

Public sector agencies deliver a vast range of services to members of the public who usually do not have the option of obtaining these services elsewhere. Under these conditions, it is important that the community has confidence that agencies will act fairly and reasonably in delivering their services.

In the Ombudsman's view it is essential that, when the service provided to an individual is unsatisfactory and the agency has in some way contributed to this, the agency should provide redress to remedy the situation.

These guidelines provide a framework to help managers make decisions about addressing a complainant's sense of grievance when they are dissatisfied with the service they have received from the agency. Ultimately, the guidelines should assist agencies to better manage their business, improve the transparency of their processes, and thus enhance public confidence in their operations.

### Codes of conduct and organisational values

Public sector agencies, which include government departments, statutory authorities and local governments, have codes of conduct setting out values that include being honest and exhibiting high levels of integrity, openness and ethical behaviour.

The values in these codes should guide the way staff deal with aggrieved complainants. For example, "fairness" is demonstrated by maintaining an open mind in investigation and action; recognising the lawful rights of others to natural justice and equitable outcomes; and allowing people access to due process. The principle of "openness" requires acknowledging mistakes, explaining actions and apologising. These principles underly the redress guidelines.

In the Ombudsman's view, the ethical principles in the codes of conduct of public sector agencies are consistent with a redress framework which provides that, when people are unfairly or unreasonably affected by decisions, the agencies should take all fair and reasonable steps to make good.

### Redress circumstances

Circumstances that warrant the provision of redress by an agency to a complainant can arise in many ways, but in broad terms may arise when any one of or a combination of the following occur:

- poor communication results in misunderstandings or misapprehensions;
- an inappropriate, unfair or unreasonable decision is made;
- an inadequate or unfair process was used to arrive at a decision; or
- a decision was made that was disproportionate or unreasonable in the circumstances.

### Redress principles

There are six principles involved in the consideration of redress:

- All mistakes are admitted and put right.
- A sincere and meaningful apology is offered.
- Arrangements for considering redress are made public.
- Redress is fair and reasonable.
- As far as possible, redress restores the complainant to their original position.
- Redress is procedurally sound.

<p>Principle 1: Admitting mistakes</p>	<p>An organisation that values openness and accountability should be willing to admit and make good its errors. For this principle to be effective, staff must be confident that they have full support from their agency to take these actions.</p> <p>To achieve this, it is important that management provide suitable resources (including training) so that staff not only handle complaints properly but also have a good understanding of the benefits of handling a complaint well. Management should also outline the scope of employees' decision-making delegations - giving them the power to deal with complaints, and explaining the limits of redress that can be offered.</p> <p>For example, in the case of a claim made against an agency by a third party, RiskCover requires there be no admission of liability. In this instance, a 'claim' is defined as "an allegation, request, or demand for compensation". Even complaints by third parties about conduct could be regarded as a claim. For further information, see <a href="http://www.riskcover.wa.gov.au/liability/riskcover_claimsmanagement_liability_forms">www.riskcover.wa.gov.au/liability/riskcover_claimsmanagement_liability_forms</a></p>
<p>Principle 2: Apologies</p>	<p>The <i>Civil Liability Act 2002</i> defines 'apology' as:</p> <p>An expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person (see <a href="#">Appendix A</a>).</p> <p>The Act provides that an apology expressed in this way does not constitute an admission of liability, and therefore should not be relevant to the determination of fault or liability in connection with civil liability of any kind, nor should it be admitted into evidence in a court hearing.</p> <p>The impact of a sincere apology, offered early in the process, should not be underestimated. Even where an apology may not appear to be warranted, it is worthwhile expressing regret or sympathy in a way that does not accept blame; for example "<i>I'm sorry that this situation has left you feeling disappointed</i>". It will often avoid the escalation of a dispute and the significant cost in time and resources that can be involved.</p> <p>Apologising should not be seen as a sign of organisational weakness. To the contrary, it is a sign of organisational strength and maturity.</p>
<p>Principle 3: Visible mechanisms</p>	<p>In order to convince the public that complaints are taken seriously, agencies should publicise their mechanisms for complaint handling. This gives the public confidence that the agency will listen to complaints and act on them, and that making a complaint is worthwhile.</p>
<p>Principle 4: Fair and reasonable</p>	<p>Redress should be fair and reasonable to both the person affected and the agency. There are a number of criteria that need to be considered.</p> <p><b>Decisions not based entirely on legal grounds</b> – Technical legal questions cannot and should not be ignored. However, fairness involves considering all of the ways in which the circumstances in question have affected the complainant and the wider community. This involves both legal and non-legal issues. An approach guided solely by legal principles risks being rigid, lacking the flexibility necessary for customer-focused agencies. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability.</p> <p><b>Equal treatment</b> - Like cases should, as a matter of principle, be treated equally. Differences in redress between similar cases should be clearly attributable to material differences in the circumstances.</p>

