 9.23 The Commissioner may seek further information from the entity or third parties. However, given the time critical nature of data breach notifications, the entity may not have a further opportunity to provide evidence or submissions to the OAIC before the Commissioner makes a decision on the application. As such, the entity should include all relevant information in its written application.
- 9.24 In considering whether to make a declaration, the Commissioner will have regard to relevant factors which may include:
- the objects in s 2A of the Privacy Act and the objects of the CDR scheme in Part IVD of the Competition and Consumer Act (set out in s 56AA) if applicable
 - the purposes of the NDB scheme, which include enabling individuals (and in the case of the CDR scheme, CDR consumers) to take steps to protect themselves from serious harm arising from a data breach

- the circumstances of the eligible data breach
- the extent to which notification will cause harm to particular groups or to the community at large
- the extent to which benefits of notification will be lost or diminished if notification does not occur or is delayed
- whether advice from an enforcement body or the ASD indicates that notification would be contrary to the public interest in the effective conduct of enforcement related activities or national security matters
- whether the entity responsible for the eligible data breach has been the subject of prior compliance or regulatory enforcement action by the OAIC, and the outcome of that action
- whether the eligible data breach is an isolated instance, or whether it indicates a potential systemic issue (either within the entity concerned or within an industry) or a potential issue which may pose ongoing compliance or enforcement issues
- such other matters as the Commissioner considers relevant.

9.25 After considering the application, the Commissioner will make one of the following decisions:

- a declaration that notification does not need to occur
- a declaration that notification can be delayed (either for the period proposed by the applicant, or another period selected by the Commissioner)
- a refusal of the application.

9.26 Where the Commissioner refuses a declaration, the Commissioner will give written notice of the refusal (s 26WQ(7)).

9.27 Decisions by the Commissioner under s 26WQ are reviewable by the Administrative Appeals Tribunal (AAT).⁵ An application for review by the AAT may be made by the entity that made the application for the declaration, or another entity whose obligations under the NDB scheme are affected by the declaration.⁶

Direction of Commissioner — requiring notification (s 26WR)

9.28 The Commissioner may direct an entity to:

- prepare a statement about the eligible data breach
- give a copy of the statement to the Commissioner, and
- notify individuals or CDR consumers about the eligible data breach.

9.29 In deciding whether to give a direction to an entity under s 26WR(1), the Commissioner must consider:

- any relevant advice given to the Commissioner by an enforcement body or the ASD (s 26WR(6)(a))

⁵ Privacy Act, ss 96(1)(ba) and 96(bb).

⁶ Privacy Act, ss 96(2A) and 96(2B).

- any relevant submission made by the entity (s 26WR(6)(b))
 - such other matters (if any) as the Commissioner considers relevant (s 26WR(6)(c)).
- 9.30 Under s 26WR(5), a direction by the Commissioner may require an entity to include specified information about the eligible data breach, in addition to the information required in a statement prepared for the Commissioner under s 26WR(4).
- 9.31 The specified information that relates to an eligible data breach is likely to be information that the Commissioner considers would assist individuals or CDR consumers to take appropriate action in response to the eligible data breach. Examples could include:
- information about the risk of harm to individuals that the Commissioner considers exists as a result of the eligible data breach
 - recommendations about steps the Commissioner considers individuals should take in response to the eligible data breach
 - information about complaint mechanisms available under the Privacy Act to individuals and under the Competition and Consumer Act to CDR consumers who are affected by the eligible data breach
 - other specified information relating to the eligible data breach that the Commissioner considers reasonable and appropriate in the circumstances to include in the statement.

Process for making a s 26WR direction

- 9.32 Before directing an entity to notify, the Commissioner will usually ask the entity to agree to notify voluntarily.
- 9.33 If the Commissioner and the entity cannot agree about whether notification should occur, the Commissioner will formally invite the entity to make a submission about the direction under consideration, within a specified period (s 26WR(3)). The form of the invitation, and the period of time specified in the invitation for the entity to respond, will be for the Commissioner to determine depending on the particular circumstances. In deciding the form and period of time to respond, the Commissioner will have regard to the impact on the entity and the nature and imminence of the risk of harm to individuals or CDR consumers who would receive notification of the eligible data breach the Commissioner has reasonable grounds to believe has happened.
- 9.34 The Commissioner will consider submissions and any other relevant information provided by the entity within the period specified before deciding whether to direct the entity to notify under s 26WR.
- 9.35 The Commissioner's decision will be communicated to the entity in writing. Entities can apply to the AAT for review of a decision by the Commissioner under s 26WR(1) to make a direction.⁷
- 9.36 An entity must comply with a direction made under s 26WR(1) as soon as practicable (s 26WR(10)). Contravention of s 26WR(10) is an interference with the privacy of an individual (s 13(4A)).

⁷ Privacy Act, s 96(1)(bc).

Publication and disclosure of information

- 9.37 The OAIC will publish statistics in connection with the NDB scheme, with a view to reviewing this approach 12 months after the scheme's commencement.
- 9.38 The OAIC will respect the confidence of commercially or operationally sensitive information that is provided voluntarily in support of a data breach notification.
- 9.39 As a matter of course, the Commissioner will consult with entities following a request for information made under FOI law. For FOI requests relating to agencies, the Commissioner will offer to transfer requests to the agency in question.
- 9.40 Decisions about public communications will be made in accordance with the considerations set out in the '[Public communication as part of privacy regulatory action](#)' section of the *Privacy regulatory action policy*, and where appropriate, the *CDR regulatory action policy*.

Reporting under the My Health Records Act

- 9.41 Under s 75 of the My Health Records Act, some entities have a mandatory obligation to provide notification of certain data breaches, including potential breaches, in connection with the My Health Record system. The mandatory notification obligation applies to entities that are, or have at any time been, the System Operator,⁸ a registered healthcare provider organisation, a registered repository operator, a registered portal operator or a registered contracted service provider (as defined in the My Health Records Act). Depending on the entity involved, notification must be made to either the OAIC or the System Operator or both.
- 9.42 A failure by a registered healthcare provider organisation, a registered repository operator, a portal operator or a registered contracted service provider to notify in accordance with s 75 is a breach of a civil penalty provision and may result in that entity being liable to pay a penalty.
- 9.43 The My Health Records Act also outlines in s 75(5) and (6) the steps an entity must take to contain and respond to the breach, or potential breach. The OAIC has developed the *Guide to mandatory data breach notification in the My Health Record system* to assist entities to comply with their mandatory data breach obligations.
- 9.44 Data breaches that are notified under s 75 of the My Health Records Act, do not need to be notified under the NDB scheme.

Responding to data breach notifications under the My Health Records Act

- 9.45 In assessing and responding to mandatory notifications, the OAIC will consider compliance with the My Health Records Act in addition to compliance with the APPs where relevant. The OAIC may also consider whether the breach was reported 'as soon as practicable', as required under s 75(2).

⁸ 'System Operator' is defined in s 14 of the My Health Records Act.

- 9.46 Section 75(5) of the My Health Records Act requires entities to take certain steps in responding to a data breach that may have occurred or arisen. These steps include containing the breach, evaluating the risks arising from the breach, notifying affected healthcare recipients (if the entity is the System Operator) or asking the System Operator to notify affected healthcare recipients (as applicable). The OAIC will consider these steps when assessing the severity of the breach and the entity's response. Section 75(6) of the My Health Records Act also requires entities to take steps in responding to a data breach that has occurred (rather than to a potential data breach). These steps include containing the breach (and to undertake a preliminary assessment of the causes), evaluating the risks related to or arising from the breach, notifying affected healthcare recipients (if the entity is the System Operator) or asking the System Operator to notify affected healthcare recipients (as applicable) and taking steps to prevent or mitigate the effects of further breaches.
- 9.47 The Commissioner has investigative powers under s 73(3) of the My Health Records Act, and may use these powers instead of the investigative powers under the Privacy Act if an investigation is warranted following a mandatory notification. However, the Commissioner will generally conduct investigations under the Privacy Act rather than the My Health Records Act unless there is a reason to conduct the investigation under the latter Act.
- 9.48 When entities are required to notify both the OAIC and the My Health Record System Operator of data breaches, the OAIC may consult with the System Operator when responding to the notification.

Reporting under the National Cancer Screening Register Act

- 9.49 Under s 22A of the National Cancer Screening Register Act 2016 (NCSR Act), the Secretary of the Department of Health (the Secretary), contracted service providers and former contracted service providers have a mandatory obligation to notify the Information Commissioner of certain data breaches, including potential breaches, in connection with the National Cancer Screening Register.
- 9.50 A failure by the Secretary, contracted service providers or former contracted service providers to notify in accordance with s 22A is a breach of a civil penalty provision and may result in that entity being liable to pay a penalty.
- 9.51 The NCSR Act also outlines in ss 22A(4) and (5) the steps the Secretary, contracted service providers or former contracted service providers must take to contain and respond to the breach, or potential breach.
- 9.52 Data breaches that are notified under s 22A of the NCSR Act, may also need to be notified under the NDB scheme, depending on the circumstances.
- 9.53 For more information on reporting under the NDB scheme, see paragraph 9.2.

Responding to data breach notifications under the NCSR Act

- 9.54 The OAIC will generally follow similar steps to the process outlined in relation to the My Health Records Act above [see paragraphs 9.45 to 9.48] when responding to mandatory data breach notifications under s 22A of the NCSR Act.

Reporting under Part VIIIA of the Privacy Act

- 9.55 Subsection 94S(1) provides that a breach of a requirement under Part VIIIA by the data store administrator (being the administrator, an officer or employee of the administrator, or a contracted service provider under a government contract with the administrator) **is taken to be an eligible data breach** by the data store administrator and the individual to whom the data relates is taken to be at risk from the eligible data breach.
- 9.56 Subsection 94S(2) provides that a breach of a requirement under Part VIIIA by a State or Territory health authority (being the authority, an employee of the authority or person in the service of the authority) **is taken to be an eligible data breach** by the State or Territory health authority and the individual to whom the data relates is taken to be at risk from the eligible data breach.
- 9.57 Subsection 94S(3)(a) provides that the breach is an eligible data breach as if the following provisions did not apply:
- S 26WE(3) – this provides that s 26WE(2) (which defines an eligible data breach as an unauthorised access to or disclosure of information that a reasonable person would conclude would be likely to result in serious harm to affected individuals; or that information is lost where unauthorised access is likely to occur and that access would likely result in serious harm to affected individuals) is subject to s 26WF
 - S 26WF – a breach is not an eligible data breach if the entity has taken action in relation to the disclosure before any serious harm results and, as a result, the likelihood of serious harm resulting is mitigated
 - S 26WH – requirement for an entity to carry out an assessment of whether a breach amounts to an eligible data breach
 - S 26WJ – no requirement to conduct an assessment in relation to a breach if another entity has conducted an assessment in relation to the same breach.
- 9.58 Subsection 94S(3)(c) provides that the breach is an eligible data breach as if the following provisions did not apply:
- S 26WN – exemption from notification of eligible data breach under ss 26WL and 26WK(3)(d) where the chief executive officer of a law enforcement body considers that notification will prejudice enforcement related activities
 - S 26WP – exemption from notification of eligible data breach under ss 26WL and 26WK(2)(a)(ii) where compliance would be inconsistent with a secrecy provision
 - S 26WQ – exemption from notification of eligible data breach under ss 26WL and 26WK where the Commissioner makes a declaration those provisions do not apply
 - S 26WS – exemption from the requirement to comply with a s 26WR(1) direction if the chief executive officer of an enforcement body believes that compliance with the direction is likely to prejudice an enforcement related activity
 - S 26WT – exemption from compliance with ss 26WR(1)(b) or 26WR(2) where compliance would be inconsistent with a secrecy provision.
- 9.59 The effect of these provisions is that any data breach by the data store administrator or a State or Territory health authority **is an eligible data breach, and the entity must comply with the requirements of Part IIIC, regardless of:**

- whether the entity has conducted an assessment and the outcome of that assessment
 - whether the entity considers that serious harm is likely to result for affected individuals
 - whether the entity has, or has attempted to, mitigate the risk of harm to affected individuals
 - whether the entity is an enforcement body and the chief executive officer of that body believes that notification of the eligible data breach would be likely to prejudice one of more enforcement activities they are conducting
 - whether there is a secrecy provision (including a prescribed secrecy provision in the regulations) that applies to the information disclosed in the breach
 - whether the Commissioner has made a declaration that ss 26WL and 26WK do not apply
 - whether the chief executive officer of an enforcement body believes that compliance with a direction of the Commissioner is likely to prejudice an enforcement related activity
 - whether compliance with ss 26WR(1)(b) or 26 WR(2) would be inconsistent with a secrecy provision (including a prescribed secrecy provision).
- 9.60 Further, s 94S(3)(b) requires the data store administrator or State or Territory health authority to:
- notify the Commissioner of the eligible data breach (s 94S(3)(b)(i)) and
 - only comply with the following provisions if the Commissioner so requires them to comply:
 - s 26WK – prepare a statement about the eligible data breach and give it to the Commissioner; and
 - s 26 WL – notify affected individuals of the eligible data breach.
- 9.61 Subsection 94S(4) provides that the Commissioner may consider a range of circumstances when considering whether to require either the data store administrator or State or Territory health authority to prepare a statement about the breach and notify affected individuals (s 94S(3)(b)(ii)), the Commissioner **must** require them to comply with those provisions if both of the following apply:
- the Commissioner is satisfied that the breach may be likely to result in serious harm to any of the individuals to whom the information relates and
 - s 94S(5) does not apply.
- 9.62 Note: the test of ‘likely to result in serious harm to any of the individuals’ is the same as exists in relation to NDBs notifiable under Part IIIC of the Privacy Act. However, in Part IIIC this assessment is conducted by the notifying entity and is one of the threshold tests for determining whether a data breach is an eligible data breach under those provisions. In relation to COVID app data, this assessment is undertaken by the Commissioner, who must have regard to the outcome of this assessment to comply with s 94S(4).
- 9.63 Subsection 94S(5) provides guidance for the Commissioner’s decision not to require compliance, or extend the period for compliance, with ss 26WK and 26WL. Satisfaction of s 94S(5) also overrides the mandatory requirement for the Commissioner to direct the data store administrator or State or Territory health authority to comply with s 26WK and 26WL

where the Commissioner is satisfied that a breach is likely to result in serious harm to affected individuals.

- 9.64 Under s 94S(5) the Commissioner may decide not to require compliance, or to extend the period for compliance, if the Commissioner is satisfied on reasonable grounds that it would not be reasonable in the circumstances. In reaching that satisfaction, the Commissioner **must** have regard to:
- the public interest
 - relevant advice provided by an enforcement body or the Australian Signals Directorate.
- 9.65 The Commissioner may take into consideration any other matters as the Commissioner considers relevant or any other advice: s 94S(5)(c) and 95S(6).
- 9.66 Other than the changes outlined above, the requirements of Part IIIC of the Privacy Act apply.

ombudsman **VICTORIAN**

Good Practice Guide to Dealing with Challenging Behaviour
Report and Guide
May 2018

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The Victorian Ombudsman respectfully acknowledges the Traditional Owners of the lands throughout Victoria and pays respect to them, their culture and their Elders past, present and future.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973 (Vic)*, I present to Parliament my *Good Practice Guide to Dealing with Challenging Behaviour, Report and Guide*.



Deborah Glass OBE

Ombudsman

22 May 2018

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Foreword

The complaints this Office receives are against “Bureaucracies”, organisations dependent on humans. Humans are unpredictable, have emotional ups and downs, good days and bad days ... a capacity to react to various situations in not always predictable ways, an ability for remembering the matters supporting their cause and forgetting or dismissing the facts that do not. With humans on both sides of the counter, the chance of misunderstandings, inaccurate assessments and subjective judgments is ever present ...

Victorian Ombudsman, Norman Geschke,
Annual Report 1981

If there is one subject that unites the Victorian Ombudsman with every person or agency dealing regularly with the public, it is how to deal with challenging behaviour.

Not only do we deal with challenging behaviour ourselves on a daily basis, we are constantly asked for advice from government departments, agencies, and local councils on what to do with overly persistent or abusive people. We hear about people who bombard agencies with complaints, refuse to listen to advice, swear at or threaten the agency’s staff, or threaten to harm themselves if they don’t get the outcome they seek.

We also hear from people who complain that an agency won’t deal with them, when they think they have a justified complaint.

We recognise this difficult balancing act. The public sector exists to serve the public, including those who may be demanding. But public sector resources are limited, and agencies need to protect the health and safety of their workforce.

As the second Victorian Ombudsman Norman Geschke so wisely observed, there are humans on both sides of the counter. This guide recognises that there is a wide spectrum of challenging behaviour – from behaviour which could be de-escalated if the complaint handler showed a greater understanding of its causes, to behaviour that should not be tolerated and needs to be contained.

It is based on many sources: our own experience, guidance developed by Parliamentary Ombudsmen over ten years ago, and the expertise of psychologists and agencies who deal with people who have a disability or a mental health issue affecting their ability to communicate. Importantly, it takes into account the requirements of Victoria’s human rights and anti-discrimination laws. I thank all of those who worked with us to create the guide.

I hope it helps to de-fuse, de-escalate, and de-mystify the behaviours that public servants encounter daily, and that greater understanding leads to fewer complaints.

Deborah Glass
Ombudsman

Report

1. This report introduces the Victorian Ombudsman's new guide for public sector complaint handlers dealing with challenging behaviour.
2. The guide responds to demand from government agencies and members of the public.
3. Every year we get calls and emails from agencies seeking advice about so-called 'difficult' people. We hear about people who bombard agencies with complaints, refuse to listen to reasonable advice or pepper their communication with threats and abuse.

[We have] endeavoured on many occasions to address [Mr A's] complaints but the pattern seems to be that he rejects the advice or actions we take, becomes aggressive and later denies a resolution because it was not what he demanded ...

[Mr A] has recently verbally abused a member of our staff ... Stories of verbal aggression undermine the confidence of our people and risk reducing customer service if we resort back to written communication ... I would like to discuss with you how we can best manage [Mr A's] contacts.

Email from government agency to
Victorian Ombudsman

4. We also hear the other side of these stories. Members of the public sometimes complain to the Ombudsman when agencies limit their contact or access to services. They believe their anger is legitimate and their complaints are justified.

I'm only allowed to contact [my case manager] on a Monday between two and four. I don't get home until a quarter to four so I miss time ... I'm left frustrated, angry and p***ed off that I'm not allowed to say what I need to say.

Complaint to the Victorian Ombudsman

5. Managing these situations can be one of the hardest parts of complaint handling.
6. On the one hand, we expect public sector organisations to be accessible to people from all walks of life. This includes people who communicate in unexpected ways because they are frustrated or distressed about their situation, or because of culture, disability or other personal circumstances.
7. On the other hand, we also expect organisations to protect the interests of the broader public and their staff. Public sector organisations need to use limited resources in the interests of all customers, not just the most demanding. They are also workplaces with obligations to protect the health and safety of their workers.
8. These situations can be especially fraught where mental illness or disability are involved. In 2013 the Victorian Civil and Administrative Tribunal found that a local council breached Victoria's discrimination and human rights laws when it banned a local resident from all buildings owned, occupied or managed by the council. The man had made thousands of complaints, many containing comments described as 'critical of and insulting about' councillors and council staff. The tribunal found the man's compulsion to complain and behaviour were a symptom or manifestation of his disabilities.¹

¹ *Slattery v Manningham City Council* [2013] VCAT 1869 (30 October 2013).

9. The guide aims to help public sector complaint handlers navigate these behavioural and legal issues so they can get on with their job – dealing with complaints.

What the guide recommends

10. The guide encourages public sector organisations to recognise that people present with a range of behaviours for a range of reasons. There is no ‘one size fits all’ solution.
11. It recommends a graduated response:
- preventing challenging behaviour where possible through good complaint handling
 - de-escalating challenging behaviour in the first instance
 - managing behaviour where it raises health, safety, resource or equity issues
 - limiting access only as a last resort, in a way that is lawful, fair and transparent.
12. It contains practical tips and examples to help complaint handlers at each stage, and a model policy to guide leaders and managers.
13. There is specific advice about dealing with challenging behaviour that may be associated with a disability or mental illness, and responding to people who raise concerns about suicide.
14. The guide stresses that people who handle complaints in the public sector are human too. It provides practical advice for complaint handlers about looking after themselves, and for managers about taking care of their staff.

How we developed the guide

15. The guide builds on the *Managing Unreasonable Conduct by Complainants Practice Manual* that was first developed by parliamentary ombudsmen in Australia and New Zealand in 2007² – led by the NSW Ombudsman. This manual was designed to deal with the most extreme types of behaviour that confront complaint handlers.
16. The Victorian Ombudsman recognises there are many other types of behaviour that can be challenging for complaint handlers. It provides advice about how to respond in a way that is tailored to Victoria’s human rights and discrimination laws.
17. The information in the guide is partly based on the Victorian Ombudsman’s own experience. We know that challenging behaviour is difficult because we deal with it too. People contact the Ombudsman because they are frustrated with something an agency has or has not done. Sometimes that frustration spills over into the way they communicate with us.
18. We also drew on the expertise and experience of bodies that deal with vulnerable parts of the community every day: the Disability Services Commissioner, the Mental Health Complaints Commissioner, the Victorian Equal Opportunity and Human Rights Commission and the Office of the Public Advocate.
19. The guide takes account of international literature about de-escalating conflict, and was reviewed by a psychologist with experience in government complaint handling and investigations.

² At the time this report was prepared, the New South Wales Ombudsman was finalising a new edition of the manual in consultation with other Ombudsman offices.

Other help for authorities

20. The new guide complements the Victorian Ombudsman's other guides for public sector complaint handlers:
- The 2015 *Councils and Complaints – A good practice guide*
 - The 2016 *Complaints: Good Practice Guide for Public Sector Agencies*
 - The 2017 *Good Practice Guide: Managing Complaints involving Human Rights* (undertaken in partnership with the Victorian Equal Opportunity and Human Rights Commission, the Human Rights Unit of the Department of Justice and Regulation, and the Independent Broad-based Anti-corruption Commission).
21. The Victorian Ombudsman will also be offering education workshops for public sector organisations on dealing with challenging behaviour. The workshops will help complaint handlers put the guide's advice into practice.
22. The new guide and workshops respond to the Victorian Parliament Accountability and Oversight Committee's 2017 report on education and training initiatives in oversight agencies. The Committee said there was interest from government agencies in greater guidance from the Ombudsman in the form of education and training activities. It recommended this office develop sector-specific guidelines to assist agencies to meet their legal obligations.³
23. The Victorian Ombudsman welcomes the Government's decision to introduce a bill to formally recognise a public education function for this office.⁴
24. In the meantime, it is hoped the guide and workshops will help organisations deal with challenging behaviour better, with fairer outcomes for complaint handlers and the public.

³ Parliament of Victoria Accountability and Oversight Committee, *Inquiry into education, training and communications initiatives of Victorian oversight agencies* (2017) 44-45.

⁴ Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 cl 149, 152.

Good Practice Guide to Dealing with Challenging Behaviour

May 2018

Introduction

Key things to remember

This guide will help complaint handlers in the Victorian public sector deal with the challenging behaviour that sometimes accompanies complaints.

The key things to remember are:

- You are not alone. Even experienced complaint handlers are challenged by people's behaviour at times.
- There are ways to prevent and respond to challenging behaviour so you can focus on your job – dealing with the complaint.
- You can draw the line in extreme cases, but there are important steps you need to take first to comply with Victorian human rights and other laws.

People who handle complaints in government often say the hardest part of their job is handling the behaviour of some people who complain.

You will be speaking with people who are angry or frustrated with your organisation's actions, sometimes with good reason. You may be speaking with people who are vulnerable and distressed. You may come across people who will not listen to your advice. Occasionally – hopefully not often – you may meet people who abuse or threaten you.

Although this kind of behaviour is hard to deal with, there can be a legitimate grievance at the heart of these complaints.

So how do you prevent this behaviour getting in the way of you doing your job – dealing with the complaint – and providing a good service? And how do you look after yourself or your staff, and make sure you use your time and resources wisely?

How this guide can help

This guide provides practical, common sense advice about how to deal with challenging behaviour. It includes tips for dealing with common situations and examples of what does and does not work, based on actual cases.

It recommends your organisation follow the four stages shown below. These stages recognise complaint handlers encounter a spectrum of behaviour, from slightly confronting to clearly unreasonable, and our responses need to be graduated too.



This guide also provides advice about looking after yourself, if you are handling complaints, and looking after your staff, if you are a manager or leader.

The strategies in this guide will not work with every person every time. It is often a matter of trying one approach and, if it does not work, trying another approach. You will get better at dealing with challenging behaviour with practice.

How we developed the guide

The information in this guide is based on our experience at the Victorian Ombudsman.

Every year we speak with thousands of people from all walks of life. Almost all of them contact us because they are upset about something a government agency has or has not done. We deal with challenging behaviour from members of the public every day.

You will find examples from our work in the case studies in this guide. Some details have been changed to de-identify the people and organisations involved.

The advice in this guide also:

- takes account of Victoria's human rights laws (see opposite), equal opportunity laws (see page 26) and workplace safety laws
- reflects discussions with organisations whose core business is dealing with vulnerable people – people with mental illness or disability or their families, and people reporting discrimination
- draws on the growing body of literature about dealing with challenging behaviour. You will find references to this literature and other helpful resources on page 54.

Victoria's human rights laws

In 1996 Victoria became the first state in Australia to adopt a charter of human rights in law.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) sets out 20 rights and freedoms enjoyed by people in Victoria including:

- a right to equality before the law
- a right to privacy and reputation
- freedom of movement
- freedom of expression
- a right to take part in public life.

Public authorities, and some private companies performing functions on behalf of the government, must act compatibly with these rights when delivering services or making decisions. They must also consider relevant human rights when making a decision.

The rights and freedoms in the Charter are not absolute. The Charter states that a human right can be subject under law to such 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' and taking into account factors including:

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose
- any less restrictive means reasonably available to achieve the purpose.

The guide is intended to be read alongside the *Managing Unreasonable Conduct by Complainants Practice Manual* developed by parliamentary ombudsmen in Australia and New Zealand in 2007¹ – led by the NSW Ombudsman. The manual focuses on the most extreme forms of behaviour that threaten the health, safety, equity or resources of the parties involved in complaints (Stages three and four of this guide). It is written for a national audience and does not reflect Victoria’s human rights and equal opportunity laws. It does, however, contain useful strategies and ideas that have helped public and private sector organisations. This guide will refer you to the manual for information about specific topics.



Tip: Using script suggestions

This guide and the *Managing Unreasonable Conduct by Complainants Practice Manual* contain script ideas for responding to different situations.

Real conversations do not follow scripts of course. If you sound like you are reading from a script, you will seem inauthentic or patronising.

We recommend you practice script ideas and adapt them to suit your style of speaking.

The terms used in this guide

This guide uses certain terms to describe the work of handling complaints and challenging behaviour.

The Victorian Ombudsman’s preferred definition of a ‘complaint’ is:

A complaint is an expression of dissatisfaction with:

- the quality of an action taken, decision made or service provided by an agency or its contractor
- a delay or failure in providing a service, taking an action, or making a decision by an agency or its contractor.

A ‘complaint handler’ is an officer responsible for responding to a complaint. It includes officers who are employed specifically to deal with complaints, and officers who only deal with complaints from time to time.

The term ‘complaint handling system’ refers to all policies, procedures, practices, officers and resources an organisation deploys to manage complaints.

The term ‘complainant’ also appears in this guide. Parliamentary ombudsmen use this term to refer to a person, organisation or representative who makes a complaint. Depending on your organisation’s work, you may use ‘client’, ‘customer’, ‘resident’, ‘student’ or another term instead.

The term ‘challenging behaviour’ is explained in the next section.

¹ New South Wales Ombudsman, *Managing Unreasonable Conduct by Complainants Practice Manual* (3rd edition, forthcoming).

What is challenging behaviour?

Key things to remember

'Challenging behaviour' is any behaviour you find challenging. It varies from person to person.

By reflecting on types of behaviour you find challenging, you will be in a better position to respond effectively.

Some types of behaviour are never acceptable. They include verbal abuse, threats and violence.

The term 'challenging behaviour' is intended to encourage you to consider what sorts of behaviour *you* find challenging and why.

This guide is not suggesting a relativist approach where it is up to every complaint handler to decide what they can and cannot handle. Nor is it suggesting that challenging behaviour only exists in the head of complaint handlers. There are behaviours that are never acceptable.

By reflecting on what you find challenging, you will be in a better position to:

- control your reaction to the behaviour so you can respond more effectively
- choose the best strategy for dealing with the behaviour
- look after yourself.

When people are confronting or unpleasant, we can have a tendency to label them and/or their behaviour. If we do this as complaint handlers, we risk using strategies that make the situation worse. It is confronting when someone starts a telephone call by shouting at you about something that has gone wrong, or challenges one of your decisions. But if you hang up straight away, they are likely to get even angrier and complain about you, and you miss a chance to resolve the problem.

This section will help you consider what behaviour you find challenging and how you should respond.

Consider your expectations

For complaint handlers, people with complaints would ideally:

- be pleasant and respectful
- explain their problem and what they want clearly and succinctly
- try to contain their emotions and focus on the issues
- understand your organisation's role and the limits on what it can achieve
- accept decisions with good grace.

In the real world, people do not always act this way. They want their problem fixed, and fixed quickly. They are often angry or upset. They may not understand your organisation's role or care that you work within legal and/or financial limits. They might not communicate information in the way you need for a whole range of reasons – emotion, culture, disability or language. They may not accept or understand your decision, particularly if it involves bad news.

This behaviour is not of itself unreasonable. To handle complaints well, you need to be prepared to deal with a diverse range of people and behaviours.

You may also have expectations about yourself – that you will be able to solve every problem and make every person happy. This does not always happen in the real world either. The measure of your success is not whether the person is happy (although it is nice when it happens), but whether you have handled the complaint well and treated the person with respect and dignity.

Know your ‘triggers’

At the Victorian Ombudsman, our officers find different situations challenging. Some officers find it hard when people shout or get angry. Others find it hard when they hear or see people in tears.

Some are challenged when people ignore their advice and raise the same issues over and over. Others might feel confronted when people question their competence by asking about their age or qualifications, or insist on speaking to a manager.

Think about types of behaviour you found particularly frustrating in the past, or behaviour that left you upset long after the conversation ended.

Remember that your threshold for coping with behaviour changes over time. People who raise their voice might not upset you ordinarily. If you have had a series of people shouting at you over the course of a morning, you may find it difficult when the next person does the same thing. Or there may be other things happening in your life that make you less resilient than usual.

Don’t make assumptions about motives

People can engage in behaviour you find challenging for different reasons.

Some studies look at the psychological aspects of ‘querulent’ or ‘high conflict’ behaviour.²

Challenging behaviour can also arise from:

- The person’s frustration, anxiety or distress about their complaint.
- Previous bad experiences dealing with your organisation or government.
- Resentment about having to deal with your organisation in the first place, if this is not the person’s choice. This might be an issue, for example, if your organisation is involved in enforcing the law, or collecting fees and taxes.
- Stressful personal situations such as significant caring responsibilities or chronic pain.
- Drug or alcohol use.
- Cultural differences. Different cultures can have different ways of communicating problems or showing honesty and respect. You can find information to help you understand some of these differences in the *Managing Unreasonable Conduct by Complainants Practice Manual*.
- Some types of disability or mental illness. This guide discusses these issues on pages 25-35.

² See, eg, Paul E Mullen and Grant Lester, ‘Vexatious litigants and unusually persistent complaints: From querulous paranoia to querulous behaviour’ (2006) 24 *Behavioural Sciences and the Law* 33; Bill Eddy, *Managing High Conflict People in Court* (High Conflict Institute, 2008).

In most cases, you will never know why the person is acting the way they are. Your job as the complaint handler is to deal with the complaint, not diagnose or stereotype the person.

Good complaint handlers observe people for signs of behaviour that need to be addressed, but recognise challenging behaviour is not usually personal. They keep an open mind about the person and their complaint.

Distinguish between different types of behaviour

Different types of challenging behaviour warrant a different level of response.

You can deal with most challenging behaviour using good complaint handling and defusing strategies (Stages one and two of this guide).

It is only when behaviour is or becomes truly unreasonable that you need to think about management strategies or limiting access to your services (Stages three and four).

So how do you tell when the behaviour has reached this point?

This guide, and the *Managing Unreasonable Conduct by Complainants Practice Manual*, state that behaviour becomes unreasonable when, because of its nature or frequency, it raises health, safety, resource or equity issues for the parties to the complaint.

The parties to the complaint can include you, the complainant, your organisation, the subject of the complaint and the other people who use your services.

Some types of behaviour clearly meet this test, such as verbal abuse, threats to harm you or other people, and violence. This behaviour is never acceptable.

Unreasonable behaviour can also be subtle. For example, the person might start reframing a complaint that has already been dealt with so it looks like they have new issues. Or they might say things to manipulate your emotions such as 'You're not helping me. If I lose my house, it will be your fault.'

If you are unsure whether conduct is unreasonable and how to respond, consult a manager or another experienced colleague. Sometimes an outside perspective can help you see the situation more clearly.

Stage one: Prevent

Key things to remember

You and your organisation can help prevent challenging behaviour by practising good complaint handling techniques.

Your complaint handling system should be accessible and easy to use.

The way you deal with complaints should be fair, respectful and prompt, and clear about what you can and cannot do.

This section looks at ways to prevent challenging behaviour by practising good complaint handling techniques.

A person's first contact with your organisation sets the tone for the rest of their contact with you. If they had to speak to three different parts of your organisation to find out how to complain, they are likely to be frustrated by the time they speak with you. If they do not get an accurate understanding of your organisation's role and how you handle complaints in those first conversations, they will be even angrier if you tell them you cannot help in three months' time.

The case study on the next page is an example of how an organisation's systems for delivering services can affect people's behaviour. Your organisation can avoid fuelling challenging behaviour by building a strong foundation of good service delivery and complaint handling.

The Victorian Ombudsman has published guides to good complaint handling for local councils and the Victorian public sector.³

This guide highlights the key steps to help prevent challenging behaviour.

Welcome complaints

Our complaint handling guides stress the importance of building an organisational culture that is receptive to complaints.

Unhelpful, defensive responses undermine confidence in your organisation and make people less likely to respond positively to you.

All officers in your organisation need to be aware of your complaint handling system and what to do if someone approaches them with a complaint.

Leaders and managers need to appoint officers that are skilled in customer service and complaint handling, empower them to resolve complaints, and offer training and support.

Our guides also recommend that you publish information about how to complain. You can do this on your website and in brochures and 'welcome packs' for your customers.

Be accessible

Good organisations also make it easy for people to complain.

Not everyone in the community can contact you during business hours or make a written complaint. We live in a diverse community where people have different communication preferences and needs. Traditional bureaucratic practices can be obstacles for people who have a disability or illness, are elderly, speak little English, struggle with literacy, are homeless or shift workers, or identify as a gender other than that assigned at birth.

The harder you make it to complain, the more frustrated people will become, and the more likely they are to take it out on you or your staff.

³ Victorian Ombudsman, *Councils and complaints: A good practice guide* (2015); Victorian Ombudsman, *Complaints: Good Practice Guide for Public Sector Agencies* (2016).

Your organisation can remove some of the barriers to complaints by:

- accepting complaints by telephone, email, letter, online and in person
- offering free access to a translator and/or interpreter service
- using the National Relay Service, communication boards and other aids to communicate with people with hearing or speech disabilities
- providing information in accessible formats
- providing support to members of the public to make complaints, if needed
- accepting complaints from authorised representatives if a person is unable to complain themselves.

It is good practice to consult with different communities about how to meet their needs. You will find more information about communicating with people with a disability or a mental illness on pages 25-35.



Case study: How service delivery can affect behaviour

In 2016 and 2017 Centrelink rolled out a partially automated system that matched income declared by welfare recipients with certain data held by the tax office. This led to some welfare recipients being asked to repay money.

Customers complained about incorrect debt notices and waiting hours to speak with Centrelink officers.

The Commonwealth Ombudsman investigated and identified service delivery problems including:

- failure to include the dedicated telephone number for compliance matters on letters, resulting in some people calling Centrelink's general line
- Centrelink staff not having sufficient knowledge about the system
- problems getting assistance on the telephone, in person and online.⁴

Media reports noted that, at the same time, the government was tendering for 'Advanced Customer Aggression Training' for Centrelink staff. One report quoted union sources as saying that 'plummeting customer service standards are driving high levels of verbal and physical aggression towards frontline Centrelink staff'.⁵

One of the people described in the Commonwealth Ombudsman's report said she had cried and screamed when speaking with Centrelink officers and had stopped engaging with the agency due to stress and anxiety.

The Commonwealth Ombudsman made recommendations to improve communication, while recognising Centrelink had already made changes.

Centrelink advised that it continues to 'focus on user testing enhancements and working with both customers and third party organisations to improve the design of online services'.

⁴ Commonwealth Ombudsman, *Centrelink's automated debt raising and recovery system* (2017).

⁵ Noel Towell, 'Centrelink cooking the books on violence against public servants, union says', *Canberra Times* (online), 23 January 2017 <<https://www.canberratimes.com.au/public-service/centrelink-cooking-the-books-on-violence-against-public-servants-union-says-20170120-gtvdme.html>>.

Respond promptly

In our experience, delays and failure to communicate are among the main reasons people become upset with organisations.

People can interpret lack of contact in ways you did not intend. They may assume your organisation does not care and is doing nothing.

Alternatively, if you take a long time to investigate their concerns without explanation, they may assume you are finding serious problems which will lead to a significant outcome for them.

At the Victorian Ombudsman, we respond to all complaints directed to us unless the person says they do not want a response, or we have previously told them that we may not respond to further contact (see pages 43-48).

It is good practice to acknowledge all complaints within 10 business days at most. You should respond sooner if the matter is urgent.

We recommend organisations resolve straightforward complaints within 28 days. If the complaint is likely to take longer because it is complex or needs investigation, give the person a timeframe and update them regularly.

Treat people with respect

When people complain, they want someone to listen and take them seriously. For many people, being treated respectfully during the complaint handling process is as important as the outcome of the complaint.

You can demonstrate respect by:

- giving the person a fair opportunity to present their position
- using active listening skills to show you are listening and taking their concerns seriously (see next page)
- giving the person an opportunity to discuss or comment on your preliminary findings before you close the complaint
- taking the time to explain your decision, how you reached it, and your reasons.

Talk like a human being

People who work in the public sector get used to official language and jargon. We sometimes use that language when we speak with members of the public.

People usually respond better if you come across as a real person rather than a 'faceless bureaucrat'.

You can do this by:

- taking time to introduce yourself and offering your name and contact details if the person has questions
- speaking or meeting with the person in person
- showing empathy (you will find more about this on page 21)
- explaining legal or bureaucratic terms in plain English
- giving common sense rather than bureaucratic explanations eg 'We ask people to do X because it helps Y' instead of 'It's our policy'.

The best communicators in our office listen to the way people speak and adapt their own language accordingly. The way they speak with a lawyer might be very different to the way they speak with someone with limited English.

Remember to stay professional – your role is to handle the person's complaint, not become their friend.

Whatever techniques you use, the more people see you as another human being, the more likely they are to treat you well.

Manage expectations

It is also good practice to explain your organisation's role and your complaint handling process at the outset. People do not always understand what government agencies do and how they work. They may believe your organisation has unlimited resources or powers to fix their problem. They may expect an instant response or a more private sector-style 'the customer is always right' approach. They may have unrealistic views about the remedies you can provide, such as compensation or getting someone fired.

When you fail to meet these expectations, their reaction may be disappointment and anger.



Tip: Active listening

'Active listening' is a technique used in dispute resolution and counselling. It involves concentrating on what someone is telling you and showing that you are listening.

Active listening techniques include:

- verbal affirmations eg 'uh huh' or 'yes'
- non-verbal affirmations such as eye contact and nodding
- asking questions eg 'You say you want justice. What would that look like?'
- paraphrasing what the person has been telling you in your own words eg 'It sounds like you're saying ...' Remember to keep your reflections tentative.
- checking your understanding eg 'I want to make sure I'm clear about this. Do you mean ...?'

The Victorian Ombudsman recommends you speak with people early to gauge their expectations and explain what you can and cannot do.

At a minimum, it is good practice to communicate:

- your organisation's role
- how you will be dealing with their complaint
- what issues you will and will not be considering
- their likely involvement in the process
- the expected timeframe for a response
- the possible or likely outcomes of the complaint.

You will find script ideas for testing and managing expectations in the *Managing Unreasonable Conduct by Complainants Practice Manual*.

If the person demonstrates challenging behaviour during these early discussions, this is your opportunity to set ground rules. At the Victorian Ombudsman, our Service Delivery Charter tells people 'As we expect our staff to be courteous and respectful when dealing with you, we expect you to afford our staff the same in return'.

Bear in mind that people are less likely to process and retain information when they are upset. Or they may not admit that they do not understand what you are saying.

If you think a person may not have understood you, or is resistant to your advice, confirm it in writing. It may be helpful to refer to this information in subsequent discussions, particularly if it is taking some time to resolve the complaint.

The case study on the next page illustrates the impact of expectations on behaviour.



Case study: Managing expectations

A couple contacted the Victorian Ombudsman because an agency was about to start building a public facility next to their home. They believed the agency failed to consult them properly. They wanted the agency to move the facility or compensate them.

The couple's son had a significant health problem and they were concerned about the impact on his health.

Our office explained to the father on the telephone that we could not stop the construction or award compensation, but would look at the agency's consultation process.

This took a few months. Based on the evidence, we concluded the agency had consulted and acted lawfully.

When we spoke to the couple about our conclusions, they were very angry. The mother said the agency and this office were ruining their lives and began chanting 'F*** you' over the telephone. This was followed by calls and letters in which the couple repeated that they wanted the facility moved or compensation, and said we had 'strung them along'.

Our office had tried to manage the couple's expectations when we first spoke with the father. In hindsight, it might have been helpful to confirm this in writing so both he and his wife had a written record. This might have led to further discussions with the couple about what they expected from our office, and we could have considered whether to continue our involvement.

Don't avoid difficult conversations

Some of the time your job will involve giving people bad news. You may not be able to resolve a problem as quickly as the person would like. Your organisation may not be able to provide the outcome they want because of the law or government policy or your budget.

No one likes to be the bearer of bad news. People work in the public sector to help people, not to disappoint them. It is natural to feel anxious about giving bad news, particularly where a person is already distressed and vulnerable.

Avoiding these conversations only makes the situation worse. By not telling the person, you are giving them false hope. They are likely to be even more upset when the time eventually comes to tell them that you cannot help.

In their book *Difficult Conversations*, members of Harvard University Law School's Negotiation Project say: 'Choosing not to deliver a difficult message is like hanging on to a hand grenade once you've pulled the pin.'⁶

If it is clear you cannot help, explain this as soon as possible. You need to be respectful, and you can acknowledge the person's feelings and disappointment, but ultimately you need to be honest.

⁶ Douglas Stone, Bruce Patton and Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (Penguin Books, 10th anniversary edition, 2010) xxx.



Tip: Delivering bad news

Contacting someone to explain you cannot give them what they want is not easy, even when you have done what you can to manage their expectations.

The following strategies can make it easier:

- Prepare. If you cannot provide a common sense explanation for your decision, the person is unlikely to accept it. Think about what they are likely to say or do and how you will respond.
- Consider what you know about the person. Are they likely to react badly as soon as you tell them your decision? Would it be better to explain what you did and your reasons first?
- Be respectful. If the issue is sensitive, they may appreciate you speaking with them in person before you write.
- Explain what you did to investigate the complaint and why you made your decision. This shows you took the matter seriously, even if the outcome is not what they wanted.
- Express empathy. The complaint might not have merit from your perspective, but this does not mean the person has no right to be upset. You can acknowledge the way they feel while disagreeing with what they say eg 'I know this is not what you were hoping for ...'. Be careful about your language and tone. You do not want to look like you are taking sides, or being patronising.
- Offer an opportunity to ask questions.
- Listen to the person. If they raise valid points, agree to consider them. If not, acknowledge that they do not agree with you and explain why you reached a different view. Use 'and' rather than 'but' eg 'I can see your point, and I can also see evidence that ...'
- List opportunities for review or other avenues for challenging the decision. Only suggest avenues that are realistic though. Otherwise you are wasting the person's time.
- If the person cannot accept the decision, do not argue. Politely explain that you have done all you can, there is no further advice you can provide, and end the discussion.

Reflect and learn

At the Victorian Ombudsman, officers make time to listen to recordings of challenging phone calls. Sometimes they conclude there is nothing they could have done to prevent the person's behaviour. Other times they find things they could do differently in future.

You might not feel like revisiting a difficult conversation straight after a phone call or meeting, but it is worth making this a regular practice.

Managers should review reports of challenging behaviour for patterns and trends too. You can use this information to improve your organisation's complaint handling system and prevent problems in future.

The more you learn from your experiences in complaint handling, the better you will become.

Stage two: Respond

Defusing emotion

Key things to remember

If someone is very emotional about their complaint, you need to deal with that behaviour before you can talk about the issues. This involves:

- taking control of your own emotions and the situation
- acknowledging how the person feels and giving them a chance to 'let off steam'
- re-focusing the conversation onto the issues in the complaint.

If the behaviour involves or turns into unreasonable behaviour, consider the strategies on page 40.

This section looks at strategies for defusing challenging emotional behaviour.

This includes angry behaviour – yelling, ranting, swearing, insults, thumping the table and so on. It can also include situations where a person is highly distressed.

Some emotion is to be expected when people complain. But if a person is so upset that they cannot talk to you properly about the issues, it becomes a problem. You need to deal with their emotions first, before you can speak rationally with them about their complaint.

This guide uses the CARP method developed by Canadian psychologist and workplace consultant Robert Bacal.⁷ CARP stands for:

Control – taking control of your response and the situation and not getting drawn into arguments

Acknowledge – allowing the person to speak and acknowledging their feelings

Refocus – shifting the focus from the way the person feels to the issues

Problem solve – moving on to discussing and addressing the issues.

The CARP model is designed to deal with angry and hostile behaviour, but it can be useful for addressing other types of emotional behaviour too.

Control yourself first

If angry or distressed behaviour is one of the 'triggers' you identified earlier, your reaction to this behaviour is likely to be emotional too. You might feel your heart thumping, notice your thoughts racing or hear your voice change pitch.

You need to control your emotional response so you can think clearly and respond to the person, instead of just reacting to the situation.

You know how best to control your emotions based on your life experience.

Common techniques people use are:

- breathing deeply
- counting to 10
- positive self-talk eg telling yourself the person is upset about the situation and not you, that you can handle the situation etc.

If you are having trouble collecting yourself, find a reason to take a break. Put the caller on hold to get some information or leave the room to get some water.

If you cannot continue productively and the matter is not urgent, it might be better to arrange to speak with the person again at another time.

Stay professional

People who are upset sometimes do or say things that draw you into their emotional state. An angry person, for example, might try to provoke an argument by insulting you.

It is important to remain neutral and in control. If you respond in a way that sounds defensive or argumentative, the situation is likely to escalate. The other person is controlling the conversation and you have lost your chance to steer it towards the issues.

⁷ Robert Bacal, *Defusing Hostile Customers Workbook: A Self-Instructional Workbook for Public Sector Employees* (3rd edition, 2010).

Your tone and body language are just as important as the words you use. You need to look and sound calm, confident and professional.

You also need to stay respectful. This can be hard if the person is being disrespectful to you. Remember your goal at this point is defusing the situation, not winning a contest.

Listen to the person

Give people a reasonable amount of time to talk about the way they feel before you turn to the issues. Some people need to 'let off steam' before they can talk about their complaint.



Tip: When you cannot get a word in

Sometimes people are so angry or upset that it is hard to get a word in and move the conversation forward. The following strategies can help in these situations:

- **Silence.** If you say nothing, the person may eventually stop to check you are still there.
- **Use the person's name** to get their attention.
- **Draw the person's attention to how long they have been talking** eg 'I've been listening to you for 20 minutes and it sounds like a lot has happened. I need to ask some questions now so I can work out if I can help you.'
- **Repeat a simple, helpful message until the person hears you** eg 'OK, let me explain what we can do.'
- **Make another time to talk** eg 'I can hear you're upset at the moment. I can make a time to call you tomorrow to talk more about your complaint. What time would suit you?'
- **Use a firmer voice.** Your tone needs to be firm, not aggressive.

If someone cries and is unable to speak, be patient. Silence is not a problem. The person might be crying with relief because someone is finally listening to them. They might be dealing with personal hardship, or worried for someone close to them. You can tell them you are happy to wait while they get a tissue or have something to drink, and then ask if they are able to continue.

Exercise your judgement though. If the person is working themselves into an even more emotional state, it is time to intervene.

Acknowledge and empathise

Page 16 of this guide talks about people wanting to be listened to and taken seriously when they complain. If someone is expressing strong feelings, you need to acknowledge this before you can move on to discussing the issues.

Empathising with someone is not the same as agreeing with them. Acknowledging and empathising means reflecting what the person has told you, and showing you understand why they are upset.

Choose your words carefully. People may not react well if you tell them how they feel, or that you know how they feel. It is better to reflect what the person has told you.

If someone is angry about the time your organisation has taken to do something, you might say 'I see, that does sound frustrating' or 'OK, I've heard what you're saying'. If they are not happy with the outcome, you could say 'I know you said you wanted X, and this isn't what you were expecting'.

Sometimes people will ask you to agree with them by saying things like 'Don't you think that's unfair?' Again, you do not have to agree. You could respond by saying 'My job is to look into that. This is what I'm going to do next ...'

You will find other ideas about what to say, and not say, in the *Managing Unreasonable Conduct by Complainants Practice Manual*.

Refocus the discussion

Once the person's feelings are under control enough for you to discuss the complaint effectively, start to refocus. You can do this by explaining that you need to ask some questions so you can assess your role and how you can help.

