

Part 3.

Communication and unreasonable conduct

3.1. Effectively managing complainants and their expectations from the outset

Initial interactions with complainants are one of the most important stages in the complaints process. The way you start the first contact with a complainant is likely to significantly affect all future interactions. Complainants are more likely to respond positively to you, your organisation and the complaints process if right from the beginning they feel listened to, understood, and treated fairly and with respect.

A positive start also includes a thorough explanation of:

- the process
- what will happen next
- likely timescales
- the possible or likely outcomes in their matter.

If a complainant seems to have unrealistic expectations, make sure you explain to them the impossibility of such unlikely outcomes.

3.1.1. Communication styles and patterns

Your initial contact with a person who has or is about to make a complaint, whether on the phone or in person, is the best time to assess their dominant communication style and decide how to adapt your own questioning, listening or even speaking styles. You may not get it right the first time but it is much better to start with a questioning mind than to incorrectly assume you both share a similar idea of what respect and courtesy look and sound like.

Most of us evaluate other people's communication based on the way we like to communicate, so understanding others means we first have to understand ourselves. Think about how you present information and how you prefer to receive it. This will help you adapt, rather than be judgemental when you receive it in other styles. Thinking about another person's behaviour in terms of categories of communication – rather than in judgemental terms, such as longwinded or dishonest – may allow you to treat them as someone who is culturally different rather than unreasonable.

See – 3.3. Cultural communication styles.

3.1.2. Establishing the ground rules

Many of the people we perceive to be acting unreasonably do not recognise that for their issue of concern to receive the attention and consideration it needs, they need to exercise their 'right' to complain in ways that respect the rights of the other parties involved in the issue they are complaining about. This includes:

- treating the people handling their matter with courtesy and respect and clearly identifying their issues of complaint
- providing all relevant information about their issue – to the best of their ability
- cooperating with any requests for information, inquiries or investigations
- acting honestly.

These responsibilities may seem obvious to complaint handlers, but many people whose behaviour becomes problematic are either unaware of or give little thought to them. Some are also unaware of or overlook that exercising their own rights is, in most cases, conditional on accepting and respecting the rights of others to do the same. This includes the rights of a case officer to dignity, physical and emotional safety, and respect. It also includes the rights of other people to an equitable share of public resources.

To help complainants clearly understand their rights and responsibilities, organisations should consider adopting a set of ground rules or 'rules of engagement' for accessing their services. These should include the rights and responsibilities of all key parties to the complaints process. This information should be clearly available on the organisation's website.

Complaint handlers should be responsible for ensuring that all parties to the complaint process are aware of these ground rules. In particular, complainants should be made aware of the ground rules either when they make their complaint or when their conduct starts to be problematic. Any questions they may have about those ground rules should be answered, within reason.

3.1.3. Managing expectations

People who raise issues of concern with you or your organisation are unlikely to be aware of your organisation's role, procedures and practices for dealing with complaints. They may believe they can dictate one or more of the following in relation to their matter:

- how your organisation will handle it
- what priority will be given to it
- who within the organisation will deal with it
- the type and level of involvement they will have
- how long it will take to deal with their matter
- what the outcome will be – for example, not uncommonly expecting that they will receive significant financial compensation or that someone will be fired.

It is essential to check and manage complainant expectations as early as possible to minimise the chance of disappointment, anger or frustration at a later stage.

As early as possible in the process, complainants should be informed about:

- the roles and functions of the case officer and your organisation as it relates to their issue of concern
- the complaints processes and procedures that will be followed by the organisation
- how their matter will be dealt with – in general terms
- the likely time frames for completing key tasks relating to their matter
- the likely and unlikely outcomes that you or your organisation might be able to achieve
- their responsibilities – including acting honestly, cooperating with and respecting the case officer
- the responsibilities of the organisation and the case officer in relation to them and their complaint.

Information to help manage or check complainant expectations can be communicated at a number of different stages:

- Before a complaint is made – in publicly available information materials such as brochures and leaflets and on the organisation’s website.
- When a complaint is made – during an initial interaction with a complainant, either over the phone or in person.
- Immediately after a complaint is made – in a letter acknowledging receipt of their complaint.
- While the complaint is being dealt with – during any interactions with the complainant about the progress of their complaint, either over the phone, face-to-face or in written or electronic communications.
- Immediately before the final letter is sent or in the final letter – in a telephone or face-to-face conversation explaining the outcome of the complaint and the reasoning behind it.
- After a complaint has been closed (possibly on an ongoing basis) – in cases of extreme persistence, it may be necessary to continue managing the complainant’s expectations after you have sent the final letter, or even after the decision on the complaint has been reviewed.

The following section has some ideas and suggestions for checking and managing a complainant’s expectations that you can use during your interactions with them.

3.1.4. Testing and managing expectations

Testing expectations

This requires finding out what the person expects and wants.

- What can we do to resolve this in a way that is fair to everyone? – this is likely to be a particularly effective question, as you are asking them to think about their issues from the perspective of all parties. What were you hoping to achieve by bringing your issue to our attention?
- What did you hope to achieve when you decided to contact us?
- What do you think our organisation can do for you?
- What outcome are you hoping for?
- Let’s have a look at your goals in this situation.
- How do you propose that we resolve this?
- Let me explain what happens when you make a complaint.
- Do you understand how the complaints process works at this organisation?

Defining the issues of complaint

This requires clarifying the complainant’s issues to determine whether they can be dealt with by your organisation.

- As I understand it, your issue (s) is/about ... and ... Is this correct? [allow for clarification] And you want ... to happen. Is that correct?

- Your issue(s) appear(s) to be 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
- Are you saying that ...?
- Let me see if I understand your issue(s).
- And am I correct that you want ... to happen?
- Can you share that with me one more time just to make sure I understand you completely?
- Thank you for going to the trouble of explaining this to me. As I understand it you're saying

If the complainant is rambling, you could say:

- I don't need that level of detail to be able to do something about your issue of concern. Tell me about
- So I don't waste your time, why don't you tell me about
- Tell me what the key issue is that you're complaining about.

Retesting and reframing expectations

This requires correcting any misunderstandings and expectations that are unrealistic or unreasonable.

- Are you aware of what our organisation can do? [often the answer is 'not really'] Perhaps I could tell you a bit about how we work and what we can and can't do.
- Let me give you an idea of what our organisation can do.
- ... is what we can do We can't do
- I realise that you want We can/can't do ... because
- ... won't happen because However, ... might be possible.
- We won't do ..., but we may/will be able to
- So that you're not disappointed later on, I should clarify now that it is very unlikely that we'll be able to do ... because
- It seems to me you're hoping we can do I have to tell you now that this will not be possible because

Redefining expectations

This requires correcting any unrealistic or unreasonable expectations, especially those relating to timeliness.

- I'm calling because I said that we would get back to you by Unfortunately due to [state reasons] 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 for the delay.
- I know you were expecting that ... would happen today, but it will not be possible. It is likely that it will happen
- I'm sorry, but we won't be able to However, we can

Preparing the person for disappointment

This requires Delivering bad news as early as possible to avoid the person developing unrealistic expectations about how their issue will be handled and possible outcomes.

- I wanted to call you and tell you about my/our 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 wanted to call you and tell you directly why we won't be able to take up your complaint, before I send you a letter saying this [explain].
- I will, of course, send you my decision in writing, but speaking with you means I can also answer any questions you may have about my decision/the outcome.

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 your bad news.

Case study – Managing expectations

A woman complained to an Ombudsman about an agency's decision to suspend and then cancel her 'Parenting Payment' welfare benefit. The agency claimed that they sent the complainant a letter notifying her that she had surplus payments owing to her and – when she failed to respond – they cancelled her payments. Although the complainant's payments were restarted sometime later, the agency refused to pay her the surplus amount and so she appealed the matter to the Social Security Appeals Tribunal and then the Administrative Appeals Tribunal (AAT).

