Ombudsman
New South Wales

Responding to unreasonably persistent litigants

September 2014

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[This is the manuscript of an article published in
The Judicial Review, Vol 12 – Number 1, September 2014]

ISBN: 978-1-925569-65-0

Introduction

In 2006, the nine Australasian parliamentary ombudsman began a joint project to identify strategies and techniques to better manage what we referred to as "unreasonable complainant conduct". This was our first joint project and culminated in the publication of a set of guidelines.[1] This project was initiated in response to the noticeable growth in the number of complainants presenting with behaviours that are increasingly challenging and serious.[2] We are seeing more complainants who are very angry, aggressive and abusive to our staff; who are threatening harm, who are dishonest or intentionally misleading in presenting the facts, or who deliberately withhold information from us. Our offices are frequently flooded with unnecessary telephone calls, emails and massive quantities of irrelevant printed material. We are seeing complainants who are insisting on outcomes that are clearly not possible or appropriate, or who are making demands that they are not entitled to make, or who, at the end of the process, are unwilling to accept our decisions and continue to demand that we take further action on their complaints. While these guidelines may assist court (and tribunal) registry staff to manage unreasonable conduct by litigants, they do not necessarily address the issues confronting presiding officers. This article identifies a number of strategies that may help to fill this gap.

When people come to us it is certainly not uncommon that they are upset, often very upset if they believe they have been treated badly by the agency to which they first raised their concerns. Dealing with people who we perceive as being somewhat "difficult" is therefore an integral part of our role. We recognise and accept that this is part and parcel of our work as complaint handlers.

However, a problem arises when "difficult" (as in challenging) becomes "unreasonable" (as in unacceptable). "Unreasonable" conduct is something out of the ordinary compared to the conduct of complainants generally. It does not encompass people who behave a bit strangely, are who are difficult to understand because they cannot put their thoughts together in ways that are easily comprehensible, or even those whose anger leads them to pepper their language with expletives. Rather, it is conduct by a small percentage of complainants that unacceptably impacts on the:

1. health and safety of the staff of an organisation, or visitors to its premises
2. limited resources of the organisation that are available to deal with complaints
3. equitable distribution of the resources of the organisation between all users, of a service, both current and potential.

What complicates the situation is that most people whose conduct is perceived by courts or complaint handlers to be unreasonable are likely to view their own conduct as being reasonable in the circumstances. How reasonableness (and fairness) is assessed can vary considerably depending on the perspective of the person or body making the assessment. For example, members of the public can be expected to adopt a very subjective approach based on assessments of "fairness",

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1 The project resulted in the publication of guidelines, the most recent edition being: Managing Unreasonable Complainant Conduct Practice Manual, 2nd ed, NSW Ombudsman, May 2012.

2 Unreasonable conduct by complainants is not a recent phenomenon. In a paper presented to a seminar in Canberra in 1985, Justice Michael Kirby (then President of the NSW Court of Appeal) noted that:

> "One of the universal problems of the Ombudsman is the chronic complainer: people who feel passionately about their own cause and are uncompromising in their reaction to a negative conclusion on the part of the Ombudsman. Such people can sometimes cause a great deal of disproportionate disruption to the work of the Ombudsman and his staff. … This issue was discussed at a recent meeting of ombudsman in Helsinki. It is a universal phenomenon".

See "The Ombudsman through the looking glass 1977–1985" (1985) 12(4) *The Canberra Bulletin of Public Administration* 300.

whereas independent review bodies adopt a more objective standard based on assessments of "reasonableness"[3]. Further, while "reasonableness" is a central issue for independent review bodies (such as courts or ombudsman), research[4] supports the idea that this is a secondary concern for members of the public. Another factor is that while in the subjective judgment of a litigant or complainant his or her conduct might appear reasonable because of its *cause*, a court or complaint handler may validly assess the conduct to be unreasonable due to its *impact*.

What is the experience of courts and complaint handlers?

The NSW Ombudsman provides training to complaint handlers (both public and private sector) and court and registry staff on the management of unreasonable conduct by complainants and litigants.

Complaint handlers participating in these training sessions across Australia consistently report that unreasonable conduct by complainants appears to be a growing phenomenon, both in terms of the numbers of people engaging in such conduct and the seriousness of the conduct. Indeed, there are some indications that this is a world-wide phenomenon.

Court staff have reported some common scenarios in our training sessions with them:

4. *The litigant who deflects responsibility onto the presiding officer or registrar* — It is often very difficult for litigants to understand why court processes and procedures must be followed. These litigants may feel that their matter is the most complex and urgent matter, warranting prompt or immediate attention, while to court staff the matter is one of many and may not be given the priority the litigant expects. Accusatory statements such as "it will be on your head if something happens to" or "it is your fault that [X or Y] has happened" are often used. Litigants may also twist information to add dramatic effect to their argument.