If the person becomes upset again, go through the CARP process again. If a person keeps repeating a point over and over, it may be a sign they do not think you have understood them. You need to acknowledge what they are saying before you can move on.



Case study: Dealing with anger

A student complained to the Victorian Ombudsman about the way her university investigated allegations against her lecturer.

She said the lecturer's behaviour impacted on her health and she wanted her marks changed. We found some problems with the university's actions, but they had not affected the student's marks.

When the case officer called to explain, the student began arguing and asked for written information about how to appeal. The case officer listened and explained the reasons for the decision. She agreed to email the student the information she requested and ended the discussion.

The student contacted us the next day and apologised for becoming heated.



Case study: Dealing with distress

A mother contacted the Victorian Ombudsman about an agency's response to her complaints about its treatment of her daughter, who has a disability.

At the time, she was caring for her daughter with little support. The mother sometimes became upset and cried during her calls with the case officer.

The case officer started emailing her before the calls to ask what time suited her. He set aside time to listen to the mother during the calls, and waited if she cried.

The mother was not happy with the outcome of her complaint, but thanked the case officer for the way he treated her.

Start problem solving

Once you have defused the situation and the person is ready to talk about the issues, go back to your complaint handling practices and start responding to the complaint.

Check your language and tone

Throughout the process, the way you deliver your message is as important as the message itself. Your language, body language and tone need to be consistent with what you are trying to achieve.

If you want to defuse the situation, it is often better to use softer, cooperative language, an open and relaxed posture, and a gentler tone.

If you want to make it clear that certain behaviour, such as racist or sexist insults, is not acceptable, you may need to vary your tone or use more direct language.

Review and adjust if needed

At the start of this guide, we noted that not every strategy will work with every person every time. Observe the person's responses and adjust your strategy until you find something that works.

Robert Bacal's advice is 'try out techniques, and watch what happens. If it works, keep doing it. If it doesn't, try something different.'⁸



Tip: Cooperative language⁹

Cooperative language is words or phrases that show you want to work with the other person, rather than control or argue with them.

Examples are:

- Showing you are open to considering other points of view eg 'We don't usually do X because ... Is there any reason we should do that here?'
- Replacing some statements with questions eg 'Were you aware that you needed to do X to qualify?' instead of 'You didn't do X so you don't qualify', or 'I wonder if you've thought about ...?' instead of 'You're wrong.'
- Offering choices, even if they are small ones eg 'What time would it be best to call you back?'

Avoid tone, words and phrases that:

- Imply blame eg 'You didn't complete the form properly.'
- Judge the person eg 'You're rude' or 'This complaint is vexatious.'
- Suggest you are not interested eg 'I don't want to hear about ...'
- Suggest helplessness eg 'There's nothing I can do' (if there really is nothing you can do, explain why).
- Threaten the person eg 'If you don't stop talking to me like that, I will have you removed from this office.'
- Bait the person eg 'Go ahead and complain about me.'
- Are absolute eg 'We never do Y' (unless the restrictions are imposed by law).

⁸ Robert Bacal, above n 7, 30.

⁹ Robert Bacal, above n 7, 64.



Tip: Disarming attacks

Most complaint handlers have been told at some point that they are useless or that the caller's taxes pay their salary. If you cannot defend or argue, what can you do?

The following techniques can be useful to get a person to stop so you can move the conversation on:

- Provide a neutral response eg 'That's interesting. Some people do think public servants are lazy'. Robert Bacal calls this 'going to computer mode'.
- Find something (non-controversial) to agree with and redirect the discussion eg 'That is a long time to wait. Let me check what the problem is.'
- If your organisation has said or done something wrong, like leaving the person waiting for a long time, admit it, apologise and move on.
- Draw the person's attention to the behaviour and offer them a choice eg 'Mr Potter, I'm trying to help you and you're yelling at me. We can talk about your complaint or leave it here. Which would you prefer?'
- Agree to revisit the issues at another time eg 'Mrs Popov, I don't think we can take this any further today. I'm going to end the call now. I'll write to you/call you again tomorrow'.



Tip: Face to face meetings

If you are meeting someone in person who starts to demonstrate challenging behaviours, your body language is as important as what you say. Consider the following techniques:

- If the person is standing over you, move to their side rather than backwards. Standing side by side can be less confrontational.
- If the person is glaring, try to break their eye contact by directing their attention to something else, like a document.
- If you need a break to collect yourself, or the other person needs one, suspend the discussion so you can consult a colleague or get some water.
- If you need to end the meeting, pack up your papers or stand up slowly to show you are ready to go.
- If you feel threatened in any way, excuse yourself and leave the room. Always sit closest to the exit. Your safety comes first. Trust your instincts.

If you are a manager and are concerned about something happening in a meeting, politely interrupt and ask to speak to the staff member. Sometimes colleagues join in to try to help. Involving more people can create drama instead of defusing it.

Always meet members of the public in a safe place. At a minimum you need:

- a clear path to the exit that cannot be blocked by the other person
- a way for the other person to leave if they want to
- access to a duress alarm, or other people around who can see and hear you. At the Victorian Ombudsman, officers always meet people in pairs.

You may never need to use these measures, but it is sensible to be prepared. If you have grounds for concern about your safety or the safety of your staff before a meeting, consider alternative ways to communicate with the person.

Behaviour associated with disability or mental illness

Key things to remember

Some types of disability or mental illness are associated with behaviours that can be challenging for complaint handlers.

Your organisation has legal obligations to eliminate discrimination on the basis of behaviours that are a symptom or manifestation of a disability, and to make reasonable adjustments to your services.

The best approach is to ask the person what they need.

This section looks at what to do when challenging behaviour is associated with a disability, including mental illness.¹⁰

Almost one in five Australians identify as having a disability.¹¹ If you have not experienced a disability firsthand, you will probably know someone who has experienced one.

This guide has already talked about making your complaint handling system accessible for all members of the community (see pages 14-15).

Victoria's Equal Opportunity Act 2010 (Vic) (see next page) creates additional rights and obligations where challenging behaviours are related to a disability.

This section provides information about how to comply with these laws when handling complaints.

It also includes information about types of disability that *sometimes* manifest in behaviour that can be challenging for complaint handlers. The emphasis on the word 'sometimes' is important. Just because one person with a particular disability acts in a certain way, it does not mean everyone with the disability acts the same way.

It is always best to take a 'person-first' approach and avoid assumptions about disability and what it involves.

Educate yourself

There are many government and community resources that can help you understand different types of disability and the way they affect people's communication and behaviour.

This guide provides information about some types of disability on pages 31-35. You will find references to other government and community websites on page 54.

Use these resources to build your awareness and communicate better. You could also consider attending or organising disability awareness training for your organisation.

Do not discriminate

It is unlawful for you or your organisation to discriminate against a person on the basis of behaviour that is 'a symptom or manifestation of a disability' by refusing to provide complaint handling services, or on the terms and conditions on which you provide services.¹²

For example, a person with autism who has difficulties with the social aspects of language may appear to you as blunt or rude. If you refuse the person service because of their manners, this may be discrimination on the basis of their disability.

¹⁰ References to 'disability' in this section include mental illness. People experiencing mental illness do not always see themselves as having a disability. *Victoria's Equal Opportunity Act 2010* (Vic) defines 'disability' to include mental or psychological disorders. This section takes the same approach.

¹¹ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, 2015 (2016).

¹² *Equal Opportunity Act 2010* (Vic) s 44.

Victoria's equal opportunity laws

Victoria's Equal Opportunity Act 2010 (Vic) protects people with a disability from discrimination in areas of public life such as employment, education, housing and the provision of services.

This includes services provided by government departments, public authorities and local councils (such as complaint handling services).¹³

It is unlawful for organisations to discriminate against a person on the basis of their disability by refusing to provide services to the person, or on the terms and conditions on which they provide services.¹⁴

Organisations must also make 'reasonable adjustments' to their services if it is necessary so that a person with a disability can access the services, or derive a substantial benefit from them.¹⁵

The Act defines 'disability' not just in terms of physical or mental functioning, diseases and disorders. It also defines disability to include behaviour that is 'a symptom or manifestation of a disability'.¹⁶

If the person's behaviour is a risk to safety, the law recognises that the interests of other people also need to be protected. The Equal Opportunity Act contains an exception where discrimination is reasonably necessary to protect health, safety or property.¹⁷

The words 'reasonably necessary' in this exception are important. You need to explore whether there are ways to protect your staff and other people without limiting your services. The rest of this section provides advice about how to do this.

If you conclude that limiting services is the only option, you will find information about what to do on pages 43-48.

Make reasonable adjustments

Where people with disabilities face challenges with communication, you can often make simple adjustments to service delivery. These might be:

- agreeing to meet the person at or near their home
- adapting your communication style eg using simpler language
- giving the person more time to explain their complaint or respond to questions
- agreeing to contact the person at a certain time of day
- allocating one officer to deal with the complaint (dealing with a new officer each time makes complaining difficult for some people).

Where the person's behaviour involves aggression or disruption, you will need to give more thought to what is reasonable in the circumstances.

Your organisation can consider all relevant facts and circumstances including:

- the person's circumstances eg the nature of the disability
- the nature of the adjustment required to accommodate the disability
- the financial and other effects of the adjustment on your organisation
- the consequences of making the adjustment for your organisation
- the consequences of not making the adjustment for the person.

The case studies on the next two pages are examples of decisions made by the Victorian Ombudsman.

You will find other suggestions for 'reasonable adjustments' on pages 31-35.

¹³ *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'services')

¹⁴ *Equal Opportunity Act 2010* (Vic) s 44.

¹⁵ *Equal Opportunity Act 2010* (Vic) s 45.

¹⁶ *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'disability').

¹⁷ *Equal Opportunity Act 2010* (Vic) s 86.



Case study: A man who needed flexible communication

A man complained to the Victorian Ombudsman about the way an agency dealt with his complaint.

He explained he had disabilities that meant he was unable to write. He had explained his complaint to the agency over the telephone. He said it examined his complaint, but it failed to address all of his concerns. He was concerned it had not accurately recorded or investigated his complaint.

The man became angry when his case officer called one morning to discuss the issues.

He said he had difficulty sleeping so was only available to speak in the afternoon at certain times. He also wanted a copy of his file.

The case officer:

- agreed to call the man in the afternoons
- wrote to the man outlining her questions about his complaint, so he could consider them before they spoke
- sent him summaries of her telephone conversations with him.



Case study: A man who needed more time

The family of a man with disabilities wanted to speak to our office about an investigation. The man's disabilities affected the way he communicated and his behaviour.

We spoke with the man's family and treating practitioners about how best to communicate with him. They advised us how to build trust before we asked any questions.

They also told us the man sometimes shouted or asked very personal questions, and 'rushed at people' if he got upset. They advised us what to do if this happened.

Our officers:

- provided photographs of themselves so the man could become familiar with their faces before they met
- visited the man's home to be introduced to him and talk about everyday things, like television, so he could get to know them
- visited the man a second time to talk about the issues in the investigation
- met the man with one of his parents, who understood his behaviour and could respond
- sat near the door, so they could leave quickly if the man got upset.

The process took more time than our usual meetings but the officers obtained valuable information.



Case study: An adjustment that was not reasonable – a woman who wanted priority

A woman wrote to the Ombudsman about an agency's decision and explained that she had a mental illness. She called many times in the following days to find out what was happening.

The woman got upset when one of our officers explained that her complaint was waiting to be allocated to a case officer. She said she needed 'immediate help' and could 'jump over everyone else'.

We had conducted a preliminary assessment of her complaint when it arrived. The complaint was about a longstanding problem and did not need immediate attention.

The officer who took the call explained to the woman that we deal with complaints from many people and talked about how we prioritise them.

Ask, don't assume

The person living with a disability is the best person to tell you what adjustments they need to use your services (or their family or guardian if the person lacks legal capacity).

While it is important to educate yourself about the impact of disability, and how to deal with communication and behavioural challenges, remember that people with a disability have widely different skills and needs. If you make assumptions about what the person needs, you risk taking steps that are inappropriate. Some disabilities are also transient or variable – a person may be able to communicate easily some days but not others.

You can find out sensitively by asking 'How do you prefer to communicate?', 'Is there anything we can do that would help you speak with us about your complaint?' or 'What has worked for you in situations like this before?' You can also ask if the person has someone they would like to support them with the complaint.

Deal with the complaint on its merits

As always, you need to deal with the person's complaint on its merits, regardless of their behaviour.

The fact that a person presents with some disordered thoughts, or difficulty articulating their concerns, does not mean they are not credible or do not have a legitimate complaint.

The case study on the next page illustrates the injustice caused when organisations treat people with a disability dismissively.

Listen to the person's concerns, identify and assess the evidence, and reach a reasoned decision.



Case study: Experiences of people with a disability reporting crime

In 2014 the Victorian Equal Opportunity and Human Rights Commission released a report on the experiences of people with a disability reporting crime.¹⁸

The report identified that the attitudes of some police officers were a barrier to reporting crime for people with a disability. The Commission heard about police refusing to take reports, or treating people with disabilities as childlike, time wasters or deserving of suspicion.

One person said:

They ask you if you are on any medication and then they treat you differently when you say yes, you become a risk in their eyes.

Another said:

They asked if I could describe the person who did it and I said 'No, I'm blind.' The police officer said, 'Well don't bother calling us then.' He didn't seem to understand I could give him information from the sounds I had heard, or that there might be other witnesses.

The then Chief Commissioner of Victoria Police launched the report and Victoria Police accepted all of the Commission's recommendations.

If unsure, get advice

This guide has already noted that there are many government and community resources that have useful information and advice about responding to people with different disabilities.

If you are unsure what to do, there are likely to be organisations, websites and resources that can help.

¹⁸ Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: The experiences of people with disabilities reporting crime – Summary report* (2014).



Tip: Respectful communication

Treat people with a disability with the same respect as every other person.

While you might need to use shorter sentences and simpler language, use the same tone you use when speaking to other adults. Do not raise your voice unless the person asks you to.

If the person is speaking with you through or with the assistance of a carer, look at and address yourself to them, not the carer.

Your language should:

- only mention the person's disability if it is relevant to the complaint
- use person-first terms ie person with a disability, not disabled person
- avoid negative terms eg 'X suffers from autism', 'Y is wheelchair bound', 'Z is a victim of stroke'. Better terms are 'X is on the autism spectrum', 'Y uses a wheelchair' or 'Z had a stroke.'
- not patronise the person.

Question: What if the person does not tell you about their disability?

Some people will tell you upfront they have a disability, how it affects them and what they need. Other people are reluctant to disclose their disability because they have experienced or fear discrimination. Others may not know they have a disability because they have never been diagnosed. Or they may simply not think about their lives in these terms.

In some cases, you may suspect that a person has a disability, but they have not disclosed anything to you. They might be subject to a guardianship or administration order, living in supported accommodation or receiving home and community care services. Perhaps you find it hard to understand them, or notice they have trouble understanding you.

We do not recommend that you ask people if they have a disability or attempt to diagnose them. What if you are wrong?

Simply ask 'Is there anything that would help you communicate with us about your complaint?'

This is good service delivery, regardless of your obligations under the Equal Opportunity Act.

Acquired Brain Injury

What is it?

An acquired brain injury (ABI) is any damage to the brain that occurs after birth. It can be caused by:

- trauma eg car accidents, falls or assaults
- stroke or vascular disease
- drug and alcohol use
- brain infection eg meningitis
- disease eg dementia, tumours
- lack of oxygen eg near drowning.

How common is it?

The Australian Institute of Health and Welfare estimates that 1 in 45 Australians have an ABI.¹⁹

How does it affect people?

The effects of ABI vary from person to person and range from mild to severe.

Effects can include fatigue, memory problems, problems processing information, shorter attention span, irritability and anger, and impulsive or disinhibited behaviour.

Tips for communication

If you are speaking with a person with an ABI that affects their communication and comprehension, the following may help:

- Use short and clear sentences and questions.
- If the person has memory problems, write down important information or repeat it regularly.

- Check that the person has understood you eg ask them to summarise what you said in their own words.
- If the person has not understood, try again using different words.
- Be patient. Give the person time to process information and respond. Do not finish their sentences for them.

Tips for challenging behaviours

The following may help you if a person with an ABI exhibits challenging behaviour:

- Stay calm and keep an even tone.
- Use non-threatening hand gestures.
- Give clear, simple and immediate feedback eg 'I would rather you don't talk about ...' or 'I hear you're frustrated but I don't like it when you shout at me.'
- Recognise when to disengage. It may be better to end the discussion and try again another time.

Useful information

Brain Injury Australia
www.braininjuryaustralia.org.au

BrainLink
www.brainlink.org.au

Synapse Australia
www.synapse.org.au

¹⁹ Australian Institute of Health and Welfare, *Disability in Australia: acquired brain injury* (2007).

Autism spectrum disorder

What is it?

Autism is a lifelong neurodevelopmental condition that affects the way people relate to other people and their environment. Its cause is unknown.

How common is it?

The Australian Bureau of Statistics estimated that there were 164,000 Australians with autism in 2015.²⁰

How does it affect people?

Autism presents differently in different people, hence the use of the word 'spectrum'. Some people with autism live independently and have families and jobs. Others have no or limited language and need lifelong support.

Autism often presents through social communication and patterns of behaviour such as:

- Difficulty interpreting verbal and non-verbal communication, such as tone of voice, metaphors or jokes. People may take what you say literally.
- Difficulty with social skills. People with autism may appear to be insensitive, or act in ways that are socially inappropriate.
- Preferences for certain routines.
- Repetitive or unusual behaviour.
- Sensitivity to certain environments eg noises, light.

Tips for communication

If you are speaking with a person with autism, the following may help:

- Use the person's name to attract their attention.
- Use short and clear sentences and questions.
- Do not overload the person with information or questions.
- Ask specific rather than open questions eg 'Did you write to X about your car? On what date?' rather than 'How have you tried to resolve this with X?'
- Avoid metaphors, sarcasm and irony.
- Consider using visual information to support what you are saying.
- Give the person time to process what you have said and respond.
- If the person does not respond, rephrase the question.

Tips for challenging behaviour

The following may help you if a person with autism exhibits challenging behaviour:

- Stay calm and keep an even tone.
- Remove the source of discomfort, if that is the cause eg reduce noise or light.
- Tell the person what to do, rather than naming the behaviour eg 'Put your hands down'.

Useful information

Amaze
www.amaze.org.au

UK National Autistic Society
www.autism.org.uk

²⁰ Australian Bureau of Statistics, above n 11.

Intellectual disability

What is it?

Intellectual disability is characterised by impairment in intellectual functioning and adaptive behaviours.

It can be caused by genetic conditions such as Down syndrome, problems during pregnancy or birth, or health problems during childhood.

How common is it?

The Australian Institute of Health and Welfare estimates that three per cent of the population has an intellectual disability.²¹

How does it affect people?

Intellectual disability can range from mild to severe.

It can affect the person's:

- communication eg they may take longer to understand information, have difficulty with abstract concepts or instructions, or have a shorter attention span
- social skills
- self-care and ability to live independently.

Tips for communication

If you are speaking with a person with an intellectual disability, the following may help:

- Use the person's name to attract their attention
- Use short and clear sentences and questions
- Raise one idea or question at a time.
- Avoid abstract concepts, acronyms and metaphors
- Use body language or visual information to help you communicate
- Consider communication aids, Easy English or other accessible communication strategies
- Check the person's understanding eg ask them to repeat what you have said in their own words
- Give the person time to process information and respond
- Allow the person to take a break if needed.

Useful information

Communication Rights Australia
www.communicationrights.org.au

Scope Australia
www.scope.vic.gov.au

Australian Federation of Disability Organisations, 'Communication with people with disabilities' website,
www.afdo.org.au

²¹ Australian Institute of Health and Welfare, *Disability in Australia: intellectual disability* (2008).

Mental illness

What is it?

Mental illness describes a group of conditions that significantly interfere with a person's thinking, emotions and/or behaviour. They include:

- anxiety disorders such as social anxiety or post-traumatic stress disorder
- mood disorders such as bipolar disorder or depression
- psychotic disorders such as schizophrenia.

People will not always use the term 'mental illness' to describe their condition. Some people might prefer terms like mental distress, mental health issues or mental ill-health.

How common is it?

Very. The Australian Bureau of Statistics estimates that 45 per cent of adult Australians experience a mental illness in their lifetime.²²

How does it affect people?

It depends on the condition.

A person with depression may feel sad or flat, have trouble with sleep and appetite and impaired thinking or concentration. A person with schizophrenia may experience psychosis (eg delusions or hallucinations). A person with post-traumatic stress disorder may have intrusive memories or be anxious or irritable.

Mental illness affects people in different ways. Some people experience it once and recover. For others it is recurring and episodic.

Tips for communication

Start by asking the person open questions about how you can help them explain their complaint. The effect of mental illness differs from person to person so it is best to ask the person what they need.

The person may need more time to collect their thoughts and explain their complaint. They may need more than one phone call or meeting to give you all the information. Or they may need help to put together a chronology of events.

Tips for challenging behaviours

It is not true that people with mental illness are more violent than other people. However, mental illness is sometimes associated with behaviours that are challenging for complaint handlers.

If you are speaking with someone who says things that seem implausible eg that people are listening to their thoughts, it is important to:

- Be respectful.
- Do not argue or tell the person they are wrong or need help.
- Acknowledge and empathise. Regardless of whether what the person is telling you is true or not, they are experiencing it as true and their distress is genuine.
- Explain that you need evidence to be able to take any action.
- Remember that the person may still have a legitimate complaint.

You will find other suggestions in the *Managing Unreasonable Conduct by Complainants Practice Manual*.

²² Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (2008).

If you are speaking with someone who talks about suicide, you will find advice about how to respond on the next few pages of this guide.

If you have other concerns about the person's behaviour:

- Talk to the person calmly but firmly.
- Give clear directions eg 'I hear you're frustrated but please stop shouting so I can work out how I might be able to help.'
- If the person does not stop, give the person time to calm down somewhere they feel safe.
- If you are concerned for the person's safety or the safety of other people, contact the crisis assessment team at the nearest hospital (contact details should be available on the hospital's website) or Victoria Police on 000.

Useful information

Sane Australia
www.sane.org

Victorian Equal Opportunity and Human Rights Commission, *Guideline: Mental Illness: Complying with the Equal Opportunity Act 2010* (2014)

Victorian Mental Illness Awareness Council (VMIAAC)
www.vmiac.org.au

Threats of suicide

Key things to remember

Follow your organisation's policy for responding to people who talk about suicide. If your organisation does not have a policy:

- Check if the person is serious.
- Show you are concerned.
- Consult a manager about what to do.
- Link the person with people or services that can help.

Talking about suicide will not make the person more likely to act.

This section provides advice about how to respond if a person talks about harming themselves.

Sometimes people talk about suicide overtly. Sometimes they make covert statements like 'I can't take this anymore. I'm scared about what I might do if this isn't fixed' or 'I can't see any way out of this' or 'I'd be better off dead.'

It is natural to be upset when a person starts talking this way, and to worry about saying or doing something to make it worse.

Asking the person about their feelings will not make them more likely to act. You can show you are concerned, check if the threat is serious, and arrange help.

You do not need to counsel the person or 'talk them out of it'. Complaint handlers are not employed, or usually trained, to provide counselling.

Your role is to try to connect the person with people or services that can help.

Follow your organisation's policy (if it has one)

If your organisation has a policy or guidelines on responding to suicide threats, follow its advice.

The Victorian Ombudsman encourages organisations to provide clear guidance to their staff about what to do if a person talks about suicide, and to train and support staff dealing with these situations. You do not want your staff to be trying to work out what to say or how to get help while the person is waiting on the phone.

If your organisation does not have a policy or guidelines, we recommend the following steps.

Check if the person is serious

You can start by asking the person if they are serious. You can say something like 'I'm concerned about what you're saying ... Are you thinking of suicide?'

Asking this question can feel confronting, but it is important to be clear so there is no room for doubt.

Sometimes people will tell you they are not intending to hurt themselves.

If the person is serious, some professionals recommend asking the person if they have a plan and a timeframe, and making plans to keep the person safe until they can get more help. There are groups such as LivingWorks Australia and Mental Health First Aid that train people how to have these conversations. If your employer does not offer this training, it is OK to just ask the person if they are serious.

Explain your concern

It is important to give the person some context for why you are asking this question. You can tell them you are concerned about them and want to make sure they are safe.

Consult a manager

Alert a manager to what is happening (if there is no manager nearby, you might have to pass a note to a colleague or mute your telephone while you call for one). They should decide what action to take and, if necessary, arrange help.

Depending on the situation, the manager might decide to:

- Ask you to keep speaking with the person, if you are comfortable with this, or talk to the person themselves.
- Encourage the person to speak with someone they trust.
- Advise the person how to contact Lifeline or another suicide counselling service (see next page). If the person does not take the details straight away, you can write them down or follow up with an email or official text message.
- Advise the person your organisation will arrange help if they do not want to do this themselves. This requires judgement. You do not want to get into an argument. You can explain that you take statements about suicide seriously, you are not able to provide clinical support, and you want to make sure they are safe.
- Contact Victoria Police if the person's safety is at risk or they need immediate help.

Most complaint handlers and managers are not clinically trained to assess suicide risk. If you have any doubts, it is best to err on the side of caution and get help.

If the person's safety is at risk, arrange help

If you believe the person is at high risk of suicide or you are concerned for their safety, your organisation should ask where they are, call 000 and ask for Victoria Police.

It will help if you can tell the police:

- the person's name and contact details
- the person's current location
- what the person said or did to make you concerned
- any relevant background information eg history of mental illness
- your name, role and contact details, if requested.

Victorian privacy laws allow your organisation to disclose personal information where it believes it is reasonably necessary to prevent a serious threat to an individual's life, health, safety or welfare.²³ You do not need the person's consent, although it is usually good practice to tell the person you are planning to call the police.

If your organisation has additional secrecy obligations, you need to consider those before acting. This is one of the reasons why policies and guidelines help, so you do not have to address these questions on the spot.

²³ *Privacy and Data Protection Act 2014* (Vic) sch 1 cl 2.1(d); *Health Records Act 2001* (Vic) sch 1 cl 2.2(h).

**Tip: Where to get help**

If a person needs immediate assistance or you are concerned for their safety, call 000 and ask for Victoria Police.

The following services provide 24-hour assistance to people thinking about suicide:

- Lifeline 13 11 14
- Suicide Call Back Service 1300 659 467
- SuicideLine Victoria 1300 651 251
- Kids Helpline 1800 55 1800

Look after yourself

Dealing with someone who is talking about suicide can be upsetting. You will find advice about getting support and looking after yourself on page 49. Managers can find advice about looking after their staff on page 51.

Stage three: Manage

Key things to remember

You can take steps to manage a person's behaviour if it raises substantial health, safety, resource or equity issues for any of the parties to the complaint, including you.

The strategy you use will depend on the type of behaviour.

Sometimes a person's behaviour is or becomes unreasonable. Page 13 discusses how to tell when behaviour has reached this point.

The Victorian Ombudsman does not expect our officers, or officers in other organisations, to tolerate behaviour that is offensive, abusive, threatening or consumes disproportionate resources.

While your organisation has obligations to provide accessible services to members of the public, it also has obligations to:

- provide a working environment that is safe and without risks to health²⁴
- manage public resources soundly.

The *Managing Unreasonable Conduct by Complainants Practice Manual* lists five categories of what it calls 'unreasonable conduct by complainants':

- unreasonable persistence
- unreasonable demands
- unreasonable lack of cooperation
- unreasonable arguments
- unreasonable behaviours.

This section outlines the steps to follow to manage this behaviour.

Adopt an appropriate strategy

Different types of unreasonable conduct require different strategies.

You will find a list of the categories of 'unreasonable conduct by complainants', and strategies for responding, on the next page. The *Managing Unreasonable Conduct by Complainants Practice Manual* contains more detailed lists of the conduct you might encounter and ideas and scripts for responding.

Be respectful

Good complaint handlers identify and deal with behaviour without labelling or demonising people.

It is important to stay respectful to the person throughout the process.

Your approach, tone and language will depend on the situation.

In some cases, you may be able to use cooperative language (see page 23), positive suggestions and choices. An example might be, 'Ms Smith, I need to be able to speak to help you and you're talking over the top of me. We can continue talking or end the call. It's up to you'. The case study on page 41 is an example of how we managed one case without the need for confrontation.

In other cases, you might want to provide a very firm, formal warning. You will find an example of a formal warning letter on page 55.

²⁴ *Occupational Health and Safety Act 2004 (Vic)* pt 3.



Tips: Some strategies for managing 'unreasonable conduct by complainants'

Behaviour

Unreasonable persistence

- bombarding you with calls, visits or information when not warranted
- contacting different officers seeking a different answer
- reframing an old complaint so it looks like there are new issues
- refusing to accept the decision after you have investigated the complaint, explained the outcome and answered questions
- questioning the skills or competence of the complaint handler

Unreasonable demands

- insisting on an immediate response or priority that is not warranted
- insisting you respond to every point, no matter how minor
- demanding information they are not entitled to eg staff contact details
- insisting that the head of your organisation, or a manager, handle the complaint when that is not warranted
- instructing you how to investigate the complaint

Unreasonable lack of cooperation

- sending voluminous amounts of information
- providing little or no information about the complaint
- presenting information in 'dribs and drabs'
- refusing to comply with reasonable requests for information

Unreasonable arguments

- insisting on the importance of minor issues
- making unsubstantiated allegations eg bias or corruption
- insisting on 'cause and effect' without evidence

Unreasonable behaviour

- verbal abuse
- aggressive behaviour
- harassment
- making threats (see page 42)

Strategy

Say no

- ask the person to stop calling or visiting
- set time limits for telephone calls and visits
- transfer the person back to the original complaint handler or the complaint handler's manager
- refuse to consider new issues that are not supported by substantial information and evidence

Set limits

- explain how you will be dealing with the complaint
- tell the person that you will not meet the demand and why
- reality check ie explain that your organisation deals with many complaints and you need to decide when and how they are handled

Set conditions to motivate action

- ask the person to take action eg to summarise their complaint as a precondition for you to consider the complaint further

Decline or discontinue involvement

- do not investigate issues where there is no practical outcome
- require evidence before taking the complaint further

Set limits and conditions

- name the behaviour and ask the person to stop
- provide a warning. Offer a choice if possible



Case study: Managing multiple calls

The Ombudsman was contacted by a woman who had been living in social housing. She returned after an extended absence to find she had lost her place and her belongings were gone.

We were aware the woman had health problems and limited social support.

The woman called our office every couple of days and became upset if her case officer was not available. She often refused to tell staff her name and the calls sometimes ended with the woman telling officers to 'go to hell'.

Her calls with the case officer were also challenging. We transferred the case to a very experienced officer. The officer offered to call the woman at a certain time each week to discuss her case, and she kept that promise. During the calls, she set aside time to discuss the woman's concerns.

The woman stopped making multiple calls to our office, and we proceeded with our enquiries into her complaint.

Consider the complaint on its merits

Unreasonable behaviour does not preclude there being a valid issue. Regardless of the person's behaviour, you still need to assess their complaint and deal with it on its merits.

The case study below is an example of a complaint which could easily have been overlooked because of the person's behaviour, but proved to be true.



Case study: Keeping an open mind

The Ombudsman received a complaint from a man about officers at the agency where he once worked.

The man's written complaint contained many of what the *Managing Unreasonable Conduct by Complainants Practice Manual* calls 'early warning signs' of unreasonable conduct. It was many pages long, contained text in UPPERCASE, **bold** and different fonts, and repeated information multiple times.

The agency told us that the man had been the subject of misconduct proceedings and was no longer working there.

The man's complaint was serious, so the Ombudsman began looking into it.

This led to a further investigation that substantiated the man's complaint and resulted in recommendations to improve the agency's policies and practices.



Tip: Ending calls and meetings

You may be tempted to deal with unreasonable conduct by hanging up or walking away. However, this might worsen the situation and may also result in a complaint about you.

Unless your safety is at risk, give the person a warning and an opportunity to change:

- Name the behaviour and explain why it is a problem. Be as specific as possible. If you simply tell the person they are being unreasonable, how will they know what the problem is? A good example is 'Mr Jones, you've been calling me every day about your complaint. I know you want this fixed, but I can't find out what happened if I spend all my time with you on the phone.'
- Give the person a chance to stop.
- Explain the consequences if the person does not stop. 'Mr Jones, you're yelling at me. I can't speak to you like this. Please lower your voice or I will need to end this call.'
- If there is no change, back up your words with action. Empty threats undermine your credibility and achieve nothing.

Remember to stay respectful. Consider words like 'Mr Jones, I'm going to end this call now. You might like to contact me again when you're feeling calmer and we can talk with each other in a productive way.'



Tip: Responding to threats to harm you or other people

We recommend you always take threats seriously.

If your organisation does not have a policy on responding to threats:

- Make the threat overt eg 'You said that ...'
- Check if the person is serious eg 'You've said that you're planning to come in and sort the officer out. Are you saying that you're going to hurt the officer if they don't change their mind?'
- If the person is serious, try to get more information. Ask about what the person plans to do, how and when. Try to get the person's name (if you don't have it) and their location.
- Explain the consequences eg 'We take those sorts of comments seriously. I'll need to report this to my manager, and we may have to inform the police.'

Alert a manager to the threat as soon as possible, so your organisation can decide whether to call the police or take other action.

If you call police, it is helpful to have as much information as possible:

- Make a verbatim record of what the person said.
- If you are on the telephone and the call needs to be traced, mute your phone instead of hanging up.

Stage four: Limit – a last resort

Key things to remember

There may be times when nothing you try works and your organisation needs to limit a person's access to your services to protect staff and resources.

Make sure that:

- any limits are proportionate to the risk posed by the behaviour
- you comply with your legal obligations, including the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*
- the decision is made at a senior level
- you inform the person about the limits and provide options for review
- your organisation reviews the decision at least once every 12 months.

Most people who work in complaint handling have come across people whose sense of grievance is so deep, or whose behaviour is so entrenched, that nothing makes a difference.

If your management strategies have not worked and the person continues to behave unreasonably, your organisation can consider limiting their access.

Limiting access to services is always a last resort. This section lists the issues you should consider and good processes to follow.

Assess the risk

Before limiting access to your organisation's services, consider all the risks and interests involved. They include:

- The history of the person's conduct.
- The nature of the conduct. Limiting access should only ever be used where conduct is a risk to health, safety, equity or resources of the parties. It should not be used to deal with behaviour that is only difficult or annoying.

- The person's personal circumstances, such as health, disability or homelessness.
- The impact of limiting access on the welfare of the person and their dependants.
- What alternative strategies have been tried or considered to reduce the impact of the behaviour.
- Your organisation's legal obligations (see pages 44-45).

Make sure you have sound evidence to support your decision. It is good practice to document the person's behaviour and its impact so you can defend your decision if necessary.

Ensure the limits are proportionate

You will find a list of options for limiting access on the next page.

Your proposed limits should be targeted and proportionate to the risks posed by the behaviour.

Although your organisation might be tempted to tell the person you are simply not going to deal with them anymore, people in Victoria are entitled to access public services and make complaints.



Tip: Options for limiting access

Depending on the behaviour, your organisation can consider limiting:

- Who the person can contact. Your organisation might restrict the person's contact to one staff member who knows the history of their complaints. This can be particularly effective where a person continues to raise issues that you have already considered and dealt with.
- What issues your organisation will respond to. This is also helpful where a person continues to raise issues that have already been dealt with by your organisation. You still need to assess each new contact on its merits, but you do not have to use resources responding to the same issues over and over again.
- Where the person can contact your officers. This strategy is useful if the person behaves aggressively. You may wish to limit face to face contact to locations where there are adequate security measures, such as duress alarms, for your officers.
- When the person can contact your organisation.
- How the person can contact your organisation. If the person is abusive or threatening, you might consider advising them that you will only communicate in writing, or through a representative.

We are aware of cases where organisations have also taken legal measures to protect their staff eg intervention orders.

In 2013, the Victorian and Civil Administrative Tribunal (VCAT) found that a local council's decision to limit a resident's access was unlawful (see page 46). VCAT's decision appears to have been influenced by the disproportionate nature of the council's response. The council had banned the resident from all premises owned, occupied and managed by the council, including places where he had never caused anyone concern.

Conduct a human rights assessment

In the 2013 VCAT case, the tribunal found the council failed to act compatibly with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (see page 46).

Before you limit a person's access, consider whether your proposed limits will affect any of the person's rights under the Charter.

If they do, consider whether:

- The proposed limits are reasonable and demonstrably justified. If you have documented evidence of the behaviour and its impact, and how you assessed the risk, you should be able to satisfy these criteria.
- The proposed limits are properly targeted to manage the impact of the person's behaviour. You should be able to satisfy these criteria if your limits are proportionate to the risk.
- There are no less restrictive options available to achieve your intended result.

If the behaviour is associated with a disability – consider equal opportunity laws

In the 2013 case, VCAT also found that the council breached the *Equal Opportunity Act 2010* (Vic).

Pages 25-26 explain that the Equal Opportunity Act prohibits you and your organisation from discriminating against a person by refusing to provide services, or on the terms and conditions on which the services are provided, on the basis of disability.²⁵ This includes discrimination on the basis of ‘behaviour that is a symptom or manifestation of a disability’.²⁶

The Equal Opportunity Act does allow you to discriminate, however, ‘where it is reasonably necessary ... to protect the health or safety of any person ... or the public generally’ or ‘to protect the property of any person ... or any public property’.²⁷

If you wish to limit a person’s access in these circumstances, we recommend you seek legal advice about your obligations under the Equal Opportunity Act and whether the health and safety exception applies.

Consider other legal obligations

You also need to consider other legal obligations that regulate your organisation’s services. Some organisations are legally obliged to provide services and may breach their obligations if they limit a person’s access.

Again, we recommend you seek legal advice if you are unsure of your obligations.

If your organisation is not able to limit access, the *Managing Unreasonable Conduct by Complainants Practice Manual* suggests considering alternative dispute resolution to resolve the problem and improve your organisation’s relationship with the person.

You will find more information about the pros and cons of this approach in the manual.

Make the decision at a senior level

Deciding to limit someone’s access to public services is a serious matter.

The Victorian Ombudsman expects decisions to limit access to be approved at a senior level, either by the head of your organisation (ie the Secretary or CEO) or a senior delegate.

Document your assessment and decision

People sometimes challenge limits by complaining to the Ombudsman or the Victorian Equal Opportunity and Human Rights Commission, or by taking legal action.

It is good practice to document the reasons for your decision and your supporting evidence. Your organisation is more likely to be able to justify its actions if you:

- have documented evidence of the person’s behaviour and its impact on your staff and resources
- can demonstrate you have considered alternative options and your legal obligations, and have reached a decision based on evidence.

²⁵ *Equal Opportunity Act 2010* (Vic) s 44.

²⁶ *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘disability’).

²⁷ *Equal Opportunity Act 2010* (Vic) s 86.



Case study: The 2013 VCAT case

In 2013 VCAT found limits imposed by a local council on contact by a resident breached Victoria's Equal Opportunity Act and the Charter of Human Rights and Responsibilities Act.²⁸

The council had banned the resident from all buildings owned, occupied or managed by the council. Some years later the resident asked the council to review the arrangements. It refused.

The resident had been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, a post-traumatic stress disorder and an acquired brain injury.

He had made many thousands of complaints to the council. VCAT noted that many of the complaints contained comments 'critical of and insulting about' councillors and officers and there had been several 'highly charged' interactions with officers.

VCAT found that the resident's behaviours were a manifestation of his disabilities and the council's ban was discriminatory.

VCAT described the council's arrangements as 'blunt, broad and insufficiently tailored'. It noted the council had banned the resident from places where he had not caused anyone concern. It noted the ban was indefinite, with no transparent process for review.

VCAT stated there was no evidence that staff were trained or supported or instructed about how to respond to the resident's behaviour, and there were non-discriminatory alternatives.

VCAT also rejected the council's arguments that the arrangements were necessary to protect the health and safety of staff. It agreed the councillors and council staff were entitled to a safe workplace but said there was no evidence to show they had suffered harm or were afraid. It said the ban did not constitute 'an appropriate and commensurate measure of protection from a level of identified risk'.

VCAT also found the council had breached the resident's rights under the Charter:

- the right to participate in the conduct of public affairs (section 18)
- freedom of expression (section 15)
- the right to enjoy human rights without discrimination (section 8).

because there were less restrictive means for the council to achieve its purposes.

VCAT ordered the council to revoke the ban, provide human rights training to councillors, its CEO and directors and pay \$14,000 compensation to the resident.

²⁸ *Slattery v Manningham City Council* [2013] VCAT 1869 and *Slattery v Manningham City Council* [2014] VCAT 1442.



Case study: Reasonable and proportionate limits

A man complained to the Ombudsman that an agency was not addressing his complaints about fire risks near his home. The man told us he was a bushfire survivor and had other health problems. He said the agency had banned him from its office and he was not allowed to speak with its staff.

We contacted the agency. The agency told us it had been dealing with the man for many years and tried to deal sensitively with him. It said he could visit its office, but it had taken out intervention orders to protect some staff in the past when the man had been abusive.

The agency offered to respond to the man's complaint to our office. It sent us a copy of the response, which explained what it was doing to address the fire risks and which staff would speak with him when he visited its office.

Although the man was not happy with the response, we were satisfied the agency's actions were reasonable. The agency had only limited his access to the extent necessary to protect its staff and it was continuing to respond to his concerns.

Inform the person

It is good practice to inform the person of any limits on their access.

The Victorian Ombudsman sometimes deals with complaints where an organisation has limited a person's access but failed to tell the person. It is not surprising that the person becomes more and more frustrated with the organisation and escalates the matter to our office. In these cases, we ask the organisation to write to the person to explain the decision and their reasons.

You can find an example of the type of letters we use on page 56.

Explain the options for review

It is good practice to explain the person's options for review if they are dissatisfied with your decision.

If the decision was made by a delegate, give the person an opportunity to seek internal review from a more senior officer.

You should also inform the person they are able to complain to the Victorian Equal Opportunity and Human Rights Commission if they believe the decision is discriminatory, or to the Victorian Ombudsman.

Deal with complaints on their merits

You still need to assess complaints from the person, even after you have limited their access to your services.

Organisations are sometimes surprised when we tell them this.

However, as page 8 of this guide explains, there can be a legitimate grievance at the heart of these complaints. If you ignore the person completely, you risk overlooking valid issues.

For example, your organisation may have told a person you will not respond to further complaints about X unless they raise new issues that warrant investigation. Unless you continue to read the person's correspondence, you will never know if they are writing about X or something else. You do not have to waste your resources responding to correspondence about X, but you do need to assess the correspondence.

Review your strategy regularly

Finally, it is sound practice to review any limits on access to your services regularly to make sure they are still effective and warranted. This should happen at least once every 12 months.

Consider subsequent contact from the person, whether the limits reduced the impact of the behaviour on your staff and resources, and whether the limits are still justified.

Document your review and decision. If you decide to change or add to the limits, seek approval at a senior level again and inform the person of your decision.

The following case study is an example of a situation where, on reflection, an agency decided to remove the limits on a person's access with good results.



Case study: Reviewing the limits

A man contacted the Ombudsman to complain that he had been stopped from telephoning an agency that provided support services for him.

The agency told us the man had been calling 20 to 30 times a day so it had limited his contact to one call on Tuesdays and one call on Fridays.

The agency decided to review the arrangements. It concluded the restrictions had made the problem worse and the man was still calling multiple times a day. It decided to lift the restrictions so the man could telephone his case officer at any time. It said this appeared to have helped and the man was now calling less often.

Looking after yourself – advice for complaint handlers

Key things to remember

Dealing with challenging behaviour is emotionally demanding. Take time to look after yourself by:

- monitoring how you feel
- drawing on support networks
- expressing your feelings
- managing stress in healthy ways.

If you feel upset after dealing with someone who is distressed or aggressive, it is not a sign of weakness. It is important to be aware of and deal with these feelings so they do not become a long-term problem.

This guide has already talked about some strategies to help you look after yourself:

- having realistic expectations of yourself and what you can achieve (see page 11)
- knowing your triggers, and times when you are more vulnerable (see page 12)
- disengaging with people if the matter is not urgent and it is not productive to continue (see page 20)
- seeking advice or help to deal with challenging behaviour (see pages 13, 29, 37)
- taking decisive action to deal with behaviour that is or becomes unreasonable (see page 39).

This section looks at other ways to look after your health and wellbeing while dealing with challenging behaviour.

Monitor yourself

Be mindful of how you feel following incidents that are upsetting or stressful.

Common signs stress is affecting your health can be:

- difficulty sleeping
- irritability
- anxiety
- feeling tearful or depressed
- feeling overwhelmed or powerless
- feeling cynical about your work and the people you are dealing with
- increased use of alcohol or drugs
- physical signs like headaches, nausea, clenching your jaw or grinding your teeth
- more frequent illnesses
- difficulty concentrating
- loss of self-confidence.

Some people react immediately to significant events. Others have a delayed reaction and may not feel the effects until after the event, sometimes hours or days later.

The impact of stress can also be cumulative and build over time in response to a series of more minor incidents.

You and the people who know you well are the best judges of when you need support. The better you understand yourself and your triggers, the easier it will be for you to recognise if you have reached this point.

Draw on support

Wherever you work in the public sector, there should be people around you who can provide support and talk over challenging behaviour with you.

They might be:

- your colleagues, if you work in a team
- a manager
- an employee assistance program that offers free, confidential counselling services, if your workplace provides one.

Talk about it

Many people find it helpful to talk about how they feel after challenging interactions.

Debriefing is one option. It is a structured, usually voluntary process which aims to provide clarity about incidents and help people recover. It is usually carried out soon after the incident and explores what happened, your experience and reactions, and ways to manage your emotional responses.

Some people debrief naturally after difficult incidents without realising it – it can be as simple as turning to the person sitting next to you and talking about what happened.

Consider formal debriefing if this is offered in your workplace.

Manage stress

There are many things you can do to manage stress and boost your wellbeing in a healthy way. They include:

- Taking time out from your telephone or desk after challenging conversations. Getting a glass of water or going for a walk can clear your head so you are ready to keep working.
- Taking regular breaks during the day.
- Avoiding excessive hours at work or taking work home.
- Looking after your physical health. Maintain a good diet, get regular exercise and avoid using alcohol or drugs to manage your feelings.
- Sticking to a routine for meal times and bed times to make sure you eat well and get enough sleep.
- Using positive self-talk. Remind yourself the person is upset with the situation and not you personally, and that you can handle these situations.
- Practising relaxation. Some people use relaxation techniques like meditation and yoga, but you can choose any activity you find relaxing or uplifting.
- Spending time with people you love.
- Doing something you enjoy every day. This can be as simple as having coffee with friends, going for a walk, or reading a good book.

You will find references to useful information about managing stress on page 54.

Looking after your staff – advice for managers

Key things to remember

You have a legal obligation to provide a working environment that is safe and without risk to health.

Challenging behaviour from members of the public is one health and safety risk that needs to be managed.

We recommend you:

- set clear guidance for staff about dealing with challenging behaviour
- train and support your complaint handling staff
- take decisive action to deal with unreasonable behaviour.

This section looks at how leaders and managers can support staff dealing with challenging behaviour.

Challenging behaviour is a risk to your employees' health and safety if it is not managed properly. In 2017, WorkSafe reported that work-related mental injury accounts for 11 per cent of workers compensation claims in Victoria, and work-related stress is a leading cause.²⁹

As a leader or manager, you need to balance:

- public sector values of responsiveness, accountability, and respect for human rights³⁰
- the right of your employees to a workplace that is safe and without risk to health.³¹

Provide clear guidance

Provide clear guidance to staff so they know how your organisation expects them to deal with challenging behaviour.

We recommend you adopt a policy or guidelines that explains:

- the standard of behaviour you expect of your staff and the people who use your services
- the processes staff should follow when dealing with challenging behaviour, using the staged approach recommended by this guide
- when staff are expected to escalate issues to managers
- how staff should respond to statements about suicide
- how staff should respond to threats of harm to themselves or others
- security arrangements for meeting people face to face
- processes for recording and responding to behaviour that is or becomes unreasonable.

The policy or guidelines should include definitions of 'challenging behaviour' and 'unreasonable behaviour'. Although different people have different thresholds for dealing with unreasonable behaviour, you need a consistent approach across your organisation. If one of your staff lets a person verbally abuse them because they can handle it, it sends a message that your organisation accepts this behaviour. The person will think they can treat everyone else in your organisation this way.

²⁹ WorkSafe Victoria, *Work-related stress* <https://www.worksafe.vic.gov.au/pages/safety-and-prevention/health-and-safety-topics/work-related-stress>.

³⁰ *Public Administration Act 2004 (Vic)* s 7.

³¹ *Occupational Health and Safety Act 2004 (Vic)* pt 3.

Train and support your staff

There are many training programs and resources about challenging behaviour. At the Victorian Ombudsman, we provide:

- Training on dealing with challenging behaviour during our induction program for new complaint handlers.
- Annual refresher training on 'difficult conversations' and self-care.
- On-the-job coaching and mentoring by experienced complaint handlers.

We also offer training workshops for state and local government organisations.

You can also support your staff in other ways by:

- Adopting good complaint handling and service delivery practices to help prevent challenging behaviour (see pages 14-19).
- Providing resources so complaint handlers can take regular breaks.
- Giving complaint handlers authority to respond to challenging behaviour eg to end conversations that are unproductive.
- Taking decisive action to deal with unreasonable behaviour when it arises.
- Supporting complaint handlers to take time out following challenging behaviour.
- Meeting regularly with complaint handlers to check their welfare.
- Encouraging staff to talk about the impact of their work.
- Recognising staff who deal with challenging behaviour well.
- Providing feedback to staff on ways to improve if needed.

- Offering debriefing after incidents of challenging behaviour. Remember debriefing is about helping the person recover emotionally, not about supervision or feedback. You can provide feedback another time if you need to.
- Offering other support, such as employee assistance programs.