Both tribunals affirmed the agency's decision stating that it complied with the relevant legislation – that is, that surplus amounts may not be paid if a decision to cancel payment is subsequently overturned and a review is not requested within 13 weeks – which the complainant had failed to do. At the same time, the AAT acknowledged that the complainant had provided correct bank account details and that there was evidence of mail regularly going missing in her neighbourhood. This substantiated her claim that she had not received any letters notifying her of the surplus owing to her.

Upset with what she believed was a gross injustice against her, the complainant complained to the Ombudsman with high expectations that they could do something to assist her in recouping the surplus payments.

The Ombudsman's office assisted the complainant to make a claim for Compensation for Detriment caused by Defective Administration (CDDA). However, because the issues involved were quite complex and because English was a second language for the complainant, a lot of time was spent explaining how the legislation worked as well as the CDDA scheme. Staff of the Ombudsman regularly had to manage her expectations by reminding her of the role of the Ombudsman and the fact that the Ombudsman could not force a CDDA decision to be made in her favour. They also had to regularly remind her that although there was a reasonable prospect of success through the CDDA scheme, they were unable to make any guarantees of success.

The complainant'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 ultimately put it behind her.

3.1.5. Managing your own expectations

Sometimes we may also have unrealistic and unreasonable expectations about people who make complaints and the complaints process. These expectations can include:

People making complaints will have realistic and reasonable expectations

Some complainants are looking for vindication, retribution, revenge, or for significant compensation or someone to be seriously punished for the wrong they have suffered – things that a complaint handling system is not designed to deliver. Some complainants may also insist on outcomes that are completely inappropriate, impossible or unrealistic.

I can bring all complainants around to my way of thinking if I explain things well enough

Explaining and logical reasoning will not always work, especially when a person has not arrived at their point of view through logical reasoning. Also, some people 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.

I can resolve all issues to a complainant's satisfaction and maintain good relationships with all complainants

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 person is not satisfied 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 matter. 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.

I can help people who appear to be spiralling out of control over a relatively insignificant issue

Some people 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. Often the best way to help a person in this situation 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.

3.1.6. Recognising barriers to communication

There are various barriers to effective communication. As a person who deals with people's issues on a daily basis, you may believe that you have communicated effectively with the various parties to a complaint – but this may not have been the case due to a range of factors. These factors may include:

- reasoning challenges – including jumping to conclusions and conspiracy theories
- reasoning capacity – including mental health issues, intellectual disabilities or reduced cognitive capacity
- recall capacity – such as poor recall and selective recall
- distorted or false recollection
- selective attention
- how messages are framed and the order in which information is conveyed
- differing perceptions about fairness and reasonableness
- perceptions about competency
- perceived disrespect
- differing cultural communication styles.

People handling complaints need to recognise the communication problems that can arise because they and the parties to a complaint may well have very different perspectives, objectives, information and knowledge:

- **Perspectives:** The perspective of people who make a complaint is likely to be subjective, biased in their favour and influenced by emotions. The perspective of the people handling a complaint on the other hand should be more objective, impartial and neutral.
- **Objectives:** The outcome a person who makes a complaint may perceive as 'fair' (based on their subjective assessment) may well be different to the outcome the person handling the complaint may consider to be 'reasonable' (based on a more objective assessment).
- **Information:** People who make complaints may jump to conclusions on the basis of the limited information they have, being unaware that there could well be other relevant information. On the other hand, people who handle complaints should recognise the possibility that there is relevant information they are currently unaware of.
- **Knowledge:** Most people who make complaints can be expected to have little or no knowledge about the complaint handling process or the methodology likely to be used in an investigation.

Some people who make complaints hold views so firmly that it is unlikely that facts or reasoning will change their minds. They do not want to believe and are likely to discount contrary evidence. However, there will be some holding strong views who are merely mistaken or who want to believe something to be true, but will still listen to reason. As people who handle complaints might not be able to initially distinguish between the two, it is important to try to correct any misunderstandings about relevant facts and circumstances.

3.1.7. Treating people who make complaints with respect

Complainants who feel they have not been respected or taken seriously can become focused on a quest for vindication, retribution or revenge. Many entrenched disputes and unresolved conflicts can be traced back to an initial real or perceived violation of a person's dignity or sense of identity. Consistently showing respect is fundamental to good complaint handling.

Dignity and respect are different, but closely related concepts. Showing respect can involve an acknowledgement of a person's fundamental or innate right to dignity as a birthright. Respect can also take the form of the recognition of a person's legal rights, acknowledgement of a person's status or position (deference, honour), recognition of a person's achievements (something earned, esteem), or even the way a person is addressed (courtesy).

Psychologist Donna Hicks has suggested a number of essential elements of dignity that people would like for themselves, including:

- Acceptance of identity – to perceive they are not being negatively judged.
- Inclusion – to perceive they belong.
- Safety – to perceive they are safe from bodily harm and humiliation.
- Acknowledgement – to perceive they are getting your full attention.
- Recognition – to perceive they are appreciated.
- Fairness – to perceive they are being treated fairly.
- Benefit of the doubt – to perceive they are trusted.

Violations of a person's dignity can include any action or treatment that makes the person feel unfairly treated, unworthy or without value. For example:

- humiliation, bullying, exclusion, intimidation or threats
- any other conduct which people perceive as implying or inferring that they are inferior or of little value – including demeaning criticisms, patronising comments, ridicule, contemptuous behaviour or dismissive responses
- behaviour that creates a perception of discrimination based on factors such as gender, race or disability.

The following strategies can help people handling complaints to avoid disrespecting a person who has made a complaint, or try to address violated dignity:

- using inclusive language
- avoiding language of dominance, power or control
- avoiding unnecessary challenges to the person's sense of identity
- active listening
- reflective listening
- acknowledging feelings
- demonstrating that the complaint has been taken seriously
- managing expectations
- focusing on the person's conduct and not labelling the person
- apologising for any procedural failings.

3.1.8. Writing letters

Communicating effectively is also important when you are writing to a person who has made a complaint, particularly a final or review letter/email. Many people who make complaints place a lot of importance on these communications so you need to take time to draft them carefully.

Final letters/emails should be written as 'standalone' documents that clearly explain the:

- issues of complaint
- issues that were investigated and explanations for any that were not
- factors that were taken into account for those that were investigated
- methodology and actions taken
- reasons for the decisions/outcomes reached.

If the conduct of the person who made the complaint is perceived to have been unreasonable, the letter/email should also:

- identify the nature and number of interactions between the person and the organisation and/or its staff – if those interactions were excessive or inappropriate
- in serious cases, identify and explain the nature of the unacceptable conduct in which the person has engaged.

This type of approach can be effective in cases where you know or suspect that the recipient:

- will be very unsatisfied with the contents of the letter/email
- has or will escalate their complaint up the hierarchy – say to the CEO or Minister – or externally to the media for sympathy or for a more favourable outcome.

A comprehensive final letter/email can in these cases be used as the basis for (or attached to) a briefing note response if the escalation is to the CEO or Minister. Alternatively, if the escalation is to a journalist you can ask whether the journalist has been shown the letter by the complainant and, if not, suggest the journalist should ask to see it.

It is also best to give the decision at the end of the final letter/email rather than the beginning to encourage the complainant to read the reasoning underpinning the decision first. This may increase the likelihood of the decision being understood and accepted. Some people – when faced with an adverse decision at the beginning of a letter/email – do not bother to read the whole letter/email before calling to express their dissatisfaction or demand a review.

A letter advising a person of the outcome of a request for review should be short and concise. Long and detailed review decisions sometimes encourage a response arguing about specific details while ignoring the substance of the decision.