5. *The demanding litigant who is never satisfied* — There is an increasing number of self-represented litigants who court staff diligently guide through the maze of legislation, forms and court proceedings. For some, however, this is a cue to become demanding and the

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3 While there is a degree of overlap in the characteristics of conduct that might be seen as being "fair" or "reasonable", there seems to be some consensus in dictionary definitions and in writings on the topic that there is a significant difference in the nature of the assessments these terms refer to:
- conduct is seen as being "fair" if it is perceived to be morally right, for example, ethical, dictated by conscience, honest, uncorrupted and free from prejudice, favoritism or self-interest, unbiased, balanced, impartial (the focus is primarily *internal* and *subjective*)
- conduct is seen as being "reasonable" if it is perceived to be in accordance with accepted standards of conduct, for example, in accordance with the law, in good faith and for legitimate reasons, rational, what is appropriate for a particular situation (the focus is primarily *external* and *objective*).

4 Research into "justice theory". See for example, JA Colquitt et al, "Justice at the millennium: a meta-analytic review of 25 years of organizational justice research" (2001) 86(3) *Journal of Applied Psychology* 425; BA Sparks and JR McColl-Kennedy, "The application of procedural justice principles to service recovery attempts: outcomes for customer satisfaction" (1998) 25 *Advances in Consumer Research* 156; J Greenberg, "Organizational justice: yesterday, today, and tomorrow" (1990) 16(2) *Journal of Management* 399; TR Tyler, *Why people obey the law: procedural justice, legitimacy and compliance*, Yale University Press, Newhaven; GS Leventhal, "What should be done with equity theory?" in KJ Gergen, MS Greenberg and RH Willis (eds), *Social exchange: advances in theory and research*, Plenum, New York, p 27; SL Blader and TR Tyler "A four-component model of procedural justice: defining the meaning of a "fair" process (2003) 29(6) *Personality and Social Psychology Bulletin* 747; T Nabatchi, LB Bingham and D Good "Organisational justice and workplace mediation: a six-factor model" (2007) 18 *International Journal of Conflict Management* 148; D Jepson and J Rodwell, "A new dimension of organisational justice: procedural voice" (2009) 105 *Psychological Reports* 1.

common experience is that the more their demands are met, the more they want, even to the point where they complain about inefficiency. For example, the litigant may demand an early hearing date, and when a date is given, complain that he or she will not be ready in time.

6. *The intelligent litigant who might have a mental health issue* — Court staff find such litigants by far the most difficult to deal with.[5] While such litigants come across as logical and as having an understanding of the process, they seek to manipulate the process to their advantage. Often fuelled by the internet, they will launch into attacks on court officers and/or the justice system generally, quoting historical remedies to support their positions (for example, the Magna Carta). Such litigants are often intransigent, refusing to follow directions, appear in court proceedings, or adhere to orders.
7. *The litigant with the hidden agenda* — Some people appear to litigate for the sake of litigation, not wanting a matter to end. Commonly such litigants will avoid the resolution of the substantive issues by making numerous objections and interlocutory applications, and by lodging appeals. The behaviour of these litigants is time consuming; they will not listen to reason and constantly question the process. Registrars are often inundated daily with emails and phone calls, resulting in micro-management of case files.
8. *The litigant who does not listen* — Some litigants, no matter how many ways or times something is explained to them, do not listen. This can lead to litigants feeling frustrated and angry. When this manifests itself in abusive and defensive behaviour towards court staff, the staff will inevitably be adversely affected.

Who complains?

The NSW Supreme Court keeps a public register of individuals against whom vexatious proceedings orders have been made (referred to below as vexatious litigants).[6] A comparison of the names on this register as at December 2013[7] with the names of repeat complainants to the NSW Ombudsman, the Judicial Commission of NSW, the Office of the Legal Services Commissioner (OLSC) and the Independent Commission against Corruption (ICAC) reveals some interesting results.