The better you know your staff, the better you will be able to support them. Some people like to talk straight after an incident and get immediate feedback. Others need time to reflect before they are ready to talk about what happened.

Model good behaviour

The best managers model the behaviour they want their staff to follow.

Your staff are more likely to feel comfortable talking about how their work affects them if you do too. You might reflect on an example of challenging behaviour from your own past and how you managed it.

This shows staff it is OK to admit when they find behaviour challenging, and that they can talk with you about how to deal with it.

Only change decisions with good reason

People sometimes ask to speak to a manager when they are unhappy with the advice provided by officers.

This is often an effective short-term way to deal with challenging behaviour. It can short-circuit interactions that have become upsetting for everyone. The person may start acting more respectfully because they see you as a person with higher status. Providing people with options for review is also good practice.

Be careful, however, not to undermine your staff by allowing people to escalate matters automatically, or by changing decisions just to keep people happy. If you do this without good reason, you give people an incentive to keep acting this way. You also undermine the confidence and authority of your staff.

At the Victorian Ombudsman, we employ skilled and capable staff and we do not expect them to escalate matters just because a person asks to speak with a manager. Complaint handlers and managers discuss requests and decide whether the manager should become involved on a case by case basis. We also publish criteria for when people can request an internal review of our decisions.

If you decide to change a decision made by one of your staff, explain why you made the decision to both the staff member and the person complaining.

If you need to provide feedback, this should happen in private, not in front of members of the public.

Further reading

We referred to the following publications when developing this guide:

Australia/New Zealand Standard™, *Guidelines for complaint management in organizations* (AS/NZS 120002:2014)

Australian Federation of Disability Organisations, '*Communication with people with disabilities*' website, <http://www.afdo.org.au>

Robert Bacal, *Defusing Hostile Customers Workbook: A Self-Instructional Workbook for Public Sector Employees* (3rd edition, 2010)

Bill Eddy, *Managing High Conflict People in Court* (High Conflict Institute, 2008)

Douglas Stone, Bruce Patton and Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most*, Penguin Books (Penguin Books, 10th anniversary edition, 2010)

Human Rights Unit of the Department of Justice and Regulation, Victorian Equal Opportunity and Human Rights Commission, Independent Broad-based Anti-corruption Commission and Victorian Ombudsman, *Good Practice Guide: Managing Complaints involving Human Rights* (2017)

Judicial College of Victoria, *Disability Access Bench Book*, <http://www.judicialcollege.vic.edu.au> (This resource is intended for judicial officers dealing with litigants and witnesses with disabilities, but contains useful advice that can be applied in other contexts).

Paul E Mullen and Grant Lester, 'Vexatious litigants and unusually persistent complaints: From querulous paranoia to querulous behaviour' (2006) 24 *Behavioural Sciences and the Law* 33

New South Wales Ombudsman, *Managing Unreasonable Conduct by Complainants Practice Manual* (3rd edition, forthcoming)

Queensland Government, '*Better communication*' website, <http://www.qld.gov.au/disability/community/communicating>

Victorian Government Better Health Channel, '*Stressbusters*' website <http://www.betterhealth.vic.gov.au>

Victorian Ombudsman, *Complaints: Good Practice Guide for Public Sector Agencies* (2016)

Victorian Ombudsman, *Councils and complaints – A good practice guide* (2015)

WorkSafe Victoria, *Work-related stress* <https://www.worksafe.vic.gov.au/pages/safety-and-prevention/health-and-safety-topics/work-related-stress>

Appendix one – Example of a warning letter

This is a fictional example of a warning to a person about unreasonable conduct.

Dear Mr Sullivan

Your complaint about Pacific City Council

I am writing about your complaint regarding your council's process for collecting unpaid rates.

I have listened to the recordings of the telephone calls you made to this office on 20 and 24 March 2018.

On the recordings, you can be heard making abusive and insulting comments to the officer who took your calls, despite being asked on a number of occasions to stop.

We expect our officers to treat you with courtesy and respect. We expect this courtesy to be returned.

I can hear on the recordings that you are frustrated with the council's actions and the time our office needs to consider your complaint. However, if you continue to speak to our officers in this way, we may have to limit your contact with us to writing in future.

I have spoken with the officer handling your case. She is currently making enquiries with the council about your complaint and will contact you when she has more information.

Yours sincerely

Anna Cattermole
Assistant Ombudsman

Appendix two – Example of a letter limiting access

This is a fictional example of a letter to a person explaining a decision to limit access.

Dear Mr Sullivan

Your complaint about Pacific City Council

We received your letter dated 16 July 2018 about your council's process for collecting unpaid rates.

In your letter, you repeat your concerns that the council's process is unlawful and that it should compensate you for the distress and embarrassment you experienced.

As you know, this office made enquiries about your concerns earlier this year. The investigation officer wrote to you on 4 April 2018 outlining her views. She advised you that she reviewed the laws and policies that apply to the council and inspected officers' records of their conversations with you. This evidence showed that the council had followed its laws and policies, and that you and the officers had different interpretations of your conversations. She explained that she was unable to find that the council had acted in a way that was contrary to law, unreasonable or wrong in these circumstances.

You wrote to the investigation officer expressing disagreement with her findings and restating your request for compensation. The investigation officer spoke to you on the telephone and wrote to you again on 26 April 2018. She answered your questions and suggested you seek legal advice if you want to pursue compensation.

You wrote to the investigation officer again stating that you should be compensated by the council. She responded on 20 June 2018 and noted that there was no new information or evidence that would change her decision.

I can see from your letter that you continue to disagree with this office's decision regarding your complaint. For the reasons the investigation officer previously explained, we are unable to assist you further.

As there is no further role for this office in relation to your complaint, any further correspondence regarding the council's process for collecting unpaid rates will be considered and kept on file, and we may not respond unless it raises new issues which we consider warrant attention.

If you want an internal review of the decision not to respond to further contact about these issues, you can write to the Deputy Ombudsman within 60 days with an explanation and any evidence about why this decision is wrong.

Yours sincerely

Anna Cattermole
Assistant Ombudsman

Appendix three – Model policy/procedure

This is an example of a policy/procedure that follows the advice in this guide. Your organisation can tailor it to suit your role and circumstances. You might add it to your existing complaint handling or service delivery policy, or adopt it as a stand-alone policy.

Introduction

[Organisation name] is committed to providing an accessible, responsive service to all Victorians. We recognise that people using our service have diverse backgrounds and needs. We also recognise they will sometimes be angry, frustrated or distressed or act in other ways we find challenging. We employ skilled officers who can communicate well and deal with complex issues.

At the same time, we are committed to providing a safe and healthy workplace and using our resources efficiently and fairly. We expect our officers to treat people with courtesy and respect. We expect this courtesy to be returned. We do not tolerate behaviour that is offensive, abusive or threatening or consumes disproportionate resources.

This document sets out how we deal with challenging behaviour in a way that is fair and balances the interest of [complainants, or another term used in your organisation], our officers, our organisation and the public.

We recognise that people who demonstrate challenging behaviour often have a legitimate grievance. Our officers will continue to deal with complaints on their merits.

Dealing with challenging behaviour

[Organisation name] encounters a spectrum of challenging behaviour, from slightly confronting to clearly unreasonable, and our responses will be graduated as follows.



‘Challenging behaviour’ is any behaviour officers find challenging. Officers can deal with most types of behaviour using prevention and responding strategies (see Stage one and Stage two on the following pages).

Behaviour becomes ‘unreasonable’ when, because of its nature or frequency, it raises health, safety, resource or equity issues for [organisation name], our officers and other people who use our services. Officers can deal with this behaviour using management strategies (see Stage three) or recommending limits on the person’s access to our services (see Stage four).

Unreasonable behaviour includes verbal abuse, threats to harm officers or other people, and violence. This behaviour is never acceptable.

If officers are unsure about whether a person’s behaviour has moved from challenging to unreasonable, they should consult a manager or another experienced colleague.

Stage one: Prevent

[Organisation name] aims to prevent challenging behaviour where possible by practising good complaint handling. Our [name your organisation's complaint handling or service delivery policy] explains how we respond to complaints.

Stage two: Respond

Defusing emotional behaviour

Officers will respond to angry or emotional behaviour in the first instance by attempting to defuse the situation. This involves the following sequence of actions:

- Taking control of their own response. At times officers may need to take a break so they can collect themselves. If this is not possible and the matter is not urgent, officers can arrange to speak with the person again at another time.
- Giving the person reasonable time to express themselves and acknowledging what they are saying and how they feel.
- When the person's feelings are under control enough to speak about the complaint, refocusing the discussion on to the complaint.
- Problem solving using good complaint handling techniques.

Behaviour associated with a disability

Where challenging behaviour may be a symptom or manifestation of a disability, officers need to consider [organisation name's] obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Equal Opportunity Act 2010* (Vic). [Name your organisation's equal opportunity policy or accessibility action plan] provides advice about avoiding discrimination and making reasonable adjustments so people can access our services.

Officers can consult [name an appropriate officer in your organisation eg your organisation's equal opportunity representative or legal counsel] where:

- they are unsure about whether or how to make reasonable adjustments
- they believe discrimination may be justified because the person's behaviour is a risk to health, safety or property.

Responding to threats of suicide

[Organisation name] does not expect officers to provide crisis support or counselling to people who talk about suicide. Our role is to check if the person is serious and connect them with people or services that can help.

If a person makes statements about harming themselves, officers will:

1. Ask the person clearly and directly if they are thinking about suicide.
2. Explain that they are concerned and want to make sure the person is safe.
3. Alert a manager, who will decide what action to take.

If the person's safety is at risk or they need immediate help, the manager will contact Victoria Police on 000. [If your organisation has specific secrecy or privacy obligations that limit your ability to provide information to the police, explain how these should be handled]

In other cases, the manager will consider whether to:

- encourage the person to speak with someone they trust, or
- offer information about contacting Lifeline (13 11 14), the Suicide Call Back Service (1300 659 467), SuicideLine Victoria (1300 651 251) or Kids Helpline (1800 55 1800).

Managers will check on the welfare of affected officers following a threat of suicide and ensure support is available.

Stage three: Manage

If a person's behaviour becomes unreasonable, officers must apply appropriate and proportionate strategies for managing the behaviour. The strategies will depend on the behaviour type of involved:

Behaviour	Strategy
<p>Unreasonable persistence</p> <ul style="list-style-type: none"> • bombarding officers with calls or visits that are not warranted • contacting different officers seeking a different answer • reframing an old complaint so it looks like there are new issues • refusing to accept the decision after we have investigated the complaint, provided a decision and reasons, answered questions and provided review options • questioning the skills or competence of the complaint handler 	<p>Saying no</p> <ul style="list-style-type: none"> • asking the person to stop calling or visiting • setting time limits for discussions • transferring the person back to the original complaint handler or their manager • declining to consider new issues that are not supported by information or evidence
<p>Unreasonable demands</p> <ul style="list-style-type: none"> • insisting on an immediate response or priority that is not warranted • insisting on a response to every point, no matter how minor • demanding information they are not entitled to • insisting that the head of your organisation handle the complaint when that is not warranted • instructing officers how to investigate the complaint 	<p>Setting limits</p> <ul style="list-style-type: none"> • explaining how you will be dealing with the complaint • explaining that you will not meet the demand and why • 'reality checking' ie explaining that we deal with many complaints and need to decide when and how they are handled
<p>Unreasonable lack of cooperation</p> <ul style="list-style-type: none"> • sending voluminous amounts of information • providing little or no information • presenting information in 'drips and drabs' • refusing to comply with reasonable requests for information 	<p>Setting conditions to motivate action</p> <ul style="list-style-type: none"> • asking the person to take action (eg providing certain information) before you will consider the complaint further
<p>Unreasonable arguments</p> <ul style="list-style-type: none"> • insisting on the importance of minor issues • making unsubstantiated allegations eg bias or corruption • insisting on 'cause and effect' without evidence 	<p>Declining or discontinuing involvement</p> <ul style="list-style-type: none"> • requiring evidence before taking a complaint further • not investigating issues where there is no practical outcome
<p>Unreasonable behaviour</p> <ul style="list-style-type: none"> • verbal abuse, aggressive behaviour, harassment or threats 	<p>Setting limits and conditions</p> <ul style="list-style-type: none"> • naming the behaviour and asking the person to stop • providing a warning

Officers can refer to the New South Wales Ombudsman's *Managing Unreasonable Conduct by Complainants Practice Manual* for more information about these categories and ideas about management strategies.

When choosing an appropriate strategy, officers will consider:

- the person's prior conduct eg is the behaviour isolated or part of a pattern?
- the nature of the conduct
- whether the complainant's personal circumstances are contributing to the behaviour eg health, social circumstances or disability
- the likely effectiveness of different strategies
- the impact of the strategy on the welfare of the complainant and any dependents
- relevant legal obligations, including [name any legal obligations that affect your organisation's ability to apply management strategies].

Stage four: Limiting access – a last resort

[Organisation name] can consider limiting access to our services if other strategies have not worked and the person continues to engage in unreasonable behaviour.

Depending on the type of behaviour, we may consider limiting:

- who the person can contact eg limiting contact to a named officer
- what issues we will respond to eg not responding to issues that have already been the subject of an assessment and explanation, unless the person raises new issues that warrant attention
- when a person can have contact
- where the person can contact us eg limiting locations for face to face meetings to secure areas
- how the person can contact us eg confining contact to writing where the person has been verbally abusive.

Deciding to limit access

Decisions about limiting access to services will only be made by [name a senior officer with authority to make these decisions. This will usually be the head of your organisation or a senior delegate].

In most cases, [name of the senior officer] will warn the person of the action we propose to take and give the person an opportunity to stop.

Before approving any limits, [name of the senior officer] must be satisfied that:

- the behaviour is unreasonable ie poses a risk to the health, safety, equity or resources of one of the parties involved
- all alternative strategies have been, or are likely to be, ineffective in managing the risk
- all relevant factors have been considered including the person's history, the nature of the conduct, the person's personal circumstances and the impact of limiting access on the welfare of the person and their dependants
- the limits are proportionate to the level of risk posed by the behaviour
- there is sound evidence to support the decision
- the limits are consistent with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and we have documented:
 - o which, if any, human rights will be affected
 - o why we are satisfied that the limits are reasonable and demonstrably justified under section 7 of the Charter
- if the behaviour may be a symptom or manifestation of a disability, the limits are consistent with the *Equal Opportunity Act 2010* (Vic)
- [if other legislation affects your organisation's ability to limit services, explain its impact here].

[Name of the senior officer] will ensure that the decision and reasons are documented in [explain how your organisation wants officers to document decisions eg in your case management system].

Informing the parties

[Name of the senior officer] will inform:

- affected officers about the decision
- the person. This will be in writing (unless another form of communication is more appropriate) and will explain the decision and the reasons for the decision. It will set a timeframe for reviewing the limits (see below) and explain the person's options for complaining about the decision.

Reviewing limits

[Name of the senior officer] will ensure that any limits on a person's access are reviewed within the named timeframe, and at least once every 12 months, to determine if they are effective and still warranted.

[Name of the senior officer] will document the review and inform affected officers and the person of any decision to remove or vary the limits on access.

[Explain how the person can complain about the decision in the meantime eg your organisation's processes for seeking an internal review. Once the person has exhausted their options in your organisation, advise them that they can complain to external oversight agencies such as the Victorian Ombudsman or, if the person claims discrimination, the Victorian Equal Opportunity and Human Rights Commission].

Where limiting access is not appropriate – alternative dispute resolution

[Name of the senior officer] may decide it is not appropriate to limit a person's access eg because it would breach legal obligations, unduly affect the welfare of the person or a dependant, or our actions have contributed to the behaviour.

In these cases, we can consider arranging alternative dispute resolution using an independent third party. [Name of the senior officer] will consider whether alternative dispute resolution is likely to be effective in the circumstances, including the person's willingness to engage genuinely in the process.

Recording and reviewing unreasonable behaviour

Officers must all record incidents of unreasonable behaviour in [describe how officers should record incidents eg in your organisation's case management system] within 24 hours. The record will:

- describe what the person said or did in neutral terms
- describe the action the officer took in response.

[Name of an appropriate officer] will review reports regularly to:

- ensure strategies are being applied appropriately and consistently
- identify possible patterns, and, if appropriate, recommend changes to service delivery that may help prevent challenging behaviour in future.

Security

[Explain your organisation's security arrangements for matters such as:

- face to face meetings eg duress alarms, use of secure meeting rooms
- incident response eg an assault or attempted assault, threats to harm other people
- harassment of officers outside the workplace eg on social media]

Roles and responsibilities

All officers are authorised to apply the strategies in Stages one to three of this policy (Prevent, Respond and Manage).

Officers must consult a manager if:

- [outline your organisation's policy on what officers should do when a person asks to speak with a manager]
- a person threatens suicide
- a person makes threats to harm a staff member or another person.

Decisions to limit access to services (Stage four) may only be made by [name the senior officer/s authorised to make the decision].

Support for staff

[Organisation name] recognises that dealing with challenging or unreasonable behaviour can be upsetting and stressful and we are committed to supporting our officers.

We will uphold our legal obligations to provide a safe workplace and support officers by:

- [list the training and support provided by your organisation eg formal training, coaching and mentoring arrangements, debriefing arrangements or employee assistance programs]

Managers will speak with officers who handle complaints regularly to check their welfare, in addition to any other supervision arrangements.

Officers are encouraged to monitor the impact of challenging behaviour on their wellbeing, draw on available supports and maintain a healthy approach to managing stress.

Officers who are injured at work can report this in accordance with [name your organisation's policy/procedure for reporting workplace injuries and claims].

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MANAGING UNREASONABLE COMPLAINANT CONDUCT

PRACTICE MANUAL

2ND EDITION



Managing unreasonable complainant conduct – 2nd Edition
A manual for frontline staff, supervisors and senior managers

May 2012

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Ombudsman's message of support

Unreasonable complainant conduct ('UCC') has been an on-going problem for Australian public sector agencies for many years. Public organisations, in particular Ombudsman offices, have been dealing with this issue (in some form) since we first opened our doors. The issue was highlighted more than 25 years ago in a speech by the former High Court Justice Kirby, who observed that:

One of the universal problems of the Ombudsman is the chronic complainer; people who feel passionately about their own cause and are uncompromising in their reaction to a negative conclusion on the part of the Ombudsman. Such people can sometimes cause a great deal of disproportionate disruption to the work of the Ombudsman and his staff.¹



He continued:

Of course, the Ombudsman already can decline to investigate matters. But vexatious complainants can cause a great deal of time loss. The issue was discussed at a recent meeting of ombudsmen in Helsinki. It is a universal phenomenon. It should have attention in this country.²

Although the terminology that we prefer to use at the Ombudsman's office has changed over the years, it is clear that the issues former Justice Kirby spoke about 25 years ago continue to affect Ombudsman offices and public organisations everywhere. The problem of the chronic or overly persistent complainant and the disruptive effects of their conduct on public resources continue to be problematic issue for all offices, including my own.

To help address this problem my office, with the support and involvement of the other Australasian Parliamentary Ombudsman, began a two-staged joint project on managing unreasonable complainant conduct in 2006. The project has sought to minimise the often disproportionate and unreasonable impacts of UCC on public organisations, their staff, services, time and resources by proposing a framework of strategies for managing such conduct. These strategies have been incorporated into a practice manual for public sector organisations and their staff, which has been at the core of our work in both stages of the UCC project.

I am pleased to present the second edition of the Managing Unreasonable Complainant Conduct Practice Manual. This manual updates the first practice manual published in 2009. It provides an extensive range of strategies for dealing with UCC, including in circumstances where it is not possible to terminate services to a complainant. Although it has been developed with public sector organisations in mind, it is equally applicable to customer or private sector situations.

It is my hope that this manual will assist organisations and their staff to respond confidently, firmly and consistently to UCC and that it will contribute to shaping a complaint handling approach across all organisations that systemically discourages UCC and effectively manages it.

Organisations that fall within the jurisdiction of the NSW Ombudsman can expect our support in cases where they have implemented the approach and strategies provided in this manual in a fair, appropriate and reasonable manner.

A handwritten signature in black ink that reads "B. Barbour". The signature is written in a cursive, flowing style.

Bruce Barbour
Ombudsman

¹ Hon. Justice Michael Kirby, Ombudsman – The future. Speech delivered at a dinner following the seminar on 'Ombudsman through the looking glass', 7 September 1985. Canberra Bulletin of Public Administration, vol XII no 4, pp 300.

² *ibid.*

If you read nothing else, read this page

The approach and the strategies suggested in this manual are based on the clear understanding that:

- They are equally relevant and applicable to all staff within an organisation including frontline staff, supervisors and senior managers.
- All complainants are treated with fairness and respect.
- In the absence of very good reasons to the contrary, all complainants have a right to access public services.
- All complaints are considered on their merits.
- Unreasonable complainant conduct does not preclude there being a valid issue.
- The substance of a complaint dictates the level of resources dedicated to it, not a complainant's demands or behaviour.
- Anger is an understandable and, to some degree, an acceptable emotion among frustrated complainants as long as it is not expressed through aggression or violence.
- Staff safety and well-being are paramount when dealing with unreasonable complainant conduct.
- The decision to change or restrict a complainant's access to services as a result of their behaviour, will only be made at a senior management level and in accordance with clearly defined policies and procedures. See Unreasonable Complainant Conduct Model Policy available at: www.ombo.nsw.gov.au.
- Senior managers will ensure relevant systems, policies and procedures are in place to manage complaints and UCC and that all staff who interact with complainants will receive training, guidance and direction about using the strategies suggested in this manual.

PART 1

Introduction

Chapter 1 – Overview

The problem

'It certainly appears that angry, hostile and abusive behaviour is increasing, and that government employees have become convenient targets for the frustrated and angry.'³

Public organisations deal with many thousands of complainants each year, most of whom act responsibly. These organisations also deal with complainants who have come to the end of their tether. Some are justifiably disappointed and angry because they have suffered harm through no fault of their own. Some may have been treated unfairly or disproportionately without reasonable explanation. Some may have been given incorrect information or advice that they relied on to their detriment or may have suffered substantial losses as a result of an improper decision that was made against them. Yet, despite these setbacks, these complainants are able to manage their frustration and anger and productively engage with the systems, processes and people they are interacting with.

Other complainants, however, do not act so responsibly. Their anger about their complaint or its outcome is often translated into aggressive and abusive behaviour towards the organisations and staff handling their complaints. These complainants threaten harm, are dishonest, provide intentionally misleading information or deliberately withhold information that is relevant to their complaint. Some of them bombard organisations with unnecessary telephone calls, emails and large amounts of irrelevant information or insist on things they are not entitled to and outcomes that are clearly not possible or appropriate in the circumstances. At the end of the process, these same complainants are often unwilling to accept decisions and continue to demand further action on their complaints even though they have exhausted all available internal review options.

It is also very common for this category of complainants to lose perspective and change the focus of their complaints from the substantive issues and the people or organisation(s) responsible for them, to allegations of incompetence, collusion, conspiracy and corruption against the case officers and organisations that they have approached to resolve those issues. As such, it is not uncommon to find that their complaints have grown over time and have been unnecessarily escalated to multiple organisations at the same time – where they re-enter the complaints cycle all over again.

In a nutshell, these complainants behave in ways that go beyond what is acceptable from people, even when they are experiencing a wide range of situational stress.

'One local character has said that he is not going to rest until he has cost the Commonwealth one million dollars. He has already cost it at least half a million. I wonder whether there ought to be some explicit mechanism by which we can decline to take on a complaint because there is no light at the end of the tunnel to justify the expense.'⁴

The problem is growing

Anecdotal evidence from a wide range of organisations and jurisdictions indicates that this problem is widespread and on the rise. In addition, the types of behaviours that organisations and their staff are being confronted with are getting more complex – for example, the growing tendency for disgruntled complainants to complain over the internet and in social media. In increasing numbers complainants are turning to the internet to vilify and defame the people and organisations they are interacting with and in the process are causing significant reputational and psychological harm to their victims.

³ Bacal, R 2010, *Defusing Hostile Customers Workbook*, 3rd edn, Bacal & Associates, Casselman, pp. 1.

⁴ Richardson, J E, *The Ombudsman: Guardian, Mentor, Diplomat, Servant and Protector*. Speech delivered at a dinner following the seminar on 'Ombudsman through the looking glass', 7 September 1985. Canberra Bulletin of Public Administration, vol XII no 4, pp. 224.

One of the main challenges for organisations dealing with complainants who display these types of behaviours is that most staff members, regardless of their job description, prefer not to deal with complainants who they view as 'difficult'. In fact, many try to actively avoid or minimise circumstances where they have to deal with these complainants. This avoidance has resulted in organisational cultures where these complainants are seen as an irritant or interference to other more 'important' work. Their complaints are often:

- Delegated to junior staff members whose work and time is seen as being more disposable.
- Assigned to someone in the organisation who is considered to be 'naturally good' at dealing with difficult complainants.
- Declined with little consideration of the merits of their issues.
- Escalated to a senior staff member who can tend to the squeaky wheel – when the situation has spiralled out of control.

Unfortunately, the unintended consequences of these approaches are increased stress levels among staff dealing with these complainants and, because of differences in skill levels, significant disparities in the ways that challenging complainants are dealt with.

About this manual

This manual is designed to help organisations and their staff take a systematic and consistent approach to managing their interactions with complainants. It provides a series of suggestions and strategies to assist all staff members – not just frontline officers – to deal with complainants, in particular those who behave unreasonably. The strategies have been developed by complaint handlers for complainant handlers, and although the focus of this manual is on the public sector, the suggested strategies may be equally applicable to customer and private sector situations.

The information in this manual is the result of a two-staged joint project of all Australasian Parliamentary Ombudsman that started in 2006 and is referred to in this manual as 'the project'. It was originally prepared as an *Interim Practice Manual* in 2007, and was piloted in Ombudsman offices around Australia over a 12-month period during 2007 and 2008. The first edition of this manual was published in 2009.

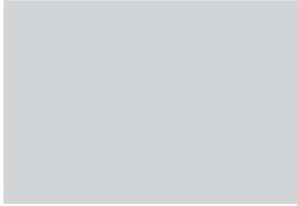
This second edition builds on the 2009 publication and the suggested strategies in that manual. It has been updated to include a broader range of strategies to suit organisations that do not have the discretion to terminate their services/relationships with complainants. This manual has also been expanded to include strategies for dealing with the problems posed by newer communication technologies, like social media, which have created a murky middle ground between conduct that has traditionally been considered to be 'private' – and beyond the scope of issues to be dealt with by organisations and conduct that must be dealt with in this regard.

There is no one size fits all approach to managing unreasonable complainant conduct.

It is important to note that this manual is not intended to be prescriptive in any way. There is no 'one size fits all approach' to managing unreasonable complainant conduct and not every suggestion in this manual will be effective 100% of the time. The strategies need to be adapted to suit the circumstances of each case and should supplement rather than replace existing organisational policies, procedures and protocols.

It is hoped that this manual will contribute to shaping a complaint handling approach across public sector organisations that systematically discourages unreasonable complainant conduct and effectively manages it. By consistently applying the approach advocated in this manual, it will not only help you and your organisation – but hopefully it will also help other organisations that deal with complaints from the public, as well.

Guide to this manual



Summary

Point of emphasis or additional information/explanation provided.



Case study example

Real life example of a UCC incident.



Quote

Written or verbal quotation.

PART 2

The fundamentals

Chapter 2 – What is UCC and why does it happen?

What is unreasonable complainant conduct?

Unreasonable complainant conduct ('UCC') can be defined as any behaviour by a current or former complainant which, because of its nature or frequency, raises substantial health, safety, resource or equity issues for the parties to a complaint. The parties to a complaint that might be detrimentally impacted by UCC include, the organisation responsible for handling a complaint, the case officer(s) tasked with dealing with a complaint, the subject of complaint, a complainant himself or herself (potentially including members of their families and friends) and other complainants and service users.

UCC is behaviour by a current or former complainant which, because of its nature or frequency, raises substantial health, safety, resource or equity issues for the parties to a complaint.

UCC can happen anywhere. It is not limited to telephone communications or face-to-face interactions with complainants. It can occur over the internet or on social networking websites, in a public location or in written correspondence. So far as the complainant's conduct is unacceptable and arises during the course of, or as a direct result of, professional work/services provided by an organisation or its staff, it can legitimately be characterised as UCC.

Why do some complainants behave unreasonably?

From our experience there are a wide range of reasons why some complainants behave unreasonably. They can be divided into the following motivational categories:

- **Attitudes** – they are dissatisfied with a person, an organisation or the systems and processes that they are interacting with.
- **Emotions and psychologies** – they are highly angry, frustrated or disappointed and express those emotions in unacceptable ways; they have an inflated sense of entitlement or are unable to accept any personal blame for their issue.
- **Aspirations** – they are seeking 'justice', a 'moral outcome' or are obsessively pursuing their issue on 'a matter of principle'; they want revenge, vindication, or retribution – things the complaints process is not designed to deliver.
- **Recreational interests** – they are carrying out an all-consuming hobby or are making a career of complaining; they are deriving pleasure from the activities associated with the complaint process or are enjoying the social contact with the case officer or organisation.
- **Needs and expectations** – their expectations, physical needs or emotional needs are not/have not been met.

Complainants can also have ulterior motives – they may make a complaint or series of complaints with the intention of harassing, intimidating, embarrassing, or annoying another person or organisation. For example, in a recent local court judgement in NSW a Magistrate said of the complainant: '[he] presents in my view as a serial pest and appears to take a macabre [morbid] pleasure in annoying public figures.'⁵ Some complainants have also been known to use the complaints system as an information gathering process for subsequent legal cases, while others may be experiencing personal or mental health problems that we have no direct control over.

Whatever the reasons are for UCC, in our view they are largely not relevant to our work as complaint handlers. While psychiatrists and psychologists may have reasons to focus on the causes behind a person's behaviour (to assess their mental state or make a psychological diagnosis), it is generally not a complaint handler's role to do this. Our role and expertise is complaint handling – that is, dealing with people who are dissatisfied with a service they have received, a failure to follow a process or procedure or an improper/incorrect decision – not the personal motivations behind their conduct.

Also, as complaint handlers, we generally do not have the qualifications to assess and diagnose complainants in this way. Even if some of us do, as complaint handlers we will rarely have enough face-to-face contact with a complainant to make a valid diagnosis of them.

⁵ Transcript of proceedings, *R v Steven Diehm* (Local Court of Taree, McCosker J, 18 July 2011).

As a result, the suggestions in this manual are based on the recognition that the most effective way for us to manage UCC is to deal with a complainant's observable conduct and the content of their communications – rather than speculating on the possible reasons for them, except of course those that relate to their complaint. This ensures that:

- Those of us who are not mental health professionals, counsellors or social workers are able to confidently manage UCC without being experts in psychoanalysis or behavioural psychology.
- We can take a more focused approach to dealing with UCC by responding directly to the things and behaviours we observe, rather than the things we assume or suspect.
- A complainant's behaviour does not negatively affect their complaint (if valid) or the level of attention that we give to it.
- We manage UCC and its impacts in ways that are transparent, reasonable and fair.

The most effective way for case officers to manage UCC is to deal with observable conduct, rather than the possible motivations or causes for that conduct.

Who pays the price for UCC?

In 2010 it was reported that one NSW resident cost his local council more than \$151,000 over a five year period, because of his incessant access to information requests and code of conduct complaints. The resident was a former Councillor at that same council.⁶

Although complainants who behave unreasonably are very few in number, their behaviour can have profound effects on an organisation's resources and efficiency levels, and the productivity, safety and wellbeing of its staff. For example, the common and widespread feedback that we have received throughout the UCC project suggests that:

- UCC is only an issue in about 3-5% of cases – sometimes more.
- UCC on average takes up between 25-30% of an organisation's resources – sometimes more.
- UCC can cause significant equity problems for organisations that are forced to substantially and unreasonably divert resources away from other complaints and functions to manage it.
- UCC can be a major source of stress for the staff members who have to deal with it – including affecting their right to dignity, physical and emotional safety and wellbeing as well as affecting their work performance – in some cases. This in turn can result in increases in the number of stress leave applications and compensation claims that are made by these staff members and can create duty of care and workplace health and safety issues for employers.⁷
- UCC can have damaging and sometimes devastating consequences for the complainants who engage in these types of behaviours. It almost always hinders their ability to achieve appropriate and acceptable outcomes for themselves and, in extreme cases, can result in unemployment, bankruptcy or self-harm – with obvious flow on effects on their families and friends.⁸ See Appendix 1 – A word on unusually persistent complainants (querulants).
- UCC can have negative consequences for external review agencies and regulatory bodies that have to dedicate time and resources to dealing with review applications that have been unnecessarily escalated by complainants who cannot 'let go' of their issue. This problem was highlighted in a speech delivered by Robert Davey, Commissioner for Superannuation from 1976 – 1986. He said:

The misuse or overuse, by some, of the many channels of review now available to those members of the public dealing with the decision-taking areas of Commonwealth Government administration has to be a cause for concern. Certainly it is of concern to me when 14 per cent of the costs of my office in administering the Superannuation and Defence Force Retirement and Death Benefits legislation can now be attributed directly or indirectly to internal and external review. In 1985-86 costs are expected to reach \$1,500,000.⁹

6 Murray O 2010, 'Hornsby Council not to respond to Pennant Hills resident's letters', *Hornsby Advocate*, viewed 28 October 2011, <<http://hornsby-advocate.wherelive.com.au/news/story/hornsby-council-not-to-respond-to-pennant-hills-residents-letters/>>.

7 See: Comcare 2009, *Prevention and management of customer aggression*, OHS 33, Canberra, pp.9.

8 Lester G, Wilson B, Griffin L & Mullen PE, Unusually Persistent Complainants, *British Journal of Psychiatry*, 2004.

9 Davey, R The Ombudsman – A Bureaucrat's Impression. Speech delivered at a dinner following the seminar on 'Ombudsman through the looking glass', 7 September 1985: Canberra Bulletin of Public Administration, vol XII no 4, pp. 275.

He added:

Increasingly, complainants are adopting a multi-channelled approach to review, but relatively few decisions are changed as a result of the processes of external review – on average less than 10 a year; more changes occur at the internal review stage.¹⁰

Figure 1 below illustrates the wide ranging impacts of UCC on the various parties to the complaints process. It is hoped that by using the approach advocated in this manual you can minimise and possibly eliminate their impacts on the relevant parties.

Figure 1 - Negative impacts of UCC



¹⁰ *ibid.*



Case study example – The potential impacts of UCC

provided by the NSW Ombudsman

In 2002 Mr M approached our office with a complaint about his former employer (a university). He believed the university had taken detrimental action against him because he had made a protected disclosure. The alleged detrimental action included a failure to re-appoint him to his position at the end of his contract term, as well as an alleged failure to follow proper procedures in finding a replacement for him. Mr M also alleged that he had been 'knowingly misled' by the university about the terms of his employment and claimed that one of his former colleagues had failed to declare certain conflicts of interest which he considered to be quite significant.

Our office declined Mr M's complaint for a number of reasons including that Mr M insisted we read numerous Hansard documents in order to understand his complaint. Mr M also refused to summarise these materials and would not specify how they related to his complaint – as we had requested.

Dissatisfied with our decision Mr M continued to make a number of complaints to our office and about our office and our staff to other agencies. He alleged that the case officers who had dealt with his complaints were corrupt because of an alleged (and unsubstantiated) conflict of interest. He also accused them of being corrupt when we decided to restrict his access to our services and his contact with our staff – an action which was taken because of the impact that Mr M's conduct was having on our staff and our resources.

Still dissatisfied, Mr M proceeded to lodge numerous FOI applications with our office and several other public agencies that he had complained to about his issues – including the Director-General of the Attorney General's Department, the Director General of the Cabinet Office, the Commissioner of Police and his former employer. Most of Mr M's FOI applications were refused.

Mr M then sought reviews of the FOI decisions in Administrative Decisions Tribunal (ADT), the supreme court and the court of appeals – at a significant cost to all the agencies. In total between 2005 and 2010 Mr M was a party to over 80 decisions of the ADT, 15 supreme court decisions and 6 court of appeals decisions.

Mr M's conduct appeared to follow the 'downward spiral' referred to by Mullen and Lester.¹¹ See Appendix 1. His obsessive drive for vindication resulted in unemployment, marriage breakdown, severe financial trauma, allegations of domestic violence and tragically – suicide. His unreasonable conduct also seemed to prevent him from achieving the outcomes he was seeking and his apparent loss of perspective about his substantive issue – ie loss of employment – ultimately resulted in disproportionate losses for him and his family.

This case provides a bleak example of how UCC can spiral out of control having devastating impacts on complainants, their families and others.

¹¹ Lester, Wilson, Griffin & Mullen, *Unusually Persistent Complainants*.

Chapter 3 – Understanding the approach and framework

Key features of the approach

To properly apply the approach in this manual, you need to understand the principles and objectives that underlie it. The approach has three core objectives. They are to:

- ensure equity and fairness for all complainants
- improve resource allocation and efficiency
- protect staff health and safety.

To achieve these objectives, you need to be guided by three broad underlying principles – prevention, management and accountability.

Table 1 – Core objectives and underlying principles

Core objectives	<p>Ensure equity and fairness</p> <p>Ensuring that all current and potential complaints are dealt with equitably and fairly and resources are distributed on the basis of a complainant's merits, rather than a complainant's demands or conduct.</p>
	<p>Improve efficiency</p> <p>Improving overall efficiency by allocating sufficient time and resources to dealing with UCC which, if left unmanaged, can be a massive drain on the complaint handling resources of an organisation.</p>
	<p>Ensure health and safety</p> <p>Complying with WH&S and duty of care obligations by identifying the potential risks posed by UCC to staff health, safety and security and implementing measures to eliminate or control those risks. Staff safety is the number one goal. See Chapter 17 – Management roles and responsibilities (Systems for identifying, assessing and managing UCC related risks) (page 98).</p>
Prevention principles	<p>Manage complainant expectations at the outset</p> <p>Managing complainant expectations from the beginning of the complaints process to ensure they are reasonable and realistic. Unmet expectations are one of the primary triggers for UCC.</p> <p>See Chapter 2 – What is UCC and why does it happen?</p> <p>See also Chapter 6 – Effectively managing complaints and expectations from the outset (page 24).</p>
	<p>Insist on respect and cooperation</p> <p>Insisting that complainants show respect for and cooperate with staff as a prerequisite to receiving services and having any further contact with or communication from the organisation.</p>
	<p>Implement policies and procedures</p> <p>Implementing appropriate policies and procedures for managing UCC and ensuring that all staff are familiar with and receive training on them.</p> <p>See – Unreasonable Complainant Conduct Model Policy. It is available at www.ombo.nsw.gov.au.</p>

Management principles**Exercise ownership and control over complaints**

Exercising ownership and control over complaints and ensuring complainants are aware that:

- The organisation and its staff effectively 'own' the complaint – they decide whether it will be dealt with and if so by whom, how quickly it will be dealt with, the priority and resources it will be given, the appropriateness of the outcome achieved, and so on.
- Complainants 'own' their issue – they are free to raise it in any other forum they like including with oversight agencies, the courts and tribunals, the media or a politician.

Focus on specific, observable conduct – not the person as a problem

Moving away from any approach that labels or categorises complainants as 'difficult'. Other terms used to describe complainants with problematic behaviours include resource-intensive, high maintenance, high conflict, vexatious or querulous. These terms all focus on labelling the complainant (as a person) as being difficult or challenging rather than their behaviour – which is the real issue. Also, when these terms are used by case officers to describe certain complainants, they can negatively influence how these complainants, and their complaints, are perceived and dealt with by other staff.

Using the term 'unreasonable conduct' allows us to focus on the problematic behaviour and respond to it openly and transparently and without the worry that we might be incorrectly or offensively labelling someone – in this case we are labelling their conduct.

Respond appropriately and with consistency to individual complainants and complaints

Making full use of the framework and strategies in this manual when dealing with UCC. The framework provides a systematised series of strategies and serves as a 'thinking tool' that can be used to prevent and respond to UCC. Used appropriately, the framework can also ensure consistency in how matters are dealt with individually and across the board – both within and across public sector agencies.

Effective communication

Providing complainants with clear, timely and firm communication including regularly informing them about the status of their complaints, even if there has been no progress.

Complainants who are not kept informed about the progress of their complaints are more likely to make negative assumptions about how they are being dealt with. This includes assuming that no one is working on their complaint, that it is the subject of a significant investigation (when it is not) or that there has been a 'stuff up'.

See Chapter 6 – Effectively managing all complaints and expectations from the outset (page 24).

Also see – *Reporting on the progress and results of investigations*, NSW Ombudsman, available at www.ombo.nsw.gov.au.

Accountability principles (supervisors and senior managers)

Commitment to the approach

Demonstrating management commitment and support for the approach is critical to its success. It is not enough to send staff off for training and expect them to be able to deal with the challenges presented by UCC.

Senior managers need to:

- Actively endorse and support the use of the strategies by staff at all levels.
- Demonstrate commitment to the approach by applying it consistently.
- Support staff with the necessary policies, procedures and authorisations to use the strategies in this manual. Staff need to be clearly informed of what they are and are not specifically authorised to do in relation to UCC and when to defer matters to nominated senior managers for further action.
- Provide staff with adequate and ongoing training, supervision and guidance in their dealings with UCC.

Supervision

Ensuring that supervision, as far as the complainant is concerned, happens behind the scenes, except perhaps in limited circumstances – eg a staff member decides they are unable to manage a complainant's conduct and/or that escalating the matter to a senior manager will defuse the situation.

In our view, it is generally not appropriate to allow complainants to be escalated to supervisors and senior managers just because they demand this. There are at least two reasons for this. First, complainants who are treated this way can feel that they are getting preferential treatment in having their complaint escalated or can make false assumptions about the importance of their complaint. Second, once a complainant has been escalated to a senior manager they will continue to expect similar treatment in their future interactions with the organisation – especially when they do not get their own way.

Unless the complainant wants to make a complaint about a case officer, which should be done in writing anyway, and perhaps in the limited situations identified above, we strongly discourage case officers from escalating calls to supervisors and senior managers.

Also supervisors and senior managers need to ensure that when they review complaint decisions made by lower level staff they consult those staff members to obtain all the relevant information about the complaint and the complainant. They should also ensure their review decisions are compliant and consistent with their UCC policies and procedures – in particular when they decide to overturn an earlier decision.

See Chapter 17 – Management roles and responsibilities (page 98).

Recognise that complaint handling, including dealing with UCC is a core part of a public organisation's work

Ensuring that managing UCC is recognised as a core organisational responsibility, rather than a peripheral issue, and is given proper priority and adequate resources. This includes ensuring that staff are provided with adequate time to deal with cases where UCC is an issue. Although this may require greater initial outlays in terms of time, training and supervisory support, over time the benefits flowing from this approach should result in significant overall savings for the organisation.

Adequate training and guidance

Providing all staff (including senior management) with adequate training and guidance on their roles and responsibilities and the policies and procedures for preventing and managing UCC. Comprehensive training on an ongoing basis is fundamental to staff developing and maintaining the skills and confidence needed to appropriately deal with UCC in their daily work.

Accountability principles (all staff)**Calm demeanour**

Remaining calm in the face of UCC and maintaining control over emotions and reactions to such conduct.

Show respect

Showing respect to all complainants regardless of their conduct.

Respect is fundamental to preventing and successfully managing UCC.

Everybody believes they deserve respect no matter how they behave, and a failure to show respect will invariably lead to a negative response from a complainant. As a result, it does not matter how a complainant acts out they should be treated with respect. This is not about faking an emotional response, but about being courteous, polite, attentive and responsive. It does not mean you cannot be firm with a complainant, say 'no' or manage their conduct.

See Chapter 7 – Dealing with anger through effective communication (page 29).

Demonstrate impartiality

Demonstrating impartiality throughout the complaints process and not acting as an advocate for either side – especially when dealing with complainants who try to use pressure tactics, intimidation and manipulation to get their way.

The obvious exception here is if advocacy is a part of your job.

Professionalism

Understanding that case officers play an important role in promoting productive and professional interactions with complainants. This includes displaying a professional approach in all dealings with complainants – even when they are behaving unreasonably.

The framework

To use and apply the strategies in Part 5 – Responding to and managing UCC, you also need to understand the framework that we use to manage UCC. The framework divides UCC into five broad categories of complainant conduct and provides an overarching strategy for managing each category. It also identifies the specific behaviours that fall under each of the five categories and provides a list of options for dealing with each one.

The framework is demonstrated in Table 2 below and is detailed in Part 5 – Responding to and managing UCC (starting on page 37).

Table 2 – The framework of strategies

Unreasonable persistence	<p>This includes complainants persisting with their issues even though they have been dealt with to finality, refusing to accept final decisions and sending excessive amounts of correspondence.</p> <p>The overarching management strategy for dealing with unreasonable persistence is saying 'no' – not necessarily using the word but the same principle.</p> <p>See pages 39 – 43 for more examples of unreasonable persistence.</p>
Unreasonable demands	<p>This includes complainants insisting on outcomes that are unattainable, moving the goal posts or demanding to have their complaints dealt with in particular ways.</p> <p>The overarching management strategy for dealing with unreasonable demands is setting limits – eg limiting how often a complainant can telephone the organisation, who they can call, for how long etc.</p> <p>See pages 50 – 54 for more examples of unreasonable demands.</p>
Unreasonable lack of cooperation	<p>This includes complainants providing disorganised, excessive or irrelevant information, being unwilling to consider other valid viewpoints, or refusing to define their issues of complaint when they are capable of doing so.</p> <p>The management strategy for dealing with unreasonable lack of cooperation is setting conditions – eg requiring a complainant to define their issues of complaint or organise information they have submitted with their complaint.</p> <p>See pages 64 – 65 for more examples of unreasonable lack of cooperation.</p>
Unreasonable arguments	<p>This includes complainants seeing cause and effect arguments where there are clearly none, holding conspiracy theories unsupported by evidence, and irrationally interpreting facts or laws and refusing to accept other more reasonable interpretations.</p> <p>The management strategy for dealing with unreasonable arguments is declining and discontinuing – eg refusing to deal with complaints that are not supported by any evidence.</p> <p>See pages 69 – 71 for more examples of unreasonable arguments.</p>
Unreasonable behaviours	<p>This includes extreme anger, aggression, threats or other threatening or violent conduct.</p> <p>The management strategy for dealing with unreasonable behaviours is setting limits and conditions about acceptable and unacceptable behaviour and, if necessary, applying risk management strategies and/or security policies and procedures.</p> <p>See pages 77 – 85 for more examples of unreasonable behaviours.</p>

How you will benefit from using this framework

By using the framework in this manual you can be confident that:

- ✓ Complainants will not be any worse off if you use the strategies provided within the framework – whether or not the strategies are successful in managing their problematic behaviour.
- ✓ All complainants, whether their behaviour is challenging or not, will be treated with fairness and respect.
- ✓ Complainants' rights will be observed.
- ✓ By taking control of interactions with complainants, you can separate the way you manage their behaviour from the way you deal with their issue – that is the two issues are not conflated.
- ✓ You will be able to easily implement the strategies, while also relying on your own professional knowledge, skills and experience to deal with UCC – it is all common sense stuff.
- ✓ It has been designed to ensure your safety and reduce your stress levels when dealing with UCC thereby helping employers to meet their duty of care and WH&S obligations.
- ✓ The impact of UCC on organisational resources will be reduced.
- ✓ All complaints, not just those where UCC is an issue, will be dealt with in a more equitable, fair and consistent way.

The process behind the framework

The framework of management strategies is based on original work by the NSW Ombudsman's office. It has been refined through extensive consultation with a range of Ombudsman offices, highly skilled complaint handlers and specialist professionals from a range of disciplines – including consumer behaviour, suicide intervention and mental health. It has also been informed and supported by a study into 'unusually persistent complainants' conducted by Grant Lester, FRANZCO, Beth Wilson, LLB, Lynn Griffin Med, and Paul E. Mullen, DSc.¹²

Initially, the framework was 'road tested' for twelve months by all the Australasian Parliamentary Ombudsman offices, starting in 2007. It has since been used by staff from a wide range of organisations, both public and private, around the world.

While preparing this edition of the manual, we also held focus group consultations involving approximately 180 public servants representing 80 organisations across Australia. Among the various issues discussed during these sessions was the effectiveness of the UCC approach and our framework. All of them confirmed that the framework is the main one that they are using to deal with UCC, including in circumstances where they are required to maintain an ongoing relationship with a complainant – which was our focus in Stage 2 of the UCC project.

¹² *ibid.*

PART 3

Identifying UCC

Chapter 4 – Recognising the early warning signs

What are the early warning signs of UCC?

Like most things in life early intervention is typically the most effective way to prevent and/or minimise the impacts of UCC and data gathered during the course of the UCC project suggests that there are several early warning signs of UCC. By identifying some of these warning signs you may be able to see difficult and potential UCC cases and prepare for them, before they become a full blown problem. Table 3 below provides a list of our findings.

It must be emphasised that the warning signs provided in Table 3 are only factors to consider. None of them are individually determinative and they do not always escalate into UCC. Nonetheless, in our experience they are almost always present in cases where UCC becomes an issue.

Also, while some of the warning signs are very obvious, others are more subtle. Some may be identified early on and others may only become apparent later on in the complaints process – eg at the end of the investigation when an otherwise reasonable and cooperative complainant discovers that the outcome they were anticipating has not been achieved. Whatever the case may be, these warning signs should never cause you to be disrespectful, unfair, heavy handed or partial towards a complainant (or their complaint) in any way.