We suggest that organisations adopt a 'one review' policy. Review letters/emails should be signed/sent by a senior manager to make it clear to the recipient that the matter has been escalated and considered by management and that there is no benefit in trying to escalate the matter further within the organisation. The letter should include a statement and explanation about how further communications relating to the person's issue of concern will be dealt with. For example, further correspondence about this issue will be 'read and filed without acknowledgement' unless the organisation considers that it requires further action.

If possible, reviews should also generally be done by a different officer – preferably someone more senior – who is likely to be more impartial to the situation.

3.2. Quick guide – effective communication strategies

3.2.1. Do:

- Show respect (always, no matter what)
- Stay calm (always)
- Allow venting (to a degree)
- Acknowledge emotions (without saying ‘*I know how you feel!*’)
- Show empathy
- Acknowledge their point of view (without agreeing)
- Find something to agree with
- Paraphrase, or at least echo what they say (to show you are listening)
- Use non-confrontational language
- Listen actively
- Clarify (when unsure)
- Check understandings and manage expectations
- Allow space to think, if necessary
- Admit and apologise (where appropriate)
- Seek resolution (where appropriate)

3.2.2. Do not:

- Argue, defend or deny
- Give excuses (explanations are different)
- Be perceived as being confrontational, verbally and non-verbally
- Be overly formal or bureaucratic in your responses
- Be too informal and be wary of humour as it can be misinterpreted
- Respond to fighting words
- Suggest the person needs therapy or counselling
- Suggest the person is being unreasonable – instead of labelling the person, focusing on your perceptions about the person’s conduct and how that is affecting you is likely to be more effective
- Invade the person’s personal space

3.3. Cultural communication styles

The following information provides some guidance on various different global communication styles, and the way they can influence interactions with people who have made a complaint.

3.3.1. Globally recognised communication styles

We all rely on our acquired set of norms to develop what we see as appropriate, polite and respectful patterns of communication. Over time we are exposed to a wide variety of styles and patterns of communication that expand our own understanding and ability to interact successfully with others. However, there are times when the logic of someone's communication does not appear clear and the meaning is lost, misinterpreted or simply dismissed. In situations such as these, understanding and appreciating different communication styles can help to reduce or avoid conflict and confusion.

The descriptions below are basic outlines of eight communication styles you may come across when interacting with people from different cultures: linear, circular, direct, indirect, expressive, restrained, intellectual and relational. They form a useful basis for questioning assumptions about people's behaviour and may help you to understand why someone is acting in a certain way. You may even be able to adapt your own behaviour when you receive information in a way that is outside what you or your organisation are used to dealing with.

Linear

Information is provided in a straight line, almost like an outline. A leads to B which leads to C – all getting to 'the point'. It is frustrating for these communicators to be 'diverted' from what they consider to be the point when they are speaking or listening. It is up to the speaker to provide information clearly and concisely. This is a dominant style for most native English speakers.

Circular

Information is provided in a roundabout way, telling stories and restating things in many different ways – sometimes getting to the same point that a linear person might. However, some circular communicators leave 'the point' unstated. This can be a much longer process than linear conversations. It can be up to the listener to analyse and reach 'the point' based on the details provided and the context. This is an important style for some Africans, Arabic speakers, Indians and many Latin Americans.

Direct

Information is provided through unambiguous statements with a strong focus on speaking rather than writing. It is up to the speaker to state explicitly what they mean. People who use this style might make statements like: 'I tell it like it is!' French, Russian, Dutch and many other Northern Europeans, plus Israelis, favour direct communication. This is also a dominant style for most native English speakers.

Indirect

Information is provided through suggestion, implication and non-verbal behaviour. Active listening is required to follow and understand the various strands of communication. It is possible that messages will be sent through a third party. This style allows a person to avoid

confronting another person or causing them to lose face. Responsibility lies with the listener to analyse information and reach conclusions based on the context and communication methods other than spoken words. Often the words used are not meant to be taken literally. Most Asian societies prefer this style in disagreement or conflict.

Expressive

Important issues are discussed with feeling and emotion, a loud tone, use of hands and other gestures. All of these methods convey the speaker's personal stake in the outcome, their passion. It is important for more restrained communicators not to misinterpret this passion as threatening or aggressive. It is also important to remember that expressive communicators are seeking empathy and understanding, so if you make explicit statements about 'calming down' they may very well become more expressive in an attempt to show you how important the issue is. Provide empathy – by showing (rather than just stating) your understanding of their feelings rather than shutting them down. This style is common in most of the Mediterranean area as well as being used by Arabic speakers, African Americans, some Africans, Indians and others.

Restrained

Important issues are discussed with calmness and 'objectivity', conveying the speaker's ability to weigh all the factors impersonally. These speakers feel that it is important to be composed and that – if it is important – it should not be tainted by personal bias. This style can be interpreted by more expressive communicators as coldness and lack of caring. Most Northern Europeans favour this style. It also dominates professional settings in the English-speaking world.

Intellectual

Any disagreement is stated directly – with the assumption that only the idea, not the relationship, is being attacked. People who use this style might make statements like: 'We're just arguing – don't take it personally!' These speakers may argue for fun and in order to get to know and build trust in others. This style is found in some European countries, such as Russia and France, as well as Israel.

Relational

Disagreements are handled in a subtle and non-confrontational manner. In a debate or disagreement, it is important to tread softly. If relational people cannot find some common ground on an issue that is difficult or important for them, they will 'agree to disagree' or use indirect language in their disagreement. People who use this style might make statements like: 'If you don't like my idea you obviously don't like me.' This style is often the source of communication where 'yes' seems to mean 'no' and requires open-ended questions rather than closed ones. When relational communicators apparently answer with a direct 'yes', they may very well follow up with a more indirect or circular 'no'. If you fail to recognise this communication pattern you may judge them as dishonest or manipulative, when in their mind they were being very clear that their answer was 'no'. Indians and some East Asians use this style to prevent loss of face. Aboriginal English often favours relational communication, especially with non-Aboriginal people or authority figures.

3.3.2. Interpreting courtesy

Courteous behaviour is highly culturally dependent and implies a shared set of communication styles and other shared cognitive and behavioural patterns. Discourteous behaviour can mean breaking simple etiquette rules, such as shaking hands or not, through to more serious infringements – such as speaking the name of the dead. When interacting with people who are culturally different from you, even if they speak your language, remember that you may have to be more explicit in your behavioural and communication expectations of them. It may not be enough to say, ‘You must be courteous and respectful’. You may have to provide a list of behavioural expectations for what you mean by these terms.

Interpreting hierarchy

People who come from more hierarchical backgrounds than what is normal in Australia and New Zealand (most countries in the world are more hierarchical) may make false assumptions about you and your organisation based on what you see as normal behaviour. For example, if you encourage people to call you by your first name they may assume you have befriended them – as only friends use first names in many societies. This may mean they expect you to behave as a friend, supporting their claim ‘no matter what’ or advocating for them throughout the complaints process. In other cases, people may themselves be quite high in rank or status in their own community and expect to be treated differently to others during their complaints process. When you do not do this, they may say you have been rude or disrespectful of them. There are many other situations in which the person’s understanding of the role of hierarchy in organising the world leads them to misinterpret you, your organisation or the complaints process.

You will not change your policies or procedures in these cases, but – to help some people understand your actions and how your process works – you may have to provide more explicit information about your own behaviour, expectations and possible outcomes. You cannot assume that your own unwritten etiquette rules and behaviours will be universally understood, even by those who speak your language fluently.

