

## Commonwealth Ombudsman National Conference

### Session D: Being difficult or experiencing difficulty?

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#### When does 'difficult' become 'unreasonable'?

People who come to an Ombudsman to make a complaint have a problem. As a general proposition you could say that people don't come to us if they are happy. It is certainly not uncommon that they are upset, often very upset if they believe they have been treated badly by the agency when they raised their concerns. Dealing with people who are being 'difficult' is therefore an integral part of our role. We need to recognise this and accept that it is part and parcel of our work as complaint handlers – that dealing with unreasonable complainant conduct is part of a complaint handling agency's core work.

However, a problem occurs when 'difficult' (as in challenging) becomes 'unreasonable' (as in unacceptable). What I am talking about when I refer to conduct being 'unreasonable' is something out of the ordinary compared to the conduct of complainants generally. Let me give some examples:

- *Repeat complainants* – There was an article in the Daily Telegraph in May this year which referred to a council that had to assign a single staff officer three hours a week to handle the incessant complaints of a complainant who wrote 736 letters to council in eight years. The council estimated that this particular complainant had cost rate payers more than \$36,400 including at least 30 minutes per week talking to the person on the phone and three hours a week spent in document management. In the local council context in NSW, and I assume Australia wide, this particular complainant is far from unique.
- *Repeat applicants* – There is a related issue where individuals exercise their statutory rights in ways that can be seen as excessive. As an example, there is one particular person in NSW who has made multiple FOI applications to a range of agencies and has then exercised his rights to seek reviews of agency decisions to the extent that his matters are now, as of last week, the subject of 72 decisions of our Administrative Decisions Tribunal, including 40 in its general jurisdiction and 31 by its Appeal Panel. As well, so far he has six decisions of the NSW Supreme Court and two decisions of the NSW Court of Appeal. While initially this person was successful in a number of the judgments, over time this success rate has diminished considerably. While this person certainly has the record in terms of numbers of decisions, there are several other people who are the subject significant numbers of decisions from our ADT, for example one has 35 and another has 24.

When I talk about 'unreasonable' complainant conduct, I am not talking about people who are a bit strange, are difficult to understand, who cannot put their thoughts together in ways that are easily comprehensible, or whose anger leads them to pepper their language with expletives.

I am sure we can all think of examples of strange or difficult conduct that is not unreasonable. A recent matter involved a complainant who had concerns arising out of her discovery in the street of a folded up "piece of removed skin". She told us she knew what it was because she had skin of her own that she used for comparison. She had painstakingly washed and softened the material so that she could unfold this piece of skin, which she had then stuck to a frame and put on a shelf at the end of her bed one night. When she woke up the next morning, the frame and the skin had gone, including the photos she had taken of it on her mobile phone. We informed her that the fact that no action was taken by police was not unreasonable in the circumstances on the basis that there was no evidence to support the claim she was making. She complained that our office had

“completely ignored my vastly superior and well informed opinion on the subject”. She went on to say that she had “no intention whatsoever of dropping the matter, indicating as it does the peril with which society is faced, both from the evidence itself and the reaction to it”. She attached a copy of her hand drawn business card in which she referred to herself as a “psychotic”!

Dealing with such interesting people is part of the work of an Ombudsman’s office.

As indicated in the *Managing Unreasonable Complainant Conduct Practice Manual* published by the Australian Ombudsman, conduct only becomes ‘unreasonable’ where it causes or raises certain issues to levels that cannot be ignored, being:

- *safety* issues for staff, for example due to threats or actual violence
- *health* issues for staff, for example due to stress
- *resource* issues – while complainants whose conduct is unreasonable only make up a small percentage of all complainants, they take up an inordinate amount of time and resources, or
- *equity* issues - in relation to the allocation of resources between complainants.

