

Part 5.

Restricting and controlling access

5.1. Modifying or restricting access to staff, premises or services

5.1.1. Decisions to modify or restrict access

There will be cases when the strategies and approaches in this manual will not be effective or appropriate to manage certain incidents of unreasonable conduct. In these situations, it may be necessary to modify or restrict contact with the people involved to ensure equity and fairness in relation to other users of your organisation's services, improve efficiency, and protect staff health and safety – and the safety of third parties.

Decisions to modify or restrict a person's ability to access your premises, communicate with your staff or use your organisation's services as a result of unreasonable conduct are a management responsibility and should always be approved by your CEO or a senior delegate. These decisions should be the exception rather than the rule – and should only be made after careful consideration of the factors that may be influencing a person's behaviour. For example the person's personal circumstances, including any disability or cultural background, and any role your organisation or your staff may have played in exacerbating or perpetuating the unreasonable conduct. Any decision to modify or restrict access to staff, premises or services should include a time limit, before the end of which a review should be undertaken for a decision to be made as to whether it needs to continue.

Some recent court and tribunal cases in Victoria – including the case study below – have shown what can happen when these factors are not properly considered, or when the decision to modify or restrict access is not tailored to the relevant behaviour.

Case study – Not tailoring a response

A Victorian City Council resolved to expel a ratepayer from Council's Access and Equity Committee. It went further, passing a resolution designed to 'uphold public safety and in reliance of its obligations to provide a safe working environment'. It prohibited the man from attending any building that was owned, occupied or managed by the council 'until further notice'.

Under the *Summary Offences Act 1966 (Vic)*, breaching the notice could result in arrest and a penalty of \$2,500 or imprisonment for six months. The ban was maintained from April 2009 until October 2014. The man's request for the ban to be reviewed in 2012 was rejected.

The banned individual had bipolar disorder, post-traumatic stress, compulsive or impulse control disorders, a compulsion to behave in a rude, offensive and insulting manner, and hearing loss. He had made thousands of verbal and written complaints to the council on a range of issues since 1998. In these communications and in his interactions with council staff and councillors, he had used 'threatening, intimidating and aggressive' language and behaviour that they found inappropriate and offensive. The issue for the council was the content of his communications. When the man took the matter to the Victorian Civil and Administrative Tribunal, the tribunal noted that 'no evidence was given to support a finding that he presented any physical harm to anyone'. This included staff, councillors or members of the public using council premises.

The tribunal accepted that the nature and tone of his communications with council were at least one of the reasons for the ban. However, the council was unable to convince the tribunal to apply the exception provided by the *Equal Opportunity Act 2010 (Vic)* for otherwise discriminatory conduct that is reasonably necessary to protect the health and safety of any person.

The tribunal believed the council had not sufficiently considered whether there were non-discriminatory alternatives to the ban from all council places that would give employees and/or members of the public protection from risk. The tribunal noted that there was no evidence that the health or safety of members of the public was directly affected by the man's conduct. He was also banned from places where he had not caused any problems, as well as from places where he had.

The tribunal concluded that the ban was 'blunt, broad and insufficiently tailored' and could not 'remain in place forever'. The tribunal noted that council could have lawfully provided an appropriate measure of protection to its employees and/or the public through 'proportionate and tailored strategies' informed by research and training, which were subject to regular review. On this basis the tribunal held that, as there were less restrictive means reasonably available to achieve council's purposes, the conduct of the council constituted direct discrimination in the area of provision of services on the grounds of disability – in breach of the *Equal Opportunity Act* and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

The tribunal ordered the council to:

- revoke its declaration
- provide training to councillors and senior staff on the charter
- pay the man \$14,000 compensation.

What this case demonstrates

If a person's unreasonable conduct might result from a disability, be careful when developing and implementing strategies to address that conduct. Carefully assess the risk the person's conduct poses to the work of your organisation, and to the health and safety of your staff and members of the public using your premises. Any strategies used must not be more restrictive than they need to be to address the detrimental impact on your organisation, your staff and/or members of the public using your premises or services.

Any restriction should have a set time period and be regularly reviewed.

Your organisation's policy should refer to the relevant legislation in your jurisdiction, such as equal opportunity/anti-discrimination/charter of human rights legislation.