NSW Ombudsman

The NSW Ombudsman's records show that:

- of the 25 vexatious litigants, 20 have a history of complaints to the NSW Ombudsman (182 complaints between them)
- of these, 10 have been informed by the NSW Ombudsman that any further correspondence raising the same or similar issues will be read and filed without acknowledgement

5. Etienne Esquirol, an early 19th century French physician referred to one manifestation of this phenomenon in terms of the surprise experienced by people when they observe that somebody who appears to function normally in nearly every respect, doesn't in relation to one aspect of their lives. Esquirol observed that: "Partial delirium is a phenomenon so remarkable, that the more we observe it, the more we are astonished, that a man who feels, reasons and acts like the rest of the world, should feel, reason, and act no more like other men upon a single point": from a paper entitled "Mental maladies: a treatise on insanity", quoted by
KS Kendlar, "Delusional disorder" in GS Berrios and R Porter, *A history of clinical psychology*, New York University Press, 1995, p 361.
6. *Vexatious Proceedings Act 2008*, s 11.
7. In relation to the register, a telling comment made by one of the people the author consulted in preparing this paper concerned what appears to be the reluctance of the Supreme Court to declare a person a vexatious litigant: "other than its surprising brevity, the list is notable chiefly for who is not on it, rather than who is".

- only one of the 25 vexatious litigants is also on the NSW Ombudsman's list of people who are the subject of restricted access directions (people who have been advised that, for example, they may only contact the office via correspondence).[8]

Judicial Commission

The Judicial Commission's records show that:

- of the 25 vexatious litigants, 12 have a history of complaints to the Judicial Commission
- the Judicial Commission has declared three of these "vexatious complainants" under s 38 of the *Judicial Officers Act* 1986.[9]

OLSC

OLSC's records show that:

- of the 25 vexatious litigants, 19 have a history of complaints to the OLSC (93 complaints)
- of these, seven have been informed (in relation to at least one complaint) that no further response will be provided without fresh evidence about existing complaints or unless they have complaints about fresh issues
- four have been given warnings about unacceptable conduct and behaviour in their dealings with the OLSC.

ICAC

The ICAC's records show that:

- of the 25 vexatious litigants, 15 have a history of complaints to the ICAC
- of these, three have been informed by the ICAC that any further correspondence raising the same or similar issues will be read and filed without acknowledgement
- only one of the 25 vexatious litigants is also on the ICAC's list of people who have been advised that they may only contact the ICAC via correspondence.

Categorisation of unreasonable complainant conduct

Based on the many years of experience of ombudsman offices with a wide range of complainants and the work of various researchers,[10] the nine Australasian parliamentary ombudsman have developed an approach for the management of unreasonable complainant conduct. The ombudsman avoid "diagnosing" the person and focus on strategies to address the problems caused by particular types of unreasonable conduct. At the core of their approach is the realisation that a "one-size-fits-all" focus on the person is unworkable. To effectively and fairly manage unreasonable

8 This is a list of people who because of issues caused by their behaviour towards our staff or office (for example, threats, aggression, excessive numbers and frequency of phone calls or emails, etc) have been advised that, for example, they may only contact the office via correspondence delivered by Australia Post, may only communicate by telephone with a particular officer, etc.

9 Out of a total of nine people so declared by the Commission since it commenced operation in 1987. This provision appears to be a provision unique to the Judicial Commission of NSW.

10 Such as Dr Grant Lester and Professor Paul Mullen who have explored the "querulant" discussed in more detail below.

conduct, the strategies used need to be tailored to address the particular problems caused by particular complainants. To facilitate this approach, the ombudsman have identified five separate categories of unreasonable conduct with associated management strategies:

1. Unreasonable persistence — this includes persisting with a complaint even though it has been dealt with to finality, refusing to accept the complaint handler's decision, excessive correspondence, etc. This conduct is addressed through management strategies that are about saying "no".
2. Unreasonable demands — this includes insisting on outcomes that are unattainable, demanding that a complaint be handled in a particular manner. This conduct is addressed through management strategies that are about setting limits.
3. Unreasonable lack of cooperation — this includes deliberately withholding information and acting dishonestly, providing disorganised information, giving excessive or unrelated information, refusing to define the issue of complaint, etc. This conduct is addressed through management strategies that are about setting conditions.
4. Unreasonable arguments — this includes seeing cause and effect links where there are clearly none, postulating conspiracy theories unsupported by evidence, irrational interpretations of the facts, irrational beliefs, and focusing on excessively trivial matters. This conduct is addressed through management strategies that are about declining or discontinuing involvement at the earliest opportunity.
5. Unreasonable behaviour — this includes anger, aggression, threats, threatening conduct, etc. This conduct is addressed through management strategies designed around a risk management protocol that we are developing.

What are the possible causes of or motivations for such conduct?