Table 3 – Early warning signs of UCC

Complainant's history – the complainant has:

- made a number of previous complaints and review requests to your organisation about their issue (or related issues)
 - made contact with various other government agencies, MPs, Ministers or oversight bodies about their issue
 - made a number of access to information requests for their issue
 - complained about a case officer's (or organisation's) integrity or competence largely or solely because they were dissatisfied with the outcome or level of attention they were given etc.
 - suffered disproportionate losses in their personal and/or professional lives as a result of pursuing their issue – eg financial or social problems, employment or career related problems or clinical depression
 - a known history of physical violence or serious verbal threats, including having a previous history with police in relation to such issues
 - safety alerts on their file either at your organisation or another organisation
 - a history of substance abuse or mental health issues – only in some cases.
-

Style of writing – the complainant's electronic or written communications contain:

- text that is UPPERCASE, lowercase, underlined, **bolded**, highlighted, in **different** colours, fonts or sizes. See Appendix 2 – Email sample received from complainant with characteristics of UCC.
- extensive and/or inappropriate uses of technical language – eg legal or medical terminology
- a formatting or reporting style that appears to imitate an official style – eg police operational format
- excessively dramatic language and/or idiosyncratic emphasis
- multiple cc's addressed to various people and/or organisations
- text or notes all over the page(s), including in the margins
- references to themselves in the third person by name or as 'the victim' or 'the defendant'
- repeated restatements of their issue, often done in different ways
- an excessive number of pages and/or supporting information, most of which are irrelevant – eg photocopies, press clippings, diary entries or testimonials when they are not warranted.

See also Appendix 1 – A word on unusually persistent complainants (querulants) (page 116).

Interaction with the organisation – the complainant:

- is rude, confronting, angry, aggressive or unusually frustrated
- is overly complimentary or manipulative or makes veiled threats
- makes excessive phone calls, sends excessive amounts of information and correspondence or regularly makes appointments to discuss their complaint when this is not needed
- gives forceful instructions about how their complaint should be dealt with and/or by whom
- has an unreasonable or unusual sense of entitlement
- displays an inability to accept responsibility and blames others
- expresses a general dissatisfaction with a person, agency or 'life in general' at the outset and without clear reasons for doing so
- appears to have a low anger threshold and very little self-control
- attempts contact while under the influence of drugs or alcohol
- refuses to define their issues of complaint when they are clearly capable of doing this
- is resistant to explanation if this runs counter to their own views
- refuses to accept advice, even if it is clearly valid and reasonable
- intentionally harasses, intimidates, embarrasses or annoys the people they are interacting with to get their own way
- provides information in dribs and drabs, even though they have been asked to provide all relevant information relating to their complaint or intentionally withholding information
- provides false information
- displays an inability to 'let go' and move on from their issue/complaint
- makes excessive demands on resources.

Outcomes sought – the complainant wants:

- a manifestly unreasonable amount of organisational time and resources to be spent dealing with their complaint – eg wants it dealt with by a specific senior officer
- financial compensation that is manifestly inappropriate or unreasonable in the circumstances
- an outcome that is altogether illogical or irrational
- an apology when it is clearly not warranted or the terms of the apology sought are clearly unreasonable
- vindication, revenge or retribution
- their issue pursued based on a matter of 'principle' or the public interest, when their interests are clearly personal.

Reaction to news that their complaint will not be taken up, will not be pursued further or an outcome/decision they disagree with – the complainant:

- refuses to accept the decision made/outcome reached in their matter
- reframes their complaint in an attempt to have it taken up again
- provides previously withheld information in an attempt to have their case reopened
- raises a range of minor or technical issues and argues that they somehow invalidate the decision/outcome of their complaint
- expects a review of the decision/outcome simply because they are dissatisfied with it and without making a clear argument for one
- demands a second review when they have already had the benefit of one
- takes their complaint to other forums alleging bias or corruption on the part of the case handler or organisation, simply because the decision went against them.

See also Chapter 7 – Dealing with anger through effective communication (Understanding and recognising complainant anger) (page 29).

Things to do when you recognise the warning signs of UCC

If you recognise any of the warning signs for UCC during your interactions with complainants refer to the suggestions in Part 4 – Preventing UCC and consider the following:

- **Make sure you don't act prematurely** – Just because you've identified a potential problem does not mean it will necessarily become one. Avoid being judgemental or overly reactive because the complainant may just be having a bad day or may not understand how the complaints process works/ how to make an effective complaint – which should be explained to them.
- **Check your communication style** – Think about how you have interacted with, and reacted to, this complainant. What can you do differently to bring about a different response from them? See Chapter 7 – Dealing with anger through effective communication (Communication strategies for avoiding or minimising the triggers for anger, conflict and UCC).
- **Stop, think, and arm yourself with the strategies** – By identifying the potential for trouble early on you have a unique opportunity to think through the appropriate strategies. See Part 5 – Responding to and managing UCC (starting on page 37).
- **Seek guidance** – It is always easier to prevent UCC than to deal with it once it becomes a full blown problem. Speak to a colleague or consider sitting down with your supervisor to develop an action plan on how you will respond if the complainant's conduct escalates. Having a plan helps to take some of the stress and anxiety out of the situation.
- **Assess the risks** – Do an informal risk assessment of the situation to see if the complainant's conduct poses an unreasonable level of risk to your health or safety (or those of others). This will usually help you to decide how you should respond in the circumstances. See Chapter 14 – Assessing risks (page 89).
- **Set limits and communicate them to the complainant** – If necessary, talk to the complainant about the behaviour that has concerned you and inform them of your boundaries. See Unreasonable Complainant Conduct Model Policy (Appendix 1 – Individual Rights and Mutual Responsibilities of the Parties to a Complaint). It is available at: www.ombo.nsw.gov.au.
- **Keep an open mind and remain positive** – There will be days when you will come across one, two, even three complainants who will test your patience and your desire for the job. Don't let it drag you down. There is always another day and another complainant who will remind you why you love doing the work you do.

Chapter 5 – When does conduct become unreasonable?

When does conduct become unreasonable?

‘The question of whether a complainant’s conduct is unreasonable primarily relates to whether an organisation and/or its staff are justified in taking steps to restrict or terminate contact, or implement alternative service arrangements to manage the impacts of that conduct.’¹³

A complainant’s conduct is unreasonable if it has unacceptable consequences for one or more of the parties to a complaint – this being the case officer and the organisation handling their complaint, the subject of their complaint, other complainants and services users, and the complainant himself/herself in certain circumstances.

However, it is not always easy to identify the specific point when a complainant’s conduct goes from being ‘reasonable’ to being ‘unreasonable’. At what point do the negative impacts of their conduct become so significant that they become unacceptable and therefore ‘unreasonable’?

The answer to this question can be fairly straightforward in some situations, for example where a complainant is overtly violent or aggressive. However, where a complainant is emotionally manipulative, passive aggressive or acts in subtle ways, this assessment can be far more difficult. In these situations, you might feel uncomfortable with the complainant’s conduct, your alarm bells go off or you may have a gut feeling that things are not right, yet because there is nothing overt or obvious in the complainant’s conduct it can be quite difficult to specify or explain why you consider their conduct to be unreasonable. What’s more, conduct that might be reasonable in one set of circumstances may be unreasonable in another – making your assessment that much more difficult.

As a result, the following list of criteria has been developed to assist you to assess whether a complainant’s conduct is, or has become, unreasonable. These criteria will need to be balanced against each other in each case to determine whether the conduct in question is unreasonable. They are:

1. The merits of the case

- Is there substance or value in the complainant’s matter?
- Is there an inherent right or wrong in the matter?
- Does it appear that the complainant may have suffered a relatively substantial loss, either in financial terms or impact on their wellbeing?

2. The complainant’s circumstances

- Does the complainant have the health, intellectual, linguistic, financial and social resources needed to cooperate and meet the requirements of the complaint process? If they do, then more can be expected of them in terms of their conduct than if some or all of these resources are absent.
- Are there any cultural influences that may be affecting the complainant’s conduct that you are misinterpreting – eg in some cultures people prefer to talk quite closely which others may perceive as being intrusive. Also in certain cultures there are underlying apprehensions or reluctances to engage with government or authority figures which may affect your interactions with complainants from these cultural groups.

3. Proportionality

- Is the complainant’s behaviour/reaction proportionate when compared to the loss or harm they have suffered?
- Are the complainant’s demands on time and resources proportionate to the seriousness of their issue – eg wanting it dealt with by a supervisor or senior officer?

4. The complainant’s responsiveness

- Do calming measures and explanations help to settle the complainant down?
- Is this the first time the complainant has displayed this type of behaviour or has it occurred in the past?
- Has the complainant been warned previously about their conduct?

¹³ Chris Wheeler, NSW Deputy Ombudsman.

5. Personal boundaries

- Have your personal boundaries been crossed? For example, do you feel unusually stressed, anxious, threatened or otherwise uncomfortable when interacting with the complainant?

Note: everyone's personal boundaries are different. Some of us may have a high tolerance for swearing, raised voices or insults, but others will not. This question is therefore completely individual to you.

6. Conduct that is unreasonable and unacceptable under all circumstances

- Does the conduct involve aggression, harassing words or actions, threats, violence or assault which should not be tolerated under any circumstances?

7. Jurisdictional issues

- Is there any law, legislation or policy that might limit or affect the types of strategies you can use to manage the complainant's conduct? For example, does the complainant have a statutory right to the services provided by your organisation thereby preventing you/your organisation from terminating their access to those services?

For information on specific types of UCC, see Part 5 – Responding to and managing UCC (starting on page 37).

Case study example – Identifying UCC provided by the Victorian Ombudsman



Mr X made multiple complaints to Ombudsman Victoria over a two month period. During this time Mr X made repeated phone calls about each of his complaints.

In relation to one particular complaint, Mr X became very agitated while we awaited a response from the agency he had complained about. Mr X told our staff that he would call every day until the matter was resolved to his satisfaction. He then proceeded to phone our office several times a day over a number of weeks.

Mr X made three phone calls to our office in quick succession that caused us to be concerned about his conduct.

During the first phone call Mr X spoke with a female officer, Officer Y. Officer Y was not handling Mr X's complaint but agreed to take a message for the case officer dealing with his matter. Mr X advised Officer Y that he had called as he felt lonely and wanted to talk to 'someone pretty'. He then began to ask Officer Y questions about his case officer's appearance and asked Officer Y to 'suss out' the case officer by the water cooler. Officer Y ended the call and reported Mr X's conversation to a manager.

Mr X made a second phone call on the following day. He spoke with another female officer, Officer Z. After enquiring about the progress of his complaint Mr X asked Officer Z who was more attractive, Officer Y or his case officer? Officer Z advised Mr X that his question was inappropriate and that she would end the call. Mr X advised that he would continue to call the office every day because that was how he would get to know everyone. This conversation was also reported to management.

During his third phone call, later that afternoon, Mr X spoke with Officer Y – for the second time. At the outset of the call Officer Y asked Mr X to confirm his full name. Mr X replied by saying: '*I am the one that you are not supposed to flirt with*'. Mr X also asked whether Officer Y thought that Officer Z liked him as he did not think that she did. This phone call was also ended.

Mr X's conduct was reported to management and a management strategy was developed to deal with his conduct. It was decided that all staff would end conversations with Mr X immediately if he engaged in any inappropriate behaviour.

This strategy was added to the office's case management system via an alert which pops up when a relevant case is accessed. A consistent approach by staff to the implementation of this strategy led to Mr X ceasing this behaviour.

Consistency in the identification of unreasonable conduct, supported by the development of a management plan which is then consistently applied is critical to the successful management of this type of behaviour.

PART 4

Preventing UCC

Chapter 6 – Effectively managing complaints and expectations from the outset

Handling the initial interaction successfully

Your initial interaction with a complainant is probably one of the most important contacts that you will have with them. The way you begin this interaction can significantly affect how the complainant interacts with you in subsequent interactions. A complainant, who feels that they have been listened to, understood, treated fairly and with respect and who has been given a thorough explanation of the complaints process and what is likely to happen with their complaint is more likely to respond positively to you, your organisation and the complaints process than if they were not given this information. This is supported by organisational justice theory which argues that:

where a person perceives that an organisation/person has followed proper procedures when handling their matter and their interactions with that organisation/person have been appropriate, then they are less likely to have negative perceptions of the organisation/person, even if they achieve a negative outcome.¹⁴

As a result, it is important that you begin all interactions in a positive and helpful manner, using the types of communication strategies provided below. These strategies can help you prevent/minimise the likelihood of UCC.

Establishing the ground rules

When interacting with complainants it is important to establish clear ground rules with them about what they can expect from the complaints process and what will be expected from them in return. The reason for this is that in our experience a common feature of many complainants who behave unreasonably is a significant failure to recognise that what they consider to be their 'rights' (eg the right to complain) are subject to a balancing set of 'responsibilities' that they must accept when they make a complaint. These responsibilities can include a responsibility to:

- clearly identify their issues of complaint
- provide all relevant information about their complaint – to the best of their ability
- cooperate with any requests for information, inquiries or investigations
- act honestly
- treat the people handling their complaint with courtesy and respect.

While these responsibilities may seem 'self-evident' to us as complaint handlers, many complainants whose behaviour becomes problematic are either unaware of or give little thought to them. Some are also unaware of or overlook that a condition of being able to exercise their own rights is, in most cases, an acceptance of and respect for the rights of others to do the same. This includes your rights as a case officer to dignity, physical and emotional safety and respect. It also includes the rights of other complainants/service users to an equitable share of public resources.

To help all complainants better understand their rights and countervailing responsibilities, we suggest that all organisations should adopt a set of ground rules or 'rules of engagement' for accessing their services. These rules should clearly identify the rights and responsibilities of the key parties to the complaints process and should be made publicly available – eg on a website and in leaflets/brochures displayed in their reception area(s).

In addition, as case officers you should assume the responsibility for ensuring that complainants are aware of these ground rules when they make a complaint and that their questions about them are responded to – within reason particularly if you are dealing with a complainant who is engaging in UCC.

See Unreasonable Complainant Conduct Model Policy (Appendix 1 – Individual Rights and Mutual Responsibilities of the Parties to a Complaint). It is available at: www.ombo.nsw.gov.au.

¹⁴ For more information on Organisational Justice Theory see: Greenberg J & Cropanzano R 2001, *Advances in Organizational Justice*, Stanford University Press, Stanford.

Managing complainant expectations

In addition to establishing ground rules another important part of preventing or minimising the likelihood of UCC is to effectively manage complainants' expectations.

In practice, it is not uncommon for complainants to be unaware of an organisation's role, procedures or practices for dealing with complaints. They may believe – without realising that these expectations are inappropriate – that they have the right to dictate:

- how the organisation will handle their complaint, including the priority it will be given who within the organisation will deal with their complaint
- the type and level of involvement they will have with their complaint
- how long it will take to deal with their complaint
- what the outcome of their complaint will be – eg that they will receive significant financial compensation or that someone will be fired.



As a result, it is essential for you test and manage complainant expectations at the earliest possible opportunity to minimise the likelihood for disappointment, anger or frustration – emotions that are all catalysts for UCC.

Other than for simple matters that can be dealt with over the phone, at the beginning of the complaints process all complainants should be informed in general terms, of:

- your role as a case officer and the functions of your organisation
- the complaints processes and procedures that you/your organisation intend to follow in relation to their complaint
- how their complaint will be dealt with
- the likely timeframes for completing key tasks relating to their complaint
- the likely and unlikely outcome(s) of their complaint
- their responsibilities as a complainant – eg acting honestly, cooperating with and respecting you as a case officer and the complaints process generally
- your responsibilities as a case officer (and those of your organisation) in relation to them and their complaint.

This information will help to manage a complainant's expectations and may minimise the likelihood for subsequent misunderstandings which can lead to UCC.

Information that is designed to test or manage complainant expectations can be communicated in a number of ways including:

- **Before a complaint is made** – in publicly available information materials such as brochures and leaflets or on an organisation's website.
- **When a complaint is made** – during an initial interaction with a complainant – eg over the phone or in person.
- **Immediately after a complaint is made** – in a letter acknowledging receipt of their complaint and explaining in general terms what will happen next. See Appendix 3 – Sample acknowledgement letter for managing expectations.
- **While the complaint has being dealt with** – during any interactions with a complainant about the progress of their complaint – eg over the phone, face to face, in written or electronic communications etc.
- **Immediately before the final letter is sent or in the final letter** – explaining the outcome of their complaint, as well as the reasons for that outcome.
- **After a complaint has been closed/on an ongoing basis** – in cases where a complainant persists with their complaint, for example by reframing their complaint or insisting that it be re-opened, and/or pursues a review of their complaint.

Table 4 below provides some script ideas for testing and managing the complainants' expectations. These scripts should be used during your interactions with all complainants – not just those who present with unreasonable behaviours.

Table 4 – Testing and managing complainant expectations

Actions	Script ideas
<p>Testing expectations – finding out what the complainant expects and wants.</p>	<ul style="list-style-type: none"> • <i>What were you hoping to achieve by bringing your complaint to our attention?</i> • <i>What did you hope to achieve when you decided to contact us?</i> • <i>What do you think our organisation can do for you?</i> • <i>What outcome are you hoping for?</i> • <i>What can we do to resolve this in a way that is fair to everyone?</i> • <i>Let's have a look at your goals in this situation.</i> • <i>How do you propose that we resolve this?</i> • <i>Let me explain what happens when you make a complaint.</i> • <i>Do you understand how the complaints process works at this organisation?</i>
<p>Defining the issues of complaint – clarifying the complainant's issues to determine whether they can be dealt with by your organisation.</p>	<ul style="list-style-type: none"> • <i>As I understand it, you're complaining about ... and.... Is this correct? (Allow for clarification) And you want ... to happen. Is that correct?</i> • <i>You appear to be complaining about ... and.... Is this correct? (Allow for clarification) ... is an issue we can look at, but ... and ... aren't things we can take up because</i> • <i>Are you saying that...?</i> • <i>Let me see if I understand your issue(s).</i> • <i>And am I correct that you want ... to happen?</i> • <i>Can you share that with me one more time just to make sure I understand you completely?</i> • <i>Thank you for going to the trouble of explaining this to me. As I understand it you're saying ...</i> <p>If the complainant is rambling:</p> <ul style="list-style-type: none"> • <i>I don't need that level of detail to be able to do something about your complaint. Tell me about</i> • <i>So I don't waste your time, why don't you tell me about</i> • <i>Tell me what the key issue is that you're complaining about.</i>
<p>Retesting and reframing expectations – correcting any misunderstandings and expectations that are unrealistic or unreasonable.</p>	<ul style="list-style-type: none"> • <i>Are you aware of what our organisation can do? (often the answer is 'not really') Perhaps I could tell you a bit about how this organisation works and what we can and can't do.</i> • <i>Let me give you an idea of what our organisation can do.</i> • <i>... is what we can do.... we can't do....</i> • <i>I realise that you want.... We can/can't do ...because....</i> • <i>.... won't happen because...However, might be possible.</i> • <i>We won't do....But we may/will be able to..</i> • <i>So that you aren't disappointed later on, I should clarify now that it is very unlikely that we'll be able to do ... because....</i> • <i>It seems to me you're hoping we can do ... I have to tell you now that this will not be possible because</i>

Actions	Script ideas
<p>Redefining expectations – correcting the expectations you/your organisation create if they cannot be met, especially those relating to timeliness.</p>	<ul style="list-style-type: none"> • <i>I'm calling because I said that we would get ... to you by... Unfortunately for [state reason(s)] we haven't been able to do this. I can call you in a couple of days, if you like, to let you know exactly when we can have it done. I apologise.</i> • <i>I know you were expecting that ... would happen today, but it will not be possible. It is likely that it will happen....</i> • <i>I'm sorry, but we won't be able to.... However, we can...</i> <p>See – Chapter 8 Apologies.</p>
<p>Preparing the complainant for disappointment – delivering bad news as early as possible to avoid the complainant developing unrealistic expectations about their complaint and any possible outcomes.</p>	<ul style="list-style-type: none"> • <i>I wanted to call you and tell you about my decision/the outcome of your complaint before I send out my letter, because I know the outcome isn't what you'd hoped for (explain).</i> • <i>I wanted to call you and tell you directly that we won't be able to take up your complaint, before I send you a letter saying this (explain).</i> • <i>I will, of course, send you my decision in writing, but speaking with you means I can also answer any questions you have about my decision/the outcome.</i> <p>Note: Although these conversations are not easy, they allow you to discuss the 'bad news' on your own terms and at a time when you are mentally prepared to do so – instead of some hours, days or weeks after you have sent the complainant their final letter and they have had time to script or rehearse a response to the bad news.</p>



Case study example – Managing Expectations

provided by the Commonwealth Ombudsman

Mrs A complained to the Commonwealth Ombudsman about an ongoing dispute that she was having with a government agency. Mrs A alleged the agency had suspended and then cancelled her 'Parenting Payment' welfare benefit, without her knowledge, and that when she appealed the cancellation some months later

the agency reinstated the payments, but refused to reimburse her several outstanding payments that were still owing to her.

Mrs A thought that this was a gross injustice against her and pursued it with the Social Security Appeals Tribunal and the Administrative Appeals Tribunal (AAT) before complaining to our office. Both tribunals upheld the agency's decision not to reimburse her payments because the agency had provided Mrs A with sufficient notice by sending letters to her via Australia Post. Also, the relevant legislation stated that in cases where a cancellation decision is overturned on review (like in Mrs A's case) and a request for review is not made within 13 weeks of the original decision, then arrears may not be paid. Mrs A had not requested the review within the 13 weeks period.

However, the AAT did acknowledge that Mrs A had not done anything wrong and had provided the agency with all the correct banking and address details. Unfortunately, for Mrs A there was evidence of mail in her neighbourhood regularly going missing and not being delivered. Mrs A approached our office to assist her in lodging an application under the Compensation for Detriment caused by Defective Administration (CDDA) to recoup the excess payments which she had very high expectations of receiving.

Because the issues involved in Mrs A's matter were quite complex and because English was her second language a lot of time was spent explaining how the legislation worked, as well as the CDDA scheme. We also had to repeatedly manage her expectations and remind her of the Ombudsman's role and the fact that we could not guarantee that she would get the payments – we had no determinative powers in the matter.

Mrs A's application was subsequently denied. Although she felt that there was an injustice, her understanding of the process, purposes and roles of the relevant schemes and bodies allowed her to rationalise and accept the decision and eventually put it behind her.

Managing your own expectations

It is not just complainants whose expectations can be unrealistic. Having unrealistic and unreasonable expectations is actually a very common occurrence in all of us. Some of the more common unrealistic expectations held by complaint handlers include that:

- **Complainants will have realistic and reasonable expectations.**
 - In practice some complainants are looking for vindication, retribution, revenge, or for someone to be punished for the wrong they have suffered – things that a complaint handling system is not designed to deliver. Other complainants may also insist on outcomes that are completely inappropriate, impossible or unattainable.
- **They can bring all complainants around to their way of thinking if they explain things well enough.**
 - In practice, explaining and logical reasoning will not always work – especially when a complainant has not arrived at their point of view through logical reasoning or has reasoned well, but from a false premise. Also, some complainants are so emotionally committed to a particular position that no amount of reasoning will lead them to change their views, acknowledge other more reasonable views, or admit to changing their views if they have indeed done so.
- **They can resolve all complaints to a complainant's satisfaction and maintain good relationships with all complainants.**
 - In practice, some complainants will never be satisfied despite your best efforts to resolve their issue. Also some problems may never be fixed. The fact that a complainant is unsatisfied with a decision you have made or the outcome of their complaint does not always mean you have failed or have been unsuccessful in the way you handled their complaint. Provided you have done your job properly – including acting fairly, reasonably and impartially – and have reached an outcome that you and your organisation consider to be reasonable and appropriate in the circumstances, the complainant's satisfaction will not be an appropriate measure of your performance or how well you handled the matter.
- **They can help complainants who appear to be spiralling out of control over a relatively insignificant issue.**
 - In practice, some complainants cannot be helped out of this situation. They get so consumed and invest so much time and energy into pursuing their issue that they lose perspective and allow their issue to dominate everything in their lives – when it should not. In these cases often the best way to help a complainant is to deal with their issue as promptly as possible – giving it due consideration, of course. Otherwise, you may just fuel them and their issue unnecessarily.

Chapter 7 – Dealing with anger through effective communication

Recognising and understanding complainant anger

In complaint handling, anger is an understandable, and to some degree acceptable, emotion among frustrated and disappointed complainants. In itself, it is not a problem and to be shocked and unprepared when it occurs is generally unrealistic.

However, anger does become problematic and unacceptable when it escalates into verbal abuse, hostility, threatening behaviour or violence. When it is expressed in these ways, it must be dealt with swiftly and decisively using the suggested management strategies in Chapter 13 – Strategies and script ideas for managing unreasonable behaviours (page 77).

As complaint handlers, it is essential that we understand and recognise the signs of anger in complainants (and within ourselves) so that we can respond in the most effective and productive ways possible.

Some of the more common signs and expressions of complainant anger include:¹⁵

- raised voices, yelling, slurred speech or chanting
- accusatory, dominating or even sexually explicit language
- loaded words that are intended to intimidate or to achieve a particular result
- harsh or overly sarcastic humour
- combative or inflexible behaviour
- irritability, anxiety or short temperedness
- redness in the face or flushed appearance
- intimidating expressions including lowered eye brows, stares, eye rolling or flared nostrils
- tension in the face, neck, hands, scalp or back – eg clenched fists or jaws, grinding teeth etc.
- intrusive behaviour such as violating your personal space or entering areas of the office that are either off-limits or that they have not been invited into etc.
- exaggerated gestures including thrashing their arms around and pointing or waving their finger
- repetitive and agitated movements – including pacing around, tapping their feet continually, constant repositioning in a chair or standing up frequently
- physical aggression including throwing and shoving things around, such as paper, pounding the table etc.

You will note that a number of these 'signs' of anger are physiological. This is because anger is one of the most physically arousing emotions that human beings experience. It can block our judgement and affect our ability to reason, problem solve and process information making it very difficult to communicate in productive ways.¹⁶

In a complaint handling context this means that complainants who are experiencing the physiological effects of anger may be incapable of processing the information that you are attempting to give them or even working towards a resolution of their complaint. As a result, you will need to use your judgement to decide whether to continue an interaction with a complainant who is displaying signs of anger or end the interaction and return to it sometime later – when they have had time to calm down which can take up to 24 hours.

In addition, as a complaint handler it is likely that you will have to deal with a complainant's anger by acknowledging and addressing that anger first, before you can effectively deal with their substantive complaint.

Ultimately, it is your responses to a complainant's anger and your communication style that will be the significant determinant in whether your interaction with an angry complainant escalates.

For more information on the physiology of anger see: www.optimus.com.



¹⁵ Department of Human Services (Vic) 2005, *Staff safety in the workplace: Guidelines for the protection and management of occupational violence for Victorian Child Protection and community-based Juvenile Justice staff*, Victoria, pp 25. Copyright © State of Victoria, Australia. Reproduced with permission of the Secretary to the Department of Human Services. Unauthorised reproduction and other uses comprised in the copyright are prohibited without permission.

¹⁶ Mills, H (Dr), 'Physiology of Anger'; viewed 21 September 2011, <http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=5805&cn=116>.

Using the CARP method to defuse complainant anger

CARP is an acronym developed by Robert Bacal to describe a sequence of actions that you can take to deal with complainant anger. CARP can help you to organise and time how you defuse a complainant's anger and refocus their attention onto resolving their issue. It stands for:

- **Control** – controlling your interaction with the complainant, as well as your own anger.
- **Acknowledge** – acknowledging the complainant's anger and giving them an opportunity to 'let off steam'.
- **Refocus** – refocusing the conversation onto the substantive issues.
- **Problem solve** – finding solutions to the issues and problems that you've identified.

The order of CARP is very important, in particular leaving the problem solving to the end. If you try to problem solve or refocus too quickly you are likely to find yourself explaining the same thing over and over again – because the complainant will persist in wanting to explain their story. If this happens, go back to acknowledging their feelings and emotions and work your way back down the sequence.¹⁷

For more information on CARP see: www.darncustomers.com/course/ch4defusingprocess.htm.

An explanation of the CARP method is also provided in Appendix 4 – Defusing complainant anger with CARP.

Communication strategies for avoiding or minimising the triggers for anger, conflict and UCC

In addition to the CARP method, the suggestions in Table 5 are designed to promote optimum communication and lessen the triggers for conflicts with complainants as well as UCC. They are the result of our years of experience and are divided into two columns:

Do – Things that you can do to facilitate non-confrontational communication and build your relationships with complainants.

Don't – Things that tend to lead to conflict and UCC and that you should avoid during interactions with complainants.

These suggestions should be used in your interactions with all complainants, not just those whose behaviour you find difficult.

Table 5 – Effective communication strategies for avoiding or minimising the triggers for anger, conflict and UCC

Do	Don't
<p>... acknowledge their emotions and give them an opportunity to 'let off steam' by venting their anger. You might say:</p> <ul style="list-style-type: none"> • <i>I've got a sense of how strongly you feel about this.</i> • <i>It sounds like you are very upset/angry about this.</i> 	<p>... allow venting if it is going to encourage UCC or is going to last for more than 2-5 minutes because continued venting can do more harm than good – having the effect of reviving the complainant's negative feelings and emotions about their experience.</p>
<p>... control your emotions.</p>	<p>...respond to fighting words. By not responding, you avoid giving the complainant ammunition to use against you.</p> <p>You might say:</p> <ul style="list-style-type: none"> • <i>Yes, I know some people believe this.</i> • <i>You are entitled to your opinion.</i> • <i>I see or mmm.</i>

¹⁷ Bacal, R 2011, 'Chapter 4 – The Defusing Process and the CARP Model' Darn Customers Guide to Angry Customers – Free Online Course on Customer Service Challenges, viewed 16 April 2012, <http://www.darncustomers.com/course/ch4defusingprocess.htm>. Also see Bacal, *Defusing Hostile Customer Workbook*, pp. 24, 28.

Do	Don't
<p>... show empathy for the stress and anger they are feeling. You might say:</p> <ul style="list-style-type: none"> • <i>I understand how you might feel that way.</i> 	<p>... allow your empathy to affect your objectivity. Also, avoid saying 'I understand what you're going through' – chances are you do not.</p>
<p>... echo what they say. This shows that you are listening and usually involves repeating the last few words or the key words they have said. You might say:</p> <ul style="list-style-type: none"> • <i>So you are saying...</i> • <i>Am I correct in my understanding that ...?</i> 	<p>... echo unless you clearly understand what the complainant has said. Do not put words in their mouth.</p> <p>Also, avoid echoing swear words and highly offensive language if it may escalate the situation.</p>
<p>... acknowledge their point of view without agreeing with it. You might say:</p> <ul style="list-style-type: none"> • <i>I can see that you believe We have come to a different conclusion.</i> • <i>I do understand that your position is Our position is a little different.</i> 	<p>... disregard their point of view as being outrageous, incorrect or inaccurate. There can be alternative valid viewpoints, interpretations, perceptions and recollections of the same issue/event.</p>
<p>... anticipate likely counter arguments/valid objections that the complainant will make and address them up front. You might say:</p> <ul style="list-style-type: none"> • <i>At this point you may well say that... Let me explain why things have happened this way.</i> 	<p>... present counter arguments unfairly or in a way that might be perceived as confrontational or disrespectful.</p>
<p>... find things to agree on with the complainant, without necessarily agreeing with their point of view. You might say:</p> <ul style="list-style-type: none"> • <i>I agree that \$2,000 is a lot of money to lose.</i> • <i>I agree that not hearing back from the department for over a month would be frustrating.</i> • <i>You're right! Two weeks does seem like a long time to wait...</i> 	<p>... make promises or agree to something that you will need to retract later – stick to the small stuff.</p>
<p>... use 'I' and 'we' messages. 'I' messages are about sharing your concerns and taking ownership and responsibility.</p> <p>'We' messages are about cooperation and inclusion and give the impression that you are on the same side. You might say:</p> <ul style="list-style-type: none"> • <i>We could look at it this way ...</i> • <i>How can we resolve this?</i> 	<p>... use 'you' messages in a way that might be perceived as being confrontational or accusatory.</p> <p>Also avoid using 'I' messages if they might be perceived as critical, condescending, condemning or demanding.</p>
<p>... ask questions to maintain control of the interaction. This way the complainant is forced to respond to you, rather than the other way round.</p> <p>Use 'when', 'what', 'where' or 'how'. These types of questions can be effective when responding to accusations by a complainant because they deflect the issue back onto the complainant without being confrontational. You might say:</p> <ul style="list-style-type: none"> • <i>What has led you to believe that I'm not taking you seriously?</i> • <i>When did you start thinking that I don't care about your complaint?</i> 	<p>... use 'why' questions – if you can avoid them. 'Why' can be perceived as being confrontational and can lead to more defensive and combative responses.</p>

Do	Don't
... keep your verbal and non-verbal cues non-threatening. Be aware of your tone of voice, facial expressions and gestures.	... display confrontational gestures – eg folding arms, rolling eyes, sighing, or doing things that might give the impression that you are not interested in the complainant or their matter.
... seek equality in your conversations with the complainant. Avoid jargon and use a communication style that is suited to them.	... say things to make the complainant feel inferior – it is likely to make them feel like they need to assert their dominance and regain control of their issue – in circumstances where they probably already feel disempowered and victimised.
... listen actively – be engaged and pay attention without interrupting unnecessarily. Clarify, repeat, paraphrase, summarise and check understandings.	... just listen to what is being said, but also listen for what is not being said. What facts/topics is the complainant avoiding/not giving you? This information may be important to your analysis into the matter.
... clarify the issues in dispute and their impact on the complainant. This may be necessary to be able to show appropriate sympathy/empathy, and will be necessary to identify the needs (and therefore the objectives) of the complainant.	... forget to clarify your personal boundaries especially if the complainant's behaviour is escalating. State what you expect from them and the things you can and cannot do for them.
<p>... admit ignorance and seek clarification if you are unsure or unclear about the complainant's issues or something they have said. You might say:</p> <ul style="list-style-type: none"> • <i>As I understand it, the situation is ... Is this correct?</i> • <i>From what you tell me it seems ... Is this the case?</i> 	... assume anything. Encourage explanation by asking questions and giving the complainant a chance to explain their issues in their own words.
<p>... explain the reasons behind certain processes, procedures and policies and/or why you can or cannot do something. You might say:</p> <ul style="list-style-type: none"> • <i>Let me explain why our agency does it this way...</i> • <i>Perhaps I can tell you a bit about how our organisation works and why this has happened.</i> 	<p>... respond in an overly formal or bureaucratic way as this may make the complainant feel inferior of that they cannot identify with you – eg</p> <ul style="list-style-type: none"> • <i>That's the policy.</i> • <i>I just follow the policies/laws.</i>
... be personable and build rapport with the complainant.	... be too informal by joking around. Jokes can be interpreted as trivialising a complainant's issue. Therefore, in difficult situations with complainants the only safe form of humour will be self-deprecating.
... express a willingness to help them and to appropriately resolve their issue.	... suggest that they need psychological help or counselling. This is unlikely to achieve anything positive.
<p>... allow space and time to think through an issue and regain self-control. Remember: anger can affect judgement and problem solving skills.</p> <p>Some reasons for taking a break during an interview can include to:</p> <ul style="list-style-type: none"> • consult a colleague or supervisor • check a policy, piece of legislation or other document • check a file or something on the computer • get/offer a cup of tea or water. 	... say to the complainant you need <i>time to cool off</i> . This is unlikely to be well received.

Do	Don't
<p>... admit mistakes and apologise if a problem, delay or omission has been caused (in whole or part) by you or your organisation. An apology may be all the complainant wants.</p> <p>See Chapter 8 – Apologies (page 35).</p>	<p>... give excuses, argue, defend or deny. Keep your ego out of it and try to neutralise the situation. The general principle behind non-confrontational language is that when someone pushes you don't push back!</p>
<p>... respect personal space.</p>	<p>... invade the complainant's personal space. Bear in mind that the average personal distance varies from one culture to the next. Some complainants may consider it acceptable to stand very close to you, almost to the point of touching, while others may refuse to touch you including shaking your hand – none of which is done with any intention of disrespecting you or your personal space.</p>

Drafting final letters and review letters

Communicating effectively is also important when you are drafting correspondence to complainants, in particular final letters and review letters. Complainants tend to place a lot of importance on these documents so time should be taken to draft them carefully.

We suggest that final letters should be drafted as 'stand-alone' documents that clearly explain for the complainant, and any third parties that they might show it to, the:

- issues of complaint
- issues that were inquired into/ investigated and explanations for any that were not
- factors that were considered during the inquiries/investigation
- methodology and actions taken during the inquiries/investigation
- reasons for the decisions/outcomes reached.

Where a complainant has behaved unreasonably in their dealings with you/your organisation, the final letter should also:

- identify the nature and/or number of interactions between them and the organisation – including if those interactions were excessive or unreasonable
- identify and explain the nature of the unreasonable conduct engaged in by the complainant and any formal warnings that were given to them about their conduct.

This type of approach can be effective in cases where you know or suspect that a complainant:

- will be very unsatisfied with the contents of the letter
- has or will attempt to escalate their complaint up the hierarchy – say to a CEO or a Minister – or externally to the media for sympathy or for a more favourable outcome. In these cases, a comprehensive final letter could also be used as the basis for (or attached to) a briefing note response to a Minister.

It is also best to give the decision at the end of the final letter rather than the beginning to encourage the complainant to read the reasoning underpinning the decision. This may increase the likelihood of the decision being understood. Also some complainants, when faced with an adverse decision at the beginning, do not bother to read the letter in its entirety before getting on the phone to express their dissatisfaction or demand a review. This unnecessarily takes up more time and resources. See Chapter 6 – Effectively managing complaints and expectations from the outset.

On the other hand, review letters should be short and concise. Long and detailed review decisions sometimes encourage a complainant to argue about specific details while ignoring the substance of the decision.

Review letters should also be signed by a senior manager, preferably the CEO, to make it clear to the complainant the matter has been escalated and considered at the highest level and there is nowhere else to go within the organisation. The letter could also include a statement and explanation about how further communications relating to their complaint will be dealt with – i.e. further correspondence about this issue will be read and filed without acknowledgement, unless the organisation decides it requires further action.

Knowing your triggers

As the section on understanding and recognising anger (above) suggests, anger can significantly affect our judgement, and our ability to reason and problem solve. As a result, as complaint handlers it is important that we recognise the things that trigger us to become angry in our dealings with complainants.

Triggers are the things that complainants say and do that push our buttons and cause us to become angry or frustrated. It may be their choice of words or their tone of voice. Whatever it is, it can provoke us and can cause us to lose control.¹⁸ It is important for us to be able to identify our triggers so that we can develop ways to deal with them – so they do not negatively influence how we deal with complainants or their complaints.

What are your triggers?¹⁹

When you have a moment, take time to figure out your triggers. Ask yourself:

- What things do complainants say or do that push my buttons?
- How do I normally react when that happens – eg Do I respond with confrontation? Do I give in? Do I become dismissive? Or am I unaffected?
- Can I respond more usefully in these situations? If so, how?
- What types of customer interactions cause me the most concern – eg face-to-face interviews, home visits, phone calls, etc? Why?
- What can I do to ease that concern?
- What do I perceive as aggressive or violent behaviour?
- How do I deal with such situations? How does this compare to the suggestions in this manual?

Using self-talk to manage your own anger and stress

One way to manage your own anger and emotional triggers is self-talk. Self-talk is your thoughts (what you say to yourself) when you are dealing with a negative situation. Done appropriately, self-talk can help you to put difficult complainant interactions into perspective and deal with them objectively rather than taking them to heart.

For example, if you are on the phone with a complainant who is ranting about their issue and won't let you get a word in edgewise, you might try saying to yourself: 'Wow! This guy is really angry about what has happened to him' rather than 'Who does this guy think he is, talking to me this way?' – which is only likely to stir you up. Positive self talk can be a powerful tool for gaining control of your anger and emotions and can help you gain control of the situation, for example by giving you a plan of action. It can also help you to put things into perspective and recognise that the complainant's anger is likely due to their circumstances rather than anything you've done.

Examples of positive self-talk:

- I will let him/her vent for another X minutes and then I will either refocus on the issues or end the conversation.
- Take a deep breath, stay calm, I can handle this.
- I'm not going to let this ruin my day.
- It's not worth getting angry over this.
- This clearly has nothing to do with me.
- This person really needs some help.

Examples of negative self-talk to avoid:

- I'm not going to take this crap.
- I don't get paid enough to deal with this
- I'm not letting this idiot talk to me this way.
- One more word and I'm going to explode.
- Why do I get all the crazies?
- I don't know what to do.
- You rude...!
- Is this guy for real?
- It's not my problem.
- Get lost!
- I hope no one can hear this.

Note how most of the negative self talk is reflective of someone who has taken a complainant's comments and anger personally – which you should generally avoid doing in your interactions with complainants.

For other examples of self talk, see: Robert Bacal, *Defusing Hostile Customers Workbook (Third Edition)*.²⁰

¹⁸ Bacal, *Defusing Hostile Customer Workbook*, pp. 40.

¹⁹ Department of Human Services (Vic), *Staff safety in the workplace*, pp 25. (See also footnote 15 (p.29) for additional copyright information.)

²⁰ Bacal, *Defusing hostile customers workbook*, pp. 42.

Chapter 8 – Apologies

Apologies – how they can help you to minimise the likelihood for UCC

Despite all the information in this manual about UCC, there is no denying that as complaint handlers (and public organisations) we sometimes get it wrong. Mistakes, delays, omissions and misunderstandings happen, complaints can be mismanaged, and our processes and procedures can be unresponsive to the needs of certain complainants. When these things happen we must rectify them as soon as possible – including providing a complainant with a full apology.

A full apology is one of the most effective ways to defuse a situation with a complainant and prevent it from escalating. It is also essential in any circumstance where we have contributed to UCC. A full apology, given at the right time, can:

- restore dignity, face and reputation
- provide an acknowledgement that the recipient was indeed right
- assure the recipient that they are not at fault
- prevent escalation of the matter and the associated costs in terms of time, resources and stress.

The dilemma, however, is that most of us don't like confrontation – particularly with an angry complainant. Some of us are afraid that if we apologise and admit fault we will make an angry complainant even angrier or give them ammunition to use against us. As a result, instead of apologising we wait and hope the situation or problem will 'blow over'. Unfortunately this rarely happens and these situations often escalate unnecessarily and for extended periods of time.

Giving an apology

An apology needs to be done properly. Apologies should also be given at the earliest practical opportunity – eg once responsibility for a wrong is apparent or immediately following an investigation into the issue giving rise to the apology. If an apology is made too late, it can be interpreted as 'damage control' rather than a sincere expression of regret.

Apologies must also be given by the right person – the one who is responsible for the wrong, or the person who is clearly perceived as speaking on behalf of the agency responsible for the wrong. Otherwise, it may be perceived as being insincere.

Apologies should also be given to the right person, the one who was harmed. Apologising to a third party is generally not appropriate.

What should an apology include?

The most appropriate form and method of communicating an apology will depend on the circumstances of a particular case. Nevertheless, the most effective apologies generally incorporate the following key elements:

1. Recognition

- An explicit acknowledgment and recognition of the act or omission (the wrong) to which the apology applies.
- Acknowledgment of the harm caused by the wrong – eg the complainant suffered embarrassment, hurt, pain, damage or loss.

2. Responsibility

- An express acceptance of responsibility or fault for the wrong that caused the harm.

3. Reasons

- A simple plain English explanation of why the wrong happened.

4. Regret

- A statement of apology that expresses sincere regret and/or sympathy, sorrow or remorse as appropriate.
- Communication with sincerity – an important indicator of the level of regret of the person or organisation doing the apologising.



5. Redress

- A proposed or actual action taken to address the problem.
- An express promise not to repeat the wrong.

6. Release

- A request for forgiveness – an optional extra to a full and complete apology.

Although it cannot be guaranteed to work in every case, the more that an apology addresses the elements listed above, the greater the likelihood that it will be effective in reducing anger, restoring a damaged relationship with a complainant, and helping all parties to 'move on'.

Note: A partial or an otherwise inappropriate apology will often do more harm than good.

What if a complainant refuses my apology?

If your apology fails – for example, because a complainant is so angry that they cannot find it in themselves to forgive you or they want to punish you (in which case no amount of apologising will resolve the situation) – then it may be appropriate to step back from the situation and give the complainant some time to calm down and let go of their issue.

If this also fails – and your organisation is required to maintain an ongoing relationship with the complainant – you may, in consultation with your supervisor, attempt to re-assign the complainant to another case officer if this will defuse the situation. Alternatively, your organisation may need to attempt remediation or alternative dispute resolution strategies such as conciliation and mediation to resolve and/or manage the conflict. See Chapter 20 – When restricting access is not possible: Using alternative dispute resolution strategies (page 105).

That said – regardless of the error you made, if you have made an appropriate apology and sufficient remediation has been offered to the complainant, they will not be justified in engaging in UCC and action will need to be taken to manage their conduct.

See Part 5 – Responding to and managing UCC (page 37), or Part 7 – Supervisors and senior managers, depending on which is more appropriate at this stage (page 98).

Will I get myself (or my employer) in trouble if I admit fault?

Next to the confrontation issue, the most difficult thing about apologising for most professionals is the fear that if we apologise the complainant will use that admission against us. We worry that by apologising we are accepting legal liability or blame, or providing evidence for complainants to use against us with our employer, in a public forum or even the courts. However, in Australia, people are generally protected from liability when they apologise.

There are three different types of protections in Australia:

- In NSW, the ACT and Qld citizens are generally protected from incurring civil liability for 'full apologies' – that is, apologies that include an admission of fault or responsibility.
- In the other states and territories citizens are protected from incurring civil liability for 'partial apologies' – that is, apologies that do not include such an admission.
- All states and territories in Australia have legislated to protect 'full' apologies from incurring liability in defamation.

Case law also states that even if a person makes an apology that includes an acceptance or admission of fault or responsibility, this will not necessarily be regarded as an admission that creates legal liability in civil proceedings by the court (*Dovuro Pty Ltd v Wilkins* [2003] HCA 51 (11 September 2003)).

What this means in practice is that – at least in NSW, the ACT and Qld – you can let go of your fears about incurring legal liability if you apologise, and accept that making an apology is often the right thing to do and serves a good purpose. You will, however, need to consult your relevant supervisors or senior managers about the circumstances when it will be appropriate for you to make an apology.

For more details see *Apologies – A practical guide*, published by the NSW Ombudsman, and available at www.ombo.nsw.gov.au.

Also, for guidance on the various options for redress that you may use as a public official or agency to respond to people who have been detrimentally affected by maladministration, see: Complaint Handler's Toolkit (2nd edition), Chapter 5 – Options for Redress at: <http://www.ombo.nsw.gov.au>.

PART 5

Responding to and
managing UCC

Explanations and caveats

Tables 6, 8, 10, 12 and 14 set out the five categories of UCC as identified in our framework for managing UCC (see page 14) and provide corresponding strategies for managing each category and behaviour listed under each one.

Tables 7, 9, 11, 13 and 15 set out the more common verbal attacks and remarks that complainants make when they engage in the types of behaviours identified in the tables above and provide possible and acceptable scripted responses for each.

These strategies and scripts are intended to be used as a 'ready reference', particularly when dealing with complainants over the phone.

It is important to note that the information and script ideas provided in the tables are only intended to be a guide and should be applied flexibly to suit the context that you are operating in and the circumstances of the complainant and the complaint that you are dealing with. Not all of the suggested strategies and scripts will work in all situations, and you will need to rely on your own judgement and experience to gauge the most appropriate response in each case. For example, the language used in the scripts may need to be altered depending upon a complainant's literacy, cultural and linguistic background, and your own communication style.

Also, tables 6, 8, 10, 12 and 14 only provide frontline strategies for dealing with UCC. Strategies that modify and/or restrict complainant contact for extended periods of time are provided in Chapter 18 – Modifying or restricting access: A management responsibility. These options must always be considered and consented to at a senior level and therefore do not fall within the scope of the other frontline strategies provided in this section.

Chapter 9 – Strategies and script ideas for managing unreasonable persistence

Unreasonable persistence

The principle underlying the strategies and script ideas for managing unreasonable persistence is saying ‘no’. Done properly, ‘no’ should be firm but polite. It should not be defensive or overly apologetic and should make it clear to the complainant that no amount of pressure will change the decision/position that has been reached.

Table 6 – Strategies for managing unreasonable persistence

Complainant conduct	Suggested strategies
<p>Interrupts the case officer or does not allow the case officer to speak.</p>	<p>There are three different options for dealing with this type of conduct:</p> <ol style="list-style-type: none"> <p>1. The silent approach²¹ – for moderately persistent complainants</p> <ul style="list-style-type: none"> Say nothing – do not speak at all. Let the complainant tell their story and ‘let off some steam’ – any attempts to interrupt them will likely get them more riled-up and keep them talking. Eventually, the complainant will stop and ask if you are still there. This will give you the opportunity to interject and attempt to regain control of the conversation. You can: <ul style="list-style-type: none"> <i>let them keep talking</i> <i>ask them a specific question (so you can guide where the conversation goes next)</i> <i>take over the conversation?</i> If you allow the complainant to keep talking, you may try to break their monologue by repeating their name, a key word or the last word they said: <ul style="list-style-type: none"> <i>I can tell you are upset, but for me to be able to help you...</i> <i>Let me make sure I’ve got it right so we can figure out what to do next.</i> Don’t back down when they try to interrupt again. <p>2. The broken record approach²² – for very persistent complainants</p> <ul style="list-style-type: none"> Repeat the same word or short phrase over and over until the complainant hears and processes your message (remember: anger can affect our ability to process information) At some point the complainant will stop and you will have an opportunity to regain control of the conversation

²¹ *ibid*, pp. 72.

²² *ibid*, pp. 71.