Interpreting honesty

Direct and intellectual communicators, such as most English-speakers, use the term ‘honesty’ to mean telling the truth, ‘saying it like it is’ or being transparent in their actions and communication. The listener has little responsibility but to pay attention. For more indirect or relational communicators, ‘honesty’ involves a very different set of actions – often in order to save face for themselves, their listener or others. They tend to rely on the listener to interpret the entire context of the communication and rely much less on words. Culturally appropriate listening skills require not only paying attention but also analysing, interpreting and questioning the entire context of the communication in order to find the speaker’s meaning.

Interpreting respect

Respectful behaviour is very different across different cultural contexts. For intellectual communicators, engaging in argument is a form of respect – as it shows esteem for people’s ideas and ability to communicate. For more relational communicators, agreeing with others is a form of respect – as it shows a willingness to set aside your own ideas for them. Expressive communicators will feel highly disrespected if you ask them to ‘calm down’ or if

you remain restrained instead of showing them that you understand them and their point of view (understanding is not agreeing). Of course, for restrained communicators, respectful behaviour is the opposite – they expect calmness and an even tone.

As with courtesy, when interacting with people who are culturally different from you even if they speak your language, remember that you may have to be more explicit in your behavioural and communication expectations of them. It may not be enough to say, 'You must be courteous and respectful'. You may have to provide a list of behavioural expectations.

3.3.3. Aboriginal and Torres Strait Islander people

The terms 'Indigenous', 'Aboriginal' and 'Torres Strait Islander' are commonly used now, but it is important to note that these names are the legacy of colonisation and are terms imposed on a range of people with diverse cultures and languages.

The term 'Indigenous' is usually used when referring to both First Nations people of Australia – Aboriginal and Torres Strait Islander peoples. This term is generally used by the Commonwealth Government as they have a charter of providing services and programs to both Aboriginal and Torres Strait Islander people at the national level. The term 'Aboriginal' refers specifically to the Aboriginal people of mainland Australia and does not necessarily include Australia's other Indigenous population – Torres Strait Islanders.

Many Aboriginal and Torres Strait Islander people are opposed to the term 'Indigenous' being used as it generalises both cultures. It is important to remember that while both are First Nations of Australia, Aboriginal and Torres Strait Islander cultures are very different – with their own unique histories, beliefs and values. It is respectful to give each their identity.

When referring to both cultures, it is appropriate to use the term 'Aboriginal and Torres Strait Islander'. In other circumstances – for example, in states and territories where Aboriginal people are the original inhabitants – use Aboriginal. The first letters of Aboriginal, Elder, Torres Strait Islander and Indigenous are always capitalised. Not doing so is similar to misspelling a person's name or another country's inhabitants.

Respect and sensitivity

Like all genuinely mutual and productive relationships, engagements with Aboriginal people and communities need to be based on respect. You need to offer and earn respect, particularly in dealings with community Elders and leaders. Elders and community leaders not only hold key community knowledge but they also have a great deal of influence over when, how and if a community will work with those from outside. This is also true for other representatives of the local community. An Elder or leader may not necessarily be an older person. They may also be a younger person who is well respected within their community and holds significant community knowledge. Many Aboriginal people acknowledge Elders and leaders as Aunty or Uncle, even if that person is not blood-related or kin, as this is a sign of respect. The same courtesies accorded to dignitaries should be applied to Elders.

Managing expectations

Numerous policies and programs have been developed by government promising Aboriginal people many things that have often not been delivered. For this reason, managing expectations is important. Be honest and upfront. Providing feedback is also critical.

You need to explain what your organisation can do, and make sure that people clearly understand any processes and limitations you may have when providing assistance and advice. Aboriginal people would rather you be honest and tell them if you cannot help them, or if it is not within your organisation's capacity to help them. Alternatively, if you cannot provide them with the advice they need immediately, explain to them that you need to research the problem or seek advice from your supervisor and you will contact them with the information. Make sure that you do this, even if it is not good news.

Credibility

It is not wise to say to an Aboriginal person 'I will look into it for you' as in most Aboriginal communities this means you are a 'looking glass man/woman' – meaning you will look into the problem like you do into a mirror, but do nothing about it. Remember that the 'grapevine' or the 'bush telegraph' is very effective and efficient – and you can be certain the whole community will know in a very short time what you did or didn't do. Providing feedback, even if it may not be what people want to hear, is critical to an organisation's or individual's credibility.

Language

Since colonisation, Aboriginal and Torres Strait Islander people have experienced prejudice, discrimination and misunderstanding and their interests, rights and concerns have often been dismissed or ignored.

For example, after European colonisation, Aboriginal people were forbidden from speaking their traditional languages, and English was used to communicate with and describe Aboriginal people. Given the beliefs and perspectives of the colonists at that time, the terminology that was developed was often inaccurate and discriminatory towards Aboriginal and Torres Strait Islander people.

Having an understanding of how to use appropriate terminology and language, and understanding some of the ways in which many Aboriginal people use language differently to non-Aboriginal people, is fundamental to effective communication and to developing strong relationships with Aboriginal community members.

Inappropriate terminology

As the relationship between Aboriginal and non-Aboriginal Australians continues to evolve, the language that is considered appropriate also changes. There are a number of terms which, while still in common use, are out of step with what many Aboriginal people believe is appropriate or offensive. It is important to understand that opinions on what is appropriate will vary between different locations and between individuals. If you are not sure about using a particular term, ask the local Aboriginal community to identify what term they believe is the most accurate and respectful.

Aboriginal English

Aboriginal English is the name given to the various kinds of English spoken by Aboriginal people throughout Australia. Technically, the language varieties are dialects of English. They have much in common with other varieties of Australian English, but there are distinctive features of accent, grammar, words and meanings, as well as language use. Aboriginal English often shows continuities with the traditional Aboriginal languages. In many subtle ways Aboriginal English is a powerful vehicle for the expression of Aboriginal identity.

Swearing

It is common for some Aboriginal people to use swear words in their regular vocabulary and in general conversation. Swearing is not considered to be as offensive as it is in non-Aboriginal culture. If this happens, try not to take any offence. This does not include a person swearing directly at you in a derogatory, threatening or offensive manner – this behaviour should not be tolerated by anyone.

Non-verbal communication

Aboriginal English makes considerable use of non-verbal signs. These are an integral part of the communication process and should not be ignored.

Differences between Aboriginal non-verbal features and those of other cultures provide additional scope for misinterpretations. This is especially so for people of Anglo-Celtic descent who usually downplay non-verbal communication. Non-verbal communication includes hand and facial gestures, eye contact and silence. If there are concerns about misinterpreting non-verbal communication, clarify by rephrasing the question or repeating the non-verbal response back by using verbal language. For example, if you are asking a person how many children they have and they hold up three fingers, clarify by asking back 'So you have got three children, right?'

Be sensitive to the use of non-verbal communication cues, which are a part of Aboriginal communication patterns. The use of silence does not mean Aboriginal people do not understand – they may be listening, remaining noncommittal or waiting for community support. During discussions, Aboriginal people may delay expressing a firm opinion – preferring to listen to other people's opinions first before offering their own. Remember that language issues are extremely sensitive because so many Aboriginal languages have been lost and many of those that survive are endangered.

Communication tips

- Be sensitive to the use of non-verbal communication cues, which are a natural part of Aboriginal communication patterns.
- The use of silence does not mean Aboriginal people do not understand. They may be listening, remaining noncommittal or waiting for community support.
- Use indirect eye contact – which is a sign of respect in Aboriginal culture.
- Time delays (sometimes lengthy) before communities provide requested information – or a less direct communication style – are common in Aboriginal communities.
- To be direct may be seen as confrontational.
- During discussions, Aboriginal people may delay expressing a firm opinion even though they may hold one. Instead, they may listen to others before offering their own view.
- If their view conflicts with others, they will often tend to understate it.
- The question 'why?' is virtually absent from the language of remote Aboriginal communities. Instead, observation is used as a learning device.

