

A Better Complaint Handling System for Tribunals

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The AIJA is a research and educational institute, which has been in existence since 1976. It is funded by the Commonwealth, states and territories and the New Zealand Ministry of Justice, and by subscription income from its membership. The principal objectives of the Institute include research into judicial administration and the development and conduct of educational programs for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems. The AIJA is an Incorporated Association under the Associations Incorporation Act 1991 (ACT) and is governed by its Rules. The AIJA members include judges, magistrates, tribunal members, court administrators, legal practitioners, academic lawyers, court librarians and others with an interest in judicial administration.

The Institute also delivers programs of education to support those working in the field of judicial administration, including specific programs for court administrators, court librarians, magistrates and judges. The AIJA has also been involved in developing courses in specialised areas, including gender awareness, cultural awareness, court technology and case management.

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Foreword

Complaints are sometimes viewed in a negative light because they express users' dissatisfaction with their experience. Wise organisations welcome complaints as an opportunity to improve what they do. Complaint handling is a service and should be performed excellently.

In its *Tribunal Excellence Framework*, the Council of Australasian Tribunals (COAT) describes excellence in tribunals by breaking it down into core values with corresponding measures. One of the core values is accountability. Among the measures of accountability, COAT identified 'an effective and transparent complaints mechanism as a means of ensuring that the public's expectations of members and staff are met' (p 22). In addition, a 'documented complaints handling and reporting process' is necessary, with reporting of complaints to the public via an Annual Report or tribunal website (p23).

COAT and the Australasian Institute of Judicial Administration Inc (AIJA) have identified a need for a better practice guide to assist Australasian tribunals to design, review and improve their complaint handling systems. To address the need, this Guide has been developed as a joint project of the two organisations. The Guide was prepared under the supervision of an advisory committee with representatives of both organisations and was assisted by the generosity of tribunals in collating and providing their complaint handling policy and procedure documents.

Many of the elements and examples of better practice discussed in this Guide are drawn from documents currently in use in tribunals. A Tribunals Focus Group convened by COAT provided expert advice and comment from experienced complaint-handlers to guide the identification of better practice. That assessment was also informed by the standards used by the courts, judicial commissions, public sector bodies and the Australasian parliamentary ombudsmen.

The Guide is written for tribunals established by legislation or executive order in Australia and New Zealand. The tribunals are highly diverse in their functions, composition, stakeholder communities, regulatory environment and resources. It is therefore to be expected that practices will vary. This Guide recognises and seeks to inform the choices which tribunals make in designing, operating, and reviewing their complaint handling systems. The Guide discusses complaint handling by Australasian tribunals with a particular focus on complaints about tribunal members made by parties external to the tribunal.

The project to develop this Guide continues a long-standing and productive collaboration between COAT and its member tribunals and the AIJA to support the development and professionalism of Australasian tribunals.

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Contents

Foreword	i
Advisory Committee	ii
Abbreviations	vi
Preface	1
Chapter 1: Tribunals and their members	2
1.1 What tribunals do	3
1.2 What is a tribunal?	4
1.3 Who works in tribunals?	4
1.3.1 Members	4
1.3.2 Registrars	5
1.3.3 Tribunal staff or employees	5
1.4 What conduct standards apply?	5
1.4.1 Public service codes	5
1.4.2 Standards guides for members	5
1.4.3 Standards made by judicial commissions	6
1.4.4 Tribunal codes of conduct for members	6
1.5 Processes for member performance and development	7
Chapter 2: Complaints about tribunals - the regulatory context	8
2.1 Who handles complaints about tribunals?	9
2.1.1 New Zealand tribunals	9
2.1.2 The judicial commissions – Victoria and the Northern Territory	9
2.1.3 Who handles complaints in tribunals?	10
2.2 Are tribunals required to establish a complaint handling system?	10
2.2.1 The Ombudsman	11
2.2.2 Privacy complaints	12
2.3 What laws apply to complaint handling?	12
2.3.1 Human rights legislation	12
2.4 What standards apply to complaint-handling?	13

Chapter 3: Designing the complaint handling system	14
3.1 The Ombudsman's design principles	15
3.1.1 The system should be user-centred, accessible and easy to use.	15
3.1.2 The system should support early resolution of complaints.	15
3.1.3 The system should be integrated within the overall corporate structure.	16
3.1.4 Complaints should be recorded in an electronic system.	16
3.1.5 Complaint handling should be supported by clear process guidelines.	16
3.1.6 All staff and members should have the skills and support to deliver better practice.	16
3.1.7 The system should have robust quality assurance and review processes.	17
3.1.8 The system should be adequately resourced.	17
Chapter 4: Delivering the complaint handling service	18
4.1 Confirm, clarify and log the complaint	19
4.2 Acknowledge the complaint	19
4.3 Assess, prioritise and classify	19
4.4 Resolve early or investigate	20
4.4.1 The investigation	20
4.4.2 Making findings	20
4.5 Report and decision	21
4.6 Communicate the outcome to the complainant	21
4.6.2 Form of redress	21
4.6.3 Other action outside the complaints process	22
4.7 Finalise or review	22
4.8 Feedback systemic issues	23
4.9 Document retention	23
4.10 Reporting complaint data	24
Chapter 5: Complaints and feedback	25
5.1 Definitions	26
5.1.1 Ordinary meanings	26
5.1.2 The definitions in the AS/NZS Standard	26
5.1.3 Commonwealth Ombudsman's definitions	27
5.1.4 Leaving 'complaint' undefined	27

5.2	Intention to complain	27
5.2.1	Clarifying intention	27
5.2.2	Where a complaint form is used	27
5.2.3	Where no complaint form is used	28
5.2.4	Plain English terms	28
Chapter 6:	Scope of complaints	29
6.1	Who can make a complaint?	30
6.1.1	Standing test	30
6.1.2	Anonymous complaints	31
6.1.3	Protocol for legal representatives and practitioners	32
6.2	Who can be complained about?	32
6.3	What can be complained about?	32
6.3.1	Common exclusions	32
6.3.2	Time for making a complaint	33
6.4	Complaints about a tribunal decision	33
6.4.1	Finality, judicial review and appeals	33
6.4.2	Wording the exception	33
6.5	Complaints about the conduct of a member in a tribunal process	34
6.6	Complaint about a pending or part-heard proceeding	34
6.6.1	General approach	34
6.6.2	Complaint raising serious concerns about conduct	35
6.6.3	Alternative avenues for complainant	35
6.7	Complaints about a member's conduct outside the tribunal	36
6.7.1	Breaches of member code of conduct	36
6.7.2	Suspected corrupt conduct	37
6.7.3	Complaints alleging criminal conduct	37
6.7.4	Conduct or incapacity that may justify removal of a member from office	37
6.7.5	Less serious conduct breaches	38
Appendix A:	Model Complaints Policy for Tribunals Template	39
Appendix B:	Tribunal Complaints Form Template	47
Appendix C:	Resources	49

Abbreviations

ACAT	ACT Civil and Administrative Tribunal
AIJA	Australasian Institute of Judicial Administration
ARC	Administrative Review Council (Cth)
COAT	Council of Australasian Tribunals
NCAT	New South Wales Civil and Administrative Tribunal
NCAT Act	<i>Civil and Administrative Tribunal Act 2013</i> (NSW)
NTCAT	Northern Territory Civil and Administrative Tribunal
OAIC	Office of the Australian Information Commissioner
QCAT	Queensland Civil and Administrative Tribunal
QCAT Act	<i>Queensland Civil and Administrative Tribunal Act 2009</i> (Qld)
SACAT	South Australia Civil and Administrative Tribunal
SACAT Act	<i>South Australia Civil and Administrative Tribunal Act 2013</i> (SA)
SAT	State Administrative Tribunal (WA)
TASCAT Act	<i>Tasmanian Civil and Administrative Tribunal Act 2020</i> (Tas)
VCAT	Victorian Civil and Administrative Tribunal
VCAT Act	<i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic)

Preface

In each of the ten Australasian jurisdictions the parliamentary ombudsman is the principal body for handling complaints about administration by public sector bodies ('agencies') and is also the principal standard-setter for the handling of complaints by agencies. The types of matters which the ombudsman can investigate are set out in the Ombudsman Act of each jurisdiction. The term 'maladministration' is sometimes used as a catch-all for these matters.

The ombudsman does not have the resources to investigate all complaints across the public sector and encourages each public sector agency to develop its own complaint handling system. In most cases the ombudsman will decline to investigate a complaint about an agency until the complainant has made use of the agency's complaint handling system. In effect, the ombudsman prefers to act as an external review body for the processes and outcomes of complaint handling by agencies.

A key role played by the ombudsman in the ten Australasian jurisdictions is to equip agencies to handle complaints consistently with widely accepted norms and standards and informed by relevant research findings. There is a high degree of consistency in the guidelines issued by the ombudsman in the various jurisdictions. At times the jurisdictions have collaborated to develop ombudsman guides for use as a common resource. They have also developed a comprehensive set of standards, guides and training resources to assist public sector agencies to develop their own complaint handling systems.

Depending on the terms of the ombudsman and the tribunal Acts of each jurisdiction, an individual tribunal may or may not be within the class of agencies about which the ombudsman can investigate complaints. Each tribunal will need to construe the relevant legislation and determine for itself whether and for what purposes its activities are subject to the ombudsman's jurisdiction.

For purposes of the Guide it is expressly assumed that each tribunal is an 'agency' and that its complaint handling processes are subject to review by the ombudsman. If this assumption does not hold true for a given tribunal, the tribunal may still find it useful to consider the ombudsman guidelines and other resources. Accordingly, the guides produced by the ombudsman in each jurisdiction are a key resource for tribunals seeking to develop and review their complaint handling systems.

Tribunals have some distinctive functions and features which are not covered by the ombudsman guides. Under specific legislative exceptions in the ombudsman Acts, or as a matter of policy or discretion, the ombudsman generally does not handle complaints arising from the adjudicative function of tribunals. Tribunals adjudicate when they make decisions in tribunal cases after hearing from the parties, making findings of fact and applying the law.

In a broad sense, adjudication is a service, but not all users will be satisfied with what the tribunal decides. Adjudication is the function which generates the largest number of complaints about tribunal members. Complainants may be unhappy about the decision made by the tribunal, the procedure or process which led to it, or the conduct of a tribunal member in the process. They often want the tribunal's decision changed, which cannot be done through a complaints process.

One of the distinctive features of tribunals is that the independence of members must be respected to enable them to decide matters impartially and lawfully. To protect their independence, they are statutory office holders appointed by the Crown for a term. They are not members of the public service. They cannot be directed by anybody to exercise their judgment and discretion to favour one party.

Because a high proportion of tribunal complaints relate to complaints about their members arising from adjudication, there is a need to supplement the ombudsman resources with a guide prepared specifically for tribunals. This Guide seeks to marry key recommendations from the ombudsman guides with the complaint handling practices of tribunals, with the focus on complaints about members. Internal or workplace complaints raise a different set of laws, practices and issues, and are outside the scope of this Guide.

Chapters 1 and 2 of this Guide explain the context and distinctive features of tribunals as they affect complaint handling. Chapters 3 and 4 summarise the ombudsman's advice on designing the complaint handling system with added comments about applying the advice to tribunals. Chapters 5 and 6 discuss a set of issues and challenges that arise in the handling of complaints about members.

Chapter 1

Tribunals and their members

1.1 What tribunals do

Tribunals are established by statute (Act of Parliament), by executive order of a government minister, or by private bodies such as sporting, religious, professional, and cultural associations. Each of the ten Australasian jurisdictions (the Commonwealth, six states, two territories and New Zealand) has established tribunals by statute or executive order for public purposes. This Guide is for the tribunals established by the ten jurisdictions for public purposes.

Bodies called 'tribunals' can be given various functions, including conducting investigations or special inquiries, or making policies for a sector of government (eg, industry standards). This Guide is concerned with the most common type of tribunal, which has one or more of the following functions:

- to review decisions of government bodies in areas of government administration such as social security, immigration and taxation
- to act as the original decision maker, authorised to make certain types of administrative decisions which affect persons or businesses individually. For example, a tribunal may have the function of deciding whether to appoint a guardian for a person, whether a treatment order should be made that enables a person to be compulsorily treated in a mental health facility, or whether the holder of an occupational registration should be disciplined for misconduct
- to resolve certain types of disputes between private parties, such as tenancy, property or consumer dispute under the laws of a state or territory or New Zealand
- to hear and determine an appeal from the decision of another tribunal, or from another division of the same tribunal, which has exercised any of the above powers.

What the above functions have in common is that:

- the tribunal acts on the application of a person who is party to a dispute or other type of action or proceeding, or a person who is individually affected by an existing decision or a decision which the tribunal is asked to make,
- the tribunal exercises its functions and powers to determine the matter, and
- the tribunal has power to reach a final decision which is binding on the parties.

It is evident that, apart from in the Commonwealth sphere, the functions of tribunals and courts overlap. Tribunals are established to resolve disputes and other types of action or proceedings or to make decisions more speedily and with less formality than a court. Some tribunals are empowered by their Acts to assist parties to settle their disputes or narrow the issues through mediation or conciliation. Their membership can include persons with specialised knowledge and skill relevant to subject areas of the tribunal's case load. For example, a tribunal that hears appeals about land valuation or planning may sit with a member who is a qualified valuer or planner.

Both courts and tribunals resolve disputes and make decisions through adjudication, a process in which the court or tribunal makes a reasoned, binding decision after hearing what the parties have to say, making findings of fact and applying the law.

While adjudication is not the only method by which courts and tribunals resolve disputes or make decisions, it has important implications for the way that courts and tribunals are organised. The first implication is that tribunals and members must be independent and impartial. Several human rights instruments recognise the right of a person to have their rights and obligations determined by an independent and impartial tribunal.¹ The second implication is that decisions made in adjudication must be final and binding on the parties, able to be changed only through an appeal or review conducted under legal process.