Complainant conduct	Suggested strategies
<p>Interrupts the case officer (cont.)</p>	<p>3. The ‘stop’ approach – for complainants who you know from experience to be extremely persistent</p> <ul style="list-style-type: none"> • Interrupt the complainant's monologue at the outset and assert control by saying, for example: <ul style="list-style-type: none"> – <i>Before I can help you with ..., I need to get some information from you. Is it okay if I ask you a few questions about...?</i> – <i>Unfortunately, I can't really help you until you tell me about ... So can you tell me about ...</i> • If this does not work you might: <ul style="list-style-type: none"> – try to give the complainant a time limit the duration of the phone call by saying, for example: <p><i>[Mr/Ms...], I only have [minutes] for this conversation. In this time I need you to answer [list questions]. Once you've answered these questions, we can discuss the problem that you're having further. So beginning with....</i></p> <p>At the end of the designated time period you should end the call. If necessary, re-schedule and remind the complainant of the information you need to cover before you can deal with anything else.</p> – reschedule and terminate the call – preferably for 24-48 hours or sooner if the issue needs your immediate attention.
<p>Bombards the organisation with phone calls, visits or written correspondence when it is not warranted.</p>	<ul style="list-style-type: none"> • Firmly ask the complainant to ‘stop’ the behaviour and tell them that they will be contacted, as necessary. • Limit phone calls to short intervals – eg five minutes. • Advise them that they have to book an appointment through the main reception if they want to meet with you (or another officer), and limit the frequency and length of those meetings, as appropriate. • Wait to respond to written communications until you receive a number of them (eg three or four) if the complainant is sending them regularly. The communications should, however, all be acknowledged either by telephone or email unless they are unreasonable in number, in which case additional limitations may be needed. See Part 7 – Supervisors and senior managers (page 98).
<p>Contacts different people within the organisation in the hope of getting a different outcome or more sympathetic response. (Internal forum shopping)</p>	<ul style="list-style-type: none"> • Avoid having extended conversations with complainants that are/ have already had their complaint dealt with by another case officer. • Expressly ask complainants at the outset if they have already talked to someone about their issue. If so, identify the relevant person and refer them to that person to ensure consistency. • Also, identify all complainants immediately on contact so you can check for their personal information in your case management system to see if their complaint is/has already been dealt with. • Make sure you keep accurate and contemporaneous records of all communications and interactions with complainants to minimise the likelihood of ‘forum shopping’ behaviour. <p>See Chapter 15 – Recording and reporting incidents (page 92).</p>

Complainant conduct	Suggested strategies
<p>Sends their complaint to multiple people/ organisations in an effort to get a different, often inappropriate, outcome – includes cc'd emails and letters.</p> <p>(external forum shopping)</p>	<ul style="list-style-type: none"> • Do not take up complaints that have already been dealt with fairly, reasonably and comprehensively by another organisation – unless they raise issues that specifically require further action by your organisation. • Treat cc'd communications as being 'fyi' rather than a complaint, unless it clearly indicates that it is intended to be a complaint for your organisation or raises an issue that your organisation decides requires further action. • Ask complainants early on if they have already raised their issue with another organisation. <ul style="list-style-type: none"> – If yes, ask for copies of any final correspondence from that organisation to help you better understand their issues and decide if additional action is needed by your organisation. However, this information should not be used in a way that would affect your ability to impartially assess the complaint. • Draft final letters as standalone documents that can be used to brief any third party/organisation that the complainant takes their issue to next – eg the media or the Minister. See Chapter 7 – Dealing with anger through effective communication (Drafting the final letter).
<p>Demands a review simply because they disagree with the decision and without making a case for one.</p>	<ul style="list-style-type: none"> • Clearly explain that your organisation has a one review policy and stick to it. • Advise them that to receive a review they have to make clear arguments for one. For example, they need to: <ul style="list-style-type: none"> – explain how or why you/your organisation has made an error in handling their complaint – explain how or why the decision or outcome reached is inappropriate in the circumstances – otherwise provide new information or evidence that would justify a review. • Have final review letters signed by an appropriate senior officer or the CEO to show that your decision has been affirmed at the highest level and therefore cannot be escalated further.

Complainant conduct	Suggested strategies
<p>Refuses to accept a final decision after all avenues of review have been exhausted.</p>	<ul style="list-style-type: none"> • Maintain a 'no means no' stance following a review. • Avoid arguments or extended discussions with complainants who refuse to listen or accept your explanations about decisions or actions taken in relation to their complaint – particularly if their complaint has been dealt with comprehensively. • Refer them back to the original case officer/case reviewer who dealt with their complaint to ensure consistency in the information given and the approach taken towards managing their conduct. • Refer them back to the final letter or review letter and advise that the letter speaks for itself. If they have additional concerns, they should put them in writing which will only be responded to if it raises a valid issue or provides substantial new evidence that affects the decision or outcome reached. Failing this, their correspondence will be 'read and filed without acknowledgement or response'. • End phone calls or interviews that are unproductive. <p>See Table 7 – Scripted responses to statements and conduct associated with unreasonable persistence (Unproductive/stressful phone call or interview) (page 48).</p>
<p>Reframes their complaint in an attempt to get it taken up again.</p>	<ul style="list-style-type: none"> • Do not allow complainants to reframe their complaints, particularly if they have already received a review. • Identify complainants at the start of a phone call to determine whether their issue has already been raised or dealt with by your organisation. If so, refer them to the case officer who previously dealt with their complaint. • Advise them that their issue will not be re-visited unless: <ul style="list-style-type: none"> – the circumstances of their case have changed substantially and are likely to affect the organisation's decision/the outcome – they provide new and substantial information or evidence that is likely to affect the appropriateness of the decision made/ outcome. • Make sure you keep accurate and contemporaneous records of all communications and interactions with complainants to minimise the likelihood of the same complaint being re-visited. <p>Note: You should always be careful not to disregard complaints that are sufficiently different from other similar complaints and that require further action by you/your organisation.</p>

Complainant conduct	Suggested strategies
<p>Makes an issue out of anything when things don't go their way, including complaining about how their matter was handled or someone's skills or competence.</p>	<ul style="list-style-type: none"> • Decline complaints that are not supported with clear evidence or for which there is no practical purpose in pursuing. • Provide complainants with clear information about the threshold(s) that their complaints must meet before they will be taken up. For example, the complaint should: <ul style="list-style-type: none"> – raise a substantial new issue – be supported by clear evidence that suggests that the event/issue they are complaining about happened. • Explain that clear evidence includes: <ul style="list-style-type: none"> – copies of official documents – photographs – videotapes – anything that shows or tends to show that what they are complaining about occurred. • Tell them clearly, firmly and transparently that complaints about you/your colleague/your organisation will not change the outcome of their original complaint, except in cases where there has been a clear error – which they will have to explain in writing. • If a complainant threatens to complain about you, confidently (but not arrogantly) provide them with the information they need to do so. <p>Note: Although it can be difficult, try not to take unfounded personal attacks or threats to complain about you personally. Often this is emotional blackmail – an attempt by the complainant to bully or coerce you to agree to their demands, or to take their frustrations out on you.</p>
<p>Persists in wanting to know where to go next, when it has been explained that there is nowhere else to go.</p>	<ul style="list-style-type: none"> • Do not suggest or refer the complainant to another organisation simply to appease them or 'get rid of them'. Referrals should only be made in cases where they are likely to be helpful to the complainant and will not contribute to their frustration or anger. • Be honest and upfront with a complainant if there is nowhere else for them to take their complaint. • Do not engage in extended discussions that are likely to give the complainant false hopes about their complaint or possibilities of success.

Table 7 – Scripted responses to statements and conduct associated with unreasonable persistence

Statement or conduct	Possible responses
You're not listening to me.	<ul style="list-style-type: none"> • <i>Well [name] I have been listening to you. I've been listening to you for [minutes] now and if you allow me to speak...</i> • <i>I'd like to help you, but before I can do that I need to ask you a few questions...</i> • <i>I can see you're concerned and I'd like to help, but I need to ... first.</i> • <i>Let's see what we can do to get things going/get you what you need.</i>
I have more proof/information. or I still haven't told you about...	<ul style="list-style-type: none"> • <i>Can you please stop? (explain –eg sending me emails every day)</i> • <i>If/when I need more information I'll let you know. Until then, please stop....</i> • <i>I already asked you not to send any more information/emails /... I ask again that you please stop.</i> • <i>You have emailed/phoned/met with us about this issue [number of times]. Unfortunately we have nothing new to tell you. When we do we'll let you know right away.</i> • <i>Your frequent emails/phone calls/meetings are taking me away from doing other important work relating to your complaint.... Please give me time to get them done because, until I do, I will not have anything new to tell you/I won't be able to read anything new that you sent to me until...</i> • <i>I can't deal with your complaint properly while you're sending all of this information. You'll have to decide whether you want to withdraw your complaint while you get your information together, or let us move forward with what I have and the issues we've identified. What's happening now simply isn't working.</i> • <i>Because I've already asked you [number of times] to stop..., I'll be following this discussion up with a written request that you stop....I'd appreciate it if you'd agree to stop.</i>
Suspected or actual internal forum shopping.	<ul style="list-style-type: none"> • <i>Have you been in contact with anyone else in the office about this issue?</i> <ul style="list-style-type: none"> – If yes, find out whom and redirect them as appropriate. – If no, get their name (with correct spelling) and check the system anyway. Otherwise, log their personal details and complaint/inquiry information as appropriate. • <i>It seems [person] is dealing with your complaint. Because they are more familiar with the details of your complaint, I'll need to forward your phone call to them.</i> • <i>It looks like [person] has spoken to you about this. One minute, while I check if they are available to speak to you right now.</i> • <i>Our system shows that you've tried to speak with a number of people about this issue. I should remind you that [person] is responsible for handling your complaint. I can get them to call you back if you like? Do you have their phone number?</i> • <i>A lot of work goes into allocating complaints to the right officers and making sure that we use our resources in the best way possible. [Name of person] is responsible for handling your complaint and is very capable of doing so.</i> • <i>[Name of person] is responsible for handling your complaint and will do so exclusively, unless we think this needs to change. Would you like me to transfer you over to them now?</i>

Statement or conduct	Possible responses
<p>Be advised that I have notified /cc'd the Ombudsman/Minister/third party.</p>	<ul style="list-style-type: none"> • <i>Our policy is to treat cc'd letters and emails as general information and not as a complaint.</i> • <i>We generally don't respond to cc'd letters and emails, unless...</i> • <i>If you want your letter/email to be dealt with as a complaint you will need to clearly indicate this and identify the specific issues you want us to look at.</i> • <i>For us to deal with your complaint appropriately, we need you to clearly identify the issues you want us to look at and explain how the information you've sent supports each issue.</i> • Have you raised this with another organisation? <ul style="list-style-type: none"> – (If yes) It would be useful if you included copies of the correspondence that you've received from them about this issue. • <i>It's clear that this has been dealt with by ... organisation(s)/people. Because we haven't found any outstanding issues that we can help you with/it's unlikely we'll get a different outcome for you, we've decided not to pursue this further.</i> • <i>It seems your complaint is being handled by more than one organisation right now. We generally wait until other organisations have finished their investigations before we consider taking up a complaint to minimise repetition. Feel free to contact us again once these investigations are finished if you're still unsatisfied. We'll see if it's something we can help you with then.</i> <p>Note: Care should be taken to avoid situations where a complainant's issue is declined by all relevant organisations, simply because the complainant has admitted to sending it to other organisations. Communication between organisations can be useful so long as it doesn't breach any privacy or confidentiality obligations.</p>
<p>I want this reviewed/ someone else to handle my complaint.</p>	<ul style="list-style-type: none"> • <i>Our office doesn't just provide a review automatically. If you want one, you'll have to put your request in writing and explain why it's needed. We will then consider it and get back to you.</i> • <i>Before we can review your complaint, you'll have to write in and explain why and how you think we have made an error either in the way we handled your complaint or in the decision we have made...</i> • <i>Simply disagreeing with our decision isn't a reason for us to provide a review/get another officer involved with your complaint. You'll have to make a case for one by ... (explain).</i> • <i>I suggest that you take time to re-read the decision that we sent you and carefully consider if we have made an error or if you simply disagree with the decision. Disagreeing with our decision isn't a reason for us to provide a review.</i> • <i>We can review your complaint if you wish, but I must warn you that we have a one review policy at this office – this means ... (provide relevant details of policy and what it means for the complainant).</i>

Statement or conduct	Possible responses
<p>You call that a review? You clearly don't understand what I'm complaining about.</p> <p>or</p> <p>You've made the wrong finding – after a review.</p>	<ul style="list-style-type: none"> • <i>When someone asks for a review their complaint is given to another case officer, usually a more senior officer, who makes a fresh assessment of the case. In your case that officer found... Our office stands by this finding.</i> • <i>I appreciate that this issue is very important to you, but we won't be taking any further action on it.</i> • <i>Simply disagreeing with our decision isn't a sufficient reason for us to revisit this issue again. We've explained to you in detail (refer to any relevant correspondence here) how and why we made the decision we have. This hasn't changed.</i> • <i>You've had an opportunity to have your complaint reviewed under our one review policy and we are satisfied with the outcome of that review. Any other correspondence that you send to us about this issue will be read and filed without acknowledgement, unless we decide that it requires our attention.</i> • <i>As we explained to you before, we only review decisions once. Because of this we make sure that all reviews are very thorough. Your complaint was thoroughly considered and unfortunately we do not agree with you on the appropriate outcome.</i> • <i>We'll only reconsider a review decision in highly exceptional cases (explain).</i> • <i>To make sure we distribute our resources fairly to everyone who complains to our office we only provide one review. This has been explained to you in the past.</i>
<p>You can't be finished with my complaint. You haven't looked at/considered/answered...</p>	<ul style="list-style-type: none"> • <i>It's unfortunate, but our office is unable to help you with this issue because ... This has already been explained to you in some detail.</i> • <i>It seems that you've contacted us before about this issue and were told that.... There is nothing else that our office can do for you about this issue.</i> • <i>It seems this issue/a similar issue may have already been brought to our attention. I'll have to look into it and call you back if that's okay?</i> • <i>This issue has already been considered by our office. You were sent a letter on ... explaining our position on it with reasons. Unless you have substantial new evidence or information that is likely to affect our decision we won't re-visit it again.</i> • <i>I think that the correspondence we've already sent to you about this clearly explains why we are unable to deal with it any further. Unfortunately, I have nothing else to add to this.</i>

Statement or conduct	Possible responses
<p>It's your fault. How could you let this happen?</p> <p>or</p> <p>You're incompetent. Who can I complain to about you etc?</p> <p>or</p> <p>What are you/your organisation good for anyway?</p>	<ul style="list-style-type: none"> • <i>I can see that you're upset and I'd like to help, but I won't accept you telling me that I am incompetent.</i> • <i>I understand that your complaint is important to you and that you are disappointed with the decision that I've made/what I'm telling you. However, making personal attacks against me is not productive. I'll have to end this conversation if this continues.</i> • <i>I'll have to end this call if we can't keep to the issues.</i> • <i>I'm sorry we weren't able to do what you wanted us to do/had hoped we could do. The fact is (explain the case details) ...</i> • <i>I appreciate that you would have liked us to take up your case. The fact is we are impartial investigators, not advocates for complainants. In this case we have decided ...</i> • <i>I'm not sure how you want/expect me to respond to this.</i> • <i>I appreciate your disappointment/frustration at my decision and why you may ask this question. You may wish to read our annual reports which explain what we have achieved over the years.</i> • <i>You can put your concerns in writing and we'll consider them. If we don't think that they raise a substantial issue that requires our attention, your letter will be read and filed without acknowledgement.</i> • <i>We won't review the decision that has been made about your complaint because ... However, if you wish you can make a complaint about me and you are free to do so.</i> • <i>One thing I should clarify for you now is that we won't be reviewing our decision about ... because... However if you believe that I/another officer have done something wrong, you are welcome to complain about it. A senior manager would look into your complaint and if it is substantiated will decide on the appropriate course of action to take.</i> • <i>I'm sorry you feel that way. My intention was to deal with your complaint impartially. I believe I have done this. If you're unsatisfied with what I've done you can put your complaint in writing and someone else in the office will consider that complaint.</i>

Statement or conduct	Possible responses
Unproductive/stressful phone call or interview.	<ul style="list-style-type: none"> • <i>I understand that you're unhappy and I've tried to explain to you how I came to make the decision that I have. But I'm unable to spend any more time explaining it to you. Perhaps you want to put any additional concerns you have in writing and we may try to respond to them.</i> • <i>I feel that I've given you all the information I can about this and our conversation seems to be unproductive/circular. Because I have other things to attend to, I'll need to end our discussion here. If you still have questions, you can put them in writing and if they require further action by our office we'll let you know.</i> • <i>We've been discussing this for ... minutes now and it's clear that we don't agree on this issue. Unfortunately, I can't spend any more time explaining why I've taken the view that I have, but you can put your concerns in writing if you wish. We would then decide on what action, if any, our office will take.</i> • <i>I don't think this conversation is productive for either of us now and I'll have to end our call/interview. You have my full reasons in the letter I sent you.</i> • <i>I see what you mean, but as I've explained that isn't something that we can help you with.</i> • <i>It seems you want me to say something that I can't. I think it will be best to end our discussion here.</i>
Where can I go where my complaint will be taken seriously?	<ul style="list-style-type: none"> • <i>I'm not aware of any other avenues of redress that may be available to you.</i> • <i>It seems you've exhausted all avenues I can think of.</i> • <i>Outside of the organisations you've already contacted, I can't think of anywhere else for you to take your complaint.</i> • <i>I don't want to waste your time by sending you to another organisation that I don't think can help you.</i> • <i>I can't think of another organisation that can help you with this.</i> • <i>Sometimes there are problems that can't be sorted out by any government organisation.</i>
I'm going to the media/Minister/Ombudsman etc.	<ul style="list-style-type: none"> • <i>You're free to contact anyone that might be able to help you.</i> • <i>That's for you to decide.</i> • <i>You're free to take your matter to any forum you choose.</i> • <i>That option is certainly open to you.</i> • <i>It's for you to decide if you want to bring it to the media's attention...</i> • <i>I have no opinion about whether you should go to the Minister/the media /... about this. This is really for you to decide.</i> • <i>That's certainly your right. We would have hoped that you would be satisfied with this outcome/our decision because.... but, it's really up to you which path you want to take.</i> • <i>It's up to you to do what you consider appropriate now.</i> • <i>As I said, that's completely up to you. If that's the case, then I guess we don't have anything else to discuss.</i>

Chapter 10 – Strategies and script ideas for managing unreasonable demands

Unreasonable demands

The principle underlying the strategies and script ideas for managing unreasonable demands is 'setting limits'. When setting limits, you should:

- identify the unreasonable demand
- expressly tell the complainant that the demand will not/cannot be met
- state why they must stop making the demand (identify the limits)
- offer the complainant a choice, if possible
- enforce the limits, as appropriate.

For example:

You've asked that I read your complaint right away because you want to come in and discuss it with me this afternoon. Unfortunately this isn't possible because I have other equally pressing complaints that I need to tend to first. If you like, I can make time to discuss your complaint with you on Thursday. By that time I will have had an opportunity to read through your complaint and think about the issues that you've raised.

A word on emotional blackmail and manipulation

In an attempt to influence you/your organisation to agree to their demands, some complainants will resort to emotional blackmail and manipulation. Emotional blackmail and manipulation can include:

- Threats of self-harm and/or harm to others.
- Threats to harass or otherwise create difficulties for you/your organisation.
- Threats to embarrass you/your organisation by taking their complaint to an oversight body or third party like the media.
- Statements about you/your organisation:
 - being powerless
 - not doing your job or performing your duty
 - being biased or colluding with other public servants and agencies
 - protecting yourselves by not taking on perceived powerful interests
 - being a waste of time and/or money – usually 'tax-payer' money.
- Pleading with you/your organisation to act in a certain way/help them because you are their last resort – that they have nowhere else to go.

This type of behaviour should be recognised for what it is – an attempt by a complainant to bully or coerce you to comply with their demands about how their complaint should be dealt with. As a consequence, although it is generally important for you to be able to empathise with complainants, you should avoid doing so if they are being emotionally manipulative. In these situations, showing anything that could be perceived as weakness will only reinforce their behaviour. You should also recognise that in these situations you are actually in a position of control as the complainant is trying to get you to do something.

Table 8 – Strategies for managing unreasonable demands

Complainant conduct	Suggested strategies
<p>Makes demands about how their complaint should be handled, including insisting on an immediate response.</p>	<ul style="list-style-type: none"> • Inform the complainant that it is you/your organisation and not them that decides how the complaint will be handled, by whom, and the amount of resources to be dedicated to it. • Tell them clearly, transparently and firmly from the outset how the organisation intends to deal with the complaint. • Be honest and upfront about what will and will not happen and what is and is not possible. • If applicable, explain that an immediate response is not possible because: <ul style="list-style-type: none"> – there are other demands on your/your organisation’s time and resources that make it impossible to respond immediately – there are processes that must be followed that do take time – to be fair to everyone, you/your organisation deal with complaints on a first come first served basis – and there are other complaints that came in before their own.
<p>Insists that you/your organisation respond to every point in their complaint, including trivial or irrelevant issues.</p>	<ul style="list-style-type: none"> • Clarify the central issues of complaint with the complainant early on and make it clear that these are the only issues that you/your organisation intend to address. • Tell the complainant that not every single issue raised in their complaint will be responded to and, if appropriate, that there is no legal obligation on you or your organisation to respond to every point that they have raised. (eg <i>KO and KP Commissioner of Police, NSW (GD)</i> [2005] NSW ADTAP 56).
<p>Insists on talking to a supervisor or senior manager personally, because they disagree with you/your decision.</p>	<ul style="list-style-type: none"> • Tell the complainant clearly and firmly that if they want to make a complaint about you or to request a review of your decision they should do it in writing and provide clear reasons to support their claims/request. • Tell them that the advice you’ve given them/the decision that’s been made will not change by talking to a supervisor/senior manager because they have already approved of the advice, if applicable. • Refer the complainant back to the original case officer or reviewer who dealt with their complaint to ensure consistency. • End phone calls or interviews that are unproductive. <p>Note: Some complainants tend to be more aggressive towards frontline staff because they perceive them as having less authority or power than senior managers. This can result in demands to talk to others with ‘more authority’. We generally suggest that you do not escalate such calls/demands if they are solely motivated by a disagreement with the advice you have given.</p> <p>See Chapter 3 – Understanding the approach and framework (page 10).</p>

Complainant conduct	Suggested strategies
<p>Wants regular and/or lengthy phone calls or face-to-face contact when it is not warranted.</p>	<ul style="list-style-type: none"> • Avoid spending inordinate amounts of time talking to complainants early on in the complaints process because they may expect similar treatment later on – when it is not warranted. • Limit the length and frequency of interactions with the complainant, if necessary – eg you may attempt to limit interactions to previously agreed appointment days and times when either the complainant can call you or you will call them with an update on the progress of their complaint – even if there has been no progress. If the complainant agrees to this arrangement you should attempt to enforce it to the extent possible (eg if they try to contact you outside of the agreed days and times), unless they are raising an issue or providing evidence that requires your immediate attention. • Make sure that conversations are focused on the central issues/tasks at hand. If not, terminate unproductive phone calls. • Slow down the communication process, when possible, by responding to emails or phone messages by letter or suggesting that the complainant put their concerns in writing. The complainant should also be firmly advised that any documentation they send should be summarised and a clear explanation provided about how it relates to their core issues of complaint. • End phone calls and face-to-face interviews as soon as it becomes apparent that the complainant has no new or substantial information or issues to discuss. • Make sure that you keep accurate and contemporaneous records of all communications and interactions with complainants so you can identify whether a particular complainant's demands on resources are excessive or unreasonable. <p>Note: A careful and cautious assessment (with a supervisor) will need to be made to determine whether or not a complainant's interactions with you/your organisation have become so excessive that they are unreasonable in the circumstances.</p> <p>See Chapter 5 – When does conduct become unreasonable? (page 21)</p>
<p>Emotional blackmail and manipulation with the intention to guilt trip, intimidate, harass, shame, seduce or portray themselves as innocent victims – when this is not the case.</p>	<ul style="list-style-type: none"> • Avoid showing any weakness in these situations and do not attempt to negotiate with the complainant. • Stay focused on the central issues of complaint. If the complainant is not able to keep focused on the central issues after some time, terminate the call or interview and re-schedule for another time. • Do not respond to overly complimentary remarks. It is extremely unlikely that the complainant knows you well enough to make an assessment about your character or skill – good or bad. • If appropriate, consider referring the complainant to an advocacy or support service that is better suited to help them – particularly if they have multiple and complex needs that extend beyond the scope of what you/your organisation can do for them.

Complainant conduct	Suggested strategies
<p>Wants to discuss your personal life or makes unwanted sexual advances.</p>	<ul style="list-style-type: none"> • Maintain clear personal and professional boundaries and avoid idle 'chit chat' about yourself or the complainant. • Only discuss things that are relevant to the issues of complaint and deflect any personal questions. • If necessary, tell the complainant that you're not allowed to discuss your personal life. • Explain that you only have a limited time to talk and therefore need to focus on their issues. • If the complainant is persistent, re-schedule the discussion for another time. Alternatively, you might consider putting your questions for the complainant in writing and send to them for response. • You may also consider having the complainant re-assigned to another complaint handler who they are less likely to engage in this type of behaviour with (male or female).
<p>Contacts you outside of office hours to discuss their complaint – eg attempts to contact you on your personal email or through social media.</p>	<ul style="list-style-type: none"> • Politely refuse to respond to any complaint related questions outside of work and always maintain clear personal and professional boundaries. • Invite the complainant to book an appointment or call you during regular office hours. • If they have called you on your home phone, hang up. Notify your relevant supervisor or senior manager about the phone call and consider having your phone number changed or unlisted, in particular if this is provided for in your organisation's security policy. • If they have contacted you through your personal email account or through social media do not respond. Forward it electronically or make a copy of the email and give it to your relevant supervisor or senior manager who will discuss possible options for dealing with the issue. You may also wish to take personal steps to block the email account that the complainant used to send you their email communication. You should also avoid socialising with or 'befriending' complainants online. <p>See also Chapter 14 – Assessing risks (page 89).</p>
<p>Demands answers to questions that have already been responded to comprehensively and/or repeatedly, when they are clearly capable of understanding these responses.</p>	<ul style="list-style-type: none"> • End unproductive discussions/arguments about issues that have been comprehensively responded to. • Refer the complainant back to the earlier correspondence/conversation and invite them to contact you again after they have read/reconsidered it – only if they have specific and outstanding questions or issues. • Acknowledge that they are unhappy with your/your organisation's response, but explain that their issue has been comprehensively considered and responded to and will not be revisited. • If necessary, explain the circumstances where their issue might be reviewed and clearly and firmly advise them that simply disagreeing with the organisation's finding is an insufficient basis for doing so. <p>Note: Special care should be taken when responding to complainants who may have literacy or other language difficulties to explain the contents of any written correspondence sent to them. If this is unsuccessful over time, suggest that they ask someone else such as, a family member or support person to explain the letter/written communication to them.</p>

Complainant conduct	Suggested strategies
<p>Demands information that you are not permitted to disclose/ provide – eg copies of sensitive documents, names and personal contact details of staff etc.</p>	<ul style="list-style-type: none"> • Maintain a ‘no means no’ stance no matter how much the complainant tries to convince you otherwise. • Provide clear reasons why the information will not be disclosed. • Advise that they can request certain information from public agencies under relevant access to information legislation (eg under the <i>NSW Government Information (Public Access) Act 2009</i> (Cth)) and explain the process for doing so/where they can access such information. • End unproductive phone calls.
<p>Changes their issues or desired outcome(s) while their complaint is being dealt with – moving the goal posts.</p>	<ul style="list-style-type: none"> • Clarify the central issues of complaint with the complainant early on in case they change focus later on. • Make it clear that the focus of your investigation will only be on the central issues of complaint. • Stick to the initial issues or outcomes agreed to by the complainant/you/your organisation, unless: <ul style="list-style-type: none"> – the circumstances of the case change and give rise to new and substantial issues – there is new and substantial information or evidence that affects the appropriateness of the outcome achieved or proposed – the new and desired outcomes are substantially different from the one achieved or proposed and are more suitable in the circumstances. • Ask the complainant to wait until their matter is resolved and they receive a final letter before raising their dissatisfaction. See Chapter 7 – Dealing with anger through effective communication (Drafting the final letter). • Make records of topics discussed and outcomes of phone calls and face-to-face interviews and have the complainant sign the record (if during a face to face interview). Alternatively, you can follow up phone calls with a letter to the complainant affirming everything that was discussed and agreed to. <p>Note: You should be careful not to disregard new issues that are substantially different from the original complaint and warrant further action by you/your organisation.</p>

Complainant conduct	Suggested strategies
<p>Insists on outcomes that are unattainable or inappropriate or that they are not ‘entitled to’.</p>	<ul style="list-style-type: none"> • Clarify the limitations of your complaint handling system and tell them clearly and transparently if something is not possible/not going to happen. • Tell them that you can only base your assessment and investigation on the facts and not their emotions – no matter how valid they are. • Manage their expectations early on by letting them know in advance: <ul style="list-style-type: none"> – what can and can’t be done – how you/your organisation intend to deal with their matter – the likelihood that they will achieve the outcome they are looking for. <p>See Table 4 – Testing and managing complainant expectations.</p> <ul style="list-style-type: none"> • Consider giving them a list of reasonable outcomes that you/your organisation may be able to achieve for them and that they can think about – be careful not to lead them on or give them false hope. • Avoid the ‘I’m entitled to’ argument as it rarely ends positively and often only escalates the situation. • ‘Agree to disagree’ about which outcome (the one they want versus the one that you/your organisation have proposed) is the most appropriate one without making them feel that their views are invalid. • Make records of topics discussed and outcomes of phone calls and face-to-face interviews. Write to the complainant outlining them and request their assent with a signature – this provides a written record in case the complainant changes their mind later on.

Table 9 – Scripted responses to statements and conduct associated with unreasonable demands

Statement or conduct	Possible responses
<p>Call me back immediately. or If I don't hear back from you right away, I'll call back again. or I want this fixed now.</p>	<ul style="list-style-type: none"> • <i>Perhaps no-one has taken the time to explain the complaints process to you. Let me.</i> • <i>I appreciate that you want this dealt with right away. But I'm sure that you can also understand that I do have several other complaints that I have to deal with in addition to yours and which were brought to my attention first.</i> • <i>We deal with complaints on a first come first served basis, and as you can imagine there are files that came in before yours. I'll be in contact with you in [days/weeks] or sooner if I need more information from you.</i> • <i>Most people who complain to us think that their complaint is the most important one and want us to deal with it right away or ahead of other complaints. That's not possible in practice.</i> • <i>It's clear this is important to you and you want it handled a certain way, but there is a process that I must follow to make sure that it's dealt with appropriately and fairly for everyone involved.</i> • <i>We are dealing with your complaint in the way we consider to be appropriate. It's unfortunate that you don't see things the same way.</i> • <i>I know you feel your complaint is urgent. I've assessed it and have decided I should call the officer/organisation concerned. I'll be able to do this sometime this week/I'll need some time to do this and then to receive a response from them. How about you call me [days/weeks] and hopefully I'll have some information for you then?</i> • <i>Ultimately, if you are unhappy with the way we are handling your complaint you are free to raise it with another organisation.</i>
<p>You've contacted the person/organisation I'm having problems with. or I told you not to contact them. They're liars.</p>	<ul style="list-style-type: none"> • <i>I'm aware of your views of this person. I find it helpful to contact the person most involved in the matter first, unless I consider it inappropriate. If I'm not satisfied with their response, I will go further up the line until I'm satisfied.</i> • <i>You have given us your side of the story. We have also given the [other party] involved the opportunity to put their side of the story.</i> • <i>In the interest of fairness, I need to hear how the other party sees the issue. I'm sure you can appreciate that I need to get both sides of the story if the matter is to be resolved.</i> • <i>I can understand that you're concerned about that. It is usually the case that it is fair and relevant to get versions from both sides of a complaint. You've presented your side and we need to get their side too.</i> • <i>If the complaint is about the conduct of a member of staff, we would make enquiries at a higher level.</i>

Statement or conduct	Possible responses
<p>You should have interviewed me/contacted me/allowed me to give you more information before you made your decision.</p>	<ul style="list-style-type: none"> • <i>I have carefully considered the information you sent us with your complaint and I have made my decision based on that. If you have any further information that is relevant to this case, you can write to us and let us know that information.</i> • <i>Yes, that's correct. The information you provided in your written complaint was enough for me to consider the matter and make a decision.</i> • <i>I have assessed all the material – your submission as well as the documents I requested from the [the other party]. If I had concluded that an investigation was required, I would have contacted you. In the end, my decision is that there appears to be no evidence that something went wrong.</i> • <i>I think the organisation's reply adequately addressed your concerns. If you are dissatisfied with it, we can talk about it now. Discuss - point out any review option if still dissatisfied.</i>
<p>You haven't answered everything in my complaint.</p>	<ul style="list-style-type: none"> • <i>We decided that the central issues in your complaint were.... and these will be the focus of our response to you/our investigation.</i> • <i>We've considered all the information in your complaint, but we don't intend to respond to every point you've raised.</i> • <i>Our organisation can look at whether... In our letter to you we addressed ... issues. We didn't look at ... because....</i> • <i>Given the many complaints we receive, we try our best to distribute our resources as fairly as possible across all of them. To do this we focus our attention and resources on the central/more substantial issues raised in these complaints. In your case, we decided that the central issues were ... and we have responded/will respond to them accordingly.</i> • <i>There is no legal obligation on us to respond to every point in your complaint.</i> • <i>We're satisfied that we've dealt with your complaint adequately and will not be responding to the issues you're now raising/the other issues you've raised.</i>
<p>I want to speak to your supervisor/manager.</p>	<ul style="list-style-type: none"> • <i>I'm in a position to respond to your concerns and to help you, without the need to get another case officer involved.</i> • <i>My supervisor could call you back, but from what you've said it seems you're raising an issue that I can help you with. All we have to do is....</i> • <i>Why don't you tell me what your concern is so I can get a better sense of which officer/supervisor would be most suited to help you with it?</i> • <i>I'm happy to put you through if you want to complain about me. But if you're looking to dispute my decision, you should put your concerns in writing. My supervisor doesn't have the detailed knowledge of your case to discuss it with you now.</i> • <i>I know you're unhappy about ... If you think it's best to talk to my supervisor about it then I can certainly help with that, but you should know that talking to them is not going to change my decision. Do you want me to help you arrange to talk to them?</i> • <i>If you'd like to have ... done by today, then I'm the person who is available to help you with it. So it's up to you what you want to do.</i>

Statement or conduct	Possible responses
	<ul style="list-style-type: none"> <i>I'm authorised to deal with this issue and would be happy for us to work together to find a solution that's appropriate for everyone. If you're not satisfied with my solution and you still want to speak with a supervisor, I can get them to call you back.</i> <i>My supervisor has reviewed your file and agrees with my decision (if this is indeed the case).</i> <i>They can't take your call right away, but I can get them to call you back. It would help if I could tell them what you'd like to speak to them about.</i> <i>You may. Can I take your telephone number and I'll arrange for them to call you?</i>
<p>I want to speak with/meet with the director/CEO.</p>	<ul style="list-style-type: none"> <i>For practical reasons the Director/CEO doesn't generally meet or speak directly with complainants, but they have given me a delegation to deal with complaints like yours.</i> <i>I'm authorised to act on the Director's behalf. You can speak to me now and we can see how we go.</i> <i>Unfortunately the Director/CEO isn't able to speak with you, but I'm happy to discuss this with you and attempt to find a solution if you wish/but here's what I can do....</i> <i>I'm sure you can appreciate that the Director/CEO, as head of the organisation, is a very busy person. That is why they have delegated authority to their staff to deal with matters like yours.</i> <i>I understand your frustration/that you're angry/that you disagree with me on this issue and you would like to speak with the Director/CEO about it. However, I can't meet that request. What I can do is...</i> <i>I understand that you disagree with me on this issue, but I'm unable to arrange a meeting with the Director/CEO for you. The usual procedure in this office is for complaints to be submitted in writing, as this is the only way to lodge a formal complaint (apply to suit circumstances of your particular organisation).</i> <i>If it's necessary, I can arrange a meeting with the officer handling your complaint. Would you like me to do this for you now?</i> <i>I've already spoken with you at length. A face-to-face meeting won't change the advice I've given you. You can send us additional information in writing and we'll then decide if another meeting is necessary.</i>
<p>I want to come and meet with you – when it's not necessary.</p>	<ul style="list-style-type: none"> <i>I can see that you really want to come in/discuss this in greater detail, but I don't think that a meeting/this is necessary right now, because ...</i> <i>I don't think a meeting would help. If you have additional documents, you can send them to me with a covering letter explaining how they relate to the central issues in your complaint. If I need to, I'll call to discuss them with you. I believe this is a much better use of our time.</i> <i>If I need more information, I'll contact you. Otherwise, the summary of issues you've provided is adequate.</i> <i>I don't have any new information to give you about your complaint. I'll be in touch with you when I do.</i> <i>There are no new developments in your complaint. However, you can call me after [date] if you'd like to check in with me.</i>

Statement or conduct	Possible responses
<p>Emotional blackmail and manipulation.</p> <p>If you don't do [x] then I'll do [y].</p> <p>or</p> <p>I've had such a hard time. I've just lost all my money and my wife has left me ...</p> <p>or</p> <p>You're my last hope. If you don't help me I don't know what I'll do.</p>	<ul style="list-style-type: none"> • <i>Can you please send me copies of these documents? I'll review them to decide if a meeting is necessary/would be useful.</i> • <i>It is generally better for us to look at the documents first, before we decide whether a meeting with you would be useful. In the end, we have to rely on documentary evidence anyway. Say-so evidence isn't enough</i> • <i>That would certainly be a difficult thing to deal with, but unfortunately I can't help you with it. Why don't we focus on what I can help you with which is...</i> • <i>You're right. It is hard to have to worry about these things. Let me explain what your options are...</i> • <i>I understand that you really want our organisation to solve this problem for you. As I've already explained to you, we can't.</i> • <i>I understand that this complaint is really important to you and that you've spent a significant amount of time trying to ...Unfortunately, this doesn't change the fact that...</i> • <i>I can only imagine how distressing this process has been for you and I'm sorry that the outcome of your complaint couldn't be more positive...</i> • <i>I'm aware that this problem has cost you a lot of money/caused a lot of stress for you and your family and in your position I would feel upset too. From an organisational standpoint though we aren't able to do anything to help you.</i> • <i>I agree that pursuing a complaint for ... years without a satisfactory outcome would be devastating. However, I need to be upfront in letting you know that I don't believe that our office/department will be able to achieve the outcome that you're looking for either.</i> • <i>I recognise that you've had a difficult time and I don't want to add to this by giving you false hope that we can help you to ...</i> • <i>I can't imagine how hard it would be for you to deal with that. It certainly wouldn't be easy. But for me to be able to deal with your complaint as quickly and effectively as possible, I need you to focus on telling me about...</i> • <i>Unfortunately, I can't respond to that. It is clearly a difficult situation to have to deal with. I can help you with... if we can focus on that...</i> • <i>No I'm sorry, I'm not qualified to help you with that. All I can do is...</i> • <i>I apologise, but I'm not the person to speak with about you're feeling about this – though I'm sure it's valid. I can help you with your complaint though if you want to focus on that for a moment?</i>

Statement or conduct	Possible responses
<p>Well, I didn't really expect you to do anything anyway.</p> <p>or</p> <p>I knew you wouldn't want to help me.</p> <p>or</p> <p>I'm a taxpayer you know.</p>	<ul style="list-style-type: none"> • <i>I'm sorry you feel that way. If you'd like, I can take a few minutes to discuss our role.</i> • <i>I'm sorry you're disappointed with the outcome of my assessment. I've explained the reasons for my decision in my letter. You may care to read through it again.</i> • <i>It appears in this case you're right (explain reasons for not doing anything).</i> • <i>I've considered your complaint and made enquiries. I appreciate my actions didn't result in the outcome you were hoping for.</i> • <i>We've fully assessed your complaint and we don't consider there is evidence that ... acted wrongly/unlawfully/corruptly.</i> • <i>When did you start thinking that we wouldn't do anything about your complaint? I imagine it wouldn't have been when you brought it to our attention?</i> • <i>I'm not sure what else you were expecting in this situation. When we spoke ... I explained to you that ...</i> • <i>It's unfortunate that you feel this way, because a lot of time was spent making inquiries into/investigating and responding to the questions/issues you raised.</i> • <i>We've satisfied ourselves that this outcome it is the most appropriate one in the circumstances.</i> • <i>I'm sure you can appreciate that I'm a taxpayer too and pay my taxes just like you do. So how about we focus on what I can help you with...</i>
<p>You're racist/sexist. You wouldn't treat me like this if I was/wasn't....</p> <p>or</p> <p>I'm not stupid you know.</p> <p>or</p> <p>Your organisation isn't interested in helping the little guys/people like me.</p>	<ul style="list-style-type: none"> • <i>Your race/gender/social status has not affected the way I have treated/ I am treating you. We deal with lots of people who are ...</i> • <i>Your race/gender/social status has not affected any of the work I have done in relation to your complaint. We deal with people from all walks of life.</i> • <i>Your race/gender/social status has played no part in the decision I've made.</i> • <i>I haven't said anything about your race/gender/social status because it simply isn't relevant to.... and it's unclear to me why you would raise such issues.</i> • <i>When did you start thinking that you were being treated differently based on your race/gender/social status?</i> • <i>When did you start thinking that we'd allow your race/gender/social status to influence our behaviour?</i> • <i>I'm sorry you got that impression.</i>

Statement or conduct	Possible responses
Asking personal questions that cross your personal boundaries – eg questions about your marital status, where you live, your kids etc.	<ul style="list-style-type: none"> • <i>I don't consider this to be relevant to the issue of... What I do need information on is...</i> • <i>I don't need information about that right now. If I do, I'll let you know. What I need you to tell me about however right now is...</i> • <i>I'm sorry my organisation doesn't allow me to discuss my personal life with complainants. So why don't we get back to ...</i> • <i>[Mr/Ms name] I have a limited amount of time to talk to you/meet with you and there is specific information that I need from you before our time runs out. So tell me about...(regain control of the conversation)</i> • <i>The information that you're giving me is making me uncomfortable and I don't believe that it relates in any way to the questions I'm asking you. I need you to focus on these issues/questions (restate them).</i> • <i>I'll have to end this call if we can't keep to the issues.</i> • <i>I find this information inappropriate and I've asked that you stop telling me about it, because it doesn't relate to the immediate issue that I'm dealing with. If you continue to talk to me like this, I'll end this call.</i> • <i>I provided you with the information you require and, if you have no new questions, I'll have to end the call here to respond to other people who are waiting.</i> • <i>I'll have to hang up now, because we are not getting the things we need to get done. I'll call you back tomorrow in [minutes/hours/days/next week]...</i> • <i>I'll have to end the call here, but I'll put my questions in writing for you and send them through Australia Post. You can read them, answer them, and send them back to me either by email or in the mail.</i> • <i>I've told you that I'll hang up if you continued this behaviour. Goodbye.</i>
Wanting to talk about their complaint outside of office hours.	<ul style="list-style-type: none"> • <i>I'm not able to comment on your file right now. You can call the office during normal business hours and I can discuss the complaint with you then.</i> • <i>I can't comment on your file without having it in front of me.</i>
Why wasn't I told about this before? – when they have.	<ul style="list-style-type: none"> • <i>If you recall, we talked about this on [date] and I told you then that ... This has not changed and I do not see any reason to rehash it now. If you have other concerns I suggest you put them in writing.</i> • <i>I sent you a letter/email on [day/date] that explains our position on this in detail. I don't have time to revisit it right now, but I suggest that you take time to read that letter/email again. If you still have specific questions that you want answered, I'll set aside [minutes] for you on [day/date] to discuss them. Do you need me to send you another copy of that email/letter?</i> • <i>A lot of time was spent making inquiries into/investigating and responding to the issues that you're raising with me now. I'd appreciate it if you could take the time to go over the letter/email I sent to you again. If you still have specific questions after reading it, you may call me back.</i> • <i>I don't think this conversation is productive for either of us because we keep on coming back to the same issue...</i>

Statement or conduct	Possible responses
	<ul style="list-style-type: none"> <i>It seems you want me to say something that I can't. I've tried to explain several times how we reached the conclusion we have. Because I don't think this conversation is productive for either of us, I'll have to end our discussion here. You can put your concerns in writing if you wish and we'll decide whether or not further action is needed by our office.</i>
<p>I have a right to see/ access those documents.</p> <p>or</p> <p>This is urgent and can't wait until tomorrow. Give me [person's] direct/home line.</p>	<ul style="list-style-type: none"> <i>I don't have authority to give this information to you. You can put your request in writing and the appropriate senior officer/manager will decide whether it will be given to you.</i> <i>I can't give you this information, because ...</i> <i>We rarely disclose this type of information, except in extremely rare cases where ... and where there are clear and substantial reasons for doing so.</i> <i>We consider requests for information on a case by case basis, so you'll need to put your request in writing and clearly explain why this information should be disclosed to you. We'll provide you with a response shortly after that.</i> <i>Our usual practice is not to disclose the information you've asked for because ...</i> <i>There is an expectation by the people/organisations that interact with our office that this information won't be disclosed, except in exceptional circumstances. Your case isn't one of these exceptions.</i> <i>You always have the option of making an application for disclosure under the [title of access to information/FOI legislation]. You can find information about making a GIPA application on the Office of the Information Commissioner's website at www.oic.gov.au.</i> <i>I understand that you think this is an urgent matter, but I can't call ... at home and I can't provide you with person's home phone number/ personal contact details. What I can do is arrange for you to talk to someone else who is available right now and who might be able to respond to some of your concerns.</i>
<p>That's not what I'm complaining about. You've got it all wrong.</p>	<ul style="list-style-type: none"> <i>We agreed that the central issues in your complaint were ... and these will be the focus of our response to you/our investigation.</i> <i>We prefer that you wait for us to complete our investigations/inquiries before raising additional issues, as things often can and do change as our investigations and inquiries progress.</i> <i>I understand that you've several concerns that you want to raise about... However, we've decided to limit our investigation to the following issues...</i> <i>Our organisation can look at whether ... In our letter to you we addressed those issues. We won't be looking at ... because...</i> <i>By changing the issues in your complaint, you are affecting our ability to resolve them. Please give us time to complete our inquiries/ investigation/etc.</i>

Statement or conduct	Possible responses
	<ul style="list-style-type: none"> <i>I can't deal with your matter properly while you're changing the issues you want us to deal with/adding new issues of complaint. You'll have to decide whether you want to withdraw your complaint while you figure out what you want us to look at or let us move forward with what we have and the issues we have identified to date. What's happening now simply isn't working.</i> <i>Given the many complaints we receive, we try our best to distribute our resources as fairly as possible across all of them. To do this we focus our attention and resources on the central issues/more substantial issues raised in these complaints. In your case, we agreed that the central issues were ... We'll not be looking at anything else, unless there are clear reasons for doing so.</i>
<p>That (outcome) isn't good enough. It's not what I wanted.</p>	<ul style="list-style-type: none"> <i>It's clear that you aren't satisfied with the outcome that we've achieved for you. We, on the other hand, are satisfied with it and have decided not to take any further action.</i> <i>The outcome you're asking for isn't very different from the one we've already achieved for you. We won't spend more time and resources pursuing this issue.</i> <i>To make sure that we distribute our resources fairly and evenly across all complaints, we must think about whether there is a practical purpose in pursuing a different outcome in your case. Our view is that the outcome you're now seeking is not very different from what we've already achieved, and it therefore would not be practical or fair for us to spend any more time and resources on it.</i> <i>If you recall, on ... [date] we discussed the types of outcomes we would be aiming for. We decided that we would try to ... This is what we've achieved and I don't see any practical purpose in pursuing...</i> <i>You're welcome to write to us and explain why you think this outcome is the wrong one/inappropriate/unsatisfactory. If we agree with you, we'll notify you accordingly. Otherwise we'll read and file your correspondence without acknowledgement.</i>
<p>They/you owe me a refund/compensation/an apology, etc.</p>	<ul style="list-style-type: none"> <i>It seems to me that you're hoping we can do... I have to tell you right now that this will not be possible because....</i> <i>What you're asking for isn't possible. Perhaps we can think about other possible options/outcomes like (give example) which are more likely to happen.</i> <i>I accept that you want to see ... happen. We do not believe this is an appropriate solution/isn't likely to happen because.... I think it would be more productive for us to start thinking about other more appropriate/likely outcomes like</i> <i>I understand ... is what you'd like to see happen in this case, but we don't consider this to be an appropriate outcome because.... We think ... is more appropriate and more likely.</i> <i>Sometimes people have a different view on the same issue. You and I clearly have a different view on ... As I've explained we think that the more appropriate/more likely outcome in this situation is....</i>

Statement or conduct	Possible responses
	<ul style="list-style-type: none"> • <i>I understand that you're quite angry about what has happened, but we can't make a decision based on your emotions alone. We can only act on the facts which must also be supported by evidence. So the sooner we can focus on the facts and the evidence, the sooner we can resolve this issue.</i> • <i>I don't want to give you false hope by telling you that ... might happen when it's quite clear that it won't. I suggest that we think about.... as possible solutions so that you're not disappointed later on.</i> • <i>Our complaints system isn't designed to provide revenge/vindication/retribution. The kinds of outcomes that we can normally achieve are... In your case it is possible that ... might happen.</i> • <i>It's unlikely that you will get the compensation you're looking for.</i>
<p>He/she/you should be fired.</p>	<ul style="list-style-type: none"> • <i>I accept that you believe ... should be sacked over this. We, however, view things a little differently.</i> • <i>You are entitled to your opinion.</i> • <i>No one will be fired over this issue.</i>

Chapter 11 – Strategies and script ideas for managing unreasonable lack of cooperation

Unreasonable lack of cooperation

The principle underlying the strategies and script ideas for managing unreasonable lack of cooperation is 'setting conditions'. This involves requiring something of the complainant as a precondition to taking any action on their complaint or performing a particular service/action. For example, a complainant may be required to organise and summarise unreasonably disorganised and lengthy documentation as a condition to it being accepted and read.