We have set out in the Practice Manual<sup>1</sup> a number of the factors that may be relevant in assessing whether conduct is unreasonable, but from discussions with the complaint handlers from across Australia, New Zealand and Canada it appears to me that most know it when they see it. In this regard, I like the comment made by a judge of the NSW Supreme Court in one of the Wentworth cases, when considering on the meaning of “vexatious”, that:

“It is more important that the conduct be easily recognised than that it be defined.”<sup>2</sup>

### **What are the causes or motivations of unreasonable complainant conduct?**

If a complainant causes safety, health, resource or equity issues, it does not matter in the end whether this is due to the complainant being intentionally difficult or experiencing difficulties.

Causes of unreasonable complainant conduct that arise out of mental disorders might include personality types that are more likely than others to engage in unreasonable behaviour, such as those discussed today by Dr Grant Lester. However, there are a wide range of motivations that can lead to complainants engaging in conduct that is unreasonable, only some of which are directly referable to mental health problems. The various motivations might be summarised as:

- *attitudinal*
  - dissatisfaction with a person, an agency, the government or life in general
- *aspirational*
  - seeking ‘justice’ or a moral outcome
  - a rigid focus on what is seen as a matter of ‘principle’
- *emotional or psychological*
  - anger or frustration due to unmet expectations
  - a ‘crusade’ seeking vindication, retribution or revenge
  - an unreasonable refusal to accept an outcome that is unfavourable, possibly due to an unreasonable sense of entitlement or expectation of favourable treatment
  - an inability to accept responsibility and a need to blame others (either people or agencies directly involved in an issue, or watchdog bodies who have not found in the complainant’s favour)
  - an inability to ‘let go’ and move on, and of course

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<sup>1</sup> at 3.3.

<sup>2</sup> Roden J in *Attorney General v Wentworth* [1988] 14 NSWLR 481.

- *recreational*
  - an all-consuming hobby, in our experience often retirees and often in relation to local council issues!

Complaints might also have ulterior motives – a complaint or series of complaints might be intended to harass, intimidate, embarrass or annoy, or the complainant might be using the complaint system as an information gathering process for some other purpose.

As my list of motivations indicates, not all people who engage in unreasonable conduct with complaint handlers have personality or psychiatric problems. Even if they do have such problems, complaint handlers do not have the professional qualifications and experience to be able to diagnose them. Even if they did, complaint handlers in most cases do not have the necessary face-to-face conduct to be in a position to do so.

I think we would all agree that it is inherently unsafe for complaint handlers to make any assessment as to the psychiatric state of motivations of a complainant, or to identify such an assessment as being the basis for any decision that is made in relation to either the management of the complainant or the complaint.

As complaint handlers, our focus must be on the conduct of the complainant and the content of their complaint, and how to manage that conduct and how to deal with the allegations raised.

This is a basis of the approach and the strategies advocated in the *Managing Unreasonable Complainant Conduct Practice Manual* recently published by Australian Ombudsman.

Interestingly this approach, which focuses on objective conduct rather than subjective motivation or mental condition, is also reflected in a change that is slowly occurring over time in the statutory provisions for dealing with 'vexatious litigants'. The original approach to vexatious litigants reflected in legislation in each Australian jurisdiction focused primarily on the motivation of the litigant – the fact that they were 'vexatious'. Over time, a number of Australian jurisdictions have moved to a different formulation of the vexatious litigant provisions which expand the power of their Supreme Courts to make orders restricting proceedings. While the change from the traditional formulation has been for the better, the requirements for somebody to be declared vexatious still focus on the motive and intentions of the litigant.

The next stage in this process can be seen in the UK's Civil Procedure Rules and Practice Directions and in an equivalent provision that has been included in the *Government Information (Public Access) Act*, that has replaced the NSW FOI Act, which allows the NSW Administrative Decisions Tribunal to make orders to restrain the making of unmeritorious access applications – known as 'restraint orders'. This new provision should be more effective than the traditional approach because it is based on objective fact – on conduct and content – not on subjective opinion such as an assessment of intention or motive.