<p>Principle 4: Fair and reasonable</p> <p><i>continued</i></p>	<p><b>Resources not used to disadvantage</b> - Agencies are typically large, with access to resources and advice not usually afforded to most citizens. Using these to the disadvantage of complainants only exacerbates the detriment suffered.</p> <p><b>Proportion</b> - Redress should be proportional to the detriment suffered. This involves weighing the problem and possible solutions to find an appropriate balance.</p>
<p>Principle 5: Restoration</p>	<p>Generally, when a person suffers a detriment wholly or partly as a result of the inappropriate actions of an agency, that person should be restored to their original position. When this is not possible, fair and reasonable alternatives should be offered.</p>
<p>Principle 6: Procedurally sound</p>	<p>A proper response by an agency to a person who has suffered a detriment involves:</p> <ul style="list-style-type: none"> <li>• covering all of the consequences of the decision in question. Failing to do so is likely to simply generate further complaints;</li> <li>• providing all relevant information about what happened, why it happened, what steps are being taken to rectify the position and why those steps are being taken;</li> <li>• accepting that agreements made in ignorance of rights and the available information are not fair and reasonable;</li> <li>• taking into account the views of the people affected;</li> <li>• taking into account protection of the public purse;</li> <li>• taking into account these guidelines and previous decisions about similar complaints;</li> <li>• dealing with the complaint in a timely manner. Agencies are much more likely to meet the ethical principles of respect, openness and accountability if redress circumstances are dealt with quickly. Delaying redress is liable to intensify the detriment already suffered.</li> </ul>

## Limitations

There are limits to what steps might be reasonably expected to be taken in order to make good. The following issues should be explored in order to determine the limits in individual cases.

### Elapsed time

As a general principle the greater the elapsed time since the decision in question the less compelling the obligation on the agency to make good.

### Remoteness

People not directly affected should not expect redress, unless special circumstances exist.

### Contribution

Complainants may have themselves contributed to redress circumstances. It is reasonable for the agency to take into account the extent to which its officers and the people affected have contributed to the detriment suffered.

### Mitigation

People affected by activities have a responsibility to take reasonable steps to minimise the impact on them.

### Unwarranted enrichment

Redress should be aimed at making good the detriment suffered. It should not lead to a person making a profit or gaining an advantage.

## External considerations

Providing redress is likely to be delayed or even inappropriate when other processes have not been completed. However, as a general principle, an agency should not delay providing redress while such processes are still in train once the need to provide it has been acknowledged. Some of the more important considerations include:

### Agency internal review

Where appropriate, having regard to the particular circumstances of each case, providing redress should not be delayed because the agency's internal review is incomplete.

### Legal liability

In some cases the person suffering detriment will have a legal entitlement to redress, and in this situation, where possible, the agency should provide appropriate redress that obviates the need for that person to pursue their legal remedies. While concerns about legal liability are an important consideration, such concerns should not be the sole or even primary consideration in assessing whether to offer redress. Agencies have a duty to correct or rectify problems arising from maladministration for which they are responsible. Agencies should make sensible decisions to reach out of court settlements, or better still, to forestall the need for legal proceedings at all. Redress can be offered without admission of liability. The agency may wish, if offering an Act of Grace payment, to enter into a deed with the complainant by which they release the agency and the State from any liability related to the complaint.

### Government expenditure

Making good a detriment suffered should be primarily based on the moral obligation of the agency to do so on a balanced assessment of the relevant circumstances. But sometimes agencies limit their responses in a bona fide attempt to limit the financial exposure of government. While it is always important to use government resources wisely, this must be accomplished in a way that does not disadvantage complainants. When considering the public interest, agencies need to take account of the improvement in public confidence in service delivery that may result from a fair and timely response to service failures. In these cases the cost of providing redress could be viewed as one of the costs of providing a reasonable standard of service.