Table 10 – Strategies for managing unreasonable lack of cooperation

Complainant conduct	Suggested strategies
<p>Sends a constant stream of comprehensive, disorganised information or an unclear/undefined complaint – when they are capable of doing so.</p>	<ul style="list-style-type: none"> • Get the complainant to organise and summarise the information they have provided as a condition of accepting/proceeding with their complaint. • Expressly ask them to stop sending information, and advise them that if you/your organisation need further information they will be notified immediately. • Do not accept cc'd communications/emails or copies of press articles as complaints, unless the complainant expressly indicates that they are intended to be a complaint for your organisation and clearly identifies specific issues of complaint – that can be appropriately dealt with by your organisation. • Advise them that every time they send you information you have to take time to read it – taking you away from doing other important work in relation to their complaint. <p>See Table 6 – Strategies for managing unreasonable persistence (Bombarding the organisation or its staff with phone calls, visits or written communications when it is not warranted) (page 39).</p>
<p>Provides little or no detail with their complaint or presents information in 'drips and drabs'.</p>	<ul style="list-style-type: none"> • Inform the complainant verbally and in writing that you/your organisation will not look at their complaint until all relevant information has been presented. • Describe the types of information that they should provide – eg copies of official documents, photographs, videotapes or other materials that clearly show that the events or actions complained about occurred. • Identify a timeframe for compliance for the complainant to provide the requested information, after which time no further action will be taken on the complaint or no additional information will be accepted in relation to their complaint – if it was intentionally withheld by the complainant.
<p>Provides irrelevant information, including documentation with sexually explicit content.</p>	<ul style="list-style-type: none"> • Return correspondence that contains inappropriate content and require the complainant to remove the inappropriate material before the correspondence will be considered – after making a copy of it for your records. • Inform the complainant that only the central issues in their complaint will be dealt with/responded to, and re-state what those issues are for clarity and agreement.

Complainant conduct	Suggested strategies
<p>Refuses to follow instructions or accept suggestions and advice.</p>	<ul style="list-style-type: none"> • Provide your advice/instruction and stick to it – do, however, acknowledge any reasons why the complainant may be resistant to the instruction or advice – eg they have previously relied on advice to their detriment. • Explain your responsibilities and theirs and your goals/intentions in pursuing their issue. See Chapter 4 – Effectively managing complaints and expectations from the outset (Establishing the ground rules). • Make sure to summarise instructions to ensure understanding. • Follow up any verbal instructions or advice in writing and clearly indicate a timeframe for compliance/action, if relevant. • End unproductive phone calls and interviews if the complainant is not receptive to instructions, advice or suggestions. • Record meeting your topics and outcomes and write to the complainant outlining the outcomes of the meeting.
<p>Unreasonably argues that a particular solution is the correct one, disregarding other valid explanations and contrary arguments.</p>	<ul style="list-style-type: none"> • Clearly state that a particular outcome is not possible. • Assert your position clearly, transparently and firmly and stick to it – but do acknowledge their viewpoint. • Avoid arguments or trying to reason with complainants who are unwilling to consider other logical and reasonable points of view. No amount of reasoning is likely to convince these complainants to calm down or to accept your point of view or decision. • Advise them of their one review option and, if they have already exercised that option, firmly advise them that the issue will not be reconsidered, unless exceptional circumstances exist. • End unproductive phone calls and interviews if the complainant is not receptive to your explanation or point of view. <p>See Table 13 – Scripted responses to statements and conduct associated with unreasonable arguments (Resistance to explanation) (page 72).</p>
<p>Displays unhelpful behaviour – eg withholds information, is dishonest, acts illegally, is unethical, misleading or otherwise misquotes others.</p>	<ul style="list-style-type: none"> • Terminate you/your organisation's involvement with the complaint if you discover that the complainant has purposely and significantly misled you or has been untruthful about their matter. • Specifically identify the problematic behaviour and ask that they stop it if they wish to have their complaint pursued further. • Re-state the ground rules 'rules of engagement' and emphasise that they must comply with them if they wish to have their matter dealt with further. See Chapter 6 – Effectively managing complaints and expectations from the outset (Establishing the ground rules). • Record meeting topics and outcomes and write to the complainant outlining the outcomes of the meeting. • Refer the behaviour to the relevant authority if necessary – eg unlawful conduct such as fraud.

Table 11 – Scripted responses to statements and conduct associated with unreasonable lack of cooperation

Statement or conduct	Possible responses
<p>See attached/the attached speaks for itself.</p>	<ul style="list-style-type: none"> • <i>So we can deal with your complaint properly, we need you to summarise the information that you've sent and explain how it relates to the central issues in your complaint. As it stands, we're having difficulty understanding how they are related.</i> • <i>I've had a chance to look at the information you sent and I'm finding it difficult to see how it relates to the issues that you've complained about. Can you summarise this information and clearly explain how it relates to the central issues in your complaint? I would need you to do this in the next [days/weeks] if you want us to proceed with your complaint.</i> • <i>For the moment, I don't need this level of detail... (explain).</i> • <i>As you can imagine we receive a lot of complaints at this office, so to make sure we deal with all of them fairly we ask complainants to clearly identify their issues of complaint and explain how their supporting documentation relates to these issues...</i> • <i>You've sent [number of emails/documents] to our office about your complaint. We don't need this much information right now. If we need it, I'll let you know. Until then, please stop sending this information as it is taking me away from doing other important tasks in relation to your complaint.</i> • <i>I previously asked you not to send any more information/emails because it is affecting my ability to deal with your complaint effectively. Again, I don't need this level of detail from you at the moment. I'd appreciate it if you would comply with this request.</i>
<p>I've told you everything/given you all the documents that you asked for – when they haven't.</p>	<ul style="list-style-type: none"> • <i>I know you probably feel like you've talked about this enough, but could I ask you a few more questions that will help us to deal with it as quickly as possible? Proceed by asking open-ended questions.</i> • <i>I understand that you're unhappy with the system, but I still need you to provide this information.</i> • <i>(Restate what they've said) sounds really important. Can we go over it in a little more detail?</i> • <i>We need you to send all the information you have that relates to your complaint within days/weeks. Otherwise, we may have to close your complaint file until we receive it from you.</i> • <i>It's essential that you send us documentation/information that relates to your complaint. Otherwise, we won't be able to deal with your complaint appropriately.</i> • <i>It's a very inefficient use of our time and resources to change the course of our investigation/undertake another investigation because you did not provide us with this information earlier/when you were asked.</i> • <i>We've asked you a number of times to send ... and you haven't. If we don't receive it by ... we won't accept it later on if you decide to send it to us. I suggest that you get it to us right away.</i> • <i>By not sending the information that we've asked for we haven't been able to....We need you to send this to us right away if you want ... Otherwise, we may have to close your complaint /decide on the outcome of your complaint without it.</i>

Statement or conduct	Possible responses
	<ul style="list-style-type: none"> <i>We can't resolve your complaint without ... I'm sure you wouldn't like to see us close your complaint file because of this.</i> <i>You've come to us because you want us to... For us to do this we need you to cooperate fully, by providing us with any information that is likely to influence how we deal with your complaint and any solutions that we might suggest...</i>
<p>It's vital to my complaint. You must look at it.</p>	<ul style="list-style-type: none"> <i>I don't consider this to be relevant to whether..... I do, however, need you to tell me about...</i> <i>I don't need to know about ... to be able to determine whether... has occurred.</i> <i>It appears to me the central issues you're complaining about are... I don't believe you need to tell me about ... for me to deal with those issues.</i> <i>I apologise, but I'm not the person to speak to about.... I can help you with ... To ensure that we don't waste time, why don't you tell me about that.</i> <i>I don't want to take up time by talking about...Perhaps we can get back to discussing...</i> <i>I find this information to be inappropriate and irrelevant to.... I'll have to end our call if you continue to raise it with me.</i> <i>I'll have to end this call if we can't keep to the issues of...</i> <i>I understand that you want to share all the details of what has happened with me. However, I don't need that level of detail because I can't help you with.... How about you tell me about...?</i> <i>If I need to know about it I'll let you know, but for the moment let's focus on...</i> <i>Can I ask why you're bringing this to my attention? (let them respond) As I've tried to explain to you, my role is to (explain). Unfortunately the information that you're sharing is not anything we can use at this office/our office can do anything about.</i> <i>You've already been informed that our office doesn't consider it appropriate for you to talk to us/me about (explain). I have nothing else to add to this issue.</i> <i>I'll have to hang up now, because we aren't getting the things we need to get done. I'll call you back in [hours/days] when I'll have more time to discuss them further/we can have a more focused discussion.</i> <i>I'll send you an email/letter with my questions later this afternoon and you can respond in writing and send them back to me....</i> <i>I told you that I would hang up if you continued to discuss.... Goodbye.</i>
<p>Who the hell makes these stupid policies?</p>	<ul style="list-style-type: none"> <i>I know you disagree with the policy. If you want to have your say about this, the best thing to do is contact agency/person. Would you like me to give you their name and number?</i> <i>If the complainant has already contacted that person/agency, then you might use the 'end of the line' responses suggested above.</i> <p>Alternative responses to 'that's our policy' or 'it's a matter of policy' are:</p> <ul style="list-style-type: none"> <i>Let me explain how we usually do things/why we do things this way....</i> <i>We ask/expect that</i> <i>Our usual practice is...</i>

Statement or conduct	Possible responses
I can't/won't do that.	<ul style="list-style-type: none"> • <i>I feel I've explained your options to you as best as I can. You might want to choose a different path and that is absolutely your decision.</i> • <i>It's my role to explain your options to you, but any decision on what you do is clearly yours.</i> • <i>Perhaps you'd like to think about what I've just explained to you. We can discuss it again next week if you need me to clarify anything further.</i> • <i>So, let me recap. I'm going to do ... and you're going to do ...Is that how you understand it?</i> • <i>I understand that you're unhappy with the system, but I still need you to do....</i> • <i>This is really the only advice I can give you. You'll have to decide from here what you want to do next.</i>
You're wrong/I disagree.	<ul style="list-style-type: none"> • <i>I acknowledge that you view things differently. However on the information I have, I've formed the view that....</i> • <i>I acknowledge that your view is ..., but we see it differently.</i> • <i>I feel that I've given you as much information as I can about this. It seems you want me to say something that I can't. Because I have other serious complaints to tend to, I'll have to end the phone call here. You can write to our office if you have new and substantial issues that you want to raise.</i> • <i>I don't think this conversation is productive for either of us now and I'll have to end it here. If you have any further concerns you can put them in writing and we'll assess them and decide whether or not they warrant any action by our office.</i> • <i>I've given you all the information you need, and if you have no new questions I'll end the call to deal with other people who are waiting.</i> • <i>I understand that you're dissatisfied with what I've told you. I've tried to explain to you how I/we came to this conclusion and can't spend any more time explaining it to you. If you wish, you can put your concerns in writing.</i> • <i>I've explained how and why I've made the decision that I have. Unfortunately, there is nothing else I can add to this. Unless you have some other issues that you would like to raise with me, I'll have to end this conversation/interview here.</i> • <i>Sometimes people have a different view on the same thing. You and I clearly have different views ... and as I've explained our office won't be taking any further action on your complaint.</i> <p data-bbox="577 1659 1342 1758">See Table 7 – Scripted responses to statements and conduct associated with unreasonable persistence (Unproductive/stressful phone call or interview) (page 44).</p>

Chapter 12 – Strategies and script ideas for managing unreasonable arguments

Unreasonable arguments

The principle underlying the strategies and script ideas for managing unreasonable arguments is 'declining or discontinuing' involvement with a complaint. This involves politely refusing to do something or stopping doing something for a complainant. As soon as it becomes apparent that a complaint is groundless, you should decline or discontinue service. If unreasonable arguments are mixed with reasonable arguments, the strategy should be to refuse to deal with the unreasonable portion.

Some words on mental illness

Unreasonable arguments are sometimes associated with mental illness. Dealing with people with a mental illness requires extra sensitivity, although their conduct can generally be dealt with in the same way as anyone else's.

When dealing with people with mental illness, it is important not to dismiss a valid issue as being delusional. A delusion (or psychosis) does not preclude a legitimate complaint. Staff who receive complaints that they suspect to be delusional should take time to ask the complainant specific questions about any evidence they have to support their claims. At the same time, extra care should be taken not to fuel or encourage complaints that are clearly delusional or complaints that have no legitimate basis, as this is likely to give the complainant false hope about what you can do for them.

A psychosis usually involves being out of touch with reality. Psychotic disorders such as schizophrenia may include delusions in which people believe that others are trying to harm them. This may lead to violent, usually self-protective, outbursts. Unprovoked violence may also be associated with hallucinations where 'voices' give orders for certain actions.

For information on mental health services in your area please contact or refer the complainant to the following:

Lifeline: 13 11 14 (www.lifeline.org.au)

Beyond Blue: 1300 22 4636 (www.beyondblue.org.au)

Mental Health Association of NSW: 1300 794 991 (www.mentalhealth.asn.au)

In emergency situations, contact your local mental health team or community health centre in the White Pages (search the 'Emergency, Health and Help' section).

Table 12 – Strategies for managing unreasonable arguments

Complainant conduct	Suggested strategies
<p>Insists on the importance of an issue that is clearly trivial.</p>	<ul style="list-style-type: none"> • Do not take up/continue with issues that there is no practical purpose in pursuing. • Explain that complaints are not taken up unless they are supported by evidence and are sufficiently serious. For example, the complaint should: <ul style="list-style-type: none"> – raise a substantial new issue – be supported by clear evidence that suggests that the event/issue they are complaining about happened. • Explain that clear evidence could include: <ul style="list-style-type: none"> – copies of official documents – photographs – videotapes – other material that shows or tends to show that what they are complaining about occurred.

Complainant conduct	Suggested strategies
<p>Insists on the importance of an issue that is clearly trivial. (cont.)</p>	<ul style="list-style-type: none"> • Tell them firmly and confidently that it is the organisation and not them who decides on the importance of an issue – ie the resources it will dedicate to it. • Advise that any further correspondence about the particular issue is likely to be read and filed without acknowledgment, unless it meets the threshold above. <p>Note: You should be careful not to disregard new issues that are substantially different from the original complaint and that do warrant further action.</p>
<p>Invents allegations from the smallest piece of unsupported information or sees cause and effect links where there are clearly none.</p>	<ul style="list-style-type: none"> • Avoid being drawn into hypothesising, catastrophising, conspiracy theories, unproductive arguments and personal attacks. • Acknowledge the complainant's point of view, but assert that you have reached a different but equally valid viewpoint and are sticking to it. • Make firm and final statements so that there is no more room for continued arguments or 'ammunition' for the complainant to raise more issues and prolong the discussion unnecessarily. • Make sure your responses are brief, yet polite. • Ask that they provide clear evidence to support any allegations – otherwise they will not be considered. • Describe the type of evidence that your organisation will accept and consider – try to identify things that relate to their particular issue. • Be upfront and honest from the outset and do not say or do anything that will give them false hope about whether their issue will be taken up or their likelihood for success. • After you close the complaint, do not respond to further communications about that issue – unless it raises a substantial new issue or evidence or provides new information that warrants further action.
<p>Raises bizarre or incomprehensible issues – eg they are being followed or recorded by the CIA when there is no evidence to support their allegations.</p>	<ul style="list-style-type: none"> • Speak to them in the same tone as you would to anyone else and treat them with respect. • Listen carefully to what they are saying and avoid arguments. • Ask questions and check for evidence. Sometimes a complainant may be delusional, but may still have a legitimate complaint. The ability to provide evidence or point to factual information will be the key. You might say: <ul style="list-style-type: none"> – <i>To take this further, we would need clear evidence like photos, documents or medical certificates...</i> – <i>Sometimes people think something wrong has happened, but there isn't any evidence. I can only suggest that if you do get some evidence you send it to me.</i> – <i>You're explaining your concerns well, but without any clear evidence I can't follow this matter up.</i> • Reflect back to them what they are saying without agreeing: <ul style="list-style-type: none"> – <i>So you believe aliens are following you.</i>

Complainant conduct	Suggested strategies
<p>Raises bizarre or incomprehensible issues. (cont.)</p>	<ul style="list-style-type: none"> • Acknowledge emotions, both theirs and yours. <ul style="list-style-type: none"> – <i>I'm feeling frustrated listening to you, so I can only imagine how frustrated you must be feeling about this.</i> • Empathise with both their lows and highs. <ul style="list-style-type: none"> – <i>I can see you're feeling really bad about this/you're feeling really happy about this.</i> • If it appears that your organisation can assist them, explain what can and can't be done to help them – without fuelling their bizarre arguments. • If it appears unlikely that your organisation can take up the issue, check whether the person may be able to come up with a solution of their own. <ul style="list-style-type: none"> – <i>Is there any other way you may be able to achieve this/make sure this doesn't happen again...?</i> <p>See Chapter 12 above – Some words on mental illness (page 69).</p>
<p>Interprets facts or law in ways that are clearly irrational or unreasonable and insists their interpretation is the correct one.</p>	<ul style="list-style-type: none"> • Acknowledge their point of view, but clearly state your own and stick to it. • If reasoning with the complainant doesn't work, refer them to another forum where they can raise their issues – such as the courts if it is a matter of legal interpretation or a Minister or MP if it is a policy or political issue, if appropriate. <p>See Table 13 – Scripted responses to complainant statements and conduct associated with unreasonable arguments (Resistance to explanation) (page 61).</p>
<p>Makes false or unsubstantiated accusations of biased, unethical, illegal, inconsistent, or partial decision making when things don't go their way.</p>	<ul style="list-style-type: none"> • Advise them that they must provide clear and verifiable evidence to support their claims. • Tell them clearly, firmly and transparently that complaints about you/your colleagues will not lead to a change the decision that has been made or the outcome reached in their matter, unless there are clear and substantial grounds for it. • Keep records of all contacts and communications with the complainant for future reference, including conversations where they argue bias.
<p>Demonstrates an inability to accept personal responsibility, and instead blames others for things that they bear no responsibility for – eg the case officer/organisation.</p>	<ul style="list-style-type: none"> • Never accept responsibility for things that you/your organisation are not responsible for. • Do not get caught up in conversations about what other people/organisations have done, unless this is the subject of a complaint that is within jurisdiction. • Avoid asking questions that are focused on the past – keep it in the present and talk about the task at hand and things that need to be accomplished in the future.

Table 13 – Scripted responses to statements and conduct associated with unreasonable arguments

Statement or conduct	Possible responses
<p>This is a very serious issue. So you think my complaint isn't important enough?</p>	<ul style="list-style-type: none"> • <i>It may well seem that way ... (followed by an appropriate explanation).</i> • <i>It's not an issue of your complaint being unimportant. It's a question of whether our organisation can achieve a substantial outcome in this situation/whether your complaint is one that our office can help you with. From our perspective, we can't/it isn't.</i> • <i>Unfortunately we don't share your view that this issue needs to be investigated further by our office.</i> • <i>All complaints are carefully assessed according to our policies and procedures. Sometimes we receive complaints we can't/don't have the powers to take up.</i> • <i>It's clear that this issue is important to you, however we do have certain requirements that complaints must meet before they are taken on by our office. These include that the complaint is... Unfortunately your complaint doesn't meet this threshold.</i> • <i>We've considered the information relating to your complaint and we don't believe that there is a practical purpose in pursuing it further.</i> • <i>As we've explained, we don't think that there are clear reasons for us to take action on this issue. Perhaps you should consider raising it in another more appropriate forum.</i> • <i>When did you start thinking that we weren't/I wasn't taking you seriously?</i> • <i>When did you start thinking that I/we don't give a damn?</i> • <i>When did you starting thinking that we aren't concerned about your situation?</i>
<p>Why are you are discouraging me from pursuing my complaint?</p>	<ul style="list-style-type: none"> • <i>My intention isn't to discourage you. I'm trying to be as realistic as possible with you now so that you are not disappointed later...</i> • <i>It's unfortunate that you feel that way. I simply don't want to see you spending even more time pursuing this when there may not be any organisation that can help you with this issue.</i> • <i>It would be very easy for me to pass you on to another organisation/person and let you think that they can help you, even though they probably can't. But I don't want to give you false hope.</i> • <i>The reality of the situation is that our office is unable to help you with your complaint because ... I'm not discouraging you from taking your complaint elsewhere if you think another organisation can help you.</i>

Statement or conduct	Possible responses
They're corrupt.	<ul style="list-style-type: none"> • <i>People often feel that a certain person/organisation have caused a problem for them. We need clear evidence to support what you're saying before we can follow it up. Examples of clear evidence include...</i> • <i>I'd really like to help you, because it's clear that your complaint is important to you. But for me to be able to do this I need you to provide us with solid evidence that supports what you're saying – for example.... Until we get this type of evidence we won't be able to move ahead with your complaint.</i> • <i>I accept that your opinion is that... We have a different view. We can't do what you're asking because ...</i> • <i>I can see that you think this is the worst thing that could happen. Perhaps we could have a closer look at how it is....</i> • <i>Sometimes people have a different view on the same situation/ issue. You and I clearly have a different view on...</i> • <i>I accept that ... is your view. I've taken a different view. My view is ... For these reasons I won't be taking any further action on your complaint/will take the following action....</i> • <i>I understand that ... is your view. However, on assessing the information that has been submitted to this office, our view is that...</i> • <i>Your view is ... Is there any possibility that there could be another/ different view?</i>
The police are listening to my thoughts/recording me/ following me.	<ul style="list-style-type: none"> • <i>Is it possible there might be an innocent explanation for...?</i> • <i>You must be worried about being followed/recorded by the police. I can't help you with that, but if you can tell me about... then I can help you with that.</i> • <i>I can't do anything about an event that hasn't yet happened.</i> • <i>Some of the things you're asking about are hypothetical. I can only respond in detail to an actual event.</i> • <i>If ... happens in the future, you can ring me then.</i> • <i>I know you will understand that we can't act on a complaint without evidence.</i> • <i>I appreciate that you've put a lot of thought into this issue and you have a lot to say about it. However, discussing [irrelevant issue] won't help us to focus on those things that our office can deal with which are...</i> • <i>I'd really like to help you, but what's lacking in your complaint is the evidence to support what you're saying. Without it I won't be able to follow up your complaint.</i> • <i>Ask a series of questions – What would make the situation better? What are you hoping to achieve by contacting us? What did you hope we could do for you? – and then manage expectations.</i>

Statement or conduct	Possible responses
<p>The legislation says that your office must.../ I'm entitled to...</p>	<ul style="list-style-type: none"> • <i>I appreciate that you have a certain opinion about how legislation/document is to be interpreted. We take the position that it should be applied like this.</i> • <i>It's obvious that we have different opinions about how this policy/legislation should be interpreted and applied. We've/I've explained our/my position to you and there is nothing else that we can add to it.</i> • <i>Sometimes people have different opinions about the same situation/issue. You and I clearly have different opinions on...</i> • <i>I accept that ... is your point of view. I have a different point of view. I think ... For these reasons I won't be taking any further action on your complaint/will take the following action....</i> • <i>I understand that ... is your position. However on assessing the information that has been submitted to us, we have formed a different position – which is that...</i> • <i>Your opinion/position is ... Is there any possibility that there could be another opinion/position?</i>
<p>You/your organisation/they are biased/corrupt....</p>	<ul style="list-style-type: none"> • <i>Do you have evidence to support this allegation?</i> • <i>Organisation/person has made a professional judgment and we have seen documentation explaining the reasons for their decision.</i> • <i>I understand you're annoyed/sceptical/angry about ... The evidence we've gathered suggests the conduct is not unreasonable/so unreasonable as to warrant action on our part.</i> • <i>I need to give organisation/person a chance to explain their side of the story. If I'm not satisfied, I'll take it further.</i> • <i>Simply because you disagree with my/our/their decision doesn't necessarily mean that we've been biased towards you. Do you have evidence to support your allegation?</i> • <i>I understand that you think that there has been bias in this situation. I've made my own assessment of these claims and, after looking at your concerns and checking the information that has been provided to me, I don't consider that there has been bias.</i> • <i>You may believe this to be the case, but we are satisfied that....</i> • <i>I appreciate that this is your view. The evidence in this case suggests...</i> • <i>We rely on good documentary evidence to make our decisions. Any biases, misconduct, shortcomings or other discrepancies usually become apparent during our enquiries and reviews of documents. So far, we haven't found any evidence to support that ... has occurred in this situation.</i> • <i>Often there can be many reasons why a person/organisation doesn't disclose the type of information that you've requested other than bias like you suggest. There may be confidentiality or privacy issues that they are required by legislation to observe.</i>

Statement or conduct	Possible responses
<p>You're taking their word for it. or You're colluding with them.</p>	<ul style="list-style-type: none"> • <i>No, that's not correct. I have sought documentation reports/files notes/correspondence to assess the decision making process and reasons for the organisation's/staff member's conclusions.</i> • <i>It seems you think that, because I haven't agreed with your complaint, I'm simply accepting their word. In fact, my job is to hear and consider both sides of a story and then to decide whether there is any/sufficient evidence that something has gone wrong.</i> • <i>I'm independent of both parties and I'm not here to take sides.</i> • <i>The fact is we are impartial/independent investigators and don't advocate for either side and cannot do what you asked for. I explained this to you before.</i> • <i>That's not the case. I have looked at the documentation and I can't see any evidence to contradict our position.</i> • <i>I've asked them to explain the situation and I'm satisfied with their explanation.</i> • <i>You may think that. I have to make my own assessment of the matter. After looking at your concerns/checking out the relevant policies/seeking information from the department I consider there is nothing for us to take up.</i> • <i>The fact that you disagree with their decision doesn't mean they have been unreasonable.</i> • <i>What do you base this claim on?</i> • <i>I understand you're disappointed with my decision/view and I must say I'm sorry you see it this way. My role is to be impartial. Based on the evidence available to me, I can't see that the organisation has acted wrongly.</i>
<p>Why won't you do it for me? You did it for my friend/ someone I know.</p>	<ul style="list-style-type: none"> • <i>Each case is different. Perhaps we can get back to your situation.</i> • <i>I'm not sure how your friend's situation applies here. Let me explain how we came to our conclusions about your situation.</i>
<p>I thought your organisation was interested in fairness.</p>	<ul style="list-style-type: none"> • <i>You're right. We are very interested in what is fair and reasonable.</i> • <i>We have carefully looked at your complaint and we have decided that there does not appear to have been any unfairness in your case.</i>
<p>They're lying to you/ manipulating you/pulling the wool over your eyes and you can't see through them.</p>	<ul style="list-style-type: none"> • <i>You may believe this. However, I'm satisfied with their response. Unless you can prove that they've deliberately misled or misinformed me, my decision stands.</i> • <i>I'm very aware of the way responses are made to me. I can assure you that I get copies of reports and documents to substantiate what I'm being told.</i> • <i>I appreciate that is your view. The evidence in this case is ...</i> • <i>So far I have no reason to believe this. I certainly welcome any evidence you can give me that supports your assertion.</i> • <i>I have considered your evidence as well as the evidence provided to us by the organisation/their staff and I can't agree with your assertion, though I do acknowledge that this is your view.</i>

Statement or conduct	Possible responses
<p>They think they can get away with anything.</p> <p>or</p> <p>So the law doesn't apply to them/they're above the law?</p>	<ul style="list-style-type: none"> • <i>They are required to abide by the law/policy/procedure that is relevant to them. They have had to explain their actions to us. I consider that they have reasonably explained their conduct.</i> • <i>Well no, they're not. The issue here is about a complaint you have brought to our organisation. Our role is to see whether there may be any evidence that something went wrong. Having looked at your complaint, I have formed the opinion that there isn't any evidence there.</i> • <i>The organisation has to conduct their business and has legitimate authority to make their decisions. We haven't found evidence that they are acting unreasonably in doing this.</i>
<p>It's all your/their fault. How could you let this happen?</p>	<ul style="list-style-type: none"> • <i>I can't take responsibility for what has happened in the past. However, I would like to help you with.... Can you tell me about...?</i> • <i>I understand that your experience with ... was/has been difficult for you and that you're still quite upset. However for me to be able to help you with your current complaint, we need to focus on....</i> • <i>I'm sure that you can understand that I'm not to blame for ... So why don't we focus on what I can help you with now...</i> • <i>I recognise that you believe ... is responsible for... But perhaps there is another explanation...</i> • <i>Is it possible that there might be some other reason why ... has occurred?</i> • <i>For me to do, you will need to do ... otherwise, we'll have to close your file</i> • <i>I'm sorry you've had trouble, but I can help you with (explain).</i>
<p>Resistance to explanation</p>	<p>Some complainants are resistant to explanation and are unwilling to consider views other than their own. To determine if a complainant will be receptive to your explanations/point of view you may ask the following types of questions as they may give you an indication of whether it will be productive to continue on with your discussion with them:</p> <ul style="list-style-type: none"> • <i>Your view is ... Is there any possibility that there could be another/different view?</i> • <i>You say ... is the case. Is this necessarily so?</i> • <i>You seem to be saying ... is the case. How is this true?</i> • <i>To manifestly illogical conspiracy allegations – Is it possible there might be an innocent explanation for ...?</i>

Chapter 13 – Strategies and script ideas for managing unreasonable behaviours

Unreasonable behaviours

The principles underlying the strategies and script ideas for managing unreasonable behaviours are 'setting limits' and 'setting conditions'. Setting conditions is about requiring something of the complainant as a precondition to taking any action on their complaint or performing a particular service/action. Setting limits is about establishing clear boundaries and placing limits on services, if necessary. When setting limits, you should:

- identify the unreasonable behaviour
- ask the complainant to change their behaviour
- state the consequences if the behaviour continues (identify the limits)
- offer the complainant a choice, if possible
- enforce the limits, if necessary.

For example:

I cannot continue with this interview if you are going to continue to bang the table. Please stop otherwise I will end the interview. Would you like to continue or would you like to do this some other time? It's your choice.

Important caveat

The suggested strategies in Table 14 below must always be considered in the context of your organisations security protocols and procedures. In cases where any of the suggestions conflict with those protocols and procedures the latter should always take priority, unless you are otherwise instructed by a supervisor or senior manager.

See also, Chapter 14 – Assessing Risks (page 89), Appendix 6 – Risk assessment worksheet (page 125), and Appendix 7 – Ten steps for responding to threats, hostility and aggression (page 127).

Also for information on things you can take to protect your personal safety – in addition to the systems and protocols that your organisation has in place – see *Staff safety in the workplace: Guidelines for the protection and management of occupational violence for Victorian Child Protection and community – based Juvenile Justice staff*. It is available at: www.dhs.vic.gov.au.

Table 14 – Strategies for managing unreasonable behaviours

Complainant conduct	Suggested strategies
<p>Low risk</p> <p>Foul language and swearing that is part of their normal communication style or an expression of distress, but still makes you feel uncomfortable.</p>	<ul style="list-style-type: none"> • Attempt to calm the complainant. • Tell them that you are uncomfortable with their choice of words and politely ask that they change them. • If it continues, ask them to stop and warn that you will have to end the call if they continue. • If it continues, end the call and make a note of the conversation. • You may also wish to invite the complainant to call back when they are prepared to use more appropriate language. Avoid saying: <i>We need time out here so we can calm down</i>, as this is likely to escalate the situation. • If you do tell the complainant to call back, make sure to give them clear instructions about who they can contact, when, how (method of communication) etc.

Complainant conduct	Suggested strategies
<p data-bbox="272 219 384 248">Low risk</p> <p data-bbox="165 271 405 338">Foul language and swearing (cont.).</p>	<ul data-bbox="523 219 1350 456" style="list-style-type: none"> • With a supervisor/senior manager, you may also consider whether: <ul data-bbox="563 264 1350 456" style="list-style-type: none"> – to take further calls from the complainant and, if so, who should take them – further calls should be automatically put through to voicemail, if possible – to inform reception about what they can do with any further calls. <p data-bbox="523 472 1350 533">Note: Whether or not this behaviour is unreasonable will depend on the circumstances of the case.</p>
<p data-bbox="272 555 384 584">Low risk</p> <p data-bbox="165 607 440 741">Acting up in the presence of others/ at public functions to create a scene.</p>	<ul data-bbox="523 555 1394 1128" style="list-style-type: none"> • Attempt to calm the complainant. • Remove the audience as quickly as possible, by either taking the complainant to another room or removing others from the immediate area where the complainant is located. • Do not discuss any issues relating to their complaint or any sensitive issues in front of others, no matter how much they try to taunt you. • If the complainant calms down, get them to agree to go to another room and get a colleague to assist you with the interview. • If a colleague is not available, leave the door open and sit closest to the exit so you can make a swift and easy escape if an incident arises. This ensures that staff in the immediate vicinity can be quickly alerted to what's happening. • If the complainant refuses your requests to calm down and the situation persists, tell them that security may be contacted if they cannot calm down. Give them time to cool off, but follow through as appropriate. <p data-bbox="523 1144 1378 1173">See below – Refuses to leave the premises or move when asked (page 79).</p>
<p data-bbox="272 1193 384 1223">Low risk</p> <p data-bbox="165 1245 464 1346">Confronting comments or threats in written communications.</p>	<ul data-bbox="523 1193 1378 1592" style="list-style-type: none"> • Make a copy of the communication, file and return the original to the complainant, advising that it will not be considered until the inappropriate content is removed. • Notify your relevant supervisor or senior manager immediately if any actual or suggested threats have been made in the communication so a decision can be made about the appropriate course of action. • If the complainant continues to send communications with inappropriate content, in particular by email, consider talking to your supervisor or senior manager about restricting the complainant's access to your direct email and only allowing contact to be made through your organisation's general email portal.
<p data-bbox="272 1615 384 1644">Low risk</p> <p data-bbox="165 1666 480 1834">Uses communication technologies like social media and the internet to vilify, defame, harass, intimidate or threaten.</p>	<ul data-bbox="523 1615 1394 1991" style="list-style-type: none"> • You should not respond to personalised or negative online comments. Make a copy and take it to your designated communications officer/ manager who can decide on the appropriate course of action. • Warn the complainant that this type of conduct will not be tolerated and action may be taken to restrict their contact with the organisation. • If you think the comment may give rise to criminal or civil liability, you should immediately consult your relevant supervisors/senior manager so they can decide whether legal action will be taken to address the situation. • Report the content immediately to your relevant supervisor or communications officer for consideration and possible action. <p data-bbox="523 2007 1378 2067">See Chapter 21 – Dealing with misuses of electronic communications, the internet and social media (page 107).</p>

Complainant conduct	Suggested strategies
<p style="text-align: center;">Low risk</p> <p>Audio or video recording interviews or phone calls without prior consent.</p>	<ul style="list-style-type: none"> • Expressly ask the complainant if they are recording the conversation or interview and clearly and firmly tell them that you do not consent to being recorded. • If the complainant says they are not recording but you still suspect they are, you may inform them that: <ul style="list-style-type: none"> – they are required by law to warn any and all other parties to the discussion/interview of the recording and obtain prior consent from each – otherwise they may be committing a criminal offence – they may also be violating confidentiality and privacy laws and your organisation will take legal action against them, if necessary. • You may also consider terminating the call immediately and discussing with your supervisor/senior manager about changing how you communicate with the complainant in the future – eg contact in writing only. <p>Note: You will need to seek appropriate direction on the laws in your jurisdiction to determine the most appropriate approach for dealing with such situations.</p>
<p style="text-align: center;">Low risk</p> <p>Refuses to leave the premises or move when asked.</p>	<ul style="list-style-type: none"> • Politely ask the complainant to leave and move towards the exit. • If the complainant follows you walk them out to ensure that they have left the building. • If the complainant does not leave, you should leave the room or area where they are located, as soon as possible. • Immediately inform other relevant staff/supervisors that the complainant refuses to leave and make sure that no one approaches the area where the complainant is located unnecessarily. • Tell the complainant that you will give them 10 minutes to leave, after which time security or the police will be contacted and they will be escorted from the building. • Allow the time to pass and contact security as advised if they are still there. • If security is not available and you need to contact the police, at the end of the 10 minutes, tell the complainant that the 10 minutes has passed and that the police are in the process of being contacted – this will give the complainant a final opportunity to leave before you follow through with that action. • Allow security/police to address the issue. • Make a detailed record of the incident, including the time and wording of all instructions/requests that you (and others) made to the complainant to leave the premises, the reasons why the complainant was directed to leave, and the complainant's responses to each request/instruction. See Chapter 15 –Recording and reporting incidents (page 92). • With a supervisor/senior manager, you may also consider whether the complainant's access to your organisation's premises should be restricted, for example, by notification under the <i>Inclosed Lands Protection Act 1901</i> (NSW) or equivalent trespass legislation in your jurisdiction. See Chapter 19 – Using legal mechanisms to deal with extreme cases of UCC (page 103). <p>See also – Aggressive, abusive, harassing or otherwise confronting behaviour face-to-face (below).</p>

Complainant conduct	Suggested strategies
<p data-bbox="248 219 411 248">Medium risk</p> <p data-bbox="165 271 480 367">Aggressive, abusive, harassing or otherwise confronting phone calls.</p>	<ul data-bbox="523 219 1385 1016" style="list-style-type: none"> • Attempt to calm the complainant down and stay calm yourself. • If the complainant does not calm down, explain that you consider their language/aggressive behaviour to be unacceptable and ask them to stop. • If it continues, warn the complainant that you will end the call (you may mute the phone and seek assistance, if necessary) – but do not hang up. • If it continues, tell the complainant that the call is being terminated and follow through, unless the call should be traced – in this case you should mute your phone, but do not hang up. • Report the incident to reception/inquiries staff immediately in case the complainant rings back. • With a supervisor/senior manager, you may also consider whether: <ul data-bbox="563 667 1337 860" style="list-style-type: none"> – to take further calls from the complainant and, if so, who should take them – further calls should be automatically put through to voicemail, if possible – to inform reception about what they can do with any further calls. • Make a file/case note of the discussion, fill out a security incident form, and direct it to the appropriate supervisor/senior manager. • Seek support either through formal or informal debriefing. See Chapter 16 – Managing stress (Debriefing) (page 93). <p data-bbox="523 1032 1366 1128">Note: If the abusive complainant has been previously told only to contact the office in writing, you should immediately remind them of this and terminate the call.</p>
<p data-bbox="248 1153 411 1182">Medium risk</p> <p data-bbox="165 1205 488 1339">Targeted threats towards the case officer – overt or covert – during phone calls.</p>	<ul data-bbox="523 1153 1385 2078" style="list-style-type: none"> • Make the threat overt by naming it – repeat their statements as close to verbatim as possible so the complainant takes ownership of their threats/comments. • Take comprehensive notes of everything that is being said. • Tell the complainant the possible consequences of making such threat and ask that they calm down. • If the threats continue, ask the complainant to stop and clearly restate what the consequences will be if they do not – eg the phone call will be ended, police or mental health crisis team will be contacted etc. • Attempt to redirect the conversation onto their substantive issues of complaint, being careful not to reward their behaviour. • If it continues, tell the complainant that the call is being terminated and follow through, unless the call should be traced – in this case you should mute your phone without hanging up. • Report the incident to the receptionist/inquiries staff in case the complainant rings back. • Immediately inform your supervisor/senior manager of the call and seek advice about any further action – eg disclosing information about the call to police or mental health professionals – if this will lessen or prevent harm to the complainant, yourself or other third parties. • Make a file/case note of the discussion, fill out a security incident form, and direct it to the appropriate supervisor/senior manager. • Seek support either through formal or informal debriefing. See Chapter 16 – Managing stress (Debriefing) (page 93).

Complainant conduct	Suggested strategies
<p data-bbox="284 215 448 246">Medium risk</p> <p data-bbox="201 271 531 400">Attends the premises while under the influence of drugs, alcohol or other substances.</p>	<p data-bbox="560 215 1414 315">Drugs and alcohol increase aggression and reduce impulse control. Therefore, aggression among these complainants can be very unpredictable and they are more likely to be easily provoked or frustrated.</p> <p data-bbox="560 327 1142 358">When dealing with such complainants you should:</p> <ul data-bbox="560 369 1430 1173" style="list-style-type: none"> • Stay calm. • Be assertive and firm. • Use non-threatening words and tone – avoid using words like ‘drunk’ in their presence. • Not argue – as it is usually pointless when a complainant is intoxicated and could lead to physical violence. • Ignore abusive words. • Keep your distance and do not touch the complainant, if possible. • Show concern for their safety and comfort – you might offer them a cup of water or food. • Repeat statements like a ‘broken record’. • Seek assistance including calling a colleague, security or police as appropriate. • Look for a workable compromise, if possible – eg if they are insisting on meeting with you immediately suggest that you will meet with them in a day or two when you have more time to discuss their concerns. • If you make arrangements to meet with the complainant another time (ie when they are sober) you should consider talking to your supervisor/senior manager about having another staff member or security or police officer present during that meeting – if you have any apprehensions about it. <p data-bbox="560 1187 1310 1252">Note: Depending on the circumstances, one or more of the other suggested approaches in this section may be applicable.</p>
<p data-bbox="308 1272 427 1303">High risk</p> <p data-bbox="201 1323 504 1456">Aggressive, abusive, harassing or otherwise confronting behaviour face-to-face.</p> <p data-bbox="201 1473 504 1641">For example – leaning towards you, moving around the room, invading your personal space.</p>	<p data-bbox="560 1272 1331 1337">You do not have to tolerate aggressive behaviour. If you feel threatened or distressed end the interview immediately.</p> <p data-bbox="560 1350 1099 1382">If you believe you are in imminent danger:</p> <ul data-bbox="560 1393 1422 1809" style="list-style-type: none"> • Immediately press your portable duress alarm or the closest alarm. • Leave the interview room or immediate area and go into a more secure area of the office. • If leaving is not possible, you may need to defend yourself by using ‘reasonable force’ – that is, the amount of force necessary to stop an attack or prevent personal injury – nothing more. • Seek support from a more senior officer. • Make a file/case note of the discussion, fill out a security incident form, and direct it to the appropriate supervisor/senior manager. • Seek support either through formal or informal debriefing. See Chapter 16 – Managing stress (Debriefing) (page 93). <p data-bbox="560 1823 1051 1854">In all other circumstances you should:</p> <ul data-bbox="560 1865 1414 2096" style="list-style-type: none"> • Continually assess the possibility of the situation becoming violent – Is the complainant’s conduct improving or getting worse? • Ask a colleague or relevant supervisor for support. • Keep a safe distance and preferably get the complainant to sit down • Create space if there are any signs of physical aggression – get something like a desk, between you and the complainant.

Complainant conduct	Suggested strategies
Aggressive behaviour (cont.)	<ul style="list-style-type: none"> • Provide alternatives to the aggression by making it clear to the complainant that aggression will not achieve their goal and that the interview will be terminated if it continues. • Maintain non-confrontational verbal and non-verbal communication and avoid any 'jargon' and or language that will confuse the complainant and increase their frustration. • Be careful not to get into a fight and do not attempt to physically restrain the complainant or physically intervene between other people who are behaving aggressively towards each other – do not try to be a hero. • If the complainant continues, end the interview. It is better to withdraw earlier rather than later. You may offer to hold the interview another time or suggest an alternate form of communication. • Make a file/case note of the discussion, fill out a security incident form, and direct it to the appropriate supervisor/senior manager. • Seek support either through formal or informal debriefing. See Chapter 16 – Managing stress (Debriefing) (page 93).
<p style="text-align: center;">High risk</p> Makes threats of suicide or self-harm (overt or covert).	<p>Dealing with threats of self-harm or suicide can be a very difficult thing to deal with. If you do not feel that you are competent or emotionally capable of dealing with such calls you should transfer them to another staff member who can. We advocate that you always react to such calls and make explicit any threats of self-harm by naming them. If the complainant confirms the threat, then attempt to keep them on the phone for as long as possible to get as many details as possible about what they intend to do. Report the threat immediately to your supervisor/senior manager and complete an incident form.</p> <p>In accordance with the ASIST model developed by Livingworks, you should:</p> <ul style="list-style-type: none"> • Notice invitations – recognise when the complainant may be thinking about suicide. Listen for statements like: <ul style="list-style-type: none"> – <i>I can't take it anymore or I can't cope.</i> – <i>What's the point?</i> – <i>I'm going to off myself.</i> – <i>I'm sitting in my car and I just don't know what to do anymore.</i> • Explore invitations – respond in ways that clarify and address the suicide risk. Ask: <ul style="list-style-type: none"> – <i>Do you have thoughts of suicide/are you thinking of killing yourself?</i> – <i>It sounds like you're very upset. If yes I'm concerned and do take this seriously.</i> <p>Note: you can't put ideas into their heads by asking. However, you should avoid responding in ways that might be perceived as being authoritative or unsympathetic. You should also try to calm the complainant down.</p> • Listen – try to understand why they want to commit suicide – the reasons for dying, the reasons for living. There is usually some hesitation once they start speaking about it. • Review – the risk factors and take comprehensive notes: <ul style="list-style-type: none"> – <i>How? When? Where are you?</i> – <i>Is there anyone else with you?</i> – <i>How are you going to do it?</i>

Complainant conduct	Suggested strategies
<p>Makes threats of suicide or self-harm (cont.)</p>	<ul style="list-style-type: none"> • Disable their plan – this might involve telling them that a Mental Health Team will be asked to go and check up on them. • Make a safe plan – get a commitment from them – eg that they will make an appointment with their GP right away etc. • Remain on the phone and seek assistance – While on the phone alert those around you/your supervisor about the complainant's threats so that they can take steps to obtain appropriate assistance for the caller – eg getting a local Mental Health Team to go to their location. Try to keep the caller on the phone until they arrive. Do not hang up. <p>If the caller does hang up the call do not hang up the call. The caller's location may be capable of being traced so that a Mental Health Team or the Police can be sent to that location to assist them. Also, immediately discuss the situation with a supervisor to decide on the appropriate course of action in the circumstances.</p> <p>Note: This brief summary doesn't constitute training. All staff should be appropriately trained on how to deal with threats of self-harm and harm to others – for example see www.livingworks.org.au.</p>
<p style="text-align: center;">Extreme risk</p> <p>Aggressive, abusive, harassing or otherwise confronting behaviour during home visits.</p>	<ul style="list-style-type: none"> • If you are subjected to harassment or aggression, you should leave the complainant's home immediately. • If you are physically attacked, press your duress alarm immediately if possible. You are also entitled to use such force as is reasonable to defend yourself. • Contact police immediately on leaving the premises and follow appropriate security procedures. <p>Otherwise you may follow the following guidelines from the Department of Human Services (Vic).²³ Make sure that at all times you:</p> <ul style="list-style-type: none"> • Respect the complainant's wishes – for example, in terms of taking off shoes before entering the home etc. • Continually assess your surroundings while conducting the interview. • Observe the exits in the house and stay close to exits in rooms. • Do not allow yourself to be blocked or locked in. • Sit in a position that allows easy access to the front door. • Interview the complainant in the closest suitable room to the front door. • Avoid the kitchen (potential weapons) and bedrooms (personal space, firearms). • Scan the environment for dangerous items or drug paraphernalia. • Face the complainant during the interview. • Attempt to monitor what the complainant is doing at all times. • Stay alert to anything out of the ordinary. • Monitor the presence of threatening pets and request they be secured in another area of the premises if you feel unsafe. <p>See: <i>Staff safety in the workplace: Guidelines for the protection and management of occupational violence for Victorian Child Protection and community – based Juvenile Justice staff (2005)</i>.</p>

²³ Department of Human Services (Vic), *Staff safety in the workplace*, pp.17. (See also footnote 15 (p.29) for additional copyright information.)

Complainant conduct	Suggested strategies
<p data-bbox="245 219 411 248">Extreme risk</p> <p data-bbox="164 271 493 367">Threats to damage property, including bomb threats –overt or covert.</p>	<ul data-bbox="523 219 1385 913" style="list-style-type: none"> • Make the threat overt by naming it. • Take comprehensive notes about the threatened action. • Let the complainant finish their sentences without interruption. • Try to keep them talking and obtain as much information as possible, including: <ul data-bbox="560 439 1326 775" style="list-style-type: none"> – When the bomb will explode/action take place – What the bomb looks like – Where the bomb is located/where will it happen – What kind of bomb it is/what are they going to do – Why the bomb was placed there/why do they want to do it – Who their intended target is, if any – The complainant’s personal details (their name, where they are located etc.). • Note the exact time of the call and its duration. • Do not hang up the phone if the complainant terminates the call. • Immediately report the threat to a relevant supervisor or security officer. <p data-bbox="523 927 1385 956">If the bomb threat is believed to be genuine, the supervisor should:</p> <ul data-bbox="523 976 1374 1346" style="list-style-type: none"> • Inform a designated senior manager or security officer, any security committee and the head of building security so appropriate action can be taken – for example, contacting the police or an evacuation. • Monitor the staff member involved, especially if support options like debriefing or counselling have not been used. • Liaise with the relevant senior manager/security officer who is responsible for making decisions about support services to determine whether counselling and/or an operational debrief is needed. • Make sure the staff member has completed a bomb threat checklist within 24 hours of receiving the phone call, if possible.
<p data-bbox="245 1373 411 1402">Extreme risk</p> <p data-bbox="164 1424 456 1485">Threats with a weapon face-to-face.</p> <p data-bbox="164 1507 485 1637">For example – producing a weapon or statements that the person is in possession of a weapon.</p>	<ul data-bbox="523 1373 1382 2067" style="list-style-type: none"> • Avoid doing anything that might incite the complainant – do not try to be a hero. • Remain calm and assess the situation. • Activate the duress alarm or call for help, if it is safe to do so. • Obey the complainant’s instructions, but only do what you’re told and nothing more – do not volunteer any information. • Move slowly and avoid eye contact. • Advise the complainant of any movements you may have to make which could appear sudden or unexpected, such as opening a drawer. • Do not invade their personal space. • Keep your hands in view. • If required, contact a first aid officer to provide first aid to staff and/or others as soon as is safe for them to do so. • Once the threat is over, fill out a security incident form and direct it to the appropriate supervisor/senior manager. • Seek support either through formal or informal debriefing. See Chapter 16 – Managing stress (Debriefing) (page 93).