3.4. Guidance on disability and mental illness

The following brief summaries, based on the work of Ombudsman Victoria, outline some of the disabilities and mental illnesses that can have an impact on a complainant's behaviour.

3.4.1. Acquired brain injury

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

- traumas such as car accidents, falls or assaults
- stroke or vascular disease
- drug or alcohol use
- brain infection such as meningitis
- diseases such as dementia or tumours
- lack of oxygen, including near drowning.

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

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

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

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

- Use short clear sentences and questions.
- If the person has memory problems, write down important information or repeat information regularly.
- Check that the person has understood you – 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.

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. For example, '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.

3.4.2. Autism spectrum disorders

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

The Australian Bureau of Statistics estimated that there were 164,000 Australians with autism in 2015.

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 in social communication and patterns of behaviour such as:

- Difficulty interpreting verbal and non-verbal communication – such as tone of voice, metaphors or jokes. They 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 things such as noises and light.

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

- Use the person's name to attract their attention.
- Use short clear sentences and questions.
- Do not overload the person with information or questions.
- Ask specific rather than open questions for example, '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 visual information to support your communication.
- Give the person time to process what you have said and respond.
- If the person does not respond, rephrase the question.

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 for example, reduce noise or light.
- Tell the person what to do, rather than naming the behaviour – for example, 'Put your hands down'.

3.4.3. Intellectual disability

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.

The Australian Institute of Health and Welfare estimates that 3% of the population has an intellectual disability.

Intellectual disability can range from mild to severe.

It can affect the person's:

- communication – 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.

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

- Use the person's name to attract their attention.
- Use short 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 – for example, ask them to repeat what you have said in their own words.
- Give them time to process information and respond.
- Allow them to take a break if needed.

3.4.4. Mental illness

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.

The Australian Bureau of Statistics estimates that 45% of adult Australians experience a mental illness in their lifetime.

The impact on an individual will depend on the type of mental illness. A person with depression may feel sad or flat, have trouble with sleep and appetite, and have impaired thinking or concentration. A person with schizophrenia may experience psychosis for example, delusions or hallucinations. A person with post-traumatic stress disorder may have intrusive memories or be anxious or irritable.

Mental illness is treatable. Some people experience it once and recover. For others it is recurring and episodic.

The effect of mental illness differs from person to person so it is best to ask the person what they need.

Consider adjustments such as giving the person more time to collect their thoughts and explain their complaint.

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 appear out of touch with reality – for example, that people are listening to their thoughts – you do not want to fuel a delusion or be confrontational. It is better 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 cannot act without evidence. For example, 'You're explaining this well. We need clear evidence before we can take action though, so I don't think we can help you'.

Remember that the person may still have a legitimate complaint.

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

- Talk to them calmly but firmly.
- Give clear directions for example, 'I hear you're frustrated but please stop shouting'.
- If the person does not stop, give them time to calm down somewhere they feel safe.
- If you are concerned for their safety or the safety of other people, contact the mental health unit at your nearest hospital or the police.

3.5. Online UCC

In 2016–17, 87% of Australians were internet users. Social networking, shopping and banking were equally popular online activities – with each attracting 80% of internet users.

It is not surprising that people are increasingly using social media platforms to express their views and opinions about issues. A survey in the United Kingdom found that one in four social media users used platforms such as Facebook, Twitter, Instagram or Google+ to make a complaint over a three-month period.

People have a right to complain about an issue in the way they want to, including online. Online complaints are only problematic when justifiable complaining becomes inappropriate and/or involves unlawful attacks on organisations and their staff. This type of behaviour can cause serious psychological or reputational harm because it can be very public and often vicious, and must be dealt with decisively and swiftly – in the same way as other more traditional forms of UCC.

3.5.1. When does online conduct become problematic?

If online conduct occurs during or as a direct result of services provided or work done by an organisation or its staff and is considered to be unacceptable (and in some cases unlawful), then it can legitimately be characterised as UCC and must be dealt with as an organisational issue. However, the level and type of response needed will vary depending on the circumstances of each case.

Some examples of inappropriate and unreasonable conduct by people complaining online include:

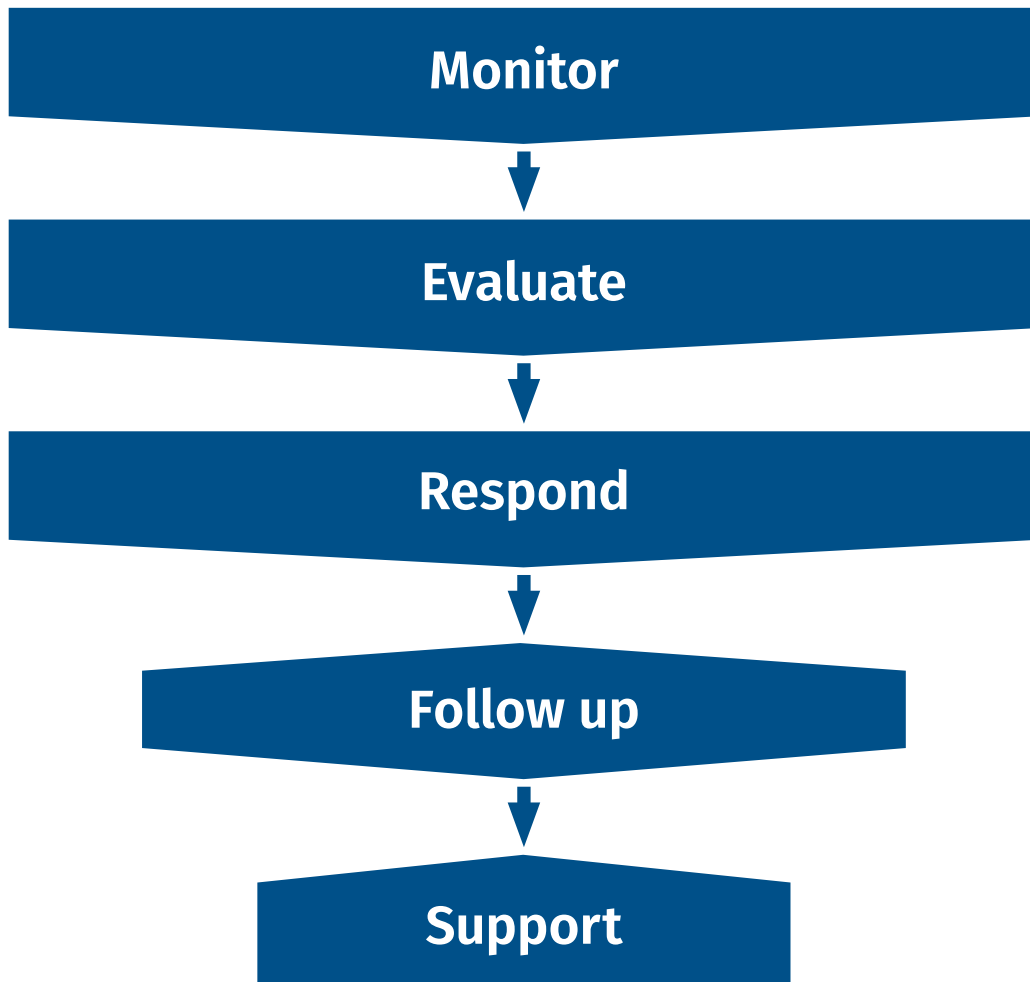
- Posting lies and defaming organisations and their staff (and in some cases their family members) – such as making corruption allegations or commenting about their personal lives or alleged sexual activities.
- Creating unpleasant websites with rude comments, photos or videos depicting members of an organisation or their family members.
- Stalking (repeated attempts to make contact/unsolicited or unwanted communications) or bullying (creating pages or online groups targeted at an organisation or its staff).
- Sending messages or posting comments that contain harassing or offensive language – including sexual references, inappropriate nicknames or jokes, racial slurs, rude or deliberately offensive comments.
- Ridiculing organisations and/or their staff to intentionally embarrass or humiliate them or worse.
- Conducting snide online polls about organisations and their staff.
- Sending threatening, harassing, verbally abusive or confronting messages/comments/emails/posts.
- Posting personal information about staff members of an organisation – including their phone number or contact details, name, address or vehicle details.
- Posting links to other disreputable or inappropriate websites, and hacking or uploading viruses or other materials that are harmful to an organisation’s network.
- Posting comments to incite others – including encouraging illegal activity or engaging in violent conduct towards a staff member.