¹ The instruments include *the International Covenant on Civil and Political Rights art 14(1)*; *Universal Declaration of Human Rights art 10*; *Charter of Human Rights and Responsibilities Act 2006 (Vic) s 24(1)*; *Human Rights Act 2004 (ACT), s21(1)*; *Human Rights Act 2019 (Qld) s 31(1)*; *New Zealand Bill of Rights Act 1990 (NZ) s 27(1)*.

1.2 What is a tribunal?

It is not always possible to tell from its title whether a body is a 'tribunal'. Tribunals are diverse and naming practices vary across the ten jurisdictions. Bodies which have the functions of a tribunal may bear names such as 'board', 'commission', 'panel', 'committee', 'service' or 'office'. On the other hand, a body which has the title of 'tribunal' may have only investigative or standard-setting functions.

A few tribunals are a court or form part of a court, such as the Disputes Tribunal of New Zealand. Some tribunals are housed and resourced by a government authority and make or review administrative decisions within the authority's program area.²

To clarify the subject of this Guide, a functional definition is needed. For the purposes of the Guide, 'tribunal' means a body established by one of the ten jurisdictions whose primary function involves the determination of disputes but which in carrying out that function is not acting as a court.³

1.3 Who works in tribunals?

1.3.1 Members

Tribunals typically have more than one category of member. The member who has primary responsibility for managing the tribunal's business may be called the President, the Chair, the Principal Member or the Senior Member. For purposes of this Guide, that member is the 'tribunal head'. Some of the Acts which establish an individual tribunal ('tribunal Acts') provide that the tribunal head must be a 'judicial officer' (a judge or magistrate).

A tribunal Act may also provide for additional judges or magistrates to hold senior positions on the tribunal concurrently with their appointment to a court ('judicial members'). Other members may be senior lawyers or have qualifications in professions or fields which are relevant to the tribunal's case work ('non-judicial members'). Tribunals sometimes give different titles to members who conduct dispute resolution processes or have specialised roles, such as mediators, adjudicators, conciliators, referees, assessors and reviewers. They are all 'members' for the purposes of this Guide.

In most tribunals, judicial and non-judicial members are not employees but statutory officeholders appointed by the Crown.⁴ They are appointed to the tribunal for a specific term and are generally eligible to be reappointed on expiry of the term. They have security of tenure during their term in the sense that they can be removed from office only on grounds and under procedures specified in the Act. Tribunal Acts commonly give members statutory protections and immunities from civil or criminal liability for acts done in good faith in carrying out their functions.⁵ These arrangements are intended to safeguard the independence of members to enable them to adjudicate tribunal proceedings impartially.

2 New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report 85 (2004) <www.nzlii.org/nz/other/nzlc/report/R85/R85.pdf> 284.

3 This definition is based on the Council of Australasian Tribunal's definition of 'eligible tribunal' (eligible for membership of the Council).

4 There are exceptions, for example, reviewers of the Immigration Assessment Authority (Cth) are contracted as APS employees rather than statutory office holders, with similar termination provisions to other APS employees. They are not given statutory protections and immunity from suit.

5 Eg, *Civil and Administrative Tribunal Act 2013* (NSW) ('NCAT Act') sch 2 cl 4.

1.3.2 Registrars

Tribunal Acts generally provide for the appointment of a chief executive officer who may be called 'the Registrar' or 'the Principal Registrar' and may be assisted by one or more deputy or assistant registrars. In addition, some tribunal Acts or Rules provide that the registrars share some of the functions of a member in tribunal proceedings, particularly in interlocutory matters such as dealing with an application for an extension of time or relief from another procedural requirement, deciding whether to grant an adjournment, or conducting a directions hearing. In some tribunals (other than Commonwealth tribunals) Registrars exercise judicial powers such as deciding whether to issue a summons in a civil jurisdiction. Registrars may also be empowered to conduct certain alternative dispute resolution processes and to make orders giving effect to any settlement reached.

Where this Guide refers to 'members', it includes registrars to the extent that the complaint relates to their exercise of powers that are shared with members or are otherwise exercisable by members.

1.3.3 Tribunal staff or employees

Tribunals have employees or staff, who are usually employees of the public service. They work under the supervision of the registrar and are subject to public service terms and conditions.

1.4. What conduct standards apply?

1.4.1 Public service codes

Public service Acts in various jurisdictions commonly require public service employees to comply with a code of conduct or statement of values made under the Acts.

Under some tribunal Acts, registrars are members of the public service. For example, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') s 208(1) states:

The principal registrar, and the registrars and other administrative staff of the registry are to be appointed under the Public Service Act 2008.

Some tribunal Acts provide for the registrars to be appointed under a process for statutory office holders. For example, the *South Australia Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act') s 74(3) provides that a registrar is appointed by the Governor for a term of up to 5 years and can be removed by the Governor on the grounds set out in s 74(4). There is no provision requiring or deeming registrars to be members of the public service. However, documents required as part of the appointment process may create a duty to comply with a public service code.

If an Act requires holders of statutory officers to comply with a public service or public sector code, tribunal members will be bound by the code.

1.4.2 Standards guides for members

There is no single statement of conduct standards that applies to members of all tribunals. The Administrative Review Council published *A Guide to Standards of Conduct for Tribunal Members* ('the ARC Guide').⁶ It sets out 'principles of conduct and professional behaviour to guide members of tribunals in the light of their public duties and private interests to the extent that they impact upon the tribunal'.⁷

6 Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001, revised November 2009) <www.ag.gov.au>.

7 Ibid 1.

The ARC Guide is structured by eight values: respect for the law, fairness, independence, respect for persons, diligence and efficiency, integrity, accountability and transparency and responsibility of the tribunal head. From these values the ARC Guide derives more specific principles to guide the conduct of members. The Guide is not binding, but it has assisted many tribunals to develop a code of conduct for their members.

Tribunals and their members can also consult the *Guide to Standards of Judicial Conduct* (3rd edition) published by the Australasian Institute of Judicial Administration ('the AIJA Guide to Judicial Conduct') which offers 'principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances.'⁸

The AIJA Guide to Judicial Conduct identifies 'three basic principles against which judicial conduct should be tested ... impartiality, judicial independence and integrity and personal behaviour'.⁹ It provides practical and specific guidance in dealing with conduct issues that can arise in judicial office. It discusses matters such as identifying and avoiding conflicts of interest, and managing activities, communications and associations which have the capacity to impair the public perception of a judge's impartiality. Although written for judicial officers, much of the discussion is instructive for tribunals and their members.

1.4.3 Standards made by judicial commissions

The Judicial Commission of Victoria has statutory power to make guidelines about standards of ethical and professional conduct expected of judicial officers and non-judicial members of the Victorian Civil and Administrative Tribunal ('VCAT').¹⁰ The Commission has adopted the AIJA Guide to Judicial Conduct as the principal source of guidelines for standards of ethical and professional conduct expected of judicial officers in Victoria.¹¹ The Commission has also adopted a guideline on sexual harassment and bullying which it will apply when investigating a complaint about a judicial officer or non-judicial VCAT member relating to sexual harassment or related victimisation.¹²

1.4.4 Tribunal codes of conduct for members

The ARC Guide and the AIJA Guide to Judicial Conduct are resources that tribunals can use in developing their own codes of conduct for members. The two guides can also supplement the member codes and provide guidance for members of tribunals that have not yet established their own code.

Some tribunal Acts provide for the tribunal head to have the function of developing a code of conduct for members.¹³ A tribunal Act may expressly provide for the code to be binding on members,¹⁴ or compliance may be required by the member's instrument of appointment or other instrument. While most tribunal codes of conduct lack a statutory enforcement mechanism, the tribunal head can counsel a member for breaches and may in appropriate cases refer the member's conduct to the Attorney-General (or other responsible Minister) for the Minister to take such action as considered appropriate.

Tribunal members who hold certain professional registrations may additionally be subject to a code of conduct applicable to their profession.

8 AIJA, *Guide to Standards of Judicial Conduct* (3rd edition, 2017, revised November 2020), published by the AIJA for the Council of Chief Justices of Australia and New Zealand, <<https://aija.org.au>> ix.

9 Ibid 5.

10 *Judicial Commission Act 2016* (Vic) s 134(1).

11 Judicial Commission of Victoria, *Judicial Conduct Guideline Sexual Harassment* (22 February 2022) 2.

12 Ibid. Where a tribunal has members who are also federal judges, special requirements apply under s 72(ii) of the Constitution where a complaint may ultimately lead to consideration by parliament for removal for office.

13 Eg, *NCAT Act* s 20(1)(d)(1).

14 Eg, *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ('TASCAT Act') ss 94, 47(1)(d).

1.5 Processes for member performance and development

Many tribunals have a structured process for ongoing appraisal of the performance of each member. The purpose is to obtain feedback, review progress and plan for the further professional development of the member. The process may include self-appraisal, peer feedback, and feedback and discussion with the tribunal head or another member of appropriate seniority and experience. Complaints, feedback, comment, and observations from various sources may all be considered in the performance appraisal process.

To enable continuous professional development, tribunals need to have a clear statement of the standards of competence and conduct expected of members. Along with the member code of conduct, a tribunal needs a member competency framework defining the abilities, skills, knowledge, behaviours, attitudes, and values which demonstrate professional excellence as a tribunal member.

The Council of Australasian Tribunals ('COAT') has produced a guide to assist tribunals in developing a competency framework suited to their individual circumstances. *COAT's Tribunal Competency Framework* identifies eight competencies, with associated qualities and performance indicators, and gives examples of how each competency is demonstrated in the member's practice.¹⁵ The competencies are knowledge and technical skills, fair treatment, communication, conduct of hearings, dispute resolution (decision making and alternative dispute resolution), efficiency, professionalism and integrity, and leadership and management.

The framework is designed to 'provide fair and transparent criteria to facilitate the appraisal of tribunal members' and to facilitate a competency-based approach to monitoring each member's professional development and meeting their training needs.¹⁶

Codes of conduct and a competency framework serve a valuable function in informing members about the standards of conduct and competency expected of them. The documents can also play a role in the handling of complaints against members, offering a 'behavioural reference point' for evaluating members' conduct and performance.¹⁷ Findings in complaint handling may also highlight gaps, inconsistencies or ambiguities in the code or framework, prompting amendments to improve them.

15 Council of Australasian Tribunals, *Tribunal Competency Framework* <<https://coat.asn.au/>> (accessed 6 February 2023) 2-3.

16 Ibid 3.

17 ARC Guide, above n 6, 2.

Chapter 2

Complaints about tribunals - the regulatory context

2.1 Who handles complaints about tribunals?

Complaint handling is the process in which complaints are received, recorded, investigated, found to be either substantiated or not substantiated, and disposed of by notifying the complainant of the finding and any action taken. (The meaning of ‘complaint’ and the scope of complaint handling are discussed in [Chapter 6](#)).

2.1.1 New Zealand tribunals

Under guidelines issued by the Ministry of Justice New Zealand for the 27 tribunals administered by the Ministry, complaints about ‘a judge’ should be made to the Office of the Judicial Conduct Commissioner.¹⁸ Notes to the guidelines indicate that this instruction applies to tribunal members who are also judges of a court. The guidelines further provide that:

- complaints about tribunal heads (chairs) can be made to the minister currently responsible for making appointments to the tribunal in question, and
- complaints about members who are not the chair can be made by writing to the chair and are handled by the chair.

2.1.2 The judicial commissions – Victoria and the Northern Territory

Most of the jurisdictions have established an independent Commission or Commissioner to investigate complaints against judicial officers or are contemplating doing so.¹⁹ Some of these bodies also receive complaints about judicial members of tribunals.²⁰ Only Victoria and the Northern Territory extend the powers of the Commission to complaints about non-judicial members of a tribunal.

Complaints regarding the conduct or capacity of an ‘officer’ (judicial or non-judicial member) of VCAT are made to the Judicial Commission of Victoria, or referred from VCAT to the Commission, under sections 5 and 6 of the *Judicial Commission of Victoria Act 2016 (Vic)*. The Commission must dismiss the complaint unless satisfied that the complaint could, if substantiated, justify removal of the officer from office, or that it warrants further consideration on other serious grounds specified in s 16(1)(b) of the Act. If the Commission does not dismiss a complaint or refer it to an investigating panel it must give the officer an opportunity to respond, consult with the President of VCAT and refer the complaint to the President.²¹

If the complaint has been investigated by a panel, it may be referred to the President of VCAT if the panel finds the complaint to be not substantiated or does not take action that could lead to the removal of the officer from office for misbehaviour or incapacity.²² When referring the complaint to the President under s 13(4) or s 34(3), the Commission or the panel must provide a report of its findings, its evaluation of the officer’s conduct, and its recommendations in relation to the future conduct of the officer.²³

Similar provisions apply to complaints about the behaviour or capacity of a judicial or non-judicial member of the Northern Territory Civil and Administrative Tribunal (‘NTCAT’). The complaints may be made to the Judicial Commission of the Northern Territory under s 40 of the *Judicial Commission Act 2020 (NT)*. The Commission may refer the complaint to the President of NTCAT if satisfied on reasonable grounds that the complaint is wholly or partly substantiated but is not serious enough to justify establishing an investigation panel (s 49(1)). There is a further possibility of referral to the President where, after investigation, the panel finds the complaint to be wholly or partly substantiated but considers that it does not justify giving consideration to the removal of the member from office (ss

18 Ministry of Justice New Zealand, ‘Complaining about a member of a tribunal’ <justice.govt.nz> (accessed 23 January 2023), 2.

19 At the time of writing, the Commonwealth was considering the establishment of a federal judicial commission and the merits and design of a potential complaints-handling body.

20 For example, complaints about NCAT’s President and other judicial officers are dealt with by the Judicial Commission of New South Wales.

