

Handling complaints

Resolving conflicts

It is in the interests of all concerned that public officials attempt to resolve disputes in the most timely and cost effective manner and, where possible, without recourse to the courts.

Public officials should, in the first instance, seek to resolve difficulties, disagreements or disputes by discussion, provision of information (eg, about policies, procedures and practices, and decisions affecting complainants), negotiation, mediation or conciliation wherever appropriate.

Agencies should embrace policies that use or encourage dispute resolution methods that are an alternative to litigation involving the agency. Agencies should also be prepared to use alternative dispute resolution methods instead of prosecution action in appropriate cases.

Agencies should also support alternative dispute resolution methods to resolve disputes between members of the public which arise in relation to matters falling to the agency to determine. This includes disputes between applicants and objectors over the merits of applications for various authorisations, and disputes between members of the public over alleged unlawful activity.

The benefits of complaints

Complaints from the public and disclosures by staff should be viewed and treated as important ways for management to be accountable to the public, as well as valuable prompts to review the performance of the organisation and the conduct of individual members of staff, contractors, consultants and other agents of the agency.

Key features

The key features essential for an effective complaints handling system are:

- the agency's **commitment** to the appropriate resolution of complaints, demonstrated in part by adopting an effective complaints policy (with clearly stated objectives)
- **publicly available** information, in accessible and appropriate formats relevant to the likely audience, about the complaints handling system, including strategies to ensure that customers/clients are made aware of their right to complain (making the existence of a complaint system and its access points well known to an agency's customers/clients is a standard requirement for an effective system)
- an **accessible** system, eg. one that is easy for consumers/clients to use, for example, the acceptance of complaints in person or over the telephone and the availability of alternative avenues to make complaints

- a **responsive** complaints handling system whereby relevant staff have the training and necessary delegations to enable them to respond to complaints in an effective and timely way, and
- the proper **recording** of complaint data, regular reporting of such information to management, and use of the information to improve the services or other operations of the agency.

The complaints handling system adopted by an agency should include:

- a complaints policy
- appropriate details about the policy on the agency's website
- a recording system that captures all complaints received
- a regular and systematic analysis of complaint data which is reported to management (and possibly to all staff)
- clear responsibilities for dealing with complaints
- complaint handling procedures providing more than one level of review, and
- appropriate training of staff.

A complaints handling system must have a process for advising every complainant of the outcome of their complaint. It is also crucial to be transparent in decision-making. If a complaint is rejected, the agency should give proper reasons for this decision.

Investigating complaints about staff

Principles

The handling of complaints against staff should incorporate the following four principles:

- **procedural fairness** for both the complainant and staff member
- **speed** to ensure that the opportunity for further misconduct and the potential for bitterness is minimised, as are opportunities to breach the confidentiality to which complainants and staff members are entitled
- **confidentiality for all parties**, where practicable and appropriate, until such time as the investigation process is completed
- **meticulous recordkeeping**, including recording of reasons for all significant decisions.

The approach to be adopted

In dealing with complaints, agencies and responsible staff must be clear about their role. They should adopt an inquisitorial approach (to impartially attempt to ascertain the truth and to uncover all relevant facts), not an adversarial approach (where the investigator acts either as prosecutor on a complainant's behalf or a defender on the agency's behalf).

Impartiality

Agency guidelines on handling complaints should emphasise the need to maintain an open mind during any investigation and to avoid forming premature judgements before all available relevant evidence has been obtained and assessed. Investigations should only be finalised after properly considering any submissions that affected parties may wish to make. A key issue is the impartiality of the complaint handler, and in particular whether the complaint handler has a real or perceived conflict of interests in relation to the subject matter of the complaint or the complainant.

Standard of proof required

For criminal allegations the evidence placed before the court has to establish beyond reasonable doubt that the alleged offender is guilty of the charge.

In an administrative investigation the applicable standard of proof is often said to be the 'civil' standard, i.e. the balance of probabilities. The courts have highlighted that the balance of probabilities standard primarily applies to the *determination of facts*, not necessarily the level of satisfaction required to *reach a conclusion/make an administrative decision*. In applying the civil standard to any set of facts, the investigator must feel an 'actual persuasion' of the occurrence or existence of each fact that needs to be established. A conclusion or decision must be based on 'logically probative evidence' – that is, evidence that is persuasive and not merely guesswork, suspicion or rumour.

It used to be assumed that the so called *Briginshaw* test applied to administrative investigations. However, in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 the majority of the Full Court clarified that as the *Briginshaw* test was a rule of evidence it did not apply to tribunals that were not bound by those rules. The court did emphasise that "*the underlying 'rule of prudence'... and the need for caution to be exercised in applying the standard of proof when making findings of a serious nature remain valid*". This means that if a fact in issue or a finding involves serious

wrongdoing, is inherently unlikely or has grave consequences, greater caution should be exercised in deciding if the evidence is sufficiently persuasive to establish that fact or finding.

The motive of the complainant

It is often argued that if a complaint appears to be activated by malice or other questionable motives, it should be automatically dismissed. However, good complaint handling practice demands that if a complaint appears to have substance, it should be investigated irrespective of the motives of the complainant (eg. a focus on the message, not the messenger). The primary relevance of motive in such circumstances is usually to increase investigator scepticism of the complainant's veracity.

Protecting complainants

Agencies need to ensure that people who complain about the services provided by or the conduct of the agency or its staff are not subjected to victimisation, harassment, discrimination or other prejudice.

The complaint handling policies adopted by agencies need to explicitly acknowledge:

- the rights of members of the public to complain about service and conduct issues
- that people who complain are not to be subjected to any form of prejudice in reprisal for their complaint
- that complaints alleging that such reprisals have occurred will be taken seriously and appropriately investigated
- that disciplinary action will be taken against any staff found to have breached the policy.

Further information

For further information see also: *Effective Complaint Handling Guidelines – 3rd edition*, February 2017, NSW Ombudsman; *Complaint management framework and model policy* June 2015, NSW Ombudsman; *Tips for accessible complaint handling* October 2016 NSW Ombudsman; *Investigating Complaints, A manual for investigators*, June 2004, NSW Ombudsman; *Tips for local councils - Building a best practice complaint management system*, November 2015, NSW Ombudsman; *Complaint handling at universities: best practice guidelines* January 2015; NSW Ombudsman; also Public interest disclosures - collection of resources available online at www.ombo.nsw.gov.au.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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