- Using an automated system to repeatedly send the same message to your network so that it overloads or crashes.
- Altering or misrepresenting information or correspondence from an organisation or its staff, inappropriately using an organisation's trademark or letterhead or otherwise violating copyright laws. This usually happens when online comments and postings are copied by a complainant to appear as though they are their own.
- Creating fake online profiles to impersonate someone or so that they cannot be identified (anonymity).

3.5.2. Taking a risk management approach to online UCC

Employers need to adequately protect themselves and their staff from risks to health and safety and liabilities that can happen as a result of online and electronic communication. Preferably, this should happen whether or not an organisation has a social media or online presence and should include clear protocols and procedures for dealing with UCC in e-communications. These protocols may be part of a broader UCC policy or can be a separate document. They should include a risk assessment process to help staff to determine when and if so how to respond to UCC in such situations.

The following risk assessment process is largely based on the work of Mike Kerwin, executive writer at Levick Strategic Communications LLC and Alyssa Gregory, founder of Avertua LLC.



Step 1 – Monitor

Maintain

- an ongoing system for researching and keeping track of postings and online comments about your organisation and staff.
- Encourage all staff to report any inappropriate or questionable online content that they discover which relates to your organisation or a member of your staff.
- Use online listening tools and alerts – such as Google Alerts, Social Mention, Technocrati, TweetBeep and Boardtracker etc. Google Alerts, for example, can send email updates of the latest online mentions about your organisation whether it is on a blog, a news item, in a video or tweet – eliminating the need for manual searches.
- Designate an authorised staff member (or response team) to monitor online content. This person should also be responsible for evaluating identified online content and deciding whether a response is needed – and if so what that response will be.

Step 2 – Evaluate

Once you are aware of the online content, the next step is to look at what response, if any, is needed. It is essential that this occurs promptly so that you can avoid or minimise the likelihood of these situations spiralling out of control. The following issues may be considered:

Content

- Does the online content contain constructive criticism, an observation or negative criticism?
- Is the online content relatively moderate 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 or does it contain misrepresentations or lies that could reasonably mislead others?
- Does the online content contain personal information about staff members – such as their names, photos, videos, contact details (personal or at the organisation) or any information that could be used to identify the staff members or members of their family?
- Does the online content contain defamatory information or threats, violate trademark or copyright laws, or contain otherwise unlawful content?
- Does the online content contain profane, indecent, vulgar or obscene sexual content and/or unsubstantiated allegations about staff?

Apparent purpose/objective

- Does the online content appear to be dedicated to degrading others? Is it part of a smear campaign or a publicity stunt?
- Does the online content incite others to engage in a particular act or omission – such as boycotting your organisation or taking part in illegal conduct?
- Does the online content appear to have been created with the intention to embarrass or humiliate or as part of a joke?
- Does the online content seem to have a valid basis – raises a valid issue for which you or your staff are responsible and should take steps to rectify?

Visibility and credibility

- Is the online content on a website that is highly visible and easily accessible? For example, is it on Facebook (with approximately 16 million Australian users) or is it on an obscure website that has been viewed by a relatively small number of people – the person’s inner and/or extended circle of friends and family?
- Has the online content taken on a life of its own – possibly even being reported in the news media and therefore 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?

Impact

- Could the online content significantly damage your organisation’s reputation or that of a staff member?
- Is the online content having (or likely to have) an impact on your workplace environment, on relationships between colleagues or with people who have made or may make complaints, or on cohesion in the workplace? If so, some form of action will be required.
- 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 duty of care, WHS or legal issues 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? Has the person represented themselves as a member of staff or another relevant authority figure?
- If relevant, is the person hijacking the communication stream in a way that is affecting its effectiveness or the ability of other people to use it in the intended way? This applies if your organisation is running a blog, Facebook or Twitter page or other online communication stream.

Context

- What is the timing of the online content? For example, has it been created at a time when your organisation (or a staff member) is under unusual public scrutiny – for example, because of a highly controversial report or for inappropriate conduct? If so, a response may be needed for ‘damage control’.

Step 3 – Respond***Is a response needed?***

If a response is required, it should be done promptly – within hours if not minutes of the online content being identified – before it has a chance to be picked up and spread widely. A timely response can also be pivotal to whether or not you can defuse the situation or a whether a comment spreads out of control.

Depending on the circumstances, reasons for responding to online content could include that:

- there is a significant risk that the online content could mislead others – because it 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 highly personal information about staff or their families or would give rise to legal or WHS issues for the organisation if it is not acted on
- it is highly visible and accessible, has gone or could go 'viral'
- it appears to be credible even though it is not or could cause others to be grossly misinformed
- it is having a significant impact on the workplace and relationships between colleagues and with people who have made or may make complaints
- it has been created at an inopportune time for your organisation.

There are a number of options for responding to online content. Responses can be public or private, they can take the form of a comment, a rebuttal or rejection, or they can include a statement on the website or forum where the inappropriate online content was discovered, or on your organisation's website, or be delivered by email, a telephone call, a face-to-face interview or in a letter. The most appropriate method for response will depend on the circumstances of each case.

Should it be a public or private response?

When deciding whether a response should be public or private you may consider the following issues.

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. A public response can either be done on the website where the offending online content was discovered, on your organisation's website, blog or social media page, or in an online newsletter etc.

It is important for public responses to be unemotional. They should show restraint and treat the complainant with dignity and respect.

Public responses should offer to correct problems if your organisation or staff have done something wrong. If all else fails, responses should thank the person for their comment and move on as quickly as possible. The reality is that the public audience is more likely to be looking for how you respond, rather than the person who posted the online content. If you respond badly, then you will do more damage than the person who posted the content ever could do.

The following suggestions have been taken from Robert Bacal's *Defusing Hostile Customers Workbook*. Bacal suggests that these are the most effective layouts for responding to people through electronic mediums, including posts on social media websites, to ensure that your key messages stand out and that readers see them quickly and pay attention to them. These suggestions can also minimise the likelihood for misunderstandings:

- Use short paragraphs, with double spacing between each paragraph. Six to ten lines per paragraph.
- Use short sentences and simple sentence structures. Complex structures will be even more confusing online than on the printed page.
- Use proper headings – assume your reader is going to take a quick look at the page overall to see if what they are looking for can be found in the headings.

- Make sure that the main content of the page is readable without scrolling down the page. That does not mean that everything that is important needs to be at the top, but it does mean visitors should be able to quickly see what is on the rest of the page by looking at the top.

Once you have responded publicly, shift to private responses/correspondence with the complainant by email, telephone or face-to-face.

Private response

If the online content is not publicly accessible, then a private email response, letter or phone call may be appropriate and adequate. A private response can be used to clarify issues – including when your organisation or staff have done something wrong – or to give the person who posted the content an opportunity to remove the online content before taking more decisive action. The latter should always be done in private because it could be viewed negatively online.

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 other communication platforms, a more comprehensive response strategy may be required. This response strategy could include press and/or media releases and interviews, proactive outreach to relevant people, corrective messaging in social media and/or on your website or blog, or responses in any other relevant publications produced by your organisation.