21 *Judicial Commission of Victoria Act 2016 (Vic)* ss 13(4), 15(1).

22 *Ibid* s 34(1), (2)(c), (3), (4), s 38.

23 *Ibid* ss 19(3), 41.

53(1), 56(1), (3)). When making a referral to the President under s 49(1) or s 56(1), the Commission may include in its report to the President recommendations as what action should be taken in relation to the complaint (ss 49(2), 56(3)).

The primary focus of the Commissions under the Victorian and Northern Territory Acts is disciplinary, not complaint-handling. From the pool of complaints about members the Commissions extract the rare allegations which, if substantiated, may be serious enough to justify consideration of the removal of the member from office. Complaints which do not meet this threshold are handled by the tribunals under their own procedures.

2.1.3 Who handles complaints in tribunals?

The complaint handling process in tribunals comprises a series of steps. In small tribunals, complaints may be handled mainly by one person. Some large tribunals may have several complaint handlers.

The registrar generally receives the complaints, co-ordinates action, monitors the timely completion of steps, designs and operates the record-keeping and management reporting systems.

While there are different steps, and therefore different roles in the complaint handling process, this does not mean that the roles must be completed by different people. The Commonwealth Ombudsman encourages agencies to 'aim for end-to-end complaint handling by a single complaint handler, but retain flexibility to reallocate complaints where needed ...'²⁴

The tribunal head may delegate steps up to and including the determination of complaints to a tribunal member, a registrar or an employee with appropriate training or experience.

2.2 Are tribunals required to establish a complaint handling system?

It is good practice for a tribunal Act to state that the tribunal head will establish and maintain a process for handling complaints about members.²⁵ A few tribunal Acts expressly provide for the head to have this function or give the head power to deal with complaints.²⁶ Where complaint handling is not mentioned expressly in an Act, it may be implied as incidental to an express power or function given to the head, such as a statutory power to introduce and manage a code of conduct or performance standards for members, or a power to manage the expeditious conduct of the tribunal's business and its administrative affairs.

In some tribunal Acts, the statutory objects of the tribunal include the promotion of public trust and confidence in their decision making.²⁷ This object is served by the provision of a fair and effective complaint handling system.

Even where the tribunal Act is silent about complaints, there may be a requirement or expectation from the executive government that tribunals will have a complaint handling process. For example, New Zealand's Ministry of Justice, which administers the majority of the nation's tribunals, publishes on its website a document entitled 'Complaining about a member of a Tribunal'.²⁸ It states:

If you believe you have been treated badly or rudely by a member of the Tribunal that is hearing your case, you can lodge a complaint about their behaviour.²⁹

24 Commonwealth Ombudsman, *Better Practice Complaint Handling Guide*, (rev. 1 Jan 2023) ('Better Practice Guide') <www.ombudsman.gov.au> (accessed 21 January 2023) 13.

25 Ministry of Justice (New Zealand) *Tribunal Guidelines* (2019) 22; Council of Australasian Tribunals, *Tribunal Excellence Framework* (June 2017) <<https://coat.asn.au/>> (accessed 6 February 2023).

26 Eg, *Fair Work Act 2009* (Cth) s 481A(1).

27 See eg, *Veterans Entitlements Act 1986* (Cth) s 133A (objectives of the Veterans' Review Board).

28 Above n 18.

29 Ibid.

The document advises how to address and submit complaints and how the tribunal will deal with the complaints.

Apart from legislation or executive directions requiring a tribunal to establish a complaint handling procedure, there are norms and standards that recommend it (see Foreword and 2.2.1.2).

An effective complaint handling system delivers benefits for both users and tribunals. Users appreciate the opportunity to have their concerns addressed through a fair and transparent complaints process which treats them with respect. Tribunals benefit from the opportunities to demonstrate accountability, build trust, enhance the tribunal's reputation for fairness and integrity, strengthen relationships with users and stakeholders, and identify pathways to improve their practice and performance.³⁰

2.2.1 The Ombudsman

Each of the ten jurisdictions has legislated to establish an ombudsman, an independent officer of the parliament with power to investigate administrative actions and omissions by public authorities. An ombudsman can investigate administrative actions or omissions by most public sector bodies ('agencies'), make non-binding recommendations to the agency, and report to the minister or parliament. The ombudsman may investigate following a complaint or on the ombudsman's own initiative. An ombudsman resolves most complaints informally. Only a small proportion proceed to formal investigation.

In some cases it is clear that the ombudsman's powers of investigation extend to administration by tribunals established by the same jurisdiction. As the legislative provisions are complex and variable, each tribunal needs to make its own assessment of whether its administrative conduct is subject to review by the ombudsman. The answer may vary according to the nature and subject matter of the complaint.

2.2.1.1 Decisions, orders, findings and procedures

An ombudsman is generally not inclined to investigate the decision-making processes of tribunals in adjudicating cases. This may be due to a statutory limitation on the ombudsman's powers, or to a policy adopted by the ombudsman.

The class of agencies whose administration can be investigated by the Ombudsman may be limited by relevant definitions in the ombudsman Act.³¹ Another form of exclusion is found in section 12(3) of the *Ombudsman Act 1978* (Tas) which provides that 'the Ombudsman shall not investigate an action of a kind specified in Schedule 2', which includes:

6. Action taken by a tribunal or a member of a tribunal in the performance of the tribunal's decision-making or determination-making functions.

Ombudsman WA has wider powers, but has made a guideline which states:³²

Although the Ombudsman has a wide jurisdiction, we do not usually investigate 'quasi-judicial' proceedings, such as where a board or tribunal is holding a formal hearing, calling witnesses, taking evidence on oath and making determinations of fact and law.

Another relevant limitation is that some of the ombudsman Acts limit investigations of matters for which the complainant has or had a legal avenue or remedy. For example, the *Ombudsman Act 1972* (Vic) provides that if the complainant had a right of appeal or review by a tribunal or a remedy by taking proceedings in a court, the Ombudsman must refuse to deal with the complaint unless it would not be reasonable to expect the complainant to exercise that right and the matter merits investigation to avoid injustice.³³

30 Ombudsman New South Wales, *Effective complaint handling guidelines – 3rd edition* (2017) www.ombo.nsw.gov.au, (i).

31 See eg, *Ombudsman Act 1976* (Cth) s 3, sub-para (a)(ii) of the definition of 'prescribed authority', which excludes a body which is empowered by statute to take evidence on oath and to have judicial members.

32 Ombudsman Western Australia, 'Guidelines: Information for boards and tribunals' (May 2009) <www.ombudsman.wa.gov.au> (accessed 1 Feb 2023).

33 Section 15(5), (6).

2.2.1.2 Review of complaint handling by tribunals

If the ombudsman has statutory jurisdiction to investigate administrative action by a tribunal, its jurisdiction may extend to a review of the handling of a complaint by the tribunal. Most complaints about tribunals are handled and resolved by the tribunal under policies and procedures determined by the tribunal. If the tribunal offers an internal review of the way the complaint was handled, the ombudsman will generally decline to investigate until the complaint process and any internal review pathway has been finalised.

If the ombudsman investigates the handling of a complaint by a tribunal, it may review and recommend changes to the tribunal's procedures. It is therefore sensible for a tribunal to design and operate its complaint handling system in a way that meets the ombudsman's standards.

Ombudsman's offices in the various jurisdictions provide on their websites a wealth of information, guidelines, information sheets, models, templates, examples, flowcharts, training materials, quick guides, checklists, self-assessment tools, glossaries, references and other resources to assist public sector agencies in designing, improving and implementing their complaint handling procedures. In some cases they also offer training for agency staff.

2.2.2 Privacy complaints

A person may have a complaint that the tribunal has mishandled their personal information or that an act or practice of the tribunal interferes with their privacy. Each jurisdiction has legislation protecting the collection, storage, use and disclosure of personal information relating to individuals. For example, a complaint about the handling of personal information by a Commonwealth tribunal can be made to the Office of the Australian Information Commissioner ('OAIC') under the *Privacy Act 1988* (Cth). The OAIC will generally not investigate the complaint until the complainant has first made a complaint to the tribunal.

Accordingly, tribunals complaints procedures should include provision for complaints about privacy breaches which meet the requirements of their jurisdiction.

2.3 What laws apply to complaint handling?

As noted above, Victoria and the Northern Territory have special Acts setting out a process for dealing with complaints about member conduct and incapacity. Acts establishing tribunals are mostly silent about the procedures for complaint handling by tribunals.

Other laws which affect aspects of complaint handling include privacy, anti-discrimination, human rights, public records, freedom of information, public interest disclosure, integrity and anti-corruption legislation as well as the criminal law.

Separate procedures exist for workplace complaints which are internal to the tribunal. They may include procedures for complaints against members or tribunal staff for bullying and sexual harassment in the workplace. Internal workplace complaints are partly regulated by industrial laws and agreements. Staff who are public service employees may also be subject to a public service code of conduct. For example, members of the Australian Public Service ('APS') are subject to the APS Code of Conduct in s 13 of the *Public Service Act 1999* (Cth) and may be subject to sanctions for breach under section 15(3) of the Act.

2.3.1 Human rights legislation

In New Zealand, Victoria, Queensland and the ACT, complaint handling must meet the requirements of a human rights Act which recognises a defined list of human rights. For example, the *New Zealand Bill of Rights Act 1990* (NZ) s 27(1) recognises the right to justice and states:

Every person has the right to the observance of the principles of natural justice by any tribunal or public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.

In Victoria, Queensland and the ACT, the human rights legislation provides that a ‘public authority’ (defined to include a tribunal exercising administrative power) must act compatibly with human rights and must give proper consideration to any relevant human right when making decisions.³⁴ The provisions apply to complaint handling, which is administrative action.

The Victorian Ombudsman, which is responsible for handling complaints of breaches of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), suggests that a person who is making a decision in response to a complaint should undertake a human rights assessment which considers

- whether any human rights recognised by the Charter (eg right to privacy or right to a fair hearing) are engaged by the proposed decision or action,³⁵
- whether the proposed decision or action limits those human rights, and
- whether the limitations are fair and reasonable.³⁶

The Victorian Ombudsman offers a step-by-step guide to making a human rights assessment when responding to complaints.³⁷ The Ombudsman recommends that the decision maker should keep a record of their human rights assessment. Similar guidance materials are provided by the Queensland Ombudsman.³⁸

2.4 What standards apply to complaint-handling?

Tribunals generally frame their policies and procedures for handling complaints about members, having regard to various standards which include:

- the current Australian and New Zealand standards on complaint management in organisations,³⁹
- requirements for New Zealand tribunals specified in the Ministry of Justice, *Complaining about a member of a Tribunal* and other materials on the Ministry’s website,⁴⁰ and
- guidelines on complaint handling by public sector bodies issued by the Commonwealth, New Zealand, state and territory ombudsmen.

Tribunals may also have regard to policies and procedures published by other Australasian and overseas tribunals. This Guide incorporates selected extracts and examples from current tribunal documents.

34 *Human Rights Act 2019* (Qld) ss 5-11, 13, pt 2, divs 2, 3, s 58(1), (2), (3); *Human Rights Act 2004* (ACT) ss 5, 6, 28, pt 2 divs 2,3, pt 5A; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3(1), 4(1)(b),(j), s-7, pt 2, ss 38, 39. See further, COAT, *Practice Manual for Tribunals 5th ed* (2020) <<https://coat.asn.au>> [6.2.13].

35 Examples of the types of matters that might raise each human right are provided in Victorian Ombudsman, *Managing Complaints Involving Human Rights* (26 May 2017) <www.ombudsman.vic.gov.au>, appendix D.

36 Victorian Ombudsman, *Complaints: Good Practice Guide for Public Sector Agencies* (September 2016) <www.ombudsman.vic.gov.au> [2.8].

37 Victorian Ombudsman, *Managing Complaints Involving Human Rights*, above n 35.

38 Queensland Ombudsman, Public administration resources, Good decisions (online resource) <ombudsman.qld.gov.au> (accessed 9 March 2023).

39 Standards Australia and Standards New Zealand, AS/NZS 10002:2022: *Guidelines for complaint management in organisations* (ISO 10002:2018) (2022) ('AS/NZS 10002:2022').

40 Above n 18.

Chapter 3

Designing the complaint handling system

The Commonwealth Ombudsman's Better Practice Guide defines a 'complaint handling system' as 'all policies, procedures, practices, officers and resources a [tribunal] deploys to manage complaints'.⁴¹ (Some jurisdictions call this a 'complaint management system').

The Ombudsman of each jurisdiction has provided resources for agencies to assist them in developing their complaint handling system. While each tribunal will pay particular attention to the guidance from their own ombudsman, there is a very high level of consistency among the Australasian ombudsmen as to the requirements for effective complaint handling by agencies. It is therefore convenient to adopt one of the more detailed guides, that of the Commonwealth Ombudsman, as the organising framework for this chapter and chapter 4, with references to other guides for additional points.

In common with other ombudsman guides, the Commonwealth Ombudsman's Better Practice Guide offers advice for public sector bodies ('agencies') which is designed to be consistent with the Australian and New Zealand standard on complaint management AS/NZS 10002:2022.⁴² The standard requires that an organisation should have a complaints management policy with procedures. The policy should state the guiding principles on which the complaint handling system is based.

3.1 The Ombudsman's design principles

The Better Practice Guide proposes eight design principles which should be applied in designing or reviewing a complaint handling system.⁴³ The eight principles, with some key strategies drawn from the Better Practice Guide and other sources, are as follows.