5.1.2. Making alternative service arrangements

Alternative service arrangements involve modifying or restricting usual service delivery methods. In the unreasonable conduct context, alternative service arrangements can be used to modify or restrict the ways in which you, your staff and your organisation interact with or deliver services to a person to minimise the impacts and risks posed by that conduct. For example, they can be used to restrict:

- **Who** – a person can make contact with in your organisation. For example, a person may be limited to dealing with one staff member within your organisation if they have engaged in persistent and otherwise unmanageable forum shopping, reframed their complaint to get it taken up again, raised minor irrelevant issues, and made regular, frequent and unwarranted contact etc.
- **What** – subject matter your organisation will respond to. This option will usually apply if a person has repeatedly raised the same issue with your organisation, reframed their complaint to get it taken up again, has been persistent in wanting your organisation to pursue trivial issues, has made unreasonable and illogical arguments, has demanded inappropriate or protected information – that is, information that cannot be disclosed etc.
- **When** – a person can make contact with your organisation. This could include restricting the person to a particular time, day or length of time, or curbing the frequency of the person's contact if they have engaged in persistent and/or lengthy contact with staff when this is not warranted, or have been aggressive, threatening or confrontational towards staff.
- **Where** – a person can interact with your staff face-to-face. For example, if a person has engaged in persistent and otherwise unmanageable aggressive, confrontational, threatening or violent conduct, and the person needs to meet with a member of your staff face-to-face, you may need to take steps to ensure that the interview is held in a safe facility or area – on your own premises or at another location like a local police station, library, etc.
- **How** – a person can contact your organisation. For example, restricting contact to writing only, prohibiting access to your premises, only allowing contact through a representative, restricting access to direct staff emails and only allowing access through the organisation's general email portal etc – if the person has engaged in persistent and otherwise unmanageable aggressive, confrontational, threatening or violent conduct, or sends a constant stream of communications, telephones constantly or visits repeatedly.

For more information on possible strategies for modifying or restricting a person's contact/ access to services and procedures see: *Unreasonable Conduct by a Complainant: A Model Policy and Procedure for Organisations* – available at www.ombo.nsw.gov.au.

5.1.3. Withdrawing access to services

An organisation should only consider withdrawing a person's access to services if the person:

- is consistently abusive, threatens, harasses, stalks or intimidates a member of your organisation and/or their family members
- is physically violent and/or causes property damage while on your premises
- makes threats to staff or other members of the public using the services or at the agency's premises
- produces a weapon or makes bomb threats
- engages in conduct that is otherwise unlawful.

All unlawful behaviour, including physical violence and assault or producing a weapon, should immediately be reported to police. However, if the services provided by your organisation are important or essential to the physical or mental wellbeing of the person concerned, it may be preferable to modify the way you deliver services to the person using the types of alternative service arrangements suggested earlier – rather than withdrawing or withholding it completely. This could include having security guards or police present during face-to-face interactions with the person, holding interviews at your local police station or other secure facility (either on your premises or elsewhere), or using specially trained staff for interviewing such people. You might also consider having relevant materials delivered to the person's home, rather than having them collect them from your organisation.

5.1.4. Public interest considerations governing access restrictions

It is important that decisions about limiting access to an organisation are made within the wider framework of public access rights and responsibilities.

These decisions must be based on a clear understanding that:

- In a democracy, people have a right to complain. Criticism and complaints are a legitimate and necessary part of the relationship between government agencies and their customers or communities, and may be dynamic forces for improvement within agencies.
- Nobody, no matter how much time and effort is taken up in responding to their complaints or concerns, should be unconditionally deprived of the right to raise those concerns and have them addressed.
- In the absence of very good reasons to the contrary, members of the public have a right to access government agencies to seek advice, help or the services the agency provides.

Organisations also have an obligation to use resources efficiently and effectively. So, at some point, it may be necessary and reasonable for them to decide to limit the nature or scope of their responses to complainants whose conduct is unreasonable. However, these situations should be the exception rather than the rule.

5.2. Using legal mechanisms to restrict access

5.2.1. Taking legal action

In extreme cases of unreasonable conduct, it might be necessary to consider supporting members of your staff to exercise their legal options. We believe legal mechanisms should be used sparingly, and only in situations of apprehended or actual violence, threats, intimidation, stalking, online defamation or other unlawful conduct by individuals. They should never be used to deal with a person who merely causes your staff some discomfort or whose behaviour your staff find difficult to manage.

However, if a staff member becomes a victim of any unlawful conduct, they have the right to exercise their legal rights in response to such conduct – including seeking a legal order such as an apprehended violence order (AVO).