It can be difficult to know when an online posting or website will be picked up and spread. Online listening tools can be helpful to alert you to all mentions of your organisation. As the number of mentions about a particular issue increases, 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 usually no further action is required. In some cases, it may be appropriate to copy and make a record of the content to identify recurrent behaviour. It may also be important to provide assistance and support to any staff members affected by the comments.

Step 4 – Follow up and follow through

Once the online content has been responded to – either directly or indirectly – you should continue monitoring to identify new comments and track old comments to see if they are picked up elsewhere or revived.

Also, if a person's concerns were valid and/or your organisation or staff have done something wrong, consider following up with the person a couple of weeks after the incident to make sure that you have satisfactorily addressed their concerns. 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.

Step 5 – Support affected staff members

If the online content poses a significant risk of psychological or reputational harm to staff, it may be important to consider providing the affected staff with a public message of support – as part of your public response. This message of support will be important in discrediting and rejecting the person’s remarks and making staff feel (and the public recognise) that they and their work are valued and supported by the organisation. You should also take appropriate steps to make sure staff receive adequate counselling and support services.

Staff should also be advised on the legal avenues that they can take in such situations and, in appropriate cases, should be supported to do so. Depending on the circumstances, there are legal mechanisms that could be used to deal with online UCC under relevant Commonwealth and state legislation.

For example, in NSW this could include an action under the:

- *Anti-Discrimination Act 1977* (NSW)
- *Broadcasting Service Act 1992* (Cth)
- *Copyright Act 1879* (NSW)
- *Copyright Act 1968* (Cth)
- *Crimes Act 1900* (NSW), in particular Part 6 – Computer Offences
- *Criminal Code Act 1995* (Cth), particularly:
 - s 147.1 – Causing harm to a Commonwealth public official
 - s 147.2 – Threatening to cause harm to a Commonwealth public official
 - s 474.14 – Using a telecommunications network with intention to commit a serious offence
 - s 474.15 – Using a carriage service to threaten to kill another person or entity
 - s 474.16 – Using a carriage service for a hoax threat against another person or entity
 - s 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.
- *Defamation Act 2005* (NSW)
- *Privacy Act 1988* (Cth)
- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Racial Discrimination Act 1975* (Cth)

A carriage service under the Criminal Code Act is any service that facilitates communication through electronic energy. This includes telephones or mobile phone services, the internet (and any facility on it like email or social networking websites), and using facsimile or other electronic means.

Case study – An example of online UCC

A man approached an Ombudsman in 2010 complaining about an agency's investigation and review of his complaints about his former employer for breaches of work health and safety legislation. He also complained that the agency had not responded to his complaints about safety breaches in an appropriate manner and alleged that – because of the agency's negligence in not referring to the legal evidence he had provided them – he had lost his employment, finances, retirement investments and worst of all his good health.

The Ombudsman accepted his complaint and decided to make inquiries into the issues he had raised. During our inquiries, we discovered that the person had created a website about his issue.

Ombudsman staff visited the website which seemed to target the person's former employer and its board of directors, whom he compared to former Chinese Communist regimes. The website also targeted a wide range of people and organisations that had rejected his allegations and included copies of correspondence involving them along with photos – some with speech bubbles added to the photos. There were also more than 60 links on the website's home page to the correspondence he had either sent or received from these people and organisations, accusing many of them of being biased and fraudulent. A number of the letters on the website had been altered to draw attention to certain sentences which were responded to either in typed script or with scribbled comments in the margins.

The website also made allegations of taxpayer-funded sex and child abuse and made references to other controversies. This appeared to have been done to support his allegations of bias and corruption – though they were completely unrelated to his complaint. There were accusations about criminal activity and negligence, fraud, discrimination and violence among other things, and – in an apparent attempt to make the website credible – included more than 30 union, government and company trademarks and logos copied onto the website's home page. Some of these had been altered to include the name of his former employer in different fonts, colours and sizes.

The home page also had approximately 10 scrolling messages about his former employer. One bounced, five scrolled to the left, while another scrolled to the right. One scrolled upwards and another went downwards and one was identified as 'breaking news'. It even offered a \$5,000 reward for any evidence on his former employer's alleged work health and safety violations and directed people to his Twitter and Facebook pages which had also been created as 'part of [his] pursuit to expose [the CEO's] OHS crimes'.

3.6. Apologies

Mistakes, delays, omissions and misunderstandings happen, complaints can be mismanaged, and processes and procedures can be unresponsive to the needs of certain people who have made a complaint. When these things happen we should correct them as soon as possible. This includes providing the person with a ‘full’ apology – an apology in which we admit fault or responsibility.

A full apology is one of the most effective ways to defuse a situation and prevent it from escalating. It is also essential in any circumstances where our initial conduct or response to a complaint has triggered or contributed to a person’s conduct becoming unreasonable. 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.

Most of us do not like confrontation – particularly with an angry person. Some of us fear that by apologising we will make an angry person even angrier, so we avoid them instead – waiting for the situation or problem to ‘blow over’. Unfortunately, this rarely occurs and the situation escalates unnecessarily.

This section briefly discusses apologies. For more information and practical examples, see NSW Ombudsman website *Apologies – A practical guide*. https://www.ombo.nsw.gov.au/___data/assets/pdf_file/0013/1426/Apologies_A-practical-guide.pdf

3.6.1. Giving an apology

An apology needs to be made properly and should be given at the earliest practical opportunity. This could be, for example, once responsibility for a wrong is apparent or immediately after an investigation into the issue giving rise to the need for an apology. If an apology is made too late, it can be interpreted as ‘damage control’ – rather than a sincere expression of regret. A partial apology (saying sorry, but not why) or an otherwise inappropriate apology can do more harm than good.

To be effective, an apology also needs to be given by the right person – the one who is responsible for the wrong, or a person who is clearly perceived as speaking on behalf of the agency responsible for the wrong. Otherwise, it may be perceived as being insincere. It is best to assume that in most cases the person who deserves an apology needs that apology to be sincere. This may not always be the case – for example, if the person’s need is for the fact of an apology, such as when a person is stridently demanding that they be given an apology.

Apologies should also be given to the right person, the one who was harmed. Apologising to a third party is generally not appropriate.

3.6.2. What should an apology include?

The most appropriate form and method of communicating an apology will depend on the circumstances of the particular case. However, the most effective apologies generally incorporate the following five key elements:

- Recognition – an explicit acknowledgement and recognition of the act or omission (the wrong) to which the apology applies. This also means acknowledging the harm caused by the wrong – for example, the person suffered embarrassment, hurt, pain, damage or loss.
- Responsibility – an express acceptance of responsibility or fault for the wrong that caused the harm.
- Reasons – a clear, plain English explanation of why the wrong happened.
- Regret – a statement of apology that expresses sincere regret and/or sympathy, sorrow or remorse as appropriate.
- Redress – a proposed or actual action taken to address the problem. An express promise not to repeat the wrong.

Communicating with sincerity is an important indicator of the level of regret of the person or organisation apologising. Although while demonstrating sincerity is always preferable, in practice – if the harm caused to a person is primarily embarrassment or loss of face – it can be assumed that the fact of the apology will generally be more important to the person than the sincerity of the apology.

To be effective, a full apology has to meet the needs of the recipient. To achieve this outcome, you may have to talk to the complainant first to clarify what those needs might be. An effective apology might follow a process of communication and possibly negotiation. This may need to include a package of measures to address each of the five elements listed earlier.

Although it cannot be guaranteed to work in every case, the more that an apology addresses these five elements, the greater the likelihood it will be effective in meeting the needs of the recipient – and in that way reduce anger, restore a damaged relationship, and help the person to ‘move on’.