3.1.1 The system should be user-centred, accessible and easy to use.

- The system should be user-centred, designed with a focus on users' needs, expectations and preferences.
- The system should be accessible, flexible and easy to use for all members of the diverse community.
- Complaints should be accepted via multiple communication channels to accommodate different needs of the diverse community.⁴⁴
- Information about making a complaint should be provided in various formats, in multiple languages if possible, and be easy to find on the agency's website. The information should include how to make a complaint, the steps in the complaint handling process, possible outcomes, and what contact or notifications they can expect.
- It should be made clear to users and staff that complaints are encouraged. A service charter or service commitments for complaint handling can provide assurance that complaints will be handled fairly, promptly, confidentially, objectively, respectfully, and without cost or detriment to the complainant.⁴⁵

3.1.2 The system should support early resolution of complaints.

- Initial assessment and classification of complaints should be early and effective.
- Assessors should be trained, empowered and encouraged to finalise simple complaints, including by referring them to a more appropriate agency, closing them without further action if they are outside the scope of the policy, and resolving straightforward and urgent complaints.⁴⁶

41 Better Practice Guide, above n 24, 36.

42 Ibid, and see above n 39.

43 Better Practice Guide, ibid 10. See also, Ombudsman New South Wales, *Complaint Management Framework* (June 2015) <www.ombo.nsw.gov.au> 2, part 2.

44 On accessibility for persons with a disability, see Ombudsman NSW, *Fact Sheet: Tips for accessible complaint handling* <www.ombo.nsw.gov.au> (accessed 25 January 2023).

45 See further, Ombudsman NSW, *Fact Sheet: Applying the Commitments to effective complaint handling – guidance for agencies* <www.ombo.nsw.gov.au/> (accessed 25 January 2023).

46 Better Practice Guide, above n 24, 13.

3.1.3 The system should be integrated within the overall corporate structure.

- Internal integration within the tribunal includes treating complaints as core business, having a role of complaints manager, requiring all staff to assist complaint handlers, and having effective communication between complaint managers and service delivery areas.
- External integration includes efficient referral pathways and co-operation with other agencies and their complaint handling systems.⁴⁷

3.1.4 Complaints should be recorded in an electronic system.

- The complainant and complaint information should be recorded in an electronic system.⁴⁸
- Ideally, the system should enable progress tracking and management of the workflow process for complaints from receipt to finalisation.
- The system should record all steps and decisions taken, hold all documents and correspondence, and be capable of generating management reports for analysing the data.⁴⁹
- The complaint records should be held separately from any related case file, to facilitate control of who can access the records.
- For agencies which do not have 'customised end-to-end case management software', the Better Practice Guide proposes a complaints database with allocated complaint reference numbers, and a separate documents file for each complaint.⁵⁰

3.1.5 Complaint handling should be supported by clear process guidelines.

- The agency should have a clear complaint handling policy which includes 'complaint handling channels, processes, responsibilities, quality assurance processes and performance indicators'.⁵¹ The Victorian Ombudsman advises that the policy should also cover how complaints are made, the steps in complaint handling, response time standards and 'mechanisms for review if the complainant remains dissatisfied with the outcome'.⁵² The Ombudsman New South Wales provides a fuller list of the matters which should be covered in the policy and procedures package.⁵³
- Complaint procedures and workflows should be documented, with step-by-step instructions to help complaint handlers to implement the policy.
- There should be compliance with privacy guidelines to protect the confidentiality and personal information of complainants and persons about whom complaints are made.
- Access to complaint records should be restricted to authorised persons and disclosed to others only where necessary, including where necessary to give procedural fairness to the member concerned.⁵⁴

3.1.6 All staff and members should have the skills and support to deliver better practice.

- Frontline staff who deal with complainants should have 'specialist skills and attributes, including empathy, resilience, impartiality, conflict management and communication'.⁵⁵ Some may also need subject matter expertise.

47 Ibid 15.

48 The Commonwealth Ombudsman sets out the information to be recorded: *ibid* 16.

49 *Ibid* 16-17.

50 *Ibid* 17.

51 *Ibid*.

52 Victorian Ombudsman, *Complaints Good Practice Guide for Public Sector Agencies*, above n 36, 4.

53 *Complaint Management Framework*, above n 43, 12 and see model policy at annexure 2.

54 Better Practice Guide, above n 24, 36.

55 *Ibid* 17.

- Complaint handlers (staff and members) should receive a 'structured complaint handling training program' that includes managing unreasonable complainant conduct, and handling complaints confidentially and impartially.⁵⁶ The Victorian Ombudsman provides a list of additional topics on which complaint handlers may require training.⁵⁷
- All tribunal staff and members should be trained on their role in complaint handling as part of their induction, including being able to recognise a complaint, to identify complainants requiring additional assistance, and to assist people to access the complaint system.⁵⁸
- The tribunal should foster a respectful, non-defensive culture that is receptive to feedback and complaints and committed to delivering high quality service.

3.1.7 The system should have robust quality assurance and review processes.

- The quality assurance process should include a supervision framework, a process for complainants to seek review of how their complaint was handled, complainant satisfaction analysis, performance benchmarks and regular review of complaint handling processes.⁵⁹
- There should be strong performance benchmarks which include measurement of timeliness, complainant satisfaction and request for review of complaints.
- The system should have processes for seeking complainant feedback on both the process and the outcomes of complaint handling.
- There should be regular measurement and review against benchmark, and periodic review of the quality assurance and review framework.

3.1.8 The system should be adequately resourced.

- The tribunal should have enough staff to meet its standards for timely resolution of complaints.

⁵⁶ Ibid 18.

⁵⁷ Victorian Ombudsman, *Complaints Good Practice Guide for Public Sector Agencies*, above n 36, 5.

⁵⁸ Better Practice Guide, above n 24, 18.

⁵⁹ Ibid 19.

Chapter 4

Delivering the complaint handling service

Following on from Chapter 3 which discussed design principles for an excellent complaint handling system, this Chapter discusses the service delivery aspects of complaint handling. The focus is on identifying the stages of complaint handling and the key requirements for each, based on guidelines issued by the ombudsman in various jurisdictions. The starting point used is the Commonwealth Ombudsman's Better Practice Guide, but tribunals should also consider any additional guidance issued by the ombudsman for their jurisdiction.

The Better Practice Guide divides the process into the following eight steps. The discussion in this chapter integrates the general advice of the Commonwealth and other Australasian ombudsmen with considerations relevant to the handling of complaints about tribunal members.

4.1 Confirm, clarify and log the complaint

Some tribunals accept complaints made orally by telecommunications or in person at the registry, as well as by various forms of writing such as online form, email, text message or other private forms of electronic communication. The tribunal may receive complaints via social media but should invite the person to switch to a private channel to enable the tribunal to deal with the complaint.⁶⁰

In some cases it may be necessary to check that the person intends to make a complaint and expects a response.⁶¹ If it is not clear what the complainant is dissatisfied about, the complaint may need to be clarified. Any missing information is flagged for further inquiry.

The complaint is recorded in the complaint handling system, with a note of any special accessibility needs of the complainant and their preferred medium of communication.

4.2 Acknowledge the complaint

The complaint handler acknowledges receipt of the complaint via the complainant's preferred medium of communication. The complaint identification number, the name of a contact person, and the person's contact details are provided. The communication explains the complaint process and advises when the complainant can next expect to hear from the contact person. The complainant is advised how and when to provide any further information or documents.

4.3 Assess, prioritise and classify

The assessor examines the complaint together with any documents submitted by the complainant. If the matter is not a valid complaint within the scope and terms of the complaints policy, it is closed without further action and the complainant is notified. The notification may include a referral or information about other pathways.

If the assessor forms the view that the complaint is well-founded, an explanation, clarification, apology or other outcome may be offered at an early stage if appropriate.

If the complaint is not closed or resolved, the assessor determines its priority and complexity, and the time that will be needed to finalise it. The assessor notifies the complainant of the expected time for the Tribunal's response to the complaint.

60 Ombudsman New Zealand, *Effective complaint handling* (2 October 2012) 8.

61 These issues are discussed further in part 5 of this Guide.

4.4 Resolve early or investigate

The Better Practice Guide defines 'resolve' to mean 'providing the complainant with a fair and reasonable outcome in the circumstances'.⁶² Even if the complainant is not provided with their preferred outcome, a matter can be deemed 'resolved' if the complaint handler has appropriately identified and addressed the key issues, given the complainant a fair and respectful process, and provided an appropriate outcome.

Complaints that may be suitable for early resolution include those which can be resolved by providing an explanation or information, or which relate to errors that can be easily remedied.

Tribunals endeavour to resolve most complaints quickly at the initial assessment stage. Many complaints relate to things said to have occurred in hearings, which the assessor can readily check by listening to an audio-recording or reading the transcript (if available) and speaking to the member concerned. The complaint may be one that can be speedily resolved with an explanation or an apology, or by advice as to action the person can take.

If a complaint about a tribunal member is not closed or resolved at the initial assessment stage, the complaint may proceed to investigation. Having regard to the nature of complaints received by tribunals, it is rare for a full-scale investigation to be necessary. For those occasions, the process is as follows.

4.4.1 The investigation

The investigator will be an impartial and appropriate person with no conflicts of interest and may be an officer or member of the tribunal or an external person.

There is no requirement to stand down a member or change their work allocations while the investigation is in train. If the complaint relates to a pending proceeding or a matter which is part-heard, see [6.6] below.

The investigator makes all inquiries to properly address the complaint, which may include the following steps:

- reviewing the complaint and related documents
- examining the tribunal file and listening to the sound recording or reading the transcript of tribunal proceedings
- gathering additional information, including speaking with any person who witnessed the relevant behaviour
- speaking with the tribunal member about whom the complaint is made
- speaking to the complainant personally to get their response to any evidence gathered from other sources, to obtain additional information, and to discuss options for resolving the complaint.

Evidence that is not in written form (such as evidence taken via telephone or videoconferencing) can be taken and a written record made.

The complainant must be given an opportunity to respond to any evidence gathered from other sources that tends to contradict their statements. The member concerned should be given an opportunity to respond to the complaint and to comment on any contrary evidence and any finding adverse to them that the investigator is proposing to make.⁶³

62 Better Practice Guide, above n 24, 27.

63 See further, Ombudsman Western Australia, *Guidelines: Procedural fairness (Natural justice)* <https://www.ombudsman.wa.gov.au> (accessed 23 January 2023).

4.4.2 Making findings

After completing the investigation and evaluating the evidence, the investigator makes findings. The investigator is not bound by the rules of evidence, but findings must be based on relevant evidence that is logically capable of supporting the conclusions reached. There is no onus on the complainant to prove the matters asserted in the complaint, nor is there an onus on the member to disprove them. The evidence must be evaluated and weighed, and findings are generally made on the balance of probabilities.⁶⁴

4.5 Report and decision

If the complaint is found to be substantiated in whole or in part, the investigator assesses potential outcomes that may be offered to resolve the matter. The investigator then:

- determines the outcome of the complaint, if authorised to act as decision maker, or
- prepares a report for the decision maker setting out the evidence, the investigator's provisional conclusion on the factual issues, and any recommendations.

If an external investigator is used, the decision maker should be an internal person. The conclusions in the investigator's report should not be definitive. The decision maker is responsible for making findings and determining the outcome of the complaint after considering the investigator's report and is not bound by the investigator's conclusions or recommendations.

4.6 Communicate the outcome to the complainant

4.6.1 Content of notification

As soon as practicable after the decision has been made, the decision maker notifies the complainant and gives the following information:

- what the decision maker understands the complaint to be about,
- what steps were taken to investigate the complaint,
- what findings were made and why,
- which parts of the complaint were found to be substantiated or unsubstantiated, with reasons, and,
- what further steps or pathways are available to the complainant. If the outcome is not what the complainant has requested, the notification may include options for internal review of the handling of the complaint or referral to an external watchdog such as the ombudsman.

The outcome should be explained in a way that is appropriate to the person's communication needs, using plain English. It may be necessary to have the letter translated for the complainant.

4.6.2 Form of redress

If the complaint is found to be wholly or partly substantiated, the notification letter will normally offer some form of redress. Redress means an appropriate response by the tribunal to a complainant who has been detrimentally affected by a deficiency in administration, with a view to reaching a fair and reasonable resolution.⁶⁵ Redress proposed by a tribunal often includes one or more of the following actions:

- an acknowledgment of what has occurred
- an explanation or reasons
- an apology (in specific terms), if appropriate⁶⁶

64 As to weighing the evidence where serious allegations are made, see COAT, *Practice Manual for Tribunals 5th ed*, above n 34 [6.2.6].

65 Ombudsman New South Wales, *Options for redress* (15 June 2004) <www.ombo.nsw.gov.au> (accessed 24 January 2023) [2.2.1].

66 Several ombudsman websites offer guides to making an apology. See eg, Victorian Ombudsman, *Apologies* (April 2017) <www.ombudsman.vic.gov.au>.

- a change to be made to tribunal policies, procedures or training to address issues raised by the complaint
- any other action taken or proposed that is reasonable in the circumstances.

The expressed wishes of the complainant should be taken into account when considering the form of redress.⁶⁷ If the redress offered does not meet the complainant 's request, it may be appropriate to explain any relevant limitation on what the tribunal can do.

4.6.3 Other action outside the complaints process

4.6.3.1 Performance appraisal and development

Where a complaint raises a question about whether the member's performance or conduct meets the tribunal's standards, it may be discussed or considered in the member performance appraisal process (see [Chapter 1](#) at [1.5], [Chapter 6](#) at [6.7.5]). While the content of the discussion should not be reported to the complainant, the tribunal can advise in a general way that complaints are considered along with other observations in the performance appraisal process.

4.6.3.2 Disciplinary proceedings

In rare cases, the conduct of a member as revealed by a complaint is of a nature that may be grounds for the removal of the member from office in accordance with the tribunal Act.⁶⁸ (See below [6.7.4]). Where the tribunal head believes there may be grounds for removal, some tribunal Acts empower the head to suspend the member from office pending an investigation.⁶⁹

The suspension and removal of a member are disciplinary actions, not an available outcome of the complaints process. The *QCAT Complaints Policy and Procedures* advises as follows:⁷⁰

Given the [complaints] process cannot provide a mechanism for disciplining Members, the President's response will not address anything other than the substance of the complaint. However, it provides an opportunity for the President to improve the performance of QCAT if behaviour falls short of expected standards.