## **What is the proper role of an Ombudsman?**

### *Citizen's defender*

Part of the problem is that Ombudsman and their staff sometimes see themselves as the citizen's defender – the way Ombudsman were traditionally referred to in the days when they were being created around Australia. They were lauded as being the 'citizen's defender' whose role was to defend the individual citizen against the might of the state.

We need to recognise that since that time our role has moved on – for a range of practical reasons we have moved to focus on broader issues or on the more significant matters affecting members of the public. Effectively we have moved the apostrophe so that we are now the citizens' defender – the defender of citizens generally.

### *Discretionary declines*

Ombudsmen are not social workers with an obligation – either legal or moral – to help everyone. We have limited resources and therefore we do not take up all matters that come to us that are within our jurisdiction.

Each Ombudsman in Australia declines complaints. The rate of discretionary decline of written complaints (by this I mean matters that are actually within jurisdiction which the Ombudsman could have decided to take up) range from a very low 7% in South Australia, to 16% in the Northern Territory, 25% Tasmania, 40% in NSW, and up to approximately 60% and over in Western Australia, Queensland, Victoria and the Commonwealth.

For what we consider to be good and proper reasons, we already decline to assist a significant percentage of the complainants who bring their matters to our offices. We cannot help everybody. We must focus our limited resources on the most meritorious matters. If any complainant is taking up a significantly inequitable proportion of those resources, it is to the detriment to other complainants or potential complainants and therefore this may not be fair and reasonable.

### **What are some of the key issues in the management of unreasonable complainant conduct?**

The Australian Ombudsmen have set out in the *Management Unreasonable Complainant Conduct Practice Manual* a range of strategies for managing what we believe to be unreasonable complainant conduct. I do not intend to go into those strategies in any detail, for that matter, at all. However, one matter that I think warrants mention in this context is the fundamental point about the ownership of complaints.

To my mind, one of the fundamental causes of unreasonable conduct is a misconception about who effectively 'owns' the complaint. For the proper management of complaints it is vital that complainants understand from the outset that once they have made a complaint to an Ombudsman, or for that matter to any other complaint handling body, the Ombudsman effectively 'owns' that complaint. The complainant would still 'own' their 'issue' and would be able to do whatever else they might wish to do with it, including taking it up in any other forum they may believe appropriate. However, the complaint handler 'owns' the complaint, and decides, for example:

- whether or not the complaint will be taken up
- if taken up, who the complaint will be dealt with
- how it will be progressed
- what resources will be devoted to it
- what priority will be given to it
- the time period in which it will be dealt with
- the nature and level of input that the complainant may be allowed in the handling of the complaint
- what will be the outcome of the complaint process, for example whether the matter will be discontinued, finalised with a letter making suggestions or in a report making recommendations, etc.

Further, the conclusions, findings and recommendations are solely the preserve of the Ombudsman, or other complaint handling body. While the complainant should be made aware that they may make submissions on these points, they should also be made aware at the outset that at the end of the day these decisions will be made by the Ombudsman, and by that office alone, based on their assessment of the available evidence.

The second and final important point I would like to make is that it may often be important to separate out the issues of the complaint and the issues of the management of the complainant. The fact that a complainant's conduct may be unreasonable does not mean that the subject matter of their complaint lacks merit. The fact that it is appropriate to impose limits on a complainant's access to Ombudsman staff, does not mean that limits should also be placed on the resources made available and priority given to dealing with the complaint.

## **Conclusions**

Upset complainants are a fact of life for complaint handling bodies.

A certain level of 'difficulty' is to be expected and accepted in dealing with upset complainants.

The conduct of angry or upset people goes from being difficult (as in challenging) to being unreasonable (as in unacceptable) when it creates real safety or health issues, or significant resource or equity problems.

The problems caused by unreasonable conduct must be managed by complaint handlers in ways that play to our strengths – we are complaint handlers not psychologists, social workers and the like.

We must focus our assessments and responses on objective criteria such as the conduct of complainants and the content of their complaints, not subjective criteria such as assessments of the motivation of complainants or their mental health.