3.6.3. What if an apology fails?

If an apology fails and you or your organisation are required to maintain an ongoing relationship with the recipient, you may need to try remediation or alternative dispute resolution strategies such as conciliation and mediation. Alternatively, you could work with your supervisor and try to reassign the person to another member of staff if this will defuse the situation.

If you have made an appropriate apology and sufficient remediation has been offered, the person will not be justified in engaging in further unreasonable conduct and action may need to be taken to manage their conduct.

See – Part 2. Staff strategies for responding to unreasonable conduct.

See – 4.1. Management roles and responsibilities.

3.6.4. Will I get myself or my employer in trouble if I admit fault?

The most difficult thing about apologising for most professionals is the fear that the recipient of the apology will use that admission against them. Many people are worried that by apologising they are accepting legal liability or blame, or providing evidence for the recipient to use against them in court.

In New South Wales (NSW), Queensland (Qld), South Australia (SA) and the Australian Capital Territory (ACT), people are generally protected from liability when they apologise. For example:

- In those jurisdictions, in most circumstances people are 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, people are only 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 their defamation legislation.

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 by a court as an admission that creates legal liability in civil proceedings. See *Dovuro Pty Ltd v Watkins* [2003] HCA 51 (11 September 2003).

What this means in practice is that – at least in NSW, Qld, SA and the ACT – you have little to fear about incurring legal liability if you make a ‘full’ apology, and you can accept that making an appropriate and timely apology is 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 or your organisation to make an apology.

3.7. Alternative dispute resolution

Alternative dispute resolution (ADR) may help to resolve a conflict and rebuild the relationship with the other party to the conflict, especially if your organisation:

- cannot terminate their contact with the person
- has considered and/or attempted other reasonable and possible management strategies to manage the dispute
- bears some responsibility for causing or exacerbating the person's conduct.

ADR is a term used to describe a wide range of different processes that can help people to settle their disputes and conflicts by means other than litigation. ADR can be facilitative, advisory, determinative or a hybrid of these approaches to suit a particular conflict or dispute. As a result, each case will need to be assessed on its own facts to determine which approach will be effective.

When using ADR in a UCC context, it is also important to ensure that the ADR process is managed by a skilled independent and impartial third party who can help you and the complainant reach a solution you can both accept in the circumstances. Having a third party as a facilitator or mediator may also minimise the likelihood for negative perceptions and imputations about bias or collusion. In cases involving UCC, it is particularly important that the facilitator is well trained and experienced in ADR processes.

3.7.1. The pros and cons of ADR to address unreasonable conduct

ADR may be useful to:

- Make sure the person knows they are being recognised and respected as a person with a problem, rather than just being a problem.
- Help the person to feel that they are being listened to and their matter is being taken seriously.
- Obtain information about their issues, interests and position and help both parties to understand the underlying factors contributing to the dispute.
- Encourage both parties to change from 'position based' to 'interest based' discussions.
- Permit a wider range of options for settlement than traditional court based dispute resolution processes.
- Allow both parties to convey and understand the impact of the behaviour, the dispute and interactions on each other and others.
- Permit better communication around the person's expectations about the types of things that can be achieved/possible outcomes and the organisation's capacity to fulfil these.
- Allow any emotional dimensions to the dispute and relationship to be expressed and acknowledged.
- Allow parties to gently challenge each other's perceptions and encourage them to consider a different perspective in a non-adversarial setting.
- Bring about a change in the relationship with the person – it may also be less damaging to your relationship with the person as compared to other options.

- Support the other party to consider options they may not otherwise be open to, particularly if they have a friend, advocate or support person assisting them in the process. The ADR process may be the first time these individuals become aware of the history involved and the other party's perspective. These support people can often reassure and/or gently encourage distressed people to more fully consider options put to them during the process, and may remind them of the desirability of finalising the matter – as long as they personally consider the options to be reasonable/explicable.
- Provide a more cost and time effective process, rather than allowing the conflict to continue for years and affect members of staff over a long period.
- Encourage the parties to look to the future and consider a liveable solution rather than focusing on past conflicts, behaviours and 'winning'.
- Solve the problem or establish that there is no available solution within the organisation's control.

Depending on the circumstances of each case, ADR can be ineffective in an unreasonable conduct context if:

- The other party is unwilling to participate in good faith, is uncooperative, resistant to compromise or unwilling to work towards a solution that is fair to all parties.
- The other party refuses to agree to keep confidential all matters disclosed in the process – which allows participants to feel able to fully disclose all relevant information – or one party doubts the other's commitment to or ability to comply with this. This can also limit the chances of a successful process, and may pose additional risks to the organisation.
- The person's identity may have become so enmeshed with their issue that they are no longer able to identify or accept possible options for resolution, no matter how reasonable or accommodating the options may appear.
- It could give the person false ideas about the importance of their issue.
- It is too expensive, particularly if a skilled independent third party is retained to facilitate the process. If the other party exhibits unreasonable behaviour and a complaint runs over years, significant initial preparation may be required – increasing the costs. The cost of ADR should however be balanced against the costs associated with continuing to deal with the person in other ways.
- It is too time consuming – again this should be balanced against the possibility of the conflict being ongoing and unresolved for years.

3.7.2. Some common ADR strategies

The following are some of the more common ADR strategies that could be used in an unreasonable conduct context.

Mediation

In mediation, the parties to a dispute – with the assistance of a neutral third party (the mediator) – identify the issues in dispute, develop options, consider alternatives and try to reach an agreement. The mediator has no advisory or determinative role in the content or resolution of the dispute. The role of the mediator is to help both parties to identify their interests, understand alternative views and arrive at a mutually acceptable solution. When a resolution is reached, the parties can decide to draft a mediation agreement – a document signed by all the parties agreeing to the outcome reached in the mediation.

Facilitation

In facilitation, the participants (usually a group) – with the assistance of a dispute resolution practitioner (the facilitator) – identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to help the participants to develop options, consider alternatives and try to reach an agreement. 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.

Facilitated negotiation

In a facilitated negotiation, the participants to a dispute – who have identified the issues to be negotiated – use a dispute resolution practitioner (the facilitator) to help them negotiate the 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.

Conciliation

In a conciliation, the participants – with the assistance of the dispute resolution practitioner (the conciliator) – identify the issues in dispute, develop options, consider alternatives and try to reach an agreement. A conciliator can provide advice on the matters in dispute and/or options for resolution, but will not make a determination. The conciliator is responsible for managing the conciliation process, and may have professional expertise in the subject matter in dispute.

Conferencing

In conferencing, meetings are organised – with a conference chair or convenor – for the participants and/or their advocates to discuss the issues in dispute. Conferences are often used by organisations with a regulatory or statutory responsibility, and the conference chair or convenor may provide advice on the issues in dispute or possible options for its resolution. The term ‘conference’ is often used to refer to processes in courts, tribunals and regulatory agencies that are similar to conciliation and may sometimes be referred to as ‘conciliation conferences’.

Conflict coaching

Although it is not formally an ADR process, conflict coaching may also be an option for dealing with conflicts with complainants – particularly internal complainants. It is a form of interactive problem-solving that involves a ‘coach’ helping a ‘coachee’ (in this case the person who made the complaint or complaint handler) to resolve their conflicts. The process encourages the coachee to reflect on and examine their conflicts and develop new and more productive strategies for managing them. The conflict coach does not provide advice to the coachee, nor do they act as an advocate, representative or mediator for the coachee. The coach also does not judge the coachee or any other party involved in the conflict.

Various negotiation training programs are available to help frontline staff to strengthen their negotiation skills when dealing with complainants.

More information about alternative dispute resolution is available at the [Commonwealth Attorney-General’s website – www.ag.gov.au](http://www.ag.gov.au).