4.7 Finalise or review

If the notification of outcome to the complainant takes the form of an offer, the complainant is asked to respond. The complainant may have questions or want a further explanation. If they are dissatisfied, they may want the decision maker to reconsider (for example, where there is new information), or they may wish to have the complaint process or outcome reviewed by another person at the tribunal who was not involved in the original complaint handling. They may also wish to make a complaint to the ombudsman for the relevant jurisdiction.

Internal review of complaint handling

The Australasian ombudsmen generally encourage public sector agencies to provide an avenue to request an internal review of complaint handling by a person of equal or higher seniority who has had no previous involvement with the complaint.⁷¹ If the person requests internal review, they can be asked to state, 'what they want reviewed and why they disagree'.⁷²

67 *Options for redress*, above n 65, [3.3.4].

68 See, eg, QCAT Act s 188(1) which provides that the Governor in Council may, on the Minister's recommendation, remove a senior member or ordinary member from office on specified grounds.

69 Eg, QCAT Act ss 189, 190.

70 <www.qcat.qld.gov.au> (accessed 25 Jan 2023).

71 Eg, Ombudsman NSW, *Effective Complaint Handling Guidelines*, above n [4.10]; *Better Practice Guide*, above n 24, 19; *Complaints: Good Practice Guide for Public Sector Agencies*, above n 36 [2.3], [2.11], Queensland Ombudsman, 'Complaints Management' <www.ombudsman.qld.gov.au> (accessed 1 March 2023); *Effective Complaint Handling*, above n 60, 14.

72 *Better Practice Guide*, *ibid* 20, and see examples provided there.

Tribunals vary in whether they offer internal review of complaint handling. Complaints about tribunal decisions and processes and complaints about the conduct of members are often handled in the first instance by the tribunal head or a member of high seniority. This practice may exhaust the tribunal's capacity to offer review by another member of equivalent or higher seniority who has had no prior involvement in the matter or the complaint and will not be needed to hear any internal appeal.

External review

Ombudsman guidelines generally express an expectation that after an agency has finalised its complaint handling and any internal review, the complainant will be advised to complain to the Ombudsman if they are dissatisfied with the agency's response. This does not apply to a tribunal which is not an agency within the scope of the ombudsman's jurisdiction.⁷³ In that case it may be appropriate to advise the person to write to the Attorney-General.

In some cases there may be another agency which has power to review particular types of complaint, and this varies by jurisdiction. For example, a complaint about a breach of privacy by the tribunal may be the subject of a complaint to the body responsible for administration of the jurisdiction's privacy legislation.

Finalisation

Once the complaint handling is finalised, the record of the complaint is updated and completed. Responsibility and timelines are allocated for completing any further action to implement the outcome. Quality assurance checks are completed, and a complainant satisfaction survey administered.

4.8 Feedback systemic issues

The final step is for the management team to reflect on any systemic issues highlighted by the complaint. An issue may be considered systemic if it is likely to affect other people beside the individual complainant.⁷⁴ A complaint may highlight gaps, conflicts or deficiencies in tribunal services, procedures, staffing, workflow, training or communication. It may also reveal trends that need to be addressed by management.

Systemic issues need to be recorded and shared with the relevant managers. De-identified complaint data should be fed back into reviews of processes and services. Even a complaint which could not be investigated (eg, due to the anonymity of the complainant) may be useful data in identifying a cluster of complaints.

4.9 Document retention

Complaints received by tribunals are public records and must be retained for the minimum period specified by law. The general rule about public records is that disposal of them is prohibited unless in accordance with a determination made by the administering body under statute. For example, the *State Records Act 1997* (SA) s 23(1) states:

An agency must not dispose of official records except in accordance with a determination made by the Manager with the approval of the Council.

Section 3(1) of the Act defines 'agency' to include 'a court or tribunal'; 'official record' means 'a record made or received by an agency in the conduct of its business' (subject to specified exclusions); 'dispose of' includes destroying or abandoning the record; 'Manager' means the Manager of State Records and 'Council' means the State Records Council.

The determinations ('disposal schedules') for public records held by agencies are complex. The minimum retention periods for complaint documents may vary according to the subject matter of the complaint, the outcome of the complaint, whether the documents have been the subject of a freedom of information request, and other specified circumstances.

73 See the Preface, 1.

74 Better Practice Guide, above n 24, 32.

4.10 Reporting complaint data

Some tribunals report publicly in their annual report or in other high level corporate reports data and statistics about the complaints received and finalised during the year under report. Where a tribunal is embedded in an administering department, court or other agency, the data may be reported in the annual report of the administering agency. The Better Practice Guide recommends that agencies report:

- total complaint numbers,
- performance against benchmarks,
- high level trend information, and
- most common types of complaint and their outcomes by type.⁷⁵

⁷⁵ Better Practice Guide, above n 24, 35.

Chapter 5

Complaints and feedback

5.1 Definitions

Tribunals generally encourage persons who have a concern about their tribunal experience to discuss it informally with the registrar or registry staff before recording a complaint. Some concerns may be resolved simply by providing an explanation, clarification, referral, alternative arrangement or assistance. Where there is any possibility that the concern remains unresolved, the option of making a complaint should be discussed.

Complaint handling systems in organisations generally distinguish between

- a 'complaint' which must be processed through the system, and
- 'feedback', which is evaluative comment for which no response is expected or required.

Since the distinction between 'feedback' and a 'complaint' is of administrative significance, tribunal policies need to explain the difference. Both words have ordinary meanings which can be found in the dictionary but are often used with a special meaning for the purposes of a complaints policy.

5.1.1 Ordinary meanings

On one view, a 'complaint' is an expression of dissatisfaction or discontent, while 'feedback' is evaluative comment which may be positive, critical or neutral. This understanding is consistent with one or more of the ordinary meanings of 'complaint' as 'an expression of censure, resentment or discontent; lament, fault-finding ...'⁷⁶and is also consistent with one or more of the ordinary meanings of 'feedback' as 'an indication of the reaction of the recipient, as of an audience ... and ... responses and reactions to an inquiry or report, etc that provide guidelines for adjustment or development ...'⁷⁷

In other words, feedback about a service or experience is evaluative comment, for the purpose of guiding improvement of the service or future experience.

Some tribunals adopt a meaning of 'complaint' that is consistent with its ordinary meaning. For example, the *Complaint Management Policy* of the Mental Health Tribunal (WA) states:

What amounts to a 'complaint' should be broadly construed. For the purposes of this policy, a 'complaint' is any written communication that might be construed as a complaint or that evinces a general state of unhappiness on the part of the person concerned.

5.1.2 The definitions in the AS/NZS Standard

The term 'complaint' is often defined in a special way for purposes of a complaints policy. The Standards Australia and Standards New Zealand *Guidelines for complaint management in organisations* (AS/NZS 10002: 2022) defines a 'complaint' as an:

expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required).

This definition is different from the usual meaning of 'complaint', which does not require an expectation or requirement of a response or resolution.

⁷⁶ *Macquarie Dictionary*, 5th edition (2009, Macquarie Publishers Pty Ltd, Sydney).

⁷⁷ *Ibid.*

5.1.3 Commonwealth Ombudsman's definitions

Several tribunals use a definition of 'complaint' that is consistent with the Commonwealth Ombudsman's Better Practice Guide ('the Ombudsman's definition'). It is in similar terms to AS/NZS 10002:2022, except for the addition of the words 'reasonable to expect'. Under this definition, a complaint is:

an implied or express statement of dissatisfaction where a response is sought, reasonable to expect or legally required.⁷⁸

The same document defines 'feedback' as follows:

'Feedback' is a compliment, criticism, comment or suggestion where a response is not sought or not reasonable to expect.

According to the Ombudsman's definition, an expression of dissatisfaction can be regarded as feedback rather than a complaint if a response is not requested, reasonably expected, or legally required.

5.1.4 Leaving 'complaint' undefined

A tribunal policy may adopt any of the above definitions in its complaints policy. Alternatively, a tribunal may prefer to adopt a policy that all comments of a critical nature will receive a response, regardless of whether a response is expected or reasonably required. This means that all critical comments will be processed as complaints.

5.2. Intention to complain

5.2.1 Clarifying intention

The Better Practice Guide gives examples of communications which would generally not be a complaint including: 'an initial request for a service or action', 'statements about an overall opinion ... unless a response or resolution is expected, or should reasonably be provided', 'requests for information or explanations' (unless they are repeated and may be implied complaints) and 'formal review requests under a legislated internal review scheme'.⁷⁹

As these examples show, the Ombudsman's definition may require complaint handlers to make assessments about whether dissatisfaction is implied, and whether it is reasonable to expect a response where none is requested or legally required. The uncertainties can arise because a person making a statement may think that their dissatisfaction and their expectation of a response are obvious and go without saying. From the tribunal's perspective, it may be difficult to distinguish such communications from critical feedback.

5.2.2 Where a complaint form is used

The New South Wales Civil and Administrative Tribunal ('NCAT') endeavours to reduce the uncertainty by drawing out better information at the outset. NCAT's website includes a complaints policy and fact sheet, a complaint form and a feedback form.⁸⁰ A person who is unhappy with NCAT's services or processes or the conduct of a member or staff is advised to contact the registry to see if the issue can be resolved informally before lodging a complaint. All complaints must be in writing and use the NCAT Complaint Form, which includes the following instruction:

You should use this form to make a complaint if you want the Tribunal to respond and take some action as a result of your complaint. If you do not want the Tribunal to respond or take action, you can use the NCAT Feedback Form on the NCAT website.

78 Above n 24, 5-6.

79 Ibid, 6.

80 <www.ncat.nsw.gov.au> (accessed 2 Feb 2023).

The Complaint Form includes a text box with a prompt to identify ‘events or circumstances about which you complain’, and the question: ‘What action do you want taken as a result of this complaint?’ These questions encourage the person to be explicit about their intention to complain and their expectation of a response.

If an online form is used, it is useful to have the functionality to generate a standard acknowledgment together with a copy of the form as submitted by the complainant.

5.2.3 Where no complaint form is used

Many tribunals encourage the use of a complaint form, and tribunal staff commonly assist complainants to complete them. Where a tribunal has a complaint form, it may accept complaints in other formats. Some tribunals do not require any writing at all and accept complaints made in person or by telecommunications.

The acceptance of complaints in multiple formats and communication channels is encouraged by the Better Practice Guide, to make the complaints system accessible to everyone:⁸¹

Pay particular attention to the needs of people who may be vulnerable due to age, disability, language, geographical, health, financial or cultural reasons. ...

Allow complaints from multiple channels so users can choose one that meets their specific needs. Better practice is to allow complaints to be raised by phone, email, online form, post and face to face.

Where complaints are accepted in person or by telephone, tribunal staff will need to ascertain whether a person they speak to intends to make a complaint. The Mental Health Review Tribunal Queensland provides the following advice to staff in its procedures:

When a person makes a complaint the Tribunal staff member who is the first point of contact for the complaint will make an assessment of whether the complaint is general feedback that requires no response or is a genuine complaint to which a response is either impliedly or explicitly requested. If in doubt, the staff member will liaise with their line manager.⁸²

5.2.4 Plain English terms

It is desirable for the tribunal to adopt clear working definitions of ‘complaint’ and ‘feedback’ for purposes of the complaint handling system. Tribunal policies, procedures, fact sheets and forms should define and use the terms with consistent meanings, albeit expressed in plain language versions.

Some tribunals prefer to avoid using words like ‘dissatisfaction’ and ‘complaint’ in forms as the terms may be inappropriate for their users. A complaint form could instead ask users to state what they are unhappy about and whether they want the tribunal to provide a response or take action.

Where forms are not used and the intention or expectation is unclear, the tribunal should seek clarification before deciding not to record the communication as a complaint.

81 Better Practice Guide, above n 24, 11.

82 ‘Policy: Feedback and Complaints Management’ (December 2019), [6.0].

Chapter 6

Scope of complaints

For the purposes of developing a tribunal's complaints policy and procedures, three inter-related questions arise:

- Who can make a complaint?
- Who can be complained about?
- What can be complained about?

6.1 Who can make a complaint?

In principle, anyone can lodge a complaint and receive an acknowledgement of receipt from the tribunal. At the initial assessment stage the complaint handler checks that it comes within the tribunal's definition of 'complaint' and is not within a class of complaints excluded by the tribunal's complaints policy. If it is not a complaint within the terms of the policy, it may be closed without further consideration and the complainant notified.

Complaints policies of Australian tribunals generally allow a person who has been a party to a case in the tribunal or, in some cases, a party's representative, to make a complaint about the tribunal's members or staff and the services they provide. Some tribunals allow a wide class of persons to make a complaint. For example, SACAT's Complaints Policy states 'a complaint may be made by (or on behalf of) an individual client, group (including other public sector agencies) or member of the public.'

Where tribunals accept complaints from a wide class of persons, they can respond to the extent that privacy requirements permit. This may mean in some circumstances that only general information can be provided, such as the scope of the tribunal's powers and the procedures it follows in proceedings of the relevant kind.

Where the tribunal is dealing with similar complaints made by multiple individual complainants, the Ombudsman New South Wales recommends that the complaints should be dealt with in a consistent way and given consistent information and advice.⁸³

6.1.1 Standing test

Some tribunals apply a standing test which restricts who can make a complaint. The intention to apply a standing test for New Zealand tribunals administered by the Ministry of Justice is made clear in the Ministry's document 'Complaining about a member of a tribunal':

*A complaint will not be investigated and will be dismissed if ... you are not a person affected by the conduct or matter you are complaining about.*⁸⁴

The term 'person affected' is commonly used in legislation and its meaning is established by judicial interpretation. It is widely used in tribunal Acts to define the classes of person who are entitled to apply to the tribunal for review of a decision or to appeal a decision.