Complainant conduct	Suggested strategies
<p data-bbox="284 219 448 248">Extreme risk</p> <p data-bbox="201 271 496 333">Threats with a weapon face-to-face (cont.)</p>	<p data-bbox="560 219 1409 315">Senior staff responding to the duress alarm should try to isolate the incident by evacuating the area and preventing others from entering it – for example, stand by the lifts or ask building management to close off the lifts to the floor.</p> <p data-bbox="560 331 1425 360">The most senior staff member present, or the office security adviser, should:</p> <ul data-bbox="560 383 1430 651" style="list-style-type: none"> <li data-bbox="560 383 1166 412">• override the duress alarm, if it has been activated <li data-bbox="560 427 1430 456">• ring 000 for urgent assistance or check that the police have been called <li data-bbox="560 472 1353 539">• if it is safe to do so, ensure communication is maintained with the aggressor until the police arrive. <li data-bbox="560 555 1414 651">• Liaise with the relevant senior manager/security officer who is responsible for making decisions about support services to determine whether counselling and/or an operational debrief is needed.
<p data-bbox="284 674 448 703">Extreme risk</p> <p data-bbox="201 725 453 788">Stalking behaviour online or in person.</p>	<p data-bbox="560 674 1214 703">Stalking includes a complainant for no justifiable reason:</p> <ul data-bbox="560 719 1418 913" style="list-style-type: none"> <li data-bbox="560 719 1418 786">• following, telephoning, sending messages or otherwise contacting you or another person <li data-bbox="560 801 1310 831">• giving you offensive material or leaving it where you will find it <li data-bbox="560 846 1082 875">• walking or frequently being in your vicinity <li data-bbox="560 891 1409 913">• approaching your home, place of work or any place that you frequent. <p data-bbox="560 929 1414 1025">If you suspect you are being stalked, you should immediately report it to your supervisor or relevant senior manager. Together you can discuss the possibility and appropriateness of:</p> <ul data-bbox="560 1041 1422 1189" style="list-style-type: none"> <li data-bbox="560 1041 847 1070">• getting escorts home <li data-bbox="560 1086 799 1115">• contacting police <li data-bbox="560 1131 1422 1189">• obtaining a legal order – such as an apprehended violence order or an order for trespass.

Table 15 – Scripted responses to statements and conduct associated with unreasonable behaviours

Statement or conduct	Possible responses
F#\$\$! F#\$\$%*! F#\$\$! S@*! – that is part of their normal communication style or a consequence of being distressed.	<ul style="list-style-type: none"> • <i>I want to hear your side of the story. Please stick to the facts to help me understand what happened.</i> • <i>I can hear/see that you're upset/angry. However, I'm uncomfortable with you swearing. Please stop swearing.</i> • <i>[Mr/Ms/name] I'll try to do what I can to resolve this situation, but can you please avoid using swear words. They are distracting us from ...</i> • <i>I'll have to end this conversation if you don't stop using swear words.</i> • <i>I've asked you at least [number of times] to stop using swear words. I'm going to end the call here and may have another officer call you back.</i>
Are you people stupid or something? or Shove it up your a**.	<ul style="list-style-type: none"> • <i>I'm willing to help you with ..., provided that you stop... If it continues I'm going to end this conversation. It's up to you, but I need your agreement now before we continue.</i> • <i>I'm happy to talk to you about this issue, but not while you're yelling at me/but I won't accept you calling me...</i> • <i>I hear that you're upset/angry, which is making it difficult for us to focus on the task at hand. Perhaps I should call you back in 5 minutes? (make sure to call them back as promised)</i> • <i>It's quite difficult for us to focus on the issues that we need to when you're [name behaviour]. I'm happy to continue the conversation with you, but you will have to stop [name behaviour]. Otherwise, I'll have to hang up and call you back in 5 minutes.</i> • <i>I understand that your complaint is important to you and that you're disappointed with the decision that I've made/what I'm telling you. However, making personal attacks towards me is not productive. I'll have to end this conversation if this continues.</i> • <i>I'm sorry we weren't able to do what you wanted us to do/had hoped we could do. The fact is ...</i> • <i>Did you call me a [#\$\$]? I can't talk to you if you're going to call me that. I'll end this call now and when you feel you're able to speak to me politely/in more moderate language, you can call me back.</i> <p>Note: only repeat the swear word if you feel comfortable repeating them and/or will not escalate the conversation.</p> <ul style="list-style-type: none"> • <i>(After warning) – It seems like you've made your choice, so I'm ending this conversation. If and when you're willing to talk without negative remarks, I'm willing to help. But right now, this conversation is over.</i> • <i>I warned you that I would end this call if you continued to speak to me like this. I'm now ending the call.</i> • <i>I'm going to hang up now. I invite you to call me back when you're ready to use more appropriate language.</i>

Statement or conduct	Possible responses
Aggressive behaviour face to face.	<ul style="list-style-type: none"> • <i>When you get too close to me, I feel trapped. I'd like you to step back or I'm going to have to ask you to leave.</i> • <i>I've said all that I can about this. I'll have to end our interview here to deal with other people who are waiting.</i> • <i>I'm happy to talk with you about your complaint, but not while you're swearing at me. I'll have to end this interview if you don't stop.</i> • <i>I'm a bit thirsty. Would you like me to get you a drink while I get one for myself? (leave the room and seek assistance, if necessary or just take a short time out).</i> • <i>It's clear that you're upset/angry ...</i> • <i>It's quite difficult for us to focus on the issues that we need to when you're [state conduct]. I'm happy to continue with the interview so long as you stop...</i> • <i>I'm afraid I have to ask you to leave now. If you've any outstanding concerns you can put them in writing.</i> • <i>I'm going to leave the room now. You can call me when you're ready to use more appropriate language.</i>
Escalated behaviour in the presence of others.	<ul style="list-style-type: none"> • <i>I'm sure you prefer that your privacy is protected so let's go to the office and we can continue there.</i> • <i>That sounds like very personal information you're telling me. This isn't a private place and I think it would be better if we talked about this in the next room.</i> • <i>Why don't we go and sit down in ...room where we can discuss this in more detail and I can get my ... file?</i> • <i>So what I hear you saying is that you're upset/frustrated/ angry about Why don't we go into the next room and you can tell me more about that feeling and we can see what we can do about it?</i> • <i>There's a lot of background noise here, perhaps we should go into another room and talk more privately? If the complainant agrees take them to the room. If you think you may need support, you might say: <i>If you'd like to take a seat, I'm sure we can wrap this up quickly. Let me just go and get your file/other object and I will be right back (go and get support).</i></i>
Threats	<ul style="list-style-type: none"> • <i>When you say...it sounds like you're threatening to.... Is that what you mean?</i> • <i>It seems to me you're saying that you're going to do something to hurt me/other person. Is this correct?</i> • <i>So what I hear you saying is that you're going to ...?</i> • <i>Did you just say you were going to follow me home and hurt me and my family?</i> • <i>If this is what you said, I'll have to report your threat to my supervisor. I may also have to report it to the police (or refer to relevant part of your organisation's risk management protocol). Go on to report it immediately.</i>

Statement or conduct	Possible responses
I'm going to come over there and...	<ul style="list-style-type: none"> • <i>It seems to me that you're saying you'll do something to damage our offices. Is this correct?</i> • <i>If this is correct, I'll have to report your threat to my supervisor. It may also have to be reported to the police.</i> • <i>So what I hear you saying is that you're going to ...?</i> • <i>Did you just say you were going to throw a brick through our door?</i> • <i>If this is what you said, I'll have to end this phone call/interview right now and report your threat to my supervisor. We'll also have to call the police (or refer to relevant part of your organisation's risk management protocol). Go on to report the threat immediately.</i>
I'm not leaving. You'll have to carry me out of here.	<ul style="list-style-type: none"> • <i>I'm not going to force you to leave. It's really up to you what happens next. I'm going to leave and if you want to stay here a little while to think, then that's fine. But if you aren't gone in twenty minutes, we'll have to contact security/the police to escort you out of the office. It's up to you.</i>
Inappropriate online conduct.	<ul style="list-style-type: none"> • <i>We can't stop you from posting something online. However, you should be aware that if we are alerted to any online content that either defames, harasses, intimidates or threatens any officer at this organisation or the organisation as a whole, then we may take legal action through the police and/or the courts.</i> • <i>I should warn you that our office takes such conduct seriously and will take legal action if necessary.</i> • <i>We treat inappropriate online behaviour the same way we do inappropriate behaviour generally. If it requires legal action, then we'll do that.</i>
Recording the interview/ phone call.	<ul style="list-style-type: none"> • <i>Are you using a recording device? If you are, you should know that ... legislation/Act requires that you have my permission to record me. I don't consent to you doing this.</i> • <i>Are you using a recording device? If you are, I'll have to terminate this 'phone call/interview and will send ... in writing instead. I don't agree to being recorded.</i> • <i>You should know that if you are recording me you are violating my rights to privacy and confidentiality...</i> • <i>As you are recording this discussion, I'll have to terminate this phone call/interview here. Goodbye.</i>

Chapter 14 – Assessing risks

Assessing the risks posed by a complainant’s behaviour

An important part of deciding how you will respond to a UCC incident is the level of risk associated with that incident – either for yourself, the complainant or third parties.

All UCC incidents carry risks. While some incidents carry lower and more acceptable levels of risk, others pose significant and unacceptable levels of risk and warrant urgent action, including at the management level.

The following risk assessment matrix has been developed to help you determine whether a complainant’s conduct poses an acceptable or unacceptable level of risk, as well as and the appropriate response to that risk (and by whom). The risk assessment matrix is based on a rating system from ‘low risk’ to ‘extremely high risk’. As the seriousness of the complainant’s conduct rises so will its rating, as well as the response needed to deal with it.

Note – Although the matrices below will be relevant throughout the complaints process, using them when the warning signs of UCC first become apparent will allow you/your organisation to take a swift and decisive response and apply the strategies when they can best minimise identified risks. Also the matrices will be particularly relevant when dealing with the types of behaviours listed in Table 14 – Strategies for managing unreasonable behaviours (page 77). It has been colour coded to illustrate how the risk assessment rating system can be applied.

Table 16 – Risk assessment matrix

Likelihood	Seriousness			
	Very serious May result in death or serious injury.	Serious May result in minor injury, major property damage, or have a significant impact on time and resources.	Moderate Intimidation, threats or abuse (face to face) – resulting in stress/fear, property damage, or measurable impact on time and resources.	Minor Verbal threats or abuse (over the phone), resulting in some degree of stress experienced by staff, possible property damage and impact on time and resources.
Almost certain Most likely to occur immediately or in a short period of time. Has happened in the past or happens frequently.	Extremely high risk	High risk	Medium risk	Medium risk
Likely Quite likely to occur. Has happened in the past.	Extremely high risk	High risk	Medium risk	Medium risk
Possible May occur – no immediate threat of harm.	Extremely high risk	High risk	Medium risk	Low risk
Unlikely Unlikely to occur – is a ‘one off’ incident.	High risk	Medium risk	Low risk	Low risk

Table 17 – Level of action required based on level of risk

Level of risk (based on assessment in Table 16)	Required action/response
Extremely high risk	<p>Conduct falling under this category poses an unacceptable level of risk. It is likely to include things like physical violence, threats with a weapon, bomb threats, stalking, etc.</p> <p>You should take immediate and urgent action to eliminate or mitigate the risks posed by the behaviour.</p> <p>You should also immediately notify your supervisor and/or nominated senior manager and make appropriate records of the incident.</p> <p>Management action is required in these situations.</p>
High risk	<p>Conduct falling under this category poses a serious level of risk. It is likely to include things like confronting behaviour during face-to-face interviews and threats of self-harm and suicide.</p> <p>You should take immediate and urgent action to mitigate or eliminate the risks posed by the behaviour.</p> <p>You should also immediately notify your supervisor and/or nominated senior manager and make appropriate records of the incident.</p> <p>Management action is required in these situations.</p>
Medium risk	<p>Conduct falling under this category poses some level of risk. It is likely to include things like aggression, targeted threats or harassing phone calls, and coming to your offices while under the influence of drugs or alcohol.</p> <p>You should take reasonable steps to try to mitigate or eliminate the risks posed by the behaviour.</p> <p>You should also notify you supervisor and/or nominated senior manager and make appropriate records of the incident.</p>
Low risk	<p>Conduct under this category poses a minimal (acceptable) level of risk. It is likely to include things like swearing or confrontational language in written communications.</p> <p>Although management action may not be needed in these circumstances, you should take steps to manage or reduce any risks posed by the behaviour by using the frontline strategies provided in Part 5 – Responding to and managing UCC (starting on page 37). You should also make a record of the conduct involved so that recurrent behaviour can be promptly identified, monitored and dealt with.</p>

See Chapter 15 – Recording and reporting incidents (page 92).

A risk assessment worksheet is also provided in Appendix 6. It is designed to help you work through incidents involving UCC to decide on the most appropriate response. It can also be used to draft a plan with your supervisor when deciding on a response to a particular UCC incident. See Chapter 17 – Management roles and responsibilities (page 98).

PART 6

Post incident issues and
responsibilities

Chapter 15 – Recording and reporting UCC incidents

The importance of record keeping

Managing UCC will only be effective if you keep accurate and contemporaneous records of your interactions with complainants. Good record keeping will ensure that all incidents of UCC (and UCC trends) are promptly identified and dealt with. It can also ensure transparency and accountability in any actions taken or decisions made to modify or restrict complainant's contact as a consequence of their conduct. As a result it is essential for organisations and complaint handling staff to be clear about how and where interactions with complainants will be recorded.



As a general rule, records should accurately reflect things as they transpire with a complainant and should include the following details:

- the name of the complainant
- your name
- the location of the interaction (if done face-to-face) as well as details of who was present
- start and finish time of the interaction and the date
- a summary of the issues discussed – including questions asked, advice given, verbatim records of any threats or abusive words (if applicable) and any agreed outcomes
- any other relevant details.

Records should never include statements of opinion about a complainant or speculate about what they may be thinking or doing. They should only include statements of fact about what was said and what you observed.

Also, all serious incidents involving personal abuse, harassment, threats and actual violence must be recorded. Correspondence containing inappropriate or offensive content should be copied and placed on the complainant's paper and/or electronic file and should be reported to the relevant security officer or senior manager.

Where possible, and if it will not lead to conflict with the complainant, you may also try to get the complainant to sign and approve the accuracy of your record. This can be particularly useful for face-to-face interviews where they committed to taking a particular action – so the signed record can be referred to later on, if necessary.

Reporting incidents of UCC

Reporting all UCC incidents to appropriate managers and supervisors is also important to effectively managing of such incidents – both individually and across the board. Reporting ensures that incidents are dealt with appropriately and in a timely manner to minimise any actual or potential risks for yourself, your colleagues, third parties and the complainant. Reporting can be done verbally or in writing, though you should consult your organisation's relevant protocols on this issue.

See Unreasonable Complainant Conduct Model Policy – available at: www.ombo.nsw.gov.au.

Monitoring further UCC incidents

Also, once a complainant's contact has been modified or restricted, all staff members are responsible for observing and monitoring their conduct during interactions with the organisation – including noting any attempts by the complainant to circumvent the restrictions that have been imposed on their access. Any unauthorised behaviour should be acted on immediately by enforcing the restriction and notifying the nominated senior officer who will decide on the appropriate course of action in the situation.

Chapter 16 – Managing stress

UCC and critical incident stress

Dealing with complainants, in particular those who engage in UCC, can be extremely stressful – and at times distressing or frightening. It is perfectly normal to get upset or experience stress when dealing with difficult situations, particularly following a critical incident. The approach advocated in this manual, when systematically applied, can go a long way towards reducing this stress and fear.

A critical incident is an event that disrupts your office's normal functions. It is an incident that you, your colleagues or staff perceive as being a significant personal or professional danger or risk. Some examples of major critical incidents are:

- threats of harm to self or others
- serious injury
- actual or threatened death
- deprivation of liberty
- severe verbal aggression
- bomb or hostage threats.

In a complaint handling context, we are more likely to experience minor critical incidents, such as abusive phone calls – though more extreme situations do occur on occasion, as this manual illustrates.



Recognising the signs of stress

Everyone reacts to stressful situations differently and our reactions to stress can vary considerably. For example, some of us may be more susceptible to critical incident stress than others because of events in our personal lives, our personality type or our perception of an incident with a complainant. Some may react to a stressful incident immediately, while others may react sometime later – well after the incident has passed.

Also for some of us stress can be cumulative, often resulting in a strong reaction to a series of minor events. And in some cases, we can even be affected by a critical incident that we have not experienced firsthand – because we perceive the incident to be critical to us.

Because of these different possibilities in how we can respond to stress, it can be difficult to identify whether a colleague or a staff member is suffering from stress/or will experience stress after a critical incident.

As a result, the following list of the more common signs of stress experienced in the workplace, including following a critical incident may help you recognise stress in your staff, colleagues and yourself and take appropriate steps to manage that stress:

Physical signs

- shock
- nausea
- fainting immediately after the event
- chest pains
- headaches
- muscle soreness
- fatigue
- gastrointestinal problems
- elevated heart rate
- elevated blood pressure

Emotional responses

- anger
- fear
- depression
- feelings of isolation
- crying or feeling tearful
- feeling powerless

Intellectual signs

- difficulty thinking clearly
- difficulty making decisions
- difficulty concentrating on the job

Behavioural changes

- increased irritability
- withdrawing from people
- insomnia
- nightmares
- resorting to alcohol more frequently or in greater quantities
- interpersonal problems
- social withdrawal
- anxiety
- depression

Some common myths about critical incident stress are:

- If staff members are experiencing critical incident stress, they are not competent or not suited for the job.
- Experiencing critical incident stress is a sign of psychological weakness.
- Talking about the incident will only make the stress worse.

Self-care strategies to manage stress²⁴

Outside of any support services provided by your organisation, you can take the following proactive steps, developed by the the Queensland Ombudsman, to manage your own stress levels and maintain your mental and physical wellbeing. These personal care strategies include the following:

- Be aware of feelings of self-blame if things do not go to plan.
- Be proactive in managing feelings of frustration, anger or resentment.
- Set manageable goals, break them down into simple steps and identify priorities.
- Rather than focusing on what you cannot accomplish, think positively and focus on the things you can – and reward yourself when goals are achieved.
- Don't be afraid to ask for help if you need it and have the ability to say no without feeling guilty.
- Debrief with colleagues, a supervisor, manager or an external professional.
- Draw on your team/colleagues for support and to work through issues.
- Build a good working relationship with your direct supervisor and other senior staff and regularly report to them. Communicate openly and seek support.
- Ensure you take lunch breaks, annual leave and flexi-days and that you do not regularly take work home to complete.
- Make use of employee assistance programs and seek professional help, if required.
- Use humour in the workplace to help lighten emotional experiences and provide a broader perspective of a situation.
- Be part of social networks at work and at home for support and satisfying relationships.
- Take part in activities that you enjoy in your free time.
- Take part in regular physical activity to help you manage stress.
- Lead a healthy lifestyle.
- Trial relaxation methods to see what works for you.

Effects of critical incident stress on the workplace

Critical incident stress can significantly impact on the wider work environment and can affect team dynamics and functioning. Work effectiveness and productivity can become impaired and there may be a higher than usual rate of absenteeism or a sudden rise in staff turnover rates. Levels of morale may fall and group problem solving abilities may become compromised. Mistrust towards complainants may also take hold. For these reasons supervisors and senior managers should look for signs of stress in their staff and ensure that appropriate support services like debriefing and counselling is made available to them. This will also be important to meeting duty of care and WH&S obligations towards their staff.

Debriefing

Many of us 'debrief' after a difficult interaction with a complainant without realising that we are doing it. For example, after an abusive phone call we might turn to our neighbour(s) to tell them about the horrible things that the complainant said to us and seek reassurance that the complainant – not us – were being unreasonable. Doing this helps us to off-load the stress (and sometimes anger) that we feel when dealing with a challenging situation and gives us an opportunity to say all the things that we often want to (but cannot) say to a complainant – as professional complaint handlers.



²⁴ Queensland Ombudsman 2007, 'Manage your stress in the hotseat', *Frontline Perspective*, Issue no 2, August 2007 <http://www.ombudsman.qld.gov.au/Newsletters/FPIssue2August07/TipsandTraps.aspx>.

Debriefing is an important part of managing our stress levels. As the example above suggests, it is usually a voluntary process, with the exception of operational debriefs, and can occur in a number of different ways:

- **Professional debrief** – is provided by an external professional service on an 'as needs' basis.
- **Internal management debrief** – is provided by a supervisor or senior manager. Any supervisors or senior managers who provide debriefing to staff should be trained in debriefing techniques.
- **Informal peer debrief** – debriefing after a minor incident can be provided by peers. It is an immediate opportunity to express your thoughts and feelings and receive appropriate support from your peers, for example, over a coffee, a walk or a short break. If this method is used, management needs to make it clear that it is a legitimate component of the work of each staff member to assist a colleague to debrief if they are asked for this assistance.
- **Informal group debrief** – frontline staff meet together to discuss recent or a particular difficult incident.
- **Operational debrief** – this is to review operational issues following an incident. It is intended to deal with people's personal issues and usually occurs after people have worked through those issues via alternative means. What happened and whether things could have happened differently, or better, should be considered.

Key components of debriefing

Some key components and objectives of debriefing include the following:

- It aims to assist recovery from critical incident stress and avoid future problems such as post-traumatic stress syndrome.
- It generally needs to occur 24 to 72 hours after an incident, depending on the readiness of the affected staff member(s).
- Some people may display a delayed reaction, in which case, debriefing may occur weeks or even months after the event.
- Formal and operational sessions are always private and discussions are confidential.
- Participation is voluntary – although staff should be advised of the opportunity to debrief.
- Follow-up sessions may be necessary.
- It should also include an educational component about stress-related symptoms that may be experienced and how to manage them.
- The affected staff member(s) may need support for a period beyond debriefing – such as a lighter workload for a while, changed duties, part-time work or leave.

A debriefing report should be prepared at the end of each session. This is a confidential document that relates to the organisation's operation and should be kept separate from the affected staff member's personnel file.

Employee Assistance Programs and counselling services

Sometimes you may feel more comfortable talking to a person outside the office – to someone other than a colleague or senior manager. You may just want time to work through an incident, particularly if you are experiencing other stressful life events, or may need ongoing or additional support through a confidential counselling service like Employee Assistance Programs (EAP). EAP is a work-based intervention program designed to improve the emotional, mental and general psychological wellbeing of all employees and their immediate family members. It aims to provide preventive and proactive interventions for the early detection, identification and/or resolution of both work and personal problems that may adversely affect performance and wellbeing. These problems and issues may include health, trauma, substance abuse, depression, anxiety and psychiatric disorders, communication problems and coping with change.

Most public sector organisations will have information about EAP readily available. If not, you should consider asking your supervisor or senior manager about the availability of these services.

PART 7

Supervisors and
senior managers

Chapter 17 – Management roles and responsibilities

Understanding the role of supervision

As mentioned throughout this manual when it comes to UCC, supporting and protecting staff should be your key priority as a supervisor or senior manager. As a supervisor you need to make it clear to your staff that they have your full support in dealing with UCC, as well as using the strategies provided in this manual. This support will enable them to make confident and clear decisions when responding to and managing UCC.

When it becomes apparent that UCC is a factor in a particular case – and it seems that it will be ongoing, will use up an unreasonable amount of time and resources, and/or may escalate – it will be essential for you (as a supervisor) to discuss the matter with the staff member concerned. With them you should:

- make a plan about how the case and the complainant will be managed
- stick to the plan as closely as possible without being inflexible.

You should never leave a case officer to suffer in silence.

When deciding on a plan, it is important that you do not limit your assessment to the complainant's conduct. You should look to the conduct of the relevant case officer(s), your own conduct (if relevant), as well as your organisation's processes and procedures to determine if they have contributed to the complainant's conduct in any way. If so, you should ensure that appropriate steps are taken to immediately rectify the issue with the complainant. See Chapter 8 – Apologies (page 35).

Also, as a supervisor, you should ensure that as far as the complainant is concerned, supervision happens behind the scenes. You should avoid becoming visibly involved in a matter, except if it involves a complaint about a member of your staff, or a member of your staff asks you to be involved – eg because they think you can help to defuse the situation. Outside of these circumstances complaints should not be escalated to you simply because a complainant has demanded it, especially if the relevant staff member is capable of handling the situation. Complaints and phone calls that are escalated in this way tend to give complainants the perception that they can control how their issue is dealt with (and by whom) and do very little to manage their conduct.



Senior management responsibilities

Developing and implementing strategies to manage complainant aggression and violence is a management responsibility.

Under work health and safety legislation in each jurisdiction employers have a duty to take all reasonably practicable steps to protect the health and safety of their employees while they are at work.²⁵ This duty requires employers to take proactive steps to identify hazards with the potential to affect employee health and safety and implement measures to eliminate or control those hazards.²⁶ It also includes reducing their risk of exposure to violent and aggressive complainant conduct as well as ensuring they have the training and skills they require to deal with complainant aggression. Employers must also have appropriate policies and procedures in place for dealing with risks and should involve their staff in the development and review of these policies.²⁷

To meet these obligations (and for the approach in this manual to be effective) as a senior manager you should take steps to ensure that you create a safe and supportive workplace environment and culture for your staff. You should also ensure that you have systems in place for identifying, assessing and managing UCC related risks and should consider using environmental design strategies to maximise the safety of your staff members and other visitors to your offices.

²⁵ See *Work Health and Safety Act 2011* (Cth), *Work Health and Safety Act 2011* (ACT), *Work Health and Safety Act 2011* (NSW), *Workplace Health and Safety (National Uniform Legislation) Act 2011* (NT), *Workplace Health and Safety Act 2011* (QLD), *Work Health and Safety Bill 2011*, *Workplace Health and Safety Act 1995* (TAS), *Occupational Health and Safety Act 2004* (VIC), *Occupational Safety and Health Act 1984* (WA).

²⁶ Comcare 2010, *Preventing and managing bullying at work: A guide for employers*, OHS 65, Canberra, pp.11.

²⁷ Comcare 2009, *Prevention and management of customer aggression*, OHS 33, Canberra, pp.9.

Safe and supportive workplace culture

A safe and supportive workplace culture is one where:

- Staff safety is a foremost consideration. You must demonstrate a zero tolerance approach to violence against your staff.
- Both staff and senior managers openly and actively recognise the realities of dealing with UCC, in particular violent and aggressive complainants.²⁸
- The stressful nature of dealing with UCC and its impacts are recognised and staff are encouraged to learn and practice self-care techniques.²⁹ See Chapter 16 – Managing stress (page 93).
- Staff have access to support mechanisms such as EAP counselling and trauma services and each UCC incident is treated individually in terms of assessing staff support needs.
- A UCC policy and procedure is implemented and communicated across your organisation using various methods (eg intranet and internal newsletters) to ensure that staff are aware of them. If possible, staff at various levels of your organisation should be involved in the development of this document(s). See: Unreasonable Complainant Conduct Model Policy – available at: www.ombo.nsw.gov.au.
- All new and existing staff are trained to deal with UCC and the strategies that they are authorised to use to manage it.
- UCC related issues (including security procedures) are regularly discussed and staff feel comfortable raising any doubts, fears, uncertainties or concerns they may have about dealing with UCC.³⁰
- UCC incidents are used as learning opportunities that inform your organisation's policies, procedures and practices for dealing with UCC – as well as identifying new potential risks.
- It is recognised that when one staff member is involved in a UCC incident it can impact on their entire team and possibly even the entire office. As a result, mechanisms should be in place for debriefing and providing counselling services for all staff if needed.³¹

In addition, you should ensure that:

- There is a centralised case management system for recording information about complainants and incidents of UCC.
- Appropriate risk management processes are in place for identifying, assessing, controlling and reviewing actual and potential risks associated with UCC.
- Ground rules are drafted and made available to complainants. See also: Unreasonable Complainant Conduct Model Policy (Appendix 1 – Mutual Rights and Responsibilities of the Parties to a Complaint). It is available at: www.ombo.nsw.gov.au.
- The police are contacted in appropriate cases and that formal reporting requirements are met by frontline staff – critical incident reporting, appropriate record keeping, etc.³² See Chapter 15 – Recording and reporting UCC incidents (page 92).
- Staff use of the strategies in this manual is monitored and reviewed to ensure that they do not conflict with your internal protocols and procedures.
- There is overall consistency in how UCC is dealt with in your organisation.

Systems for identifying, assessing and managing UCC related risks

When the approach in this manual is systematically applied, it provides a robust risk management approach that goes some way to ensuring that you meet your WH&S obligations towards your staff – in relation to UCC. However, you should also ensure that in addition to anything in this manual, risk management occurs on an on-going basis within your organisation to identify, assess, control and review current and potential UCC related risks. Figure 2 below demonstrates how this process might be undertaken.

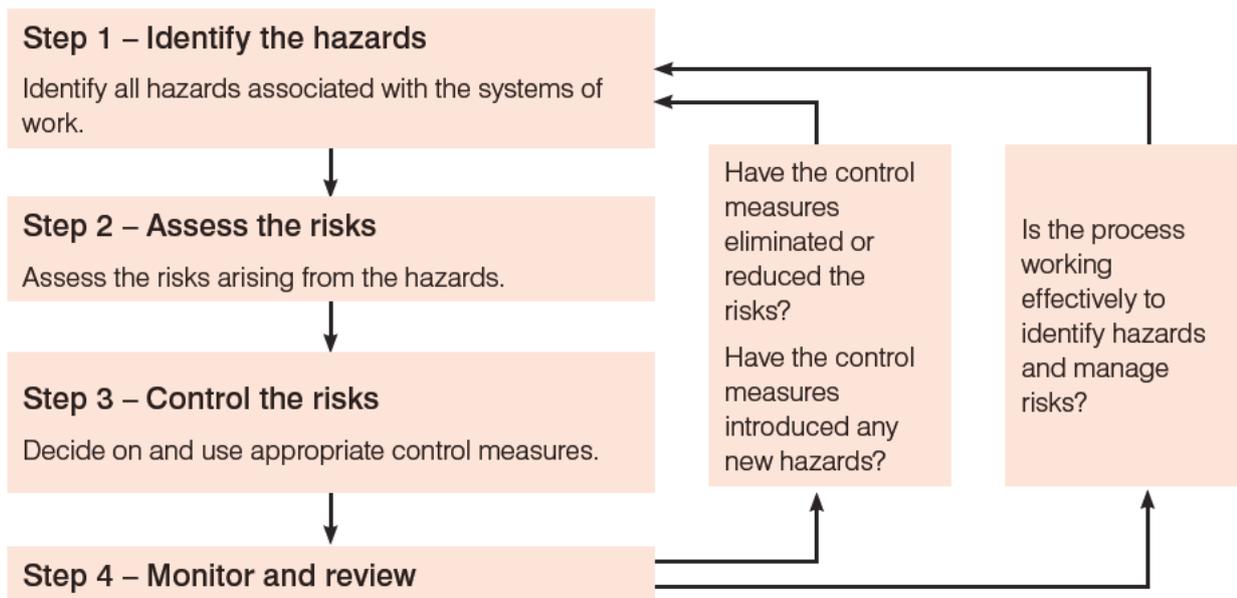
²⁸ Department of Human Services (Vic), *Staff safety in the workplace*, pp. 23. (See also footnote 15 (p.29) for additional copyright information.)

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

Figure 2 – Risk management process³³

1. Identify the nature of the potential hazards

This includes assessing the workplace environment for any physical hazards that may be used by the complainant to cause harm to themselves or others. It also includes going through any records you have of incidents of UCC or workplace violence. This might reveal whether there are problem areas that need to be addressed, or if any patterns are emerging.

2. Assess the risks

This includes making a judgment about the seriousness of each hazard, and deciding which hazard requires the most urgent attention. It involves developing a list and ranking the hazards from highest to lowest priority based on the level of risk and regularly reviewing and updating the list as needed. It also requires continued monitoring of your workplace environment and assessing off-site visits to make sure that any potential new hazards are immediately identified – staff participation will be important in this regard.

3. Control the risks

This includes addressing the hazards and potential risks that have been identified. The primary goal will be to totally remove the risks. For example, if the risk involves a complainant throwing things like staplers around the interview room, then staplers should be removed from all interview rooms.

If it is not possible to completely remove a risk, you may manage it to the extent possible. For example, you might consider the design layout of your office to make interview rooms more visible to all staff members in the immediate vicinity – eg installing large or floor to ceiling windows in interview rooms. Alternatively, you might consider changing the ways certain jobs are done or have face-to-face interviews conducted by at least two staff members at a time.

Whatever your resources are you will find that there are usually a wide range of options for addressing many risks, with little or no expense in some cases. See Appendix 8 – Dealing with internal hazards through environmental design below (page 129).

4. Regularly review the risks

This includes continually monitoring your workplace environment and assessing off-site visits to make sure that any potential new hazards are immediately identified – staff participation will be important in this regard. Where necessary safety procedures may need to be changed and systems may need to evolve to ensure their effectiveness.

For more information on risk assessment processes see also: www.worksafe.vic.gov.au.

For information on how the design/layout of your workplace can help to prevent or minimise the potential risks associated with UCC, see Appendix 8 – Dealing with internal hazards through environmental design (page 129).

³³ Comcare 2005, *Identifying Hazards in the Workplace*, OHS 10, Canberra, pp. 4.

Chapter 18 – Modifying or restricting access to services: A management responsibility

Decisions to modify or restrict access

Decisions to restrict a complainant's access to services should be viewed as the exception rather than the rule.

There are times when the frontline strategies provided in Part 5 – Responding to and managing UCC – will not be effective or appropriate to manage a complainant's conduct. In these situations, it will be important to consider ways to modify or restrict contact with a complainant to protect the health and safety of your staff (or others) as well as ensuring equity and fairness in the distribution of your resources.

Decisions to modify or restrict a complainant's ability to access services are management responsibilities and should always be approved by a CEO (or a senior delegate). They should also be made with the greatest reluctance after careful consideration of factors like the complainant's personal circumstances and, where relevant, the role a case officer or organisation has played in exacerbating the unreasonable conduct.

Modifying or restricting access with alternative service arrangements

'**Alternative service arrangement**' is the common term used to describe the process of modifying or restricting usual service delivery methods to customers and complainants. In the UCC context, alternative service arrangements can be used to modify or restrict the ways in which you and your staff deliver services to a complainant to minimise the impacts and risks posed by their conduct. For example, they can be used to restrict:

Who – a complainant can make contact with within your organisation. A complainant may be limited to dealing with one staff member within your organisation if they have:

- engaged in persistent and otherwise unmanageable forum shopping
- reframed their complaint to get it taken up again
- repeatedly raised minor and/or irrelevant issues with your organisation
- made regular, frequent and unwarranted contact with your organisation.

What/the subject matter – your organisation will respond to. This solution may be used in situations where a complainant has:

- repeatedly raised the same complaint or issues with your organisation and appears to be incapable of letting go of their issues
- reframed their complaint to get it taken up again
- been persistent in wanting your organisation to pursue trivial issues
- made unreasonable and illogical arguments which they insist you should pursue.

When – a complainant can make contact with your organisation. This could include restricting them to a particular time, day or length of time, or curbing the frequency of their contact if they have:

- engaged in persistent and/or lengthy contact with staff when this is not warranted
- been aggressive, threatening or confrontational towards your staff.

Where – a complainant can interact with your staff face-to-face. This could include limiting the locations where contact occurs, for example to a secured facility on your premises, at a local police station, or a community centre. Situations where these strategies might be used include cases where a complainant has engaged in:

- extremely aggressive or confrontational behaviour
- threatening, violent or hostile conduct

How – a complainant can contact your organisation. This could include restricting their contact to writing only, prohibiting access to your premises, only allowing contact to be made through a representative, restricting access to direct staff emails and only allowing access through the organisation’s general email portal, etc. These strategies might be applied in situations where a complainant has:

- engaged in persistent and otherwise unmanageable aggressive, confrontational, threatening or violent conduct
- sent a constant stream of written communications, called or visited your offices when it is not warranted and when they have been asked not to do so.

For more information on possible strategies for modifying or restricting a complainant’s contact/access to services and procedures for doing so, see: Unreasonable Complainant Conduct Model Policy. It is available at: www.ombo.nsw.gov.au.

Withdrawing access to services

In our view, the only situations where an organisation should contemplate withdrawing a complainant’s access to services are in cases where a complainant:

- is consistently abusive, harasses, stalks or intimidates a member of your organisation and/or their family members
- is physically violent and/or causes property damage while on your premises
- makes threats to staff or other members of the public using the services or at the agency’s premises
- produces a weapon or makes bomb threats
- entraps a staff member in their home during a field visit or is otherwise violent during such visits
- engages in conduct that is otherwise unlawful.

In all other circumstances, it is probable that there are other alternative arrangements that can be used and that will be effective in managing a complainant’s conduct.

Even in cases where a complainant exhibits the types of behaviours listed above, consideration should be given to a wide range of issues – not just the complainant’s conduct – such as the complainant’s personal circumstances and the impact that the restriction will have on them and their dependents. For example, if the services provided by your organisation are important or essential to the physical or mental wellbeing of the complainant, it may be preferable to modify the way that services are delivered to the complainant (using the types of alternative service arrangements suggested above) rather than withdrawing or withholding access completely. Alternative and possible solutions in these situations may include having security guards or police present during face-to-face interactions with the complainant, holding interviews at your local police station or other secured facility (either on your premises or elsewhere), or using specially trained staff for interviewing the complainant. You might also consider having relevant materials delivered to the complainant’s home rather than having them collect them from your organisation.

Public interest considerations for withdrawing access to services

We strongly encourage any organisation that is considering withdrawing a complainant’s access to their services, to do so with the following public interest considerations in mind:

- In the absence of very good reasons to the contrary members of the public have a right to access agencies to seek advice, help or the services the agency provides.
- In a democracy people have a right to complain. Criticism and complaints are a legitimate and necessary part of the relationship between agencies and their customers or communities, and may be dynamic forces for improvement within agencies.
- Nobody, no matter how much time and effort is taken up in responding to their complaints or concerns should be unconditionally deprived of the right to raise those concerns and have them addressed.

Chapter 19 – Using legal mechanisms to deal with extreme cases of UCC

Taking legal action

*'Public servants are employed to serve the public. As such, we should be seen to act with tolerance and reasonableness. We should only resort to legal sanctions against our customers as a last resort. Nonetheless, there will be times when such action is appropriate.'*³⁴

As a senior manager you may also come across cases where you consider it to be necessary and appropriate for your organisation to use legal mechanisms to restrict a complainant from your premises and/or to protect specific members of your staff. For example, if a staff member becomes a victim of assault or intimidation or is stalked by a complainant you may legitimately support them to pursue their legal rights including supporting them to obtain an order of protection or apprehended violence order (AVO).³⁵

An AVO is a legal order that is issued by the Local Court under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). It aims to protect people from personal violence, threats, harassment and intimidation by restricting the conduct and movements of their aggressor. An AVO may be effective in managing situations where a staff member requires protection while at work as well as when they are away from the office – eg at their home.

Another legal option that you might consider when dealing with incidents that are confined to your organisational premises and/or incidents that pose a general risk to staff members or visitors at your premises, is the *Inclosed Lands Protection Act 1901* (NSW).³⁶ The Act provides a basis for taking civil and/or criminal action in relation to trespass and empowers owners, occupiers, or people in charge of 'inclosed lands' to require a person (eg a complainant) to leave their premises in certain circumstances.

However, extreme caution must be used when contemplating the use of any legal options to manage UCC. In our view these options are options of last resort and should never be used to deal with a complainant who is merely difficult to manage or who your staff are uncomfortable with. Legal mechanisms should only be considered in situations where one or more members of your staff have a real and genuine fear of harm by a complainant. In all other circumstances, other reasonably available management strategies should be considered and/or attempted in the first instance.

For information on the circumstances when it may be appropriate to support a staff member to obtain an order of protection, see: *Orders to address violence, threats or intimidation and unauthorised entry onto agency premises*. It is available at: www.ombo.nsw.gov.au.

For information on the circumstances when it may be appropriate to use trespass legislation to restrict a complainant from your premises, see: *Applying the provisions of the Inclosed Lands Protection Act 1901* (NSW). It is also available at: www.ombo.nsw.gov.au.

³⁴ Efficiency Unit, Government of Hong Kong Special Administration Region, 2009, *A Guide to Complaints Handling and Public Enquiries*, pp. 23. http://www.eu.gov.hk/english/publication/pub_bp/files/A_Guide_to_Complaints_Handling_and_Public_Enquiries.pdf

³⁵ For more information on the circumstances when public officials can receive ex gratia legal assistance, see: M1999-11 Guidelines for the Provision of ex Gratia Legal Assistance for Ministers, Public Officials and Crown Employees, available at: http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/1999/m1999-11.

³⁶ See also Public Order (*Protection of Persons and Property*) Act 1971 (Cth); *Trespass Act 1987* (NT); *Land Act 1994* (Qld); *Police Act 1892* (WA); *Summary Offences Act 1953* (SA); *Police Offences Act 1935* (Tas); *Summary Offences Act 1966* (Vic); *Enclosed Lands Protection Act 1943* (ACT).

Case study example – Situations where legal action may be required to deal with UCC

provided by the NSW Ombudsman



Mr D complained to our office in February 2009 and again in April 2009, January 2010 and February 2010 about his local council. His complaints generally concerned a local development application and the conduct of the General Manager of his local council.

Although none of our enquiries into Mr D's complaints uncovered any wrongdoing, he persisted in contacting our office about his complaints. In the period between his first formal complaint and his last (in February 2010) Mr D sent over 100 emails to our office and made more than 16 phone contacts with our staff – all about his local council. These emails included numerous copies of media articles about the council and copies of correspondence between him and the council, which were largely irrelevant to the work we had done on his complaint. That same month we blocked Mr D's email access and restricted him to sending correspondence via Australia Post.

Unfortunately, this did not stop Mr D. He repeatedly attempted to circumvent our restrictions by changing his email address on multiple occasions. We dealt with Mr D's conduct by not responding to any of his correspondence and blocking each new email address that he used to contact our office. To date at least 88 of Mr D's emails have been blocked.

We subsequently learned that the council Mr D had complained about had also placed similar restrictions on his email access. This action was taken after the council received more 300 emails from Mr D within a 6 month period. The council was also concerned about the impact that Mr D's conduct was having on their staff and their resources (they had to dedicate one senior staff member two days a week to deal with his matters). In addition the council was concerned about the contents of his emails which were very intrusive and threatening to staff – in particular threatening their jobs. In one incident, Mr D even managed to obtain the personal email address of a staff member at the council (which had not been disclosed to him) and began emailing her on her personal email account.

After several run-ins with members of the council, including the General Manager and the Mayor (and their families), AVOs were issued against Mr D for a period of 5 years by both parties.

In reasoning, the local magistrate who presided over the case made the following observations:

...The complaints relate to... voluminous correspondence both written and electronic which appears to have been sufficient to justify the installation of a duress alarm in [GM's] assistant's office, the back base home security at his own home and blocks on emails being received from the [complainant] to the Council. It is clear that there has been an attempt by [the complainant] to circumvent the processes to ... put himself in the company of [the GM] and [the Mayor] with a view to raising matters of council business...

These contacts have been made not only at the business premises [of the council] but attempts [also at the Mayor's home] and it would seem, attempts to unsettle [the GM] by being in the vicinity of his private residence and making it very clearly conspicuous to [the GM] that [he] was in fact there.

....

I have no doubt, even at the low standard of the civil standard but I would place it even sufficient to satisfy the criminal standard of beyond a reasonable doubt that [the complainant] has engaged in behaviour where he stalks and harasses these two public figures under the guise of legitimately pursuing issues which he says are relevant to council activities. The volume of the contact including in person, by phone and electronically is extraordinary to say the least.

With respect, I have formed the view that he is a person I believe possibly suffers from some form of mental disorder which has manifested itself in the form of persecution of two public figures for his own deluded gratification and to inflict elevated levels of concern not only on those two people directly, but also extending the concern to members of their respective families in the form of disturbing and unsolicited correspondence. Whilst those persons in public office must expect that their activities and performance of their various roles will be subject to the normal levels of scrutiny and review, what [the complainant] purports to do by presuming to be in a position to have the mayor and the general manager of the council respond to his voluminous requests and demands exceeds the broadest interpretation of reasonable accountability levels for public servants.

Chapter 20 – When restricting access is not possible: Using alternative dispute resolution

What if access cannot be restricted or we have contributed to the problem?

In circumstances where your organisation:

- cannot terminate their contact with a complainant
- has considered and/or attempted other reasonable and possible management strategies to manage the dispute, or
- bears some responsibility for causing or exacerbating a complainant's conduct

Alternative dispute resolution ('ADR') may help to resolve a conflict with a complainant and rebuild a relationship with them.

ADR is a term to describe a wide range of different processes that can assist people to settle their disputes and conflicts by means other than litigation. ADR can be facilitative, advisory, determinative or a hybrid of these approaches and can generally be selected to suit a particular conflict or dispute.

When using ADR in a UCC context, it is important to ensure that the ADR process is managed by an independent and impartial third party who can help you to reach a solution that is satisfactory to both parties. Having a third party can minimise the likelihood for negative perceptions and imputations about bias or collusion (by the complainant) and can help settle an escalating dispute.

The complainant should also be encouraged/supported to obtain a support person or representative who can assist them throughout the ADR process – as appropriate.

The pros and cons of ADR in a UCC context

In cases where UCC is an issue, ADR may be beneficial in the following ways:

- It can make the complainant feel that they are being listened to and understood and that their matter is being taken seriously.
- It can allow the complainant to vent their emotions about their complaint or issue.
- It can assist your organisation to obtain information about the complainant's issues, interests and position and help you understand the underlying factors contributing to the ongoing dispute.
- It can give your organisation the opportunity to change the complainant's perceptions/encourage them to consider a different perspective in a non-adversarial setting.
- It can assist your organisation to manage the complainant's expectations about the types of things that can be achieved and the possible/likely outcomes to be achieved – a message that may be better received from a 3rd party than from a member of your staff/organisation.
- It can may be less damaging to your relationship with the complainant, as compared to other alternatives, and/or may bring about a change in that relationship.
- It can potentially identify areas for improvement within your own organisation for example, in your service delivery, policies or procedures.
- It can be more cost and time effective than if you allowed the conflict to continue for years and/or negatively affect members of your staff – eg on productivity levels or staff/team morale, etc.
- It can push the complainant (and your organisation) to focus on the future and on achieving a solution rather than focussing on past conflicts or behaviours.
- It can solve the problem/conflict.

Conversely ADR can be ineffective in a UCC context for the following reasons:

- A complainant who is engaging in UCC may not be willing to participate in the ADR process in good faith. They may be resistant to compromise or unwilling to work towards a solution that is fair for all parties – making a resolution/conclusion unlikely.
- It can be an expensive process, in particular if an independent third party is obtained to facilitate the process.

- It can give a complainant false ideas about the importance of their issue (ie that it is given high level attention because it is valid or 'correct').
- It can be time consuming.

As a result, you will need to assess each case on its own facts to determine whether ADR might be effective in ending an ongoing dispute with a complainant.

That said – even in cases where you determine (at first glance) that ADR will not be a suitable approach, it may be worthwhile to review the case on a periodic basis to assess whether it might subsequently be submitted for ADR – eg if the conflict is ongoing and shows no signs of ending, is likely to lead to a litigation or is significantly affecting your resources, ability to carry out your functions or is affecting members of your staff.

What types of ADR could you use in a UCC context?

Some of the more common ADR strategies that may be used in a UCC context are:

- **Mediation** – mediation is a voluntary process where the parties to a dispute, with the assistance of a neutral third party (the 'mediator'), identify their disputed issues, develop options for resolving those issues, consider alternative options/arguments and endeavour to reach an agreement.

The mediator has no advisory or determinative role in the resolution of the dispute. Their role is to assist the parties to identify their interests, understand alternative viewpoints and arrive at a mutually acceptable solution. The mediator may also assist the parties to draft a mediation agreement.

- **Conciliation** – conciliation is a process where the parties to a dispute identify their disputed issues, develop options for dealing with those issues, consider alternatives and endeavour to reach an agreement – with the assistance of a conciliator.

The conciliator is responsible for managing the conciliation process. They will provide advice on the matters in dispute and/or options for resolution, but will not make a determination. They may also have professional expertise in the subject matter in dispute.

- **Facilitation** – facilitation is a process where the participants (usually a group) identify the problems that they need to solve and the steps they need to take to solve those problems.

Facilitation is done with the assistance of a facilitator. The facilitator does not have an advisory or determinative role in the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

- **Facilitated negotiation** – facilitated negotiation is a process where the parties to a dispute, who have identified the issues they want to negotiate, obtain the assistance of a facilitator to negotiate an outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

- **Conferencing** – conferencing is a series of meetings conducted by a convenor in which the participants and/or their advocates discuss issues in dispute. Conferences are often used by organisations with a regulatory or statutory responsibility and the convenor may provide advice on the issues in dispute or possible options for its resolution.

- **Conflict coaching** – conflict coaching is a voluntary, confidential, forward-focused process in which a trained conflict coach supports and assists the client to understand and improve the way they manage their conflicts and disputes. The coach helps the client to reflect on and identify their goals, explore different ways for reaching those goals, develop practical methods for preventing unnecessary conflict and resolve their dispute. The process also allows the client to enhance their conflict management skills

The coach does not act as an advocate or a representative and does not make any determinations for the client.

Conflict coaching can be particularly useful if the complainant is an internal complainant, is consistently in conflict with others and/or will have an ongoing relationship with your organisation.

For more information on conflict coaching, see: www.cinergycoaching.com/ and also visit the Department of Defence website on: www.defence.gov.au (What are alternative resolutions: What is conflict coaching?).

For more information on alternative dispute resolution, see: <http://www.nadrac.gov.au>.