Of course agency expenditure must have a legal foundation. The *Financial Management Act 2006* includes authorisation to request approval for Act of Grace payments (section 80(1)), which provides for the following:

If the Treasurer is satisfied that it is appropriate to do so because of special circumstances, the Treasurer may authorise an amount to be paid to a person even though the payment would not otherwise be authorised by law or required to meet a legal liability.

The procedure for making such requests is set out in [Treasurer's Instruction 319](#).

Western Australian Government policy encourages agencies to develop policies on the provision of redress (or remedies) as part of their complaints management process.<sup>3</sup>

## The redress process

An agency's complaint handling system must have the capacity to identify and efficiently and effectively deal with decisions about redress. In the Ombudsman's view, a model redress mechanism incorporates the following four steps:

- Step 1.** Decide whether redress circumstances resulting in a person suffering a detriment exist.
- Step 2.** Consider the nature of the detriment.
- Step 3.** Decide what it would take to satisfy the complainant or restore the complainant to their original position.
- Step 4.** Determine what would need to be done to prevent a recurrence.

<p><b>Step 1: Decision resulted in a detriment</b></p>	<p>There are many occasions when a complainant may suffer a detriment when an agency is acting lawfully and reasonably. Depending on the circumstances, however, an apology may be appropriate.</p> <p>Similarly, redress does not need to be provided when legislation is operating as intended or to remedy major legislative deficiencies.</p>
<p><b>Step 2: Nature of detriment</b></p>	<p>Establishing the nature of the detriment that the complainant has suffered and their desired outcome should be a standard component of the complaint-handling process. In determining this, agencies should take into account:</p> <ul style="list-style-type: none"> <li>• the amount of quantifiable financial loss (such as loss or damage to property, injury or damage to health, loss of earnings, medical and legal costs, time and trouble where the person dealt with the matter without professional assistance); and</li> <li>• any non-financial damage (such as gross inconvenience, embarrassment, humiliation, or stress).</li> </ul> <p>Many complainants are eager to move on and merely seek acknowledgement of their grievance and a timely apology. Some are satisfied with the knowledge that remedial action has been taken and elect not to pursue civil claims.</p>
<p><b>Step 3: Restoring complainant to original position</b></p>	<p>Sometimes agencies offer only partial redress, resulting in the complainant remaining dissatisfied. This occasionally occurs when property has been damaged or lost as a result of an agency's action. The agency may offer a part payment on the basis that the damage or loss was accidental. However, if the complainant's actions did not contribute to the damage or loss, the principle of fairness indicates that the complainant should be fully reimbursed.</p>
<p><b>Step 4: Prevent recurrence</b></p>	<p>One of the principal functions of a good complaint handling system is to allow the agency to learn from its complaints and improve its services. It is expensive, inefficient and poor administrative practice to simply deal with complaints as they arise and fail to fix the cause.</p> <p>Each complaint should be assessed to determine whether the circumstances are likely to arise again and if there is a better way to deal with the matter. Often this will involve identifying training needs or making amendments to procedural manuals.</p>

### Common excuses to avoid making good

The Ombudsman's experience is that agencies are often motivated to avoid making good to avoid expenditure or embarrassment or because they believe making good risks being seen as an admission of liability. In our view, such decisions are ill-conceived and inconsistent with the principles of accountability and openness.

The following common responses are unacceptable reasons to avoid making good:

#### Avoiding setting a precedent (or "the floodgates" argument)

If the flawed decision is demonstrably unfair and unreasonable in a specific set of circumstances, then this is what must be addressed.

#### Not legally required to offer redress

This confuses the issues of lawfulness and fairness. Fairness involves considering both legal and non-legal issues. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability.

### Fix the system but not resolve individual complaint

The original complainant may obtain little satisfaction from actions to prevent a recurrence of the incident that led to the complaint. When an agency identifies a deficiency that needs correction, fairness requires that the complaint which led to that identification be addressed in an appropriate manner.

### Don't want to create a bigger problem

This approach is inconsistent with the ethical principle of openness. If making good alerts people to the fact that a bigger problem exists, then this is itself a useful outcome.

### Forms of redress

When things go wrong, many complainants want no more than to be listened to, understood, respected and, where appropriate, provided with an explanation and an apology.

There are various forms that redress can take.