There are various matters which a tribunal may weigh up in deciding whether to adopt a standing test for complaints. Where relevant, they may include:

- the number and types of complaints that the tribunal receives,
- whether a standing test would likely generate more correspondence or costly legal disputes as complaints are escalated to ministers or other external bodies,
- whether the tribunal deals with matters concerning vulnerable persons whose welfare may be of genuine concern to other persons such as family members, carers, treating practitioners or community organisations,

⁸³ Effective complaint handling guidelines, above n 30 [5.6].

⁸⁴ Above n 18.

- whether complaints raising systemic issues are more effectively made by an organisation than by individuals affected by the issues
- the extent to which privacy laws or closed hearings limit the types of information the tribunal can provide to a complainant who is not a party to the proceeding, and
- whether the controversial or sensitive nature of the matters dealt with by the tribunal attracts repeated, tactical or abusive complaints from non-parties.

6.1.2 Anonymous complaints

Consistently with its use of a standing test, the Ministry of Justice New Zealand states that an anonymous complaint against a New Zealand tribunal will be dismissed.⁸⁵ Complaints policies of Australian tribunals are either silent on this question, or state that the tribunal will generally not investigate a complaint which fails to identify the complainant.

Some Australian Ombudsmen find that there are sometimes good reasons why people wish to complain anonymously, and encourage agencies to accept the complaints.⁸⁶ At the same time, it is recognised that in some cases it is not possible to investigate or resolve an anonymous complaint due to lack of information.⁸⁷ An example is a complaint about a tribunal proceeding where the complainant provides insufficient information to identify the proceeding in question.

There are types of complaint which, although made anonymously, may be capable of being investigated. For example, it may be possible to investigate a complaint that a particular member is in the habit of arriving late for hearings.

The New South Wales Ombudsman advises agencies to investigate anonymous complaints which meet the following threshold:

If they are assessed as having some substance, are of reasonable seriousness, there is sufficient information in the complaint to enable the allegations to be investigated.⁸⁸

An anonymous complaint, even if it cannot be investigated, may be fed back into management or performance reviews if appropriate (see [Chapter 4](#) at [4.8]).

Reporting back to an anonymous complainant presents some constraints. If a complaint relates to what occurred in a particular tribunal proceeding, privacy laws or other laws limit the information that can be disclosed to an unidentified person. In some circumstances, it may be possible to respond by giving general information without commenting on untested assertions in the complaint.

6.1.2.1 Identified complainant requests withholding of identity from member

Sometimes a complainant identifies themselves to the complaint handler but asks that their identity be withheld from the member concerned. To accommodate the request may present difficulties in ensuring that the member has a fair opportunity to answer the complaint. The complaint handler may need to consider whether

- the substance of the complaint can be put to the member for a response without revealing the identity of the complainant, or
- arrangements can be made that will reassure the complainant that they will suffer no detriment if their identity becomes known by the member.

If the complaint is a 'protected disclosure' (see [Chapter 6](#) at [6.7.2]) the tribunal is obliged to withhold the name and identifying details of the complainant.

85 'Complaining about a member of a tribunal', above n 25.

86 Effective complaint handling guidelines, above n 30, [5.2]; Better Practice Guide, *ibid* 24, 11, 36; Complaints: Good Practice Guide for Public Sector Agencies, above n 36, 7

87 Complaints: Good Practice Guide for Public Sector Agencies, *ibid*.

88 Effective complaint handling guidelines, above n 30, [5.2].

6.1.3 Protocol for legal representatives and practitioners

Separately from the complaints policy, some courts and tribunals have developed protocols for legal professional associations (for example, the Bar Council) which provide a channel for concerns of legal representatives and legal practitioners to be raised through the President with the head of the court or tribunal.

6.2 Who can be complained about?

A complaint may be made about any member or employee of the tribunal, including the head, but the mode of processing the complaint may differ according to who is the subject of the complaint. (See discussion in Chapter 2 at [2.1]).

6.3 What can be complained about

According to the Commonwealth Ombudsman, complaints about organisations are commonly about the accessibility or quality of services, treatment by staff, incorrect or unfair actions, reasons not properly explained, inaction or delay, failure to respond to requests or applications, or disagreement with policy or process.⁸⁹ For tribunals, many complaints received are about the outcomes of cases.

6.3.1 Common exclusions

In tribunal complaints policies, the matters about which a complaint can be made are often defined by exception. There may be a general statement that a person may complain about the staff or members or the functioning of the tribunal, followed by a list of matters about which a complaint cannot be made, or will be dismissed, or will not be investigated. The list of excluded matters commonly includes the types of complaints discussed below.

6.3.1.1 Complaints outside the tribunal's area of responsibility

Tribunals do not investigate complaints about matters which are outside their area of responsibility or control, such as complaints about a legal representative or the state of the law. The complainant will be referred to the appropriate office or body for dealing with the matter.

6.3.1.2 Complaints against a former member

Tribunals generally do not accept complaints against a person who is no longer a member of a tribunal, and discontinue the handling of a complaint against a member if they resign or retire. As tribunal heads have limited powers to investigate complaints and no powers to direct former members to participate in the process or undertake remedial action, the investigation is unlikely to deliver a useful outcome for the complainant.

6.3.1.3 Frivolous and vexatious complaints

Tribunals commonly reserve the right to dismiss at any stage a complaint which is found to be frivolous or vexatious. These terms have established legal meanings. 'Frivolous' means the complaint is clearly without substance. 'Vexatious' means it is made primarily to cause annoyance. The threshold for dismissing a complaint on the ground that it is 'frivolous and vexatious' is high.

Terms such as these are poorly understood and are liable to cause offence when applied to a complaint. The Ombudsman New South Wales advises that where the agency is justified in dismissing the complaint on the ground that it has no substance, the complainant should be advised that 'no evidence was found to support the allegations'.⁹⁰

⁸⁹ Ibid 5.

⁹⁰ Ibid [5.3].

Tribunals may find assistance in the procedures for dealing with unreasonable complainant conduct which were developed as a joint project of the Australasian Parliamentary Ombudsman.⁹¹ The procedures assist in identifying, managing and responding to unreasonable complainant conduct of various types, and give options for restricted or alternative service arrangements in exceptional circumstances. A number of tribunals have developed procedures for dealing with these matters.

The Victorian Ombudsman provides guidance on how to conduct a human rights assessment to ensure that any limitation on access to services is reasonably justified and proportionate to the behaviour and its impact.⁹²

6.3.2 Time for making a complaint

In some circumstances, delay in making a complaint can affect the availability of evidence or limit the options for resolving the complaint. The policy of one tribunal states:

A complaint may be dismissed at initial stage without substantive investigation where ... the complaint has not been lodged within 3 months.

The complaints policies of Australasian tribunals generally do not require the complaint to be made within a specified time after the matters complained of occurred. As a complaint cannot result in a change to a tribunal decision or a change of member, no other party to a tribunal proceeding is affected by the timing of the complaint.

6.4 Complaints about a tribunal decision

Some tribunal complaint policies allow complaints about a member's conduct but exclude complaints about a member's decision. For example, the ACT Courts and Tribunals administration (which includes the ACT Civil and Administrative Tribunal ('ACAT')) states in its policy that it 'does not review decisions or hear complaints regarding ACT Court or ACAT decisions.'⁹³

6.4.1 Finality, judicial review and appeals

Except for decisions protected by privative clauses in legislation, tribunal decisions are generally subject to judicial review by a court, on the application of a party, on recognised grounds such as breach of natural justice or error of law. For certain types of decisions, legislation also provides a right of appeal to a court or a second-tier tribunal. Where a class of decision is subject to both judicial review and a right of appeal, a court generally expects parties to use the appeal avenue first.

Except as an outcome of judicial review or appeal, a tribunal decision disposing of a case which has been published to the parties is final and cannot be changed or set aside.⁹⁴ This arises from the principle of *functus officio*, which holds that once the tribunal has discharged a statutory power or duty by exercising it, the tribunal has no authority to exercise the power again in the same matter.

Whether the principle applies is a question of statutory interpretation. It may be subject to exceptions. For example, the tribunal Act may allow the reinstatement of a proceeding that has been dismissed. Another limited exception is a 'slip rule' which allows the correction of obvious errors and omissions in the text of a tribunal order or statement of reasons.⁹⁵

The principle of finality is widely recognised in legislation establishing complaint bodies such as an ombudsman or a judicial commission. The Acts establishing such oversight bodies commonly limit

91 Eg, Ombudsman New South Wales, *Managing unreasonable conduct by a complainant: A manual for frontline staff, supervisors and senior managers* (2021) <ombo.nsw.gov.au>.

92 Ombudsman Victoria, *Managing Complex Complainant Behaviour* (February 2022) <www.ombudsman.vic.gov.au> 38-41.

93 ACT Courts and Tribunals, *Complaints and Feedback Policy* (1 Sept 2020) <www.courts.act.gov.au>, [13.2].

94 The principle of finality is subject to the effect of jurisdictional error which, under Australian law, invalidates the decision and leaves unexhausted the tribunal's powers to decide the proceeding. See COAT, *Practice Manual for Tribunals 5th ed*, above n 34 [6.6.1], discussing *Minister for Immigration and Ethnic Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11.

95 Eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 63. On the scope of the principle of *functus officio*, see *Practice Manual for Tribunals*, above n 34 [6.6.1].

their power to investigate action taken by a court or tribunal in the performance of its adjudicative or deliberative functions.⁹⁶

6.4.2 Wording the exception

A common form of wording in tribunal policies is to exclude a complaint about a decision for which judicial review or an appeal is (or was) available. An example is a policy which states that a complaint is outside the scope of the complaints policy if it is ‘about the result of the case or about something else that was capable of being raised on appeal’.

This type of wording suggests that the purpose is to channel complainants towards judicial review or an appeal as the more appropriate remedy. However, the exclusion admits no exception where the options for judicial review or appeal have lapsed or are exhausted, are beyond the complainant’s resources or unlikely to provide the outcome the complainant seeks.

If the exclusion of complaints about a decision is intended to uphold the principle of finality, it is unnecessary to qualify it by referring to the availability of judicial review or appeal. The point can be made more simply, by stating that a tribunal decision cannot be changed or set aside as an outcome of a complaint. Persons wanting the decision changed can be advised to seek legal advice about challenging the decision through judicial review or appeal and informed that time limits apply.

6.5 Complaints about the conduct of a member in a tribunal process

A person may wish to complain about a member’s conduct in the course of performing the member’s functions. For example, the complainant may say that the member behaved rudely or treated them badly in a hearing or conciliation conference. Tribunal complaint policies generally allow a person to make a complaint about a member’s conduct, although the complaint cannot result in a change of the decision or a change of the member allocated to the relevant tribunal process.

Some types of conduct by a member in a tribunal process may provide a ground on which the complainant can apply for judicial review or a statutory appeal to a court on a question of law or an internal appeal. For example, there may be conduct which can be said to demonstrate actual bias or to breach the fair hearing requirements of natural justice.

It is not useful to attempt in the complaints policy to exclude the making of complaints about such conduct. Complainants who are not lawyers cannot be expected to know whether the conduct complained of could potentially be the subject of an application for judicial review or a statutory appeal. It may be preferable to allow the complaint to be made. Then, in the initial assessment stage of complaint handling, the assessor can consider whether the complainant should be advised to consider an application for judicial review or the exercise of a statutory appeal right (if available).

6.6 Complaint about a pending or part-heard proceeding

6.6.1 General approach

Tribunal policies commonly do not expressly say whether a complaint may be made in a proceeding that has not been finalised (a ‘pending proceeding’). Some policies include limitations relating to pending proceedings. For example, the QCAT Complaints Policy and Procedure limit complaints about the way a pending proceeding is being conducted:

Generally, it will not be appropriate for the President to investigate complaints about the conduct of pending proceedings. In most cases, it will be appropriate for a party who has concerns to raise the complaint before the tribunal when the matter is next listed for hearing.⁹⁷

96 See, eg, *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) s 16(1)(f); *Judicial Conduct Commissioner Act 2015* (SA) s 17(1)(e), 6(3); *Ombudsman Act 2001* (Qld) s 16(2)(a); *Ombudsman Act 1989* (ACT) s 5(2)(d).

97 QCAT website <qcat.qld.gov.au> (accessed 22 January 2023) 3.

Where a complaint about a pending proceeding is not dismissed, the handling may need to be deferred. The QCAT Complaints Policy and Procedure expresses this point as follows:

If the President considers that dealing with the complaint might have an adverse effect on the disposition of a matter currently before the tribunal, the President may defer dealing with the complaint until the determination of the matter. If so, the Member concerned would not normally be advised of the complaint in order to avoid any possible perception of bias, and the complainant would be informed of this.

6.6.2 Complaint raising serious concerns about conduct

Although it will often be appropriate to defer the handling of a complaint relating to a pending or part-heard matter, the tribunal head should be made aware of the complaint when it is made. If serious allegations are made about the conduct of a member during proceedings, the head may need to take steps to satisfy themselves about the safety of participants and the avoidance of any conduct that could threaten the integrity of the proceedings or the reputation of the tribunal. The head should be prepared to act where there is clear evidence during the proceedings of a serious departure by members from safe and acceptable conduct.

6.6.3 Alternative avenues for complainant

While the following procedures do not form part of complaint handling, they may offer an alternative pathway for the complainant.

6.6.3.1 Disqualification of a member

A tribunal's complaints policy should state that a complaint cannot be used to change the tribunal member hearing a case. A dissatisfied party may be advised to ask the member to disqualify themselves. An application for disqualification can be made on grounds of actual or apprehended bias or a conflict of interest.