Chapter 21 – Dealing with misuses of electronic communications, the internet and social media

UCC in e-communications: a growing issue for public organisations and their staff

*'Clearly some people are viewing social media as a bypass to the traditional routes of discussing dissatisfaction with the school.'*³⁷

An emerging issue in UCC that has been raised throughout Stage 2 of the UCC project, in particular during focus group discussions,³⁸ is the growing tendency for certain complainants to use the internet and social media to attack, abuse, harass, vilify and defame the organisations and public officers they are interacting with. In increasing numbers organisations are being confronted with very public and very extreme online incidents involving their complainants and they are struggling to find effective ways to keep pace with and manage these situations.

For example, a recent UK study into online abuse found several instances where teachers had been targeted for abuse by parents and students on websites such as YouTube, Ratemyteacher.com and Facebook – where specific Facebook groups were being created to target teachers. One teacher who was targeted and victimised said of her experience: 'I eventually had a breakdown in the summer holiday needing an emergency doctor to be called out – as I had become suicidal.... I had intensive support from the mental health unit via my GP, a new telephone guidance service that really helped me, plus medication which was a great help, and still is.'³⁹

In a similar testimonial, another teacher who was falsely accused of behaving inappropriately towards a student said: 'I was questioned by the police on one single occasion and released without charge, caution or reprimand... I also ended up in the care of a psychologist to help me deal with the loss of self-worth, depression and the urge to commit suicide.'⁴⁰

And in March 2010 in NSW, the media widely reported that school principals had been formally advised that they can sue parents who defame and harass them through social networking sites and email.⁴¹ The Primary Principals Association President was reported to have said:

We felt that it would be appropriate for our principals to hear, directly, what course of action was open to them if they were subject to these sorts of allegations that were unfounded or malicious or vexatious.

...

*It's obviously reached a serious degree to get beyond the normal complaints-handling process, and those principals at the time thought it was serious enough to seek some support and, maybe, to undertake action.'*⁴²

However, this growing problem is not limited to teachers or the education sector – as our focus group discussions revealed. Public organisations everywhere are increasingly being confronted with this issue.

37 Professor Andy Phippen cited in BBC News Technology 2011, 'Study finds one third of teachers have been bullied online' *BBC News* 15 August, viewed 16 August 2011, <<http://www.bbc.co.uk/news/technology-14527103>>.

38 During stage 2 of the UCC project the NSW Ombudsman, with the support of each state and territory Ombudsman office held focus group discussions across Australia on UCC (except in Tasmania and the Northern Territory). In all, they held 25 focus groups involving 179 public servants between 3 March and 23 July 2010. For more information about the focus groups please see: Unreasonable Complainant Conduct Project Report (Stage 2), available at: www.ombo.nsw.gov.au.

39 BBC News Technology 2011, 'Study finds third of teachers have been bullied online' *BBC News*, 15 August, viewed 16 August, <<http://www.bbc.co.uk/news/technology-14527103>>.

40 *ibid.*

41 Labi, S 2010, 'Now schools can sue parents', *The Sunday Telegraph*, 28 March, viewed 27 May 2011, <<http://www.dailytelegraph.com.au/news/now-schools-can-sue-parents/story-e6frewt0-1225846360533>>.

42 *ibid.*

For example in NSW two council officials were reportedly granted apprehended violence orders against a complainant who harassed them (and their families) for years through electronic communications, over the phone and in person. One of the council officers said of the experience:

It is not just a financial burden for taxpayers. It also undermines our effectiveness as community leaders due to the mental and emotional strain. Simple pleasures such as attending community functions with my family became a worry because of the possible behaviour of this person.

...

We were forced to seek legal protection, but if we had clear legislative distinctions regarding what is reasonable or excessive, we may not have had to endure this financial and emotional burden for over two years.⁴³

And in a landmark decision in November 2009 a South Australian man pled guilty to criminal defamation after posting material on Facebook about a local police constable. The man created a Facebook group called '**Piss off [name of constable]**'. The page included posts that were incorrect, offensive and contained grossly defamatory statements about the Senior Constable. It identified him and his children in photographs, and disclosed the location of his house. Some of the posts also encouraged acts of violence and aggression towards the constable.⁴⁴

When asked about his experience, the Constable said:

It has caused considerable distress to my family ...

[I] was astounded at the savage nature of many of the interactions [on the page]...

I was angry ... As a local police officer I believe it is part of the territory that we have to take a little bit more than the average person. However, on this occasion it was quite a personal attack and it [the page] even had photographs of my children.... this was one step too far.

...

My answer to (his critics) is if you are not happy about what I do, complain about it [through the appropriate channels] and have my activities scrutinised, and they will be...⁴⁵

What all of these cases illustrate is that UCC that occurs online and in electronic media can have far reaching and devastating consequences for the staff members and organisations that have to deal with it. 'It is easier than ever for a single disgruntled [complainant] to permanently stain an [organisation's] image⁴⁶ or an individual's reputation, causing serious psychological injury because of its very public and often vicious nature. One single posting done intentionally or 'in the heat of the moment' has the potential to cause injury on a far greater scale.⁴⁷

As a result, in our view organisations need to develop appropriate systems and processes for identifying and managing UCC that occurs online and in social media. This is not only important for the effective application of the UCC approach advocated in this manual, it may be viewed as a foreseeable work-related risk if a sufficient connection can be drawn between the professional work/services provided by a staff member and a complainant's online conduct – in which case an organisation may have a duty to act.

When does online conduct become unreasonable?

It is important to clarify that not all online behaviour is unreasonable and it is not the fact that complainants are using social media and the internet to air their grievances that is concerning. Complainants have a right to express their views or complain online in the same way that they can to our offices. The problem arises when reasonable complaining behaviour turns into inappropriate and/or unlawful attacks on organisations and their staff. This type of behaviour cannot be ignored and steps should be taken to evaluate and respond to it – in the same way as other forms of UCC.

43 Parker, S 2011, 'What is fair in public office?: Mayor and general manager forced to court by excessive and 'obsessive' tirade', *Manning River times*, 21 October, viewed 21 October 2011, <<http://www.manningrivertimes.com.au/news/local/news/general/whats-fair-in-public-office-mayor-and-general-manager-forced-to-court-by-excessive-and-obsessive-tirade/2331486.aspx?storypage=0>>.

44 Lim, P 2010, 'You have 3 friend requests and 1 criminal conviction: tackling defamation on Facebook', *Internet Law Bulletin*, vol 12, no. 10, March pp. 169.

45 Hunt, N 2009, 'Teen guilty of Facebook Slur', *Sunday Mail (SA)*, 22 November, viewed 10 July 2010, <<http://www.adelaidenow.com.au/news/south-australia/teen-guilty-of-facebook-slur/story-e6frea83-1225801651074>>.

46 Kerwin, M 2010, 'Six Tips for Responding to Blogger Attacks', *BulletProof Blog*, 17 August, viewed 21 April 2011, <<http://www.bulletproofblog.com/2010/08/17/six-six-tips-for-responding-to-blogger-attacks/#ixzz1VQXAEZSf>>.

47 Rooding, A 2009, 'Cyberbullying in the workplace: dealing with social networking sites', *Internet Law Bulletin*, vol. 12, no.1, March, pp. 14.

Some examples of inappropriate and unreasonable online conduct by complainants include the following:

- Vulgar and abusive language.
- Targeted, personal and obscene attacks.
- False allegations and lies with the intention to embarrass, humiliate, discredit or portray in a negative light.
- Offensive language and terms inappropriately targeting specific groups or individuals – eg racial slurs.
- Threats or defamatory statements – eg a case officer is corrupt or dishonest (without proof).
- Spamming and sending multiple successive and irrelevant emails or posts.
- Cyber-stalking or cyber-bullying.
- Conducting snide online polls about case officers – eg about their level of competence, etc.
- Posting personal information about case officers including their personal contact details or phone number, name, address, vehicle details etc. – so they can be targeted.
- Suggestions or encouragements to commit illegal activities or crimes.
- Posting inappropriate content/links to disreputable websites.
- Hacking or uploading viruses or other materials that are harmful to an organisation's website, blog, Facebook page, etc.
- Creating unpleasant websites with rude comments, photos or videos depicting members of an organisation and/or their family members.
- Copyright and trademark infringements.
- Creating fake online profiles to impersonate someone – eg a staff member – or so that they cannot be identified and then engaging in behaviours described above.

What can you do to manage online conduct?

To effectively manage UCC online organisations will need to adapt to online and electronic communication technologies like social media to ensure that they and their staff are adequately protected from any risks to health, safety and liability.⁴⁸ Preferably, this should happen whether or not your organisation has an online or social media presence and should include clear protocols and procedures for dealing with online conduct. These protocols may be part of a broader UCC policy or can be a separate document, and should provide clear guidance for staff on when and how to respond to such conduct.

The following five-step process is provided to assist relevant staff in this regard. It is primarily based on information obtained from articles by Mike Kerwin, Executive writer at Levick Strategic Communications LLC⁴⁹ and Alyssa Gregory, founder of Avertua LLC.⁵⁰ This information has been used in conjunction with other sources to suit a public sector complaint handling context.

Step 1 – Monitor

Maintain an ongoing system for researching and tracking postings, comments, websites, blogs, etc. for negative content about your organisation or your staff.⁵¹

- Encourage all staff to report any inappropriate or questionable online content that they discover online and which relates either to your organisation or a member of your staff.
- Use online listening tools and alerts – such as Google Alerts, Social Mention, Technocrati, TweetBeep, Boardtracker, Dialogix, The Search Monitor, etc. to track comments about your organisation online. For example, Google Alerts sends regular email updates of the latest online mentions of your organisation whether it is on a blog, in an online newspaper, a video or tweet – thus eliminating the need for manual searches.
- Designate a staff member (or response team or specialist service) to monitor online content. This staff should also be responsible for identifying, evaluating and responding to inappropriate online conduct – when necessary.

⁴⁸ *ibid*, pp.13-14.

⁴⁹ Kerwin, Six Tips for Responding to Blogger Attacks.

⁵⁰ Gregory A 2009, 'Online reputation management: The basics', *Webpro Business*, 20 May, viewed 27 April 2011, <<http://www.sitepoint.com/online-reputation-management/>>.

⁵¹ *ibid*.

Step 2 – Evaluate

Once the unacceptable online content is discovered it needs to be assessed immediately to determine whether a response is needed.⁵² It is essential for this to be done promptly so that you can avoid and/or minimise the likelihood of the content ‘going viral’ and spiralling out of control. The following factors may be considered:⁵³

A. Content

- Does the online content contain constructive criticism or observations or is it purely negative?
- Is the online content reasonable in its tone or does it contain grossly inflammatory or offensive content that will require some form of action?
- Is the online content grossly misinformed or misleading? Does it contain misrepresentations or lies that could reasonably mislead others?
- Does the online content contain personal information about a staff member (or their family) that has been inappropriately obtained and/or used for an inappropriate purpose – eg personal photos, videos, address information, etc?
- Does the online content contain defamatory information or threats, violate trademark or copyright laws or contain otherwise unlawful content?
- Does the online content contain indecent, vulgar, or obscene sexual content and/or unsubstantiated allegations about staff?

B. Visibility and credibility⁵⁴

- Is the online content on a website that is highly visible and easily accessible? For example, is it on Facebook (with 9.8 million Australian users) or is it an obscure website that has been viewed by a relatively small number of people – eg the complainant’s inner and/or extended circle of friends and family.
- Has the online content ‘gone viral’ – taking on a life of its own, possibly even being reported in the news media thereby requiring a relatively comprehensive response?
- Could the online content be perceived to be credible or is it so farfetched that it will not be believed by a reasonable person?

C. Apparent purpose/objective

- Does the online content appear to be dedicated to targeting or degrading others? Is it part of a smear campaign or a publicity stunt?
- Does the online content incite others to engage in particular acts or omissions – eg targeting your organisation or a member of staff – or engage in unlawful conduct?
- Does the online content appear to have been created with the intention to embarrass or humiliate, or as part of a joke?

D. Impact

- Could the online content significantly damage your organisation’s reputation or the reputation of a member of your staff? – Note: this only applies if the damage is unwarranted/the content is false.
- What impact, if any, will the online content have on your workplace environment, on relationships between colleagues or with complainants, in particular if it is believed?
- If the online content is about a staff member, how do they feel about the posting? Have they (or their family) been affected by it in a substantial way?
- Could your organisation be open to a common law duty of care, WH&S or legal liability if some form of action is not taken in response to the online content?
- Could the online content be interpreted as a representation made by or on behalf of your organisation?
- If relevant, is the complainant hijacking the communication stream in a way that is impacting on its effectiveness or the ability of other people to use it in the intended way? – Eg if your organisation is running a blog, Facebook or Twitter page where you engage in a two-way communication.

⁵² Morgan, D 2011, ‘Another Cautionary Tale about how NOT to Respond in Social Media’, *PSAMA Blog*, 1 April 2011, viewed 21 April 2011, <http://www.psamablog.blogspot.com/2011/04/another-cautionary-tale-on-how-to-not-to.html>.

⁵³ Note: the factors are based on general information obtained from: Department of Education 2010, *Prevention and Education Team Standards and Integrity Directorate*, Western Australia.

⁵⁴ Kerwin, *Six Tips for Responding to Blogger Attacks*.

E. Context

- What are the circumstances surrounding the online posting? For example, does it stem from an interaction or conflict the complainant has had with your organisation (or a member of staff), a decision that your organisation has made or an action that has been taken – either against them directly or generally?
- Does the complainant appear to have a legitimate issue? If so, steps should be taken to rectify the matter – even if the complainant's actions seem to be somewhat disproportionate in the circumstances?
- What is the timing of the online content? For example, has it been created at a time when your organisation (or a member of your staff) is under unusual public or media scrutiny? If so, a response may be needed for the purpose of 'damage control'.

Step 3 – Act

Once the content has been assessed a decision will need to be made about whether it needs to be responded to. Some reasons for responding to negative or inappropriate online content may include that:

- There is a significant risk that the online content could mislead others, contains gross misrepresentations or is highly misinformed.
- It is extremely inflammatory, offensive, defamatory or otherwise unlawful.
- It could cause significant reputational and psychological harm.
- It discloses sensitive personal information about staff or their families or could give rise to legal or WH&S issues for the organisation if it is not acted on.
- It is highly visible and accessible, has or could 'go viral'.
- It appears to be credible even though it is not, and/or could cause others to be grossly misinformed.
- It is having a significant impact on the workplace and relationships between colleagues and with complainants.
- It has been created at an inopportune time for your organisation.

Some reasons for not responding to online content may include that:

- It would only encourage or incite the complainant if you responded – publicly or privately.
- It would only create controversy and invite media interest.
- It is so farfetched that it could not possibly be believed by a reasonable person.
- It is relatively moderate or contains constructive criticism and carries little risk to staff or the organisation.
- It does not violate any laws and would not raise any duty of care, WH&S or legal issues for your organisation if it is not acted on.
- It is not located on a website that is highly accessible or visible to others.
- It is unlikely to cause reputational or psychological harm or affect the workplace environment in any significant way.

If a response is needed

If it is determined that a response is required in a particular case, the response should be done promptly (ie within hours if not minutes of the online content being identified) – before it has a chance to be picked up and to spread widely. A timely response can be pivotal to whether or not you can defuse a situation and whether the content is picked up by others and spreads out of control.⁵⁵

The response must also directly address the comment/content, as a failure to do so may simply lead to increased frustrations (by the complainant) and more negative comments and postings.⁵⁶ An option in these situations might be to address the comment directly (in the public forum) and then contact the complainant privately and resolve the issue.⁵⁷

There are a range of possibilities for responding to online content. Responses can be public, private, or both. They can take the form of a comment, a rebuttal or rejection or can include statement in agreement.

⁵⁵ Kerwin, *Six Tips for Responding to Blogger Attacks*.

⁵⁶ *ibid.*

⁵⁷ Bacal, *Defusing hostile customers workbook*, pp. 143.

Responses can also be done on the website or forum where the online content was discovered, on your organisation's website, blog or social media page, in an online newsletter etc. They can be done by email, telephone call, face-to-face interview or in a letter sent via Australia Post. The most appropriate form of response will depend on the circumstances of the case along with the characteristics of the complainant involved.

If a response is needed you may also need to decide whether to notify police about the online content and/or seek legal advice about the content. Also, note that if the complainant's conduct constitutes a crime you may be required to report their conduct – section 316, *Crimes Act 1900 (NSW)*.⁵⁸

Public or private response?

Also, if you have decided that a response is needed in a particular case, you will need to decide whether that response will be public, private or both. The following general guidelines may be useful in this regard.

I. Public response

If the online content is on a website that is highly visible and accessible or includes gross and repeated false and misleading information, a public response may be appropriate.

It is important for public responses to be unemotional. They should show restraint and should never include personal attacks, be mean spirited, shun the complainant, or involve 'he said/she said' debates.⁵⁹

Public responses should offer to correct things if your organisation or staff have done something wrong, and if this fails, should simply thank the complainant for their comment and move on as quickly as possible.⁶⁰

The reality is that the public audience is more likely to be looking for how you respond, rather than the complainant's response. If you respond poorly you will probably do more damage than the complainant ever could do.

Once you have responded publicly, in the first instance, you may decide to shift to private responses/correspondence with the complainant – for example via email, telephone or face-to-face communications. Social media and the internet can be 'poor platforms for problem-solving and there may be confidentiality and privacy issues that will need to be considered.'⁶¹

II. Private response

If the online content is not on a website with high traffic, then a private email response by letter or telephone may be appropriate and adequate. A private response can be used to clarify things, including when your organisation or staff have done something wrong, or to give the complainant an opportunity to remove the online content before taking more decisive action – eg legal advice in incidents involving defamation, etc.

III. Both public and private responses

If the online content has taken on a life of its own and has spread virally across the internet or through social media, targets specific member(s) of your staff, is unlawful, or appears to be credible, then a more comprehensive response strategy may be required. This response strategy could include elements of both a public and private response including press and/or media releases and interviews, proactive outreach to relevant complainant(s), corrective messaging in social media and/or on your website or blog, or response(s) in any other relevant publication(s) produced by your organisation.

Note: It can be difficult to know when an online posting or website will spread virally. While some (usually the non-credible ones) can generally be dismissed quite quickly, others get picked up by other bloggers and even the media.⁶² The online listening tools (referred to above) can be helpful in this regard because they alert you to all mentions of your organisation. Therefore, if the number of mentions about your organisation increase unusually or repeatedly raise the same issue, you will have an opportunity to make a comment or even deal directly with the source of the posting before things get out of hand.

No response needed

If a response is not needed then no further action will be required, although depending on the circumstances, it may be appropriate to copy and make a record of the content to identify recurrent behaviour. It may also be important to provide support for any affected staff members.

⁵⁸ Waterhouse M, 'Unsavoury Online Communications – How Can Australian School Authorities Take Action?' In proceedings of the ANZELA Conference 2011, pp. 4.

⁵⁹ Morgan, *Another Cautionary Tale about how NOT to Respond in Social Media*.

⁶⁰ *ibid.*

⁶¹ Bacal, *Defusing hostile customers workbook*, pp. 143.

⁶² Kerwin, *Six Tips for Responding to Blogger Attacks*.

Step 4 – Follow up and follow through

Once the online content has been responded to – either directly or indirectly – you should continue to monitor the internet, in particular the website/blog where the content was located, to see if there are any new (or old) comments relating to the original posting. You should also check to see if the content has been picked up elsewhere.⁶³

Also, in cases where the content/comment is legitimate and/or your organisation or staff have done something wrong, consider following up with the complainant a couple of weeks after the incident to make sure that you satisfactorily addressed their concern(s). By keeping in touch you convey a sense of approachability and increase the likelihood that they will contact your organisation in the first instance next time around – before turning to the internet.⁶⁴

Step 5 – Supporting affected staff members

If the online content poses a significant risk of psychological or reputational harm to staff, it may also be important to consider providing the affected staff with a public message(s) of support – as part of your public response. The message of support will be important in discrediting and rejecting the complainant's remarks and making staff feel (and the public recognise) that they and their work are valued and supported by the organisation. Appropriate steps should also be taken to ensure that staff receive adequate counselling and support services like debriefing.

Staff should also be advised on the legal avenues that they can take in such situations and should be supported to do so, in appropriate cases. Depending on the circumstances, the legal mechanisms that may be relevant under Commonwealth and State statutes include, the:

- *Defamation Act 2005* (NSW)
- *Copyright Act 1968* (Cth)
- *Copyright Act 1879* (NSW)
- *Privacy Act 1988* (Cth)
- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Racial Discrimination Act 1975* (Cth)
- *Anti-Discrimination Act 1977* (NSW)
- *Broadcasting Service Act 1992* (Cth)
- *Crimes (Domestic and Personal Violence) Act 2007* (NSW) – for AVOs
- *Crimes Act 1900* (NSW), in particular Part 6 – Computer Offences
- *Criminal Code Act 1995* (Cth), in particular sections:
 - 147.1 – Causing harm to a Commonwealth public official
 - 147.2 – Threatening to cause harm to a Commonwealth public official
 - 474.14 – Using a telecommunications network with intention to commit a serious offence
 - 474.15 – Using a carriage service⁶⁵ to threaten to kill another person or entity
 - 474.16 – Using a carriage service for a hoax threat another person or entity
 - 474.17 – Using a carriage service to menace, harass, or cause offence to another person or entity in such a way as would be regarded as offensive by reasonable persons

See Appendix 9 – Flowchart for responding to inappropriate online comments/content by a complainant.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ A 'carriage service' under the *Criminal Code Act* is any service that facilitates communication through electronic energy. This includes telephones or mobile phone service, the internet (and any facility on it like email or social networking websites), using facsimile, or other electronic means.

Case study example – Responding to UCC online

provided by the NSW Ombudsman



Mr C complained to the NSW Ombudsman in 2010 about the outcome of an investigation that a public authority had undertaken into complaints he made about his former employer. Mr C had complained that his former employer had failed to comply with WH&S obligations. He felt that the public authority had not responded appropriately to his complaints and had failed to refer to important legal evidence that he had provided during the investigation. Mr C was very distressed and complained that in the process of pursuing what he considered to be an important safety issue, he had lost his employment, finances, retirement investments and worst of all his good health.

Our office made enquiries into Mr C's complaint. During the course of our enquiries we were advised that a website had been created about Mr C's ordeal. All the information we were provided suggested that Mr C had created the website.

The subject website was not relevant to our decision that the agency had not committed any wrongdoing in his matter. However, we did access it as part of the information that had been provided to us during our enquiries.

The website contained highly inflammatory and defamatory comments about his former employing company, its board of directors, and various individuals and organisations that had rejected Mr C's complaints (including copies of correspondence with them – some of which had been altered). It also included several comments and arguments that appeared to be illogical and that did not appear to be founded on credible information.

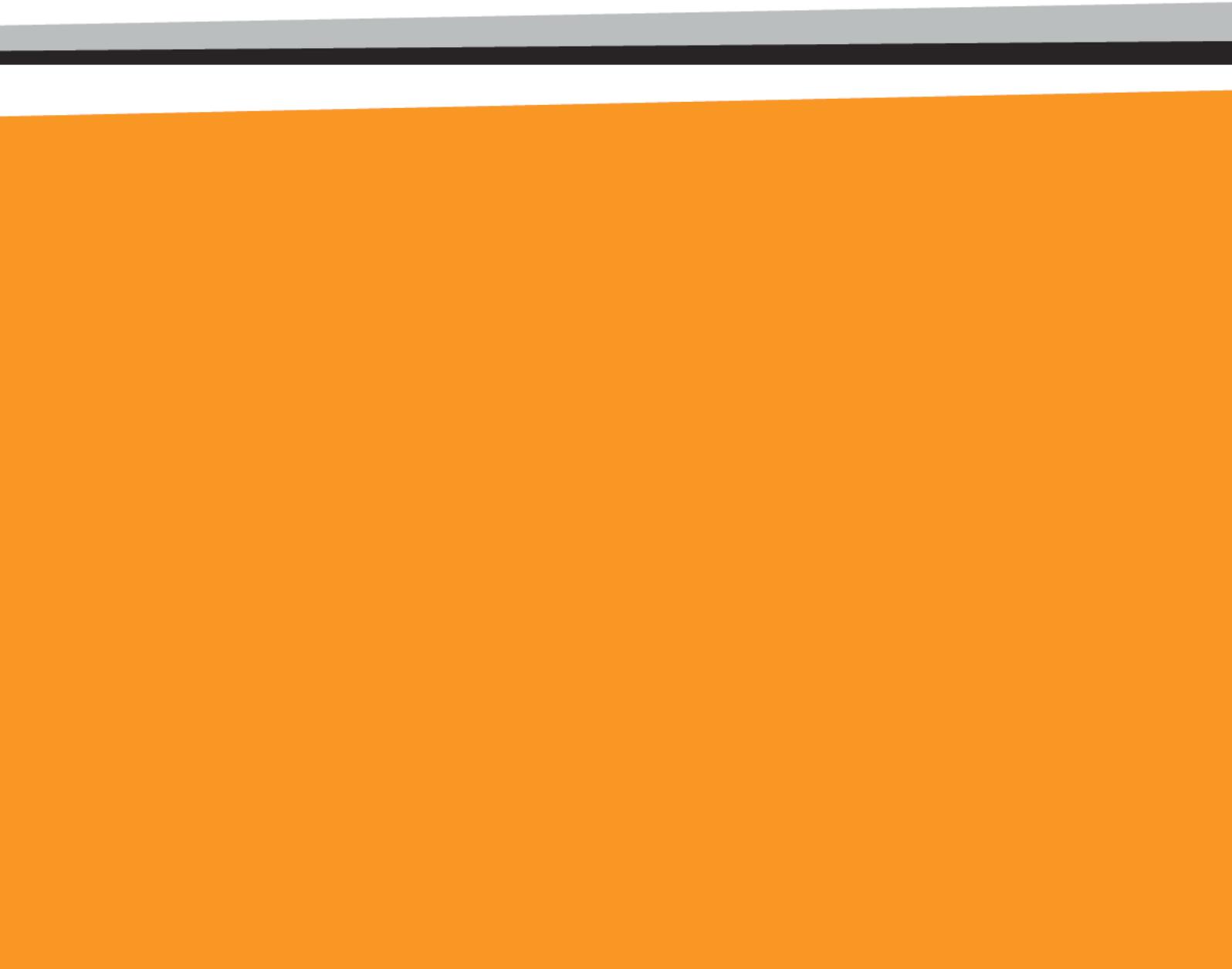
The website also made a vast array of allegations of criminal activity, negligence, fraud, discrimination and violence and included images of more than 30 union, government and company trademarks and logos – some of which had been altered.

The website also offered a reward \$5,000 to anyone who could provide evidence to show that the company concerned had violated WH&S regulations and encouraged people to access Twitter and Facebook pages which had been created as 'part of [his] pursuit to expose [the company's] *alleged* [WH&S] crimes'.

The content of the website typically met the threshold for the types of complainant conduct and online content that organisations should respond to in order to protect and support their own reputations and those of their staff. The website made targeted and personal attacks towards specific individuals, included images of them, made what appeared to be false and unsubstantiated allegations, was highly defamatory and appeared to violate copyright and trademark rules.

However, because any reasonable person looking at the website would likely consider it to be far-fetched and not credible, and because the website was not visited often as well as the complainant's personal circumstances we did not believe that this was the type of incident that warranted further action – although on-going monitoring of the site might be required in the circumstances.

APPENDICES



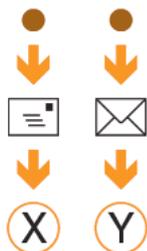
Appendix 1 – A word on unusually persistent complainants (querulants)

Although this manual cautions against approaches that focus on mental health issues, one that is particularly relevant to complaint handlers is querulance. Querulance is a psychiatric diagnosis for people who have morbid (illness driven) complaining behaviour.⁶⁶ These people are abnormally driven by suspicion and accusations and tend to exhibit extreme kinds of UCC. For example, when compared to a matched control group, querulants have been found to:

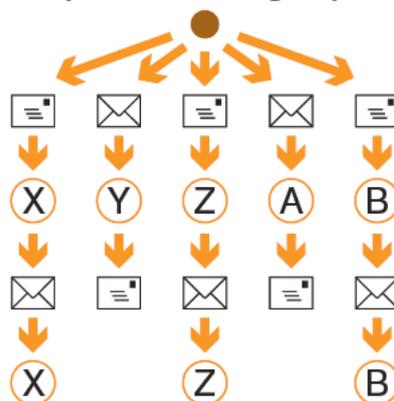
- Pursue their complaints for much longer than other complainants.
- Produce far greater volumes of material in support of their case.
- Telephone more frequently and for longer.
- Intrude more frequently without an appointment.
- Continue complaining after their cases have been closed.
- Engage in behaviour that was typically more difficult and intimidating.
- Involve other/external organisations more often including contacting Ministers as their complaints progress.
- Want outcomes that a complaint handling system cannot deliver – eg vindication, retribution and revenge.

The research in this area also indicates that one of the distinguishing features of querulance is an extreme loss of focus over time that results in querulants pursuing multiple complaints at the same time and across a number of organisations as demonstrated in the charts below.

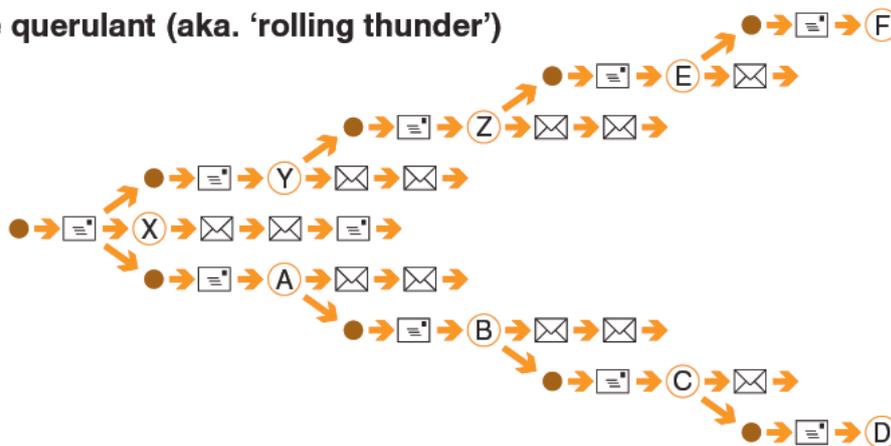
The usual complainant



The persistent complainant (aka. 'scatter gun')



The querulant (aka. 'rolling thunder')



Legend

● issue or event that causes them to complain



the complaint/FOI application



the agencies that receive the complaints/FOI applications

⁶⁶ Lester G 2005, *A guide to the management of the unreasonable complainant and their behaviours*, unpublished manual, pp.18.

Most people can be expected, over time, to make one, two, sometimes three complaints to a few agencies about issues resulting in a few separate complaints streams. They may display difficult behaviours at times, but they do maintain reasonable balance and perspective.

The classic querulant's issues will grow over time. They lose perspective of their issue and their focus moves onto allegations of incompetence, conspiracy and corruption, initially by the organisation handling their issue and then by other review bodies to whom they have turned for vindication.

People who could be classified as querulants can be dealt with in the same way as all complainants who display unreasonable behaviours, however it should be noted that they do tend to represent the extremes of UCC. They are more likely to pursue their complaints into what Lester and Mullen have described as a 'downward spiral' that often ends in unemployment, bankruptcy, divorce, and possibly domestic violence and suicide. Also, the chances of querulants reverting to 'normal' behaviours decreases as they descend down the 'spiral' and managing their behaviour may require you to either severely restrict or even terminate their access to services.

For more information on querulance see: Lester G, Wilson B, Griffin L & Mullen PE, Unusually Persistent Complainants, *British Journal of Psychiatry*, 2004.

Appendix 2 – Email sample received from complainant with characteristics of UCC

What follows is a de-identified copy of parts of a 32 page email which a complainant copied to 23 Ministerial offices and 99 media outlets, organisations and individuals. The email exhibits some of the indicators of possible UCC that can be identified from a complainant's writing style. See Part 3 – Early warning signs of UCC.

WITH RESPECT TO EVERYONE - PLEASE UNDERSTAND THIS VERY WELL

I refer to the matters above and to your inadequate response...

...I repeat ALL ISSUES, as people **should not be put through (1) the wringer nor**

...(2) have to keep resubmitting and escalating [just like this 2nd submission]

...**if council**ors [for one] were doing **the right thing by the public** [their rate payers] **at large** in the first place. – **How many times** do people have to keep resubmitting their valuable time, energy and **endless frustration** to then **compound councils 'work load' and waste of public funds** **...to end up in your unhelpful office is a horrible compounding injustice !.** – Therefore regarding your comments on **"out of date and irrelevant"** and what clearly **"appears" to be your lopsided defence of council** -- **you're certainly not showing yourself as a proactive public defender...**

3. Nor would they publish it **if** it wasn't truthful and/or going to embarrass them in some way if it wasn't worthy of comment and/or "In the Public Interest" - ...

4. **Therefore are you implying that this newspaper, part of a major media group don't know what they are talking about?...**

5. Nor was this **claimed to be or defended as being "proper procedure"** by **ANY** of the **Council**ors interviewed - **read the article Ms...**, I'd included it in the **PDF, #RE Alleged breach of TMO [etc - attached above] - being complaint #1** - for everyone's reference and convenience – this sort of thing obviously effects many ordinary folk locally and plausibly statewide **because your Office doesn't seem to act** – how many similar cases is your office [for one] aware of ?...

6. **...In fact - each and every point** of my complaint(s) **[the major details]** were/are **very very clearly** set out in my immediate opening address with the relevant areas of investigations taken directly from your website [again as published - as supposedly committed -for public information]. You also don't like the **use of bold fonts and underlining throughout - AND - you don't like copying and pasting [otherwise being commonly used tools to emphasise, highlight, clarify, simplify etc]** thank you for the lesson Madam but I'd beg to differ - so tell me something – please - **wasn't it really the way in which I detailed explicate evidence and expressed the blunt truth have anything to do**

...if you had ANY trouble accessing web links it's very easy to do your own search with the info I gave – just as I had initially with nothing to go on - otherwise - I did offer to send the matter as PDF's – all you had to do was take the trouble to ask. Plus I did say:

"Please follow the descending date & time email thread below [which form a part of this document and to save reiterating, to be read in conjunction with all included matter/attachments] then read FIRSTLY the detailed PDF attachment titled 'RE Alleged breach of - response 28 Feb 20..'--. which is loaded with questions"...

Is everyone out there who is 'looking on' , awake to or care about the wider implications of what "appears" to be happening here – this is our government at work – on us their fools - and it could very well be you or your loved ones caught up in such situations - and - "may be" from ANY agency etc. Relationship noted – ombo.nsw.gov.aunsw.gov.au....can ANYone notice the standout feature – just asking ?...

...Is everyone keeping up with me here ? – if not please let me know if there's ANY queries or disagreement etc with ANY thing I have said otherwise it shall indicate that I AM MAKING- perfectly-understandable-acceptable-logical-sense. Alternately let me **condense all of this matter** [extensive I know, but every word **has genuine meaning**] into one simple question – **are you people HAVING A LEND OF US ? – as without a VERY CREDIBLE response - speculation and deduction is acutely UNDERSTANDABLE**

Appendix 3 – Sample acknowledgement letter for managing expectations

Our reference: [reference]
Contact: [case officer]
Telephone: [number]

[Date]

[Name of complainant]
[Address of complainant]

Dear [name of complainant]

We have received your complaint about the [name of organisation/person].

The person handling your complaint is [case officer].

What we do first

Generally speaking, when we receive a complaint we [briefly explain general complaints process].

At this stage we are assessing your complaint and will decide whether we need to [action]. It can take [number of days, weeks, or months] for this to occur and for us to inform you of the results.

When a complaint takes longer to deal with

In some cases, it can take us longer than [number of days, weeks, or months] to [explain]. When this occurs we may need to [explain]:

- inspect files and documents
- conduct interviews
- visit the site
- ask them for a written report.

These actions take time, but we will try to complete them and let you know the results within [number of days/weeks/months].

Formal investigation

Sometimes when a problem is not solved or we think the problem is very serious, we can start a formal investigation. This is a long, complex process that usually takes at least nine months. In these cases, we will keep you informed of our progress.

Important information

On the back of this letter, there is some information that explains what the [name of organisation] does and what its responsibilities are. Please read this through carefully.

We will work through the complaint you have made and the facts you have given us, and will contact you again shortly.

Yours sincerely

Signature

Full name

[example of the reverse side of the acknowledgment letter used by the NSW Ombudsman]

What the Ombudsman's office does	What the Ombudsman's office doesn't do
In most cases, we can investigate the administration of NSW government departments, organisations and local councils when that administration appears to be wrong or bad.	We do not have to investigate every complaint we get. We are more likely to investigate ongoing problems or serious abuses of power.
We are free of control by any government body and act independently.	We do not act for particular parties or organisations.
Our aim is to be fair and find out the truth.	We cannot force an organisation to take action in the way a court can.
Our aim is to work out reasonable solutions that are in the public interest.	We do not give legal advice.

The responsibilities of the Ombudsman's office	Your responsibilities when you make a complaint
<p>We are responsible for:</p> <ul style="list-style-type: none"> • handling your complaint professionally, efficiently and fairly • keeping you informed of our progress • giving you reasons for our decisions • treating you with respect. 	<p>You are responsible for:</p> <ul style="list-style-type: none"> • providing us with a clear idea of the problem and the solution you want • giving us all the relevant information you have (or know about) at the beginning • telling us new facts or letting us know you no longer want our help • cooperating with us • treating us with respect.

For more information on who we are and what we do, please refer to our website www.ombo.nsw.gov.au.

Appendix 4 – Defusing complainant anger with CARP

1. Control

This is about getting the complainant to stop and listen and letting them know that their anger is not going to control you or the interaction. Be assertive, but not aggressive or passive.

2. Acknowledge

Deal with their feelings first. It's important that the complainant knows that you understand (or at least empathise) with their emotional state of mind and situation.

Where it will not encourage UCC, give them an opportunity to let off steam and vent their emotions. Venting can help them feel like they are being listened to and understood.

Venting should be timely, usually not lasting more than 2-5 minutes. The complainant should be able to settle down and discuss their complaint in a calm manner after being given such an opportunity. Note: Extended venting can do more harm than good because it can make the complainant feel like they are reliving the bad experience.

Echo what they are telling you to show that you are listening. This usually involves repeating the last few words or their key words. This can be done by backtracking (eg 'so you are saying...') or paraphrasing (ie defining what you believe they said and meant).

3. Refocus

Make the transition from their emotions to their issues of complaint by refocusing the conversation. Ask questions about facts and repeat, in your own words, the complainant's issues. See Table 11 – Scripted responses to statements and conduct associated with unreasonable persistence (Unproductive phone calls).

4. Problem solve

This is about getting down to business – telling the complainant what can and cannot be done, what will and will not happen, and focusing on possible solutions to their issue etc.



Remember: the order of CARP is important!

For more information on CARP you can also visit: www.darncustomers.com/course/ch4-defusingprocess.htm and the *Defusing Hostile Customers Workbook*, 3rd edn, by Robert Bacal, pp. 28.

Appendix 5 – Effective communication strategies

Do:

- Show respect
- Clarify
- Allow venting
- Acknowledge emotions
- Show empathy
- Find something to agree with
- Check understandings
- Acknowledge their point of view without agreeing
- Echo what they say
- Listen actively
- Allow space to think, if necessary
- Admit and apologise, if necessary
- Stay calm
- Seek resolution



Don't:

- Argue, defend or deny
- Give excuses
- Be confrontational, verbally and non-verbally
- Be overly formal or bureaucratic in your responses
- Be too informal and do be wary of joking
- Respond to fighting words
- Suggest the complainant needs therapy or counselling
- Invade the complainant's personal space



See Part 4 of the Manual – Preventing UCC (Dealing with anger through effective communication).

Appendix 6 – Risk assessment worksheet

Risk assessment worksheet		
List details of the complainant's conduct, including all the major and minor risks associated with it.	What are all the things that could occur as a consequence of the conduct – best and worst case scenarios?	What can you and your supervisor do (as appropriate) to manage or mitigate the risk posed by the complainant's conduct?

Appendix 7 – Ten steps for responding to threats, hostility and aggression

1. Recognising danger signals and reviewing risk

- Recognise the signs of client anger – whether or not the anger is directed at you.
- Ask yourself: 'Am I in danger?'
- If 'yes' – remove yourself from harm's way as quickly as possible. Walk through the nearest door into a more secure area, and then inform the complainant that the interview has/will be terminated – eg *'I cannot continue this interview while you are behaving in an angry way or making threats.'*
- If the threat abates – that is, the client's behaviour improves – then you can re-start the interview based on clear behavioural ground rules.

2. Repeating

- Make sure threats are clarified (made overt) and the client takes ownership of the threat by repeating the statement as close to verbatim as possible—eg *'You have just said to me that..'*
- Ask if this is what the client meant to say and whether it is in fact a threat to cause harm – eg *'Is that what you meant? Are you threatening me?'*

3. Reacting

- React to all threats by explicitly acknowledging them – whether they are overt or covert threats to you, themselves or to others.
- Always show some reaction to a threat, even if minimal – eg take a 5 minute break.
- But, don't over-react or mirror the threatening language or the threatening behaviour.
- Continue to show respect even when the person is being rude or threatening.

4. Responding

- Ask the client to stop the behaviour – *'Mr ... stop shouting at me'* – while informing them of the organisation's protocols for responding to threats.
- Communicate clearly and consistently what the consequences will be if the behaviour continues.

5. Redirecting

- Redirect or distract the attention of the client with actions or comments that do not reward the behaviour.
- Ask questions about the substantive issue to try to move the client from the 'emotional' state back into a 'cognitive' or thinking state.
- Take a 5 minute break or offer a cold drink, if needed.

6. Refocusing

- Try to help the client bring their emotions under control, refocus their attention on their issue. A question about the facts can change a client's focus from their feelings to thinking about the substance of their issue.

7. Raising concerns

- If you feel threatened, activate a silent alarm (if available) or leave the room and call for assistance from other staff.

8. Running

- If all else fails and you feel an imminent risk of harm – run (or at least move quickly) to a safe location.

9. Recording

- Always make a 'verbatim' record of all threats and put a copy on the relevant file.

10. Reporting and reviewing responses

- Report the matter to a supervisor/manager so that both of you can review your responses to the threatening behaviour and identify strategies to manage or control any future interactions with the person.
- You may want a formal or informal debrief after the incident.

Appendix 8 – Dealing with internal hazards through environmental design

One way to minimise the risks posed by violent and aggressive complainant conduct is to consider the environmental design (or layout) of your organisation. The concept of Crime Prevention Through Environmental Design (CPTED) suggests if you enhance certain design features within your office you can discourage violence, in particular by dealing with things like space, layout, colour, lighting temperature etc. The following examples of CPTED are taken from the Prevention and management of customer aggression guideline – by Comcare. They include:⁶⁷

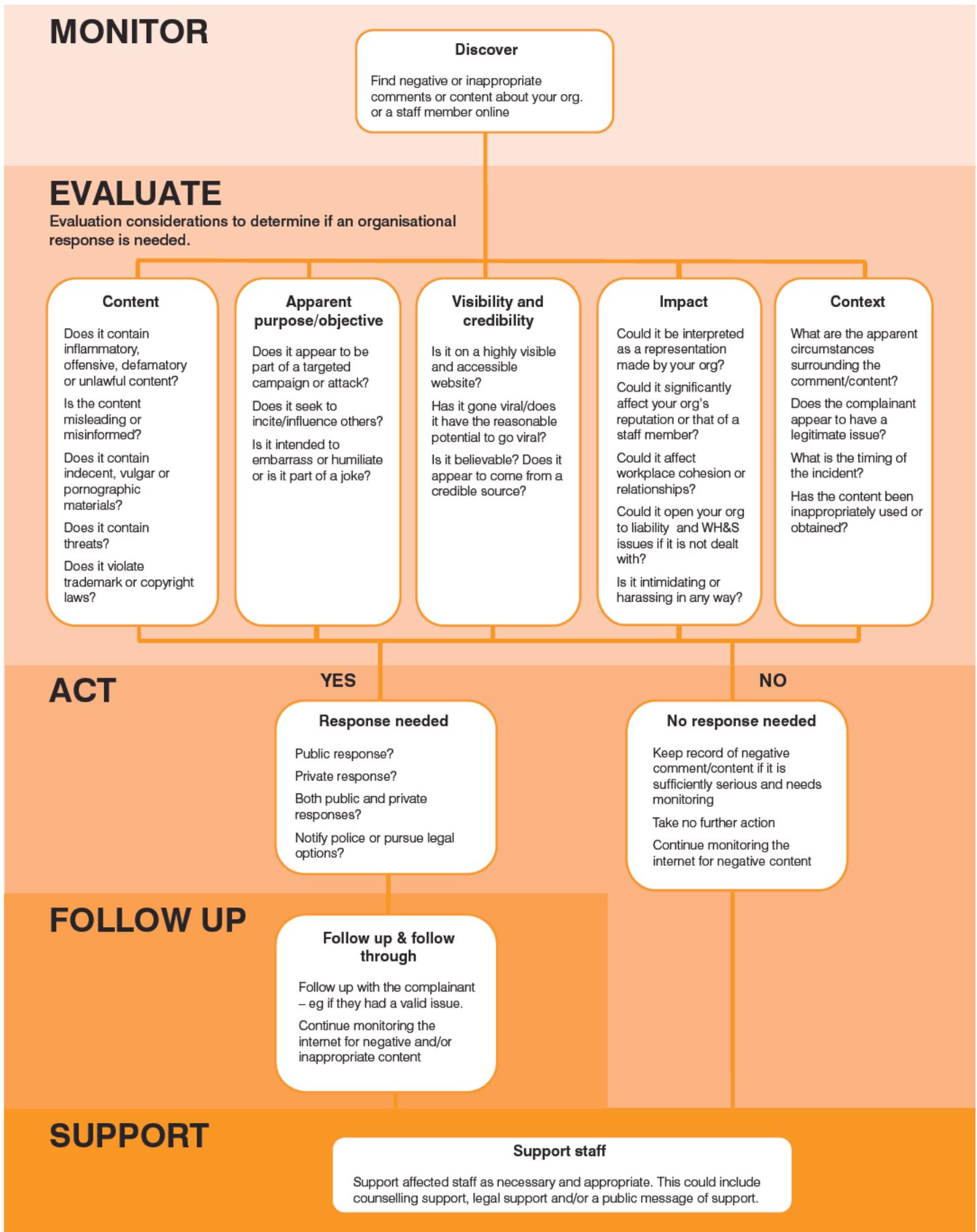
- Using building security if available, or stationing employed security guards or police officers at entry points that are visible to complainants. This can be full or part time – eg when a 'notorious' complainant will be attending the premises.
- Increasing the number of staff around the office at high risk times.
- Separating the access points to the building, different floors of the building or lifts for staff and the general public.
- Clearly differentiating between complainant/customer and employee space by using different carpet, tiles, etc.
- Requiring that visitors identify themselves and sign themselves in and out of the workplace.
- Closed circuit television – which has been proven to have a deterrent effect, particularly when people can see themselves being recorded.
- Prominently posting signs that you are video monitoring as well as codes of conduct for visitors.
- Wider and/or higher front counters that make it more difficult for a complainant to reach across, jump over etc.
- Ensuring that things are fixed and cannot be used as projectiles.
- Designated safe rooms where staff can gather if a threat arises.
- Double exit doors in all interview rooms.
- Shatterproof glass in interview rooms and public areas of the office.
- Complainant access to interview rooms and certain part of the office controlled – eg need key card access to enter.
- Having minimal furniture in public areas and furniture that is large enough that it cannot be easily thrown about.
- Minimising the number of entrances to the workplace, while maintaining fire code regulations.
- Metal detectors at building entrances (depending on the nature of the services provided)
- Duress alarms fitted to walls or desks or worn by staff during interviews – these alarms can be silent internally but with a link to computers that raise automatic emergency responses.
- Having a planned approach to queuing such as taking a number or clearly defined queuing area.
- Ensuring waiting rooms are comfortable and spacious and that there is adequate seating – to minimise discomfort.
- Making sure that there are proper ventilation and temperatures controls.
- If complainants will be waiting in waiting areas for extended periods of time, having televisions and/or reading materials in the reception area that are suitable for them – but do try to minimise waiting.
- Making sure that there is adequate lighting in car parks surrounding the workplace.
- Using relaxing music and calm colours in paintwork to reduce potential violence.
- Visitors must be escorted to non-public areas.
- Air phones.

The suitability of these strategies will likely depend on the type of services provided by your office.

For more information on CPTED see: Chappell, D. 2008, Literature review into the best practice for preventing and managing customer aggression, www.comcare.gov.au.

⁶⁷ Comcare, *Prevention and management of customer aggression*, pp.16.

Appendix 9 – Flowchart for responding to inappropriate online comments/content by a complainant



Acknowledgements

We wish to thank the following for permission to reproduce copyright material:

Comcare: www.comcare.gov.au

- Prevention and management of customer aggression, OHS 33 (2009).
- Bullying in the workplace A guide to prevention for employers, OHS 65 (2007).
- Identifying Hazards in the Workplace, OHS 10 (2005).

**Department of Human Services (Vic) (Child Protection, Placement and Family Services):
<http://www.dhs.vic.gov.au>**

- Staff safety in the workplace: Guidelines for the protection and management of occupational violence for Victorian Child Protection and community- based Juvenile Justice staff, (2005). Copyright © State of Victoria, Australia. Reproduced with permission of the Secretary to the Department of Human Services. Unauthorised reproduction and other uses comprised in the copyright are prohibited without permission.

Levick Strategic Communications, LLC (Bulletproof Blog): www.bulletproofblog.com

- 'Six Tips for Responding to Blogger Attacks', BulletProof Blog, 17 August 2010.

Sitepoint: www.sitepoint.com

- 'Online reputation management: The basics', Webpro Business, 20 May 2009.

Contributors

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