In NSW, an AVO is a legal order that is issued by the Local Court under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). It aims to protect people from personal violence, threats, harassment or intimidation by restricting the conduct and movements of their aggressor.

For unlawful conduct that occurs on your organisation's premises – for example, a person assaults a member of your staff or damages property – it may be appropriate for your organisation to obtain a trespass order under the relevant legislation in your jurisdiction. For example, in NSW the *Inclosed Lands Protection Act 1901* (NSW) provides a basis for taking civil and/or criminal action in relation to trespass and empowers owners, occupiers, or people in charge of 'inclosed lands' to require another person to leave their premises in certain circumstances.

However, extreme caution needs to be used when deciding whether legal mechanisms are an appropriate course of action for dealing with unreasonable conduct. These options can have significant implications – particularly for the person who may become criminally liable or may be prevented from accessing services that they need for their health or welfare.

See – **Applying the provisions of the *Inclosed Lands Protection Act 1901* (NSW)**, NSW Ombudsman, available at www.ombo.nsw.gov.au.

Case study – Situations where legal action may be needed to deal with unreasonable conduct

A man complained to an Ombudsman's office in February 2009 and again in April 2009, January 2010 and February 2010 about his local council. His complaints generally concerned a local development application and the conduct of the General Manager of the council.

None of the Ombudsman's inquiries found any wrongdoing, but the person persisted in contacting the Ombudsman's office about his allegations. In the period between his first and last formal complaints in February 2010, the complainant sent more than 100 emails and made more than 16 phone calls about his issues with the council. He sent numerous copies of media articles relating to the council, copies of correspondence and complaints between him and the council, and copies of appeals he had made to the then Administrative Decisions Tribunal. He was asked to restrict his emails, but he refused. The Ombudsman's office blocked his email access and notified him by letter.

Upset that restrictions were placed on his access, the person tried to avoid the restrictions by changing his email address and sending more complaints. The Ombudsman's office did not respond and continued to block each new email address. Almost 90 of the person's emails were blocked.

The council involved had also placed restrictions on his email access after he sent them over 300 emails within a six-month period. The council were concerned about the impact of the person's conduct on their resources, as they had to dedicate a senior staff member two days a week to deal with his matters. The council were also worried about the content of the emails that the person had sent to their staff. The emails made intrusive personal observations about staff and threatened their jobs if they did not respond to his demands. A staff member who provided the person with her name when he approached the front counter subsequently received emails to her personal email account from him. It was not clear to council or the staff member how the person obtained this address.

After several incidents where the person approached council officers – particularly the General Manager and the Mayor (and their families) – in public places and was verbally abusive towards them, each of them sought and was granted AVOs against the person for five years, an unusually long period of time.

When granting the orders, the local magistrate made the following observations:

... The complaints relate to ... voluminous correspondence both written and electronic which appears to have been sufficient to justify the installation of a duress alarm in [the GM's] assistant's office, the back base home security at his own home and blocks on emails being received from [the person] to the Council. It is clear that there has been an attempt by [the person] to circumvent the processes to ... put himself in the company of [the GM] and [the Mayor] with a view to raising matters of council business

These contacts have been made not only at the business premises [of the council] but attempts also at [the Mayor's home] and it would seem, attempts to unsettle [the GM] by being in the vicinity of his private residence and making it very clearly conspicuous to [the GM] that [he] was in fact there.

...

With respect, I have formed the view that he is a person I believe possibly suffers from some form of mental disorder which has manifested itself in the form of persecution of two public figures for his own deluded gratification and to inflict elevated levels of concern not only on those two people directly, but also extending the concern to members of their respective families in the form of disturbing and unsolicited correspondence. Whilst those persons in public office must expect that their activities and performance of their various roles will be subject to the normal levels of scrutiny and review, what [the person] purports to do by presuming to be in a position to have the mayor and the general manager of the council respond to his voluminous requests and demands exceeds the broadest interpretation of reasonable accountability levels for public servants.

The magistrate granted the following AVO restrictions for the GM and Mayor respectively. The person could not:

- assault, molest, harass, threaten or otherwise interfere with
- engage in any other conduct that intimidates
- stalk
- enter the premises where [the GM] resides or works
- approach [the GM] by any means whatsoever except through a legal representative.

Part five

For the Mayor (and any person he has a domestic relationship with), the person could not:

- assault, molest, harass, threaten or otherwise interfere with
 - engage in any other conduct that intimidates
 - stalk
 - enter or loiter within 100 metres of any premises where [the Mayor] resides or works.
-