The NCAT Complaint Policy states:

A person who wants a different Member to hear their matter must ask the Member to disqualify themselves. This can be done in person at the hearing or by writing to the Registrar and other parties before the next hearing.⁹⁸

Further information is provided in the 'NCAT Fact Sheet: Complaints about NCAT':

The Member may ask for submissions from the parties as to why they should or should not remove themselves.⁹⁹ If the Member does not remove or disqualify themselves you may be able to appeal against this decision to NCAT's Internal Appeal Panel.

6.6.3.2 Reconstitution of the tribunal

It is the function of the tribunal head to 'constitute' the tribunal for the purpose of hearing and deciding a matter or case by allocating it to a specified member or members. Many Acts expressly allow the tribunal head to reconstitute a tribunal for a hearing by changing one or more of the members.¹⁰⁰

98 www.ncat.nsw.gov/

99 www.ncat.nsw.gov/

100 Eg, NCAT Act s 52.

The VCAT Act provides for reconstitution of a tribunal on the application of a party. At any time before the conclusion of the hearing of a proceeding before VCAT a party may apply to the President of VCAT to reconstitute the tribunal.¹⁰¹ The VCAT Act also gives a party the right to object to a member constituting the tribunal for the hearing if the member presided at a compulsory conference or conducted a mediation in the proceeding.¹⁰²

6.6.3.3 Complaints about timeliness and delay

Many complaints in pending proceedings are about delays. Delays in completing proceedings are a major concern for tribunal heads. Adopting a reserved decisions policy can enable the tribunal head to monitor timeliness and act on delays. An example of such a policy is the QCAT Reserved Decisions Policy which can be summarised as follows:

- QCAT members endeavour to deliver decisions with reasons within three months of the decision being reserved, unless the member specifies a later date due to the complexity of the matter,
- the President of QCAT monitors the progress of reserved decisions, and
- a self-represented party or the legal practitioner representing a party may make an enquiry about the progress of the reserved decision, but normally not before the indicated date for delivery has elapsed.¹⁰³

While delays in handing down decisions are generally attributable to the member, delays in completing steps before that stage may be due to other people or other factors. A tribunal may consider establishing timelines for completion of key procedural steps from filing to completion of the proceeding. Where timeline standards have been published, registry staff can promote compliance by notifying the persons responsible for completing the steps.

6.7 Complaints about a member's conduct outside the tribunal

6.7.1 Breaches of member code of conduct

The AIJA Guide to Judicial Conduct advises that in their private lives outside the courtroom judges should carefully consider and, if possible, avoid conduct and activities that could place at risk public confidence in the administration of justice, public respect for the judiciary and the reputation of the judiciary and its members.¹⁰⁴ Judges are advised to test their conduct against the guiding principles of impartiality, independence, and integrity.¹⁰⁵

Codes of conduct developed by tribunals for their members commonly acknowledge these principles and provide guidance on how members should conduct themselves both in their tribunal role and in their lives outside the tribunal. Perceptions of a member's impartiality and independence, or the reputation of the tribunal and its members, may be placed at risk by a member's conduct outside the tribunal. The conduct may include a member's comments on social media, behaviour at a social function, political ties or the receipt of gifts or personal benefits.

In Victoria, complaints about the conduct or capacity of judicial and non-judicial members of VCAT may be made to the Judicial Commission of Victoria which has broad investigative powers.¹⁰⁶ The Commission must dismiss the complaint if it relates to the private life of the member and, if substantiated, could not reasonably be considered to have affected the performance of the member's functions or the member's suitability to hold office.¹⁰⁷ Similar provisions apply to members of NTCAT, except that the Commission has a discretion to dismiss the complaint if the same conditions apply.¹⁰⁸

101 VCAT Act s 108.

102 VCAT Act ss 86, 93A.

103 QCAT President, 29 November 2018, <www.qcat.qld.gov.au/> (accessed 11 January 2023)

104 Above n 6, 5.

105 Ibid.

106 *Judicial Commission of Victoria Act 2016 (Vic)* ss 5, 6. This may be contrasted with the special requirements of s 72(ii) of the Constitution for members of tribunals who are also federal judges.

107 *Judicial Commission of Victoria Act*, *ibid* s 16(3)(c).

108 *Judicial Commission Act 2020 (NT)* s 40(1), 41, 44(1)(H).

Tribunal complaint policies commonly do not expressly mention complaints about conduct outside the members' tribunal functions. The powers of tribunals to investigate complaints about conduct or other matters which may have occurred outside the tribunal are limited. Tribunals generally lack the broad investigative powers and the statutory protections of a judicial commission or an integrity commission.

Where the complaint makes allegations of conduct by a tribunal or a staff member of the tribunal which involve suspected corruption or criminality, the tribunal or the complainant may be under a duty to report the matter to another agency.

6.7.2 Suspected corrupt conduct

Each Australian state and territory has an integrity agency which is empowered by statute to investigate suspected corrupt conduct by a public official. For example, the Independent Commission Against Corruption of New South Wales can investigate allegations that a public official has engaged in forms of 'corrupt conduct', as defined in Part 3 of the *Independent Commission Against Corruption Act 1988* (NSW). The integrity commission may also receive public interest disclosures (or 'whistle-blower' complaints) about serious wrongdoing in the public sector. A tribunal member can potentially be the subject of a disclosure.

The legislative terminology and the definitions of the types of conduct which must be reported to the integrity agency vary across the jurisdictions. In general, if a tribunal head has reasonable grounds to suspect that corrupt conduct by a tribunal member or employee has occurred or is occurring, the conduct should be reported to the integrity agency without delay.¹⁰⁹

In 2022 the Australian Parliament legislated to establish a National Integrity Commission, which is expected to be operational during 2023. New Zealand does not have a single national integrity body. Instead, the functions are divided among several organisations.

6.7.3 Complaints alleging criminal conduct

Apart from corrupt conduct, the complainant may be under a legislative obligation to report to the police information they have about the commission of a crime. For example, section 316 of the *Crimes Act 1900* (NSW) provides that any adult who knows or believes that a 'serious indictable offence' has been committed and has information that might be of material assistance to the police must report the information to the police. A 'serious indictable offence' is an offence punishable by imprisonment for five years or more.

Even where there is no legislative obligation to refer the conduct to the police, referral should be considered. The New South Wales Ombudsman advises that a referral to the police should be made if the investigator suspects that an offence has been committed and there is some evidence to support this view.¹¹⁰

6.7.4 Conduct or incapacity that may justify removal of a member from office

There are kinds of misconduct which, while not necessarily criminal in nature, could provide grounds on which Parliament or a Minister can recommend to the Governor or Governor-General that the member be removed from office or their appointment terminated. The grounds for removal are usually set out in the relevant tribunal Act. In Victoria and the Northern Territory, the investigation of these matters with respect to a member of VCAT or NTCAT is handled by the Judicial Commission. Removal of a member is an outcome of disciplinary proceedings, not complaint handling, and is outside the scope of this Guide.

109 See further, Ombudsman NSW, 'Handling public interest disclosures (whistleblowing)' <https://www.ombo.nsw.gov.au/guidance-for-agencies/>.

110 Effective complaint handling guidelines, above n 30 [5.1].

6.7.5 Less serious conduct breaches

Otherwise, if the head receives a report of conduct which appears not to meet the standards of conduct and competence expected of a member, the head may investigate and discuss the matter with the member separately from the complaints process. The discussion may form part of the ongoing processes of member performance appraisal and professional development outlined in [Chapter 1](#) at [1.5]. The head may also consider whether the member code of conduct needs to be amended, or whether changes in procedures or in member training are required.

Appendix A: Model Complaints Policy for Tribunals Template

This model policy template offers options and choices to enable tribunals to adapt it to their individual circumstances. It is based on elements from

- the Victorian Ombudsman's *Complaints Good Practice Guide for Public Sector Agencies* (September 2016) Appendix 1,
- the Ombudsman NSW's *Complaint Handling Model Policy Template* <www.ombo.nsw.gov.au> (accessed 9 Feb 2023),
- various current tribunal policies as indicated below, and
- the discussion in the Guide [chapters 3-6](#).

It is ideally used in conjunction with

- a procedures document, providing complaint handlers with step-by-step instructions
- a plain language fact sheet for the information of persons who might wish to make a complaint or provide feedback.

How to use this template

Some tribunals may wish to use the template as a structure and a series of prompts for drafting their own policy. Tribunals whose users contend with significant barriers to making a complaint may prefer to design a shorter policy in simple language, using this template as a checklist to ensure their policy covers the essentials.

Standard wording is in black roman type, with suggested wording in *italics*. Agencies may need to tailor this text to suit their individual circumstances.

[Tips and instructions for drafting and modifying the policy template are in red and brackets]

Name of tribunal

Title and version number

Responsible officer

Date of Human Rights review (Vic, Qld, ACT, NZ)

Approved by

Date approved

Review date

[Review complaint handling system regularly, including key performance indicators – suggest within 3 years from approval or last review]

Relevant legislation

[Name of tribunal] Act; Charter of Human Rights and Responsibilities Act 2006; Independent Broad-based Anti-corruption Commission Act 2011; Privacy and Data Protection Act 2014; Health Records Act 2001; Public Interest Disclosures Act 2012

[List all legislation relevant to complaint handling by your tribunal. This example is for a hypothetical Victorian tribunal (other than VCAT and the Victims of Crime Assistance Tribunal)].

Related policies

[Insert all related Tribunal policies]

Service Charter; Public Interest Disclosures Policy; Reserved Decisions Policy

1.0 Introduction

1.1 Purpose

This policy is intended to put in place an open, fair and transparent system for receiving and responding to complaints made to us about our operations or services, members, registrars or employees.

Our complaint handling system is intended to:

- enable us to respond to issues raised by complainants in a timely and cost-effective way,
- demonstrate our fairness, impartiality and efficiency,
- enhance public trust and confidence in the Tribunal and its processes,
- strengthen relationships with users and the community; and
- identify issues and options for improving our performance.

1.2 Our commitments

The Tribunal is committed to the following principles which inform its complaint handling.

1. A culture that values complaints

We have a culture that respects an individual's right to complain and to disagree with us. We are committed to fair, effective and prompt resolution of complaints.

2. Accessibility

People with a range of needs can easily complain and staff actively assist them to navigate the complaints process. There is no fee charged for making complaints, and no detriment to a person for making a complaint.

3. Transparency

We make it clear how to complain, where to complain and how the complaint will be handled. The steps taken to respond to a complaint are recorded and are subject to review. The Tribunal provides the complainant with reasons for our decisions and any options for review.

4. Objectivity and fairness

Complainants are treated with courtesy and respect and consistently with human rights. Complaints are considered impartially on their merits and we will engage with the complainant in the process. We will ensure that the person handling a complaint is different from any person whose conduct or action is being complained about.

5. Privacy

Complaint information is handled according to privacy laws and other relevant legislation. Personally identifiable information is shared within the Tribunal only as necessary for the purposes of investigating and responding to the complaint and reviewing the handling of the complaint. This may include inviting a response to the complaint from a Member, Registrar or employee who is identified or concerned in the complaint or may have relevant information. The complaint information will not be shared with any other party to a Tribunal matter.

Complaint information is not disclosed outside the Tribunal, unless the complainant consents or disclosure is required by law. Complaint data is de-identified when it is reported on externally.

6. Accountability & improvement

We provide explanations and reasons for decisions. We are accountable internally and externally for our decision making and complaint handling performance. Analysis of complaints will drive improvement in our performance and in complaint handling.

1.3 Definitions

Complaint: For the purposes of this Policy, a ‘complaint’ is [select from options below or insert your own]:

- An implied or express statement of a person’s dissatisfaction [made to us about our processes or services or the conduct of a Tribunal Members or an employee] where a response is sought, reasonable to expect or legally required (Commonwealth Ombudsman’s definition)
- An expression of a person’s dissatisfaction with the operations of the Tribunal or with the conduct of an employee, a registrar or a member where a response or resolution is explicitly or implicitly expected or legally required (NSW Ombudsman’s definition as modified for a tribunal)
- ‘An expression of a person’s dissatisfaction with the functioning of the Tribunal or with the conduct of [its] staff, [a Registrar] or a Member, where the complainant seeks a response and remedial action other than changing the Tribunal’s decision or changing the Member hearing a matter’ (based on NCAT’s definition).
- A [written communication/any communication] from a person to the tribunal that evinces a general state of unhappiness [with the operations of the tribunal or the conduct of an employee, a registrar of a member] (the Mental Health Tribunal WA’s definition);

and falls within the Scope of the Policy [1.4].

‘**Employee**’ includes a person employed by Court Services Victoria [or insert name of employing department or ministry] to work for the Tribunal as a member of our staff.

‘**KPI**’, an abbreviation of Key Performance Indicator, expresses a management expectation for the performance of a specified activity or task.

‘**Matter**’, means an application, proceeding or case initiated in the Tribunal which has been allocated a case file reference number [insert similar term] and which may be finalised or pending.

‘**Member**’ means

- A Deputy President, Senior Member, Ordinary Member [list all titles used for Members (excluding judicial or presidential members if they are subject to a different complaints process)], and
- a Registrar when constituting the Tribunal or exercising the functions and powers of a Member.

‘**Registrar**’ means the Principal Register and any Deputy Registrar [or insert title of equivalent positions] including any person acting in such a role.

‘**Resolution**’ — see ‘resolve’.

‘**Resolve**’, in relation to a complaint, means to provide the complainant with a fair and reasonable outcome in the circumstances.

‘**Staff**’ — see ‘Employee’.

1.4 Scope of the Policy

This policy applies to the handling of complaints received by us from persons external to the Tribunal about the operations or services of the Tribunal, the actions, decisions or conduct of a Registrar or employee, or the conduct of a Member.

A complaint may be made by [select from the options below or insert your own formulation]

- any person, group or organisation,
- any person interacting with the Tribunal including parties to a matter, their representatives and their service providers, or
- any person affected by the operations, services, conduct or action the person is complaining about, or the authorised representative of such a person.