Explanation	It may be possible to resolve the complaint by providing information about the decision-making process or relevant policies or legislation, or by giving reasons for decisions if this has not already been done. A complainant's sense of grievance is likely to be lessened when they are satisfied that their position has been understood and taken into account.
Apology	A prompt apology can be extremely effective. Apologise promptly, sincerely, face to face, and confirm it in writing. Depending on the circumstances, it may be appropriate for the agency to acknowledge responsibility and express sympathy or regret. If legal liability may be a concern, an expression of sorrow, regret or sympathy, without acknowledging fault, can still be helpful.
Reconsidering conduct	Taking into account new information or information that may have been unintentionally ignored during the original assessment may lead to stopping action or taking alternative action or otherwise changing the consequences of a flawed decision.
Changing policy or practice	Some complainants are satisfied by the fact that changes will be made to prevent future similar incidents.
Mitigation	Mitigation reduces the impact of the detriment suffered and may involve replacing damaged property, correcting records, returning property or refunding fees.
Restitution	Compensation for loss or damage to property.
Reimbursement	Compensation for costs that were incurred as a result of the flawed decision, including medical costs, professional costs, or time and trouble involved.
Satisfaction	Compensation for loss of amenity or rights, or for inconvenience. When an agency is not under a legal liability to provide financial compensation (i.e. restitution, reimbursement and satisfaction), it may still decide that it has a moral obligation to offer this type of redress. This can be done by way of an Act of Grace payment under section 80 of the <i>Financial Management Act 2006</i> . <a href="#">Treasurer's Instruction 319</a> provides the procedure and guidelines for making such requests.

## Develop agency-specific guidelines

The availability of redress is a crucial component of a fair and reasonable complaints system. When a complainant suffers a detriment and it can be established that an agency contributed to that detriment, an agency that wishes to be seen as accountable must take steps to rectify the perceived damage. If agencies lack a proactive approach to providing remedies, they risk complainants remaining aggrieved.

To ensure public confidence is safeguarded, the Ombudsman suggests that agencies develop a “menu” of remedies, including examples, to assist staff in considering what remedy to provide. This will ensure that staff provide consistent and appropriate responses. To ensure transparency, the agency’s commitment to appropriate redress (including limitations, where these apply) should also be made accessible to members of the public.

## Resources

The following Ombudsman Western Australia publications provide further details that may be useful in the development of complaint handling systems and for staff involved in handling complaints:

- [Effective handling of complaints made to your organisation – An overview](#)
- [Making your complaint handling system accessible](#)
- [Complaint handling systems checklist](#)
- [Guidance for Complaint Handling Officers](#)
- [Investigation of complaints](#)
- [Conducting administrative investigations](#)
- [Procedural fairness](#)
- [Dealing with unreasonable complainant conduct](#)
- [Good record keeping](#)

For further information about the role of the Ombudsman and guidance for complaints management, visit our website at [www.ombudsman.wa.gov.au](http://www.ombudsman.wa.gov.au).

## Acknowledgement

Ombudsman Western Australia wishes to thank the [NSW Ombudsman](#) for allowing us to use their publication *The Complaint Handler’s Tool Kit 2004* in the development of these guidelines.

## Appendix A

### CIVIL LIABILITY ACT 2002

#### Apologies Part 1E

##### s. 5AF Interpretation

In this Part — “apology” means an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person.

##### s. 5AG Application of this part

Subject to sections 3A and 4A, this Part applies to civil liability of any kind unless this section states otherwise.

This Part extends to a claim even if the damages are sought to be recovered in an action for breach of contract or any other action.

This Part does not apply unless the civil liability giving rise to the claim arises out of an incident happening on or after the commencement day.

If in a claim for damages:

- it cannot be ascertained whether or not the incident out of which the personal injury arises happened on or after the commencement day; and
- the symptoms of the injury first appeared on or after the commencement day, the incident is to be taken, for the purpose of subsection (3), to have happened on or after the commencement day.

In this section “commencement day” means the day on which the Civil Liability Amendment Act 2003 section 8 comes into operation.

##### s. 5AH Effect of an apology on liability

An apology made by or on behalf of a person in connection with any incident giving rise to a claim for damages:

- does not constitute an express or implied admission of fault or liability by the person in connection with that incident; and
- is not relevant to the determination of fault or liability in connection with that incident.

Evidence of an apology made by or on behalf of a person in connection with any incident alleged to have been caused by the person is not admissible in any civil proceeding as evidence of the fault or liability of the person in connection with that incident.

You can access a full copy of the *Civil Liability Act 2002* at the [WA State Law Publisher](#) website



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