1.4.1 Complaints outside the scope of the Policy – alternative processes

The following matters are **not** complaints within the scope of this policy and are subject to separate processes:

- complaints *[about a decision or order/seeking a change to a Tribunal decision or order]*, including any ruling, finding or direction on which a decision or order is based. A person who wants a decision changed should seek legal advice about their right to apply to a court for review of the decision *[or to appeal/seek leave to appeal the decision]*. Rights to *[appeal/seek leave to appeal or]* apply for review of a decision are subject to time limits. *[General information on the procedure to initiate an appeal is provided [here](#) (insert link to instruction on lodging an appeal on Tribunal website)]*.
- complaints seeking a change of a Member allocated to hear and/or decide a matter. A party who believes that the Member has a conflict of interest or is affected by bias may ask the Member to disqualify themselves. *[Insert details of the procedure for doing this or link to information on the Tribunal's website]*.
- complaints about members of the Tribunal who are judicial officers (judges or magistrates) are received and handled by *[insert name and contact details of the relevant Judicial Commission/er]*
- staff grievances or complaints by an employee about another employee, a registrar or a Member or a work related problem or a breach of the code of conduct. Internal complaints regarding staff conduct will be handled in accordance with applicable public sector employment laws, agreements and processes.
- complaints about persons who are not employees or members of the Tribunal (eg, legal practitioners, lay representatives, insurers or expert witnesses). These complaints should be directed to the appropriate regulator.
- complaints alleging that conduct on the part of an employee, registrar or Member is 'corrupt conduct' within the meaning of section 4 of the *Independent Broad-based Anti-corruption Commission Act 2011* should be referred to the *Independent Broad-based Anti-corruption Commission* ('IBAC') *[or insert name of the appropriate statutory term, Act and integrity body]*
- complaints relates to our use or disclosure of personal information (other than health information), will be directed to our Privacy Officer. The handling of the complaint will comply with the *Privacy and Data Protection Act 2014* *[insert name of the relevant privacy or information Act for your jurisdiction]*. Complaints about our handling of health records will also be referred to our Privacy Officer and dealt with in accordance with the *Health Records Act 2001* (Vic) *[Insert name of the relevant Act]*.
- complaints about delay in the handing down of a reserved decision (see our Reserved Decisions Policy)
- public interest disclosures within the meaning of section 9 of the *Public Interest Disclosures Act 2012* *[or insert reference to similar provisions in the legislation of your jurisdiction]* are handled separately in accordance with our Public Interest Disclosures Policy

2.0 How to make a complaint

2.1 Means of communication

A person can make a complaint in several different ways.

Mail: [Insert name of tribunal and postal address]

Telephone: [Insert telephone number]

Email: [Insert email address]

In person: [Insert locations]

Online: [Insert web address. If you have an online form, include instructions on how to access it from the homepage]

A person who has a concern is encouraged to first contact the Tribunal in one of these ways to discuss it with Registry staff. If it cannot be resolved informally, the person will be asked if they wish to make a complaint.

2.2 Accessibility provisions

[Detail the processes/services the agency has in place to assist people with additional needs to make a complain, as in the following example].

To make the complaints process accessible to everyone we can

- arrange free access to a translation or interpreter service,
- use the national relay service or text telephone device to communicate with people with hearing or speech impairments,
- provide support and assistance to persons to make a complaint if needed, and
- accept complaints from a person's authorised representative if a person is unable or does not want to complain themselves.

2.3 Anonymous complaints

An anonymous complaint is one in which the complainant's name and other identifying information is withheld from the Tribunal. [Insert your policy here, or choose from the options below]

- *We do not act on anonymous complaints.*
- *We act on anonymous complaints and will investigate them if we have enough information to make reasonable enquiries and respond to the complainant. If the complaint relates to a matter in the Tribunal, we may need to review the Tribunal's case records and seek information or a response from a Member or other persons. This may not be possible if we lack the information needed to identify which Tribunal case which the complaint is about. If we are unable to communicate a response to the unknown complainant we will, if appropriate, consider whether matters raised in an anonymous complaint can inform improvements in our processes and performance.]*

3.0 Complaint Handling Procedures: Overview

[Tailor this section to your individual procedures]

3.1 Initial assessment

We will acknowledge all complaints within 3 working days of receipt [or your KPI] using the complainant's preferred mode of communication (eg, text message, email). We will also advise the complainant when they can next expect to hear from us, and give contact details of the person handling the complaint.

At the initial assessment stage we will

- check that the complaint is within the terms of this policy (and close it if it is not)
- if the Tribunal is not the right agency to deal with the complaint, refer the complainant to the right agency
- record the complaint in the complaint handling system, with all the required information
- if necessary, contact the complainant to clarify the complaint and the outcome the complainant is seeking
- if necessary, request documents or further information from the complainant
- refer the following complaints to the President [or delegate] for initial assessment: anonymous complaints, complaints where the complainant requests that their identity be withheld from a person about whom the complaint is made; a complaint relating to [a decision or] the conduct of a Member or Members or a registrar [add any categories that may require special assessment or handling].
- assess the complexity of the complaint and the likely time required for it to be completed
- within 15 days of receipt of the complaint [insert your KPI], notify the complainant of the expected time it will take for the Tribunal to finalise its response to the complaint.

3.2 Investigation

- If a complaint is not resolved early by registry staff, it may be assigned to a registrar or to a Member for investigation and resolution.
- If it is expected to take longer than 28 days [insert your timeline KPI] the contact person will contact the complainant prior to this time and give an updated time estimate. If the time estimate changes, the contact person will notify the complainant and explain the reasons for the delay.
- The person responsible for determining the Tribunal's response to the complaint ('the decision maker') will write to the complainant to notify them of the response, including any action taken or proposed by the Tribunal. The letter will explain the Tribunal's response and, if appropriate, will advise the complainant of their avenues for review of the handling of the complaint (usually by the Ombudsman).

3.3 Responses

If the decision maker finds the complaint to be well-founded, they may respond by:

- providing an explanation for what occurred
- giving information about processes and procedures
- acknowledging an error if one has been made, and offering an apology
- changing a decision (not being a decision or order of the Tribunal in a matter)
- advising the complainant of a review of our policies, procedures, systems or training to address issues raised by the complaint
- providing assistance or a referral to another organisation

3.4 Responses that are not available

We cannot respond to a complaint by [list your exclusions. The following list is based on the NCAT Complaints Policy]

- changing the Tribunal's decision in a matter
- changing the Member allocated to hear or decide a matter
- influencing a decision to be made by the Tribunal in a matter
- providing legal advice or an opinion on a complainant's case in a Tribunal proceeding

4.0 Keeping records and reporting on performance

We will keep detailed records about the complaint, how it was managed, the outcomes and any action to be implemented.

To measure our performance and plan for continuous improvement, we report on: [select which apply or insert your own]

- complaints upheld, partially upheld, not upheld
- performance against our timeline KPIs
- changes made to our processes as a result of complaints
- complaints reviewed by the Ombudsman's office where they result in recommendations by the Ombudsman for action by the Tribunal]

We will report our complaint handling data in our annual report, where we will also detail any changes to our processes made as a result of complaints.

5.0 Managing unreasonable complainant conduct

We are committed to being accessible and responsive to complaints. However, we need to ensure the health, safety and security of our people and our ability to perform our work. Occasionally we need to manage unreasonable conduct by a complainant, which may consist of:

- being unreasonably persistent in pursuing a complaint that has already been comprehensively considered and reviewed
- making unreasonable demands (such as insisting on unattainable outcomes)
- unreasonably failing to co-operate (such as failing to provide relevant documents or making unreasonable arguments)
- engaging in unreasonable behaviours such as threats or verbal abuse.

We will attempt to moderate unreasonable conduct by applying approaches recommended by the Ombudsman.

[The New South Wales Ombudsman's Managing unreasonable complainant conduct Manual and Model Policy include guidance for managing unreasonable complainant conduct, which agencies can tailor to their individual circumstances < <https://www.ombo.nsw.gov.au/guidance-for-agencies/>>].

If these approaches have been applied and the unreasonable conduct persists, we may need to consider placing necessary and proportionate restrictions on the complainant's contact with us or our actions in relation to a particular complaint or matter. In Victoria, Queensland and the ACT, a Tribunal may need to undertake a human rights assessment before placing a service restriction on a complainant. See Victorian Ombudsman, Complaints: Good Practice Guide for Public Sector Agencies (September 2016) www.ombudsman.vic.gov.au [2.12]].

Appendix B: Tribunal Complaints Form Template

This form is designed to be lodged by email or mail, rather than as an electronic form. If an electronic form is used, points 2 and 3 in the Instructions can be omitted.

See discussion about use of a complaint form in [Chapter 5](#) at [5.2], and comments in the preamble to Appendix A about designing a form for users who contend with significant barriers .

[Tribunal name] Complaint Form:

If you wish to complain about your experience with [Tribunal name], please read the [Tribunal name] Complaints Policy [\[or Fact Sheet\]](#) before completing this form.

Instructions on how to lodge a complaint

1. Use this form to lodge a complaint against a Tribunal Member, [\[list any other titles given to members eg adjudicator\]](#), registrar or Tribunal staff, our operations, process or service [\[Align with your definition of 'complaint'\]](#).
2. Make a copy of your complaint before you send it to [Tribunal name].
3. Send the original complaint form marked attention to [\[official's title\]](#):

[\[insert address\]](#)

or

[\[insert email address\]](#)

Note:

- If you are unhappy with a Tribunal decision in your matter [\[and want it changed\]](#), do not lodge a complaint. A complaint process cannot change the decision. Only [\[an appeal or\]](#) a review by a court can change the decision. [\[Information about lodging an appeal can be obtained at \[provide link to relevant webpage or factsheet\].\]](#)
- [Tribunal name] is not responsible for government policy or the law itself and does not respond to complaints about those matters.

YOUR DETAILS

Full name:

Postal Address:

Contact Phone:

Email address:

DETAILS OF [TRIBUNAL NAME] PROCEEDINGS

Provide details of [Tribunal name] proceedings if relevant

Tribunal File Number (if known):

Division (list) (if known):

EVENTS OR CIRCUMSTANCES YOU ARE UNHAPPY ABOUT

Identify what you are unhappy about and the factual basis for it. Set out dates and places of a hearing or other tribunal process if these are relevant.

EXPECTED OUTCOME OF YOUR COMPLAINT

Do you expect a response? (please tick)

Yes

No

What action do you want the Tribunal to take in response to your complaint?

SIGNATURE

Name and signature of complainant or authorised representative

Name:

Signature:

Date:

Appendix C: Resources

Ombudsman guides, manuals and guidelines

The following resources are on the listed websites. Dates of publication are given where available.

Commonwealth Ombudsman www.ombudsman.gov.au

- *Better Practice Complaint Handling Guide* (updated 1 Jan 2023)
- *Providing remedies*, Fact Sheet 3, November 2008

Ombudsman New South Wales www.ombo.nsw.gov.au

- *Apologies: A practical guide* 2nd ed, (March 2009)
- *Complaint assessment criteria* (Public Administration Jurisdiction), Public Sector Agencies Fact Sheet 25
- *Complaint Management Framework*, 2015 (and see Annexure 2, Complaint Handling Model Policy)
- *Effective complaint handling guidelines* 3rd ed, February 2017
- *Fact Sheet: Applying the Commitments to effective complaint handling – guidance for agencies*
- *Fact Sheet: Tips for accessible complaint handling*
- *'Handling public interest disclosures (whistleblowing)*
- *Managing unreasonable conduct by a complainant: A manual for frontline staff, supervisors and senior managers* (2021)
- *Options for redress* (15 June 2004)

Ombudsman New Zealand www.ombudsman.parliament.nz

- *Apologies* (Aug 2022)
- *Effective complaint handling* (2 October 2012)
- *Making a protected disclosure*
- *Managing unreasonable complainant conduct* (Oct 2012)

Ombudsman Queensland www.ombudsman.qld.gov.au

- *Unreasonable complainant conduct – quick guide*
- *Selection of online guides and course materials on aspects of complaint-handling*

Ombudsman Tasmania www.ombudsman.tas.gov.au

- *Managing other people's personal information*
- *Public interest disclosures Fact Sheets, Guidelines and Model Procedures*

Ombudsman Victoria www.ombudsman.vic.gov.au

- Accessibility guidelines for government communications (2019)
- Apologies (April 2017)
- Complaints: Good Practice Guide for Public Sector Agencies (Sept 2016)
- Good Practice Guide: Managing Complaints Involving Human Rights (26 May 2017)
- Managing Complex Complainant Behaviour (February 2022)

Ombudsman Western Australia www.ombudsman.wa.gov.au

- 'Guidelines: Information for boards and tribunals' (May 2009) www.ombudsman.wa.gov.au (accessed 1 Feb 2023).
- *Guidelines: Procedural fairness (Natural justice)* (accessed 23 January 2023)
- [Guidelines, The Principles of Effective Complaint Handling](#)

Other

Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (2001, revised November 2009) www.ag.gov.au.

AIIA, *Guide to Standards of Judicial Conduct* (3rd edition, 2017, revised November 2020) www.aija.org.au (accessed 3 February 2023)

Council of Australasian Tribunals www.coat.asn.au

- Tribunal Excellence Framework (June 2017)
- Tribunal Competency Framework: Promoting Professional Excellence
- Practice Manual for Tribunals 5th ed (2020)

Ministry of Justice (New Zealand) *Tribunal Guidelines* (2019) 22; Council of Australasian Tribunals, *Tribunal Excellence Framework* www.coat.asn.au (accessed 6 February 2023).

Ministry of Justice New Zealand, 'Complaining about a member of a tribunal' <justice.govt.nz> (accessed 23 January 2023)

Standards Australia and Standards New Zealand, AS/NZS 10002:2022: *Guidelines for complaint management in organisations* (ISO 10002:2018) (2022)