Possible causes or motivations leading to unreasonable conduct by complainants include:

Attitudinal

- *Dissatisfaction* - with a person, agency, organisation, government body, or general discontent.
- *Venting* - a desire to express his or her feelings and have views heard – to 'let off steam' or 'have their day in court'. This is particularly the case in circumstances where a person is more interested in expressing feelings or views than in getting a concrete outcome

Aspirational

- *Principle* - a rigid focus or fixation on what is seen as a matter of "principle" or a "crusade" seeking "justice", coupled with an inability to 'let go' and move on – to normalise. Some people become 'fused' with their 'campaign', which effectively becomes the main purpose of their life and part of their identity. Where resolution of the issues in dispute would mean a significant loss of such purpose and meaning, the person concerned may want to hold onto and continue their campaign regardless of whether a proposed outcome might address their original issue or current interests.
- *Vindication* - including the need for public recognition of the injustice suffered, and acknowledgement of the seriousness of the issue(s) to be addressed; the extent of the battle waged in the "public interest" or as a "matter of principle"; and that the people they have identified in their complaint or action have acted corruptly or illegally and/or have conspired to cover up the alleged wrongs
- *Retribution* - including consequences for the people deemed to be responsible for the wrong suffered (for example, dismissal from employment and/or criminal charges) or payment of "punitive damages"

- *Revenge* - including the desire to harass, intimidate, embarrass, annoy, or inflict pain and suffering on those seen as responsible for perceived wrongs — often litigation or complaint is used as a means to exact revenge.

Emotional or psychological

- *'Infallibility'* - a firm conviction that they are right and that any presiding officer or complaint handler reaching a different conclusion is either incompetent or corrupt (often due to a misunderstanding about the role and methodologies of courts and complaint handlers). Such litigants and complainants may also seek *publicity* for their allegations
- *Control* - the need to overcome feelings of powerlessness and take *control* of the process and its outcome. In the complaint handling context, the desire for control is one of the primary triggers for most unreasonable conduct by complainants. The struggle for control is primarily due to ignorance, a misunderstanding, a failure to recognise, or a refusal to accept who effectively "owns" the complaint. It is the complaint handler who "owns" the complaint and who will be held accountable for how it is dealt with, while the complainant "owns" the issue and can do with it as they will
- *Expectations* - anger or frustration due to unmet expectations
- '*It's all about me*' - an unreasonable sense of entitlement
- '*It's not about me*' - an inability to accept responsibility and a need to blame others
- *Anger* - low anger threshold and limited self-control
- *Disorders* – for example litigious paranoia (re vexatious litigation) and querulous paranoia (re bureaucracies and large service providers), that is, "querulance"(see discussion below).

Irrational - irrationality due, for instance, to the effects of alcohol or drugs, or reduced mental capacity due to mental illness, and so on.

Recreational - an all-consuming hobby or activity (for example, to keep the mind active in retirement!).

Some words of caution

It is important to understand that:

- not all people who engage in unreasonable conduct have personality disorders or suffer from psychiatric illnesses, or intend to be a nuisance
- court and complaint-handling staff are unlikely to have the professional qualifications to identify personality or psychiatric issues
- even if they did, they are unlikely to have the necessary face-to-face contact to be able to do so.

Querulance

One of the most problematic complainant behaviour encountered by complaint handlers is described in psychiatric literature as "querulance".[11] The behaviour appears to develop slowly over time (possibly over some years), so complaint handlers and courts are likely to experience people at various stages of this development.

11 From the Latin "plaintiff murmuring" or "queri" — to complain.

The most significant and frequently cited Australian research on this subject was published in the *British Journal of Psychiatry* in 2004.[12] This pioneering study, conducted by Dr Grant Lester, Beth Wilson, Lyn Griffin, and Professor Paul Mullen, investigated "unusually persistent complainants".
It found that compared to a control group, the people identified as "unusually persistent complainants":

- pursued their complaints for longer, including after their cases were closed
- produced far greater volumes of documentation in support of their cases
- telephoned more frequently and for longer and attended the complaint handler's premises more frequently without an appointment
- engaged in behaviour that was typically more difficult and intimidating
- often wanted what a complaint-handling system is not designed to deliver — vindication, retribution and revenge.

The authors associated these behaviours with "querulousness", a psychiatric diagnosis.

The distinguishing features or manifestations of querulance may include some or all of the following:

- behaviour that is disproportionate to the loss or injury
- an emotionally-charged belief that they were unjustly treated/wronged
- a rejection of any responsibility
- a quest for total vindication, retribution and revenge
- over-optimistic expectations of compensation and/or punishment
- a strong belief that their issue is of far greater importance than the facts indicate
- logical and clear reasoning, but from an incorrect or unfounded premise
- the underlying assumption at the core of their quest is held with an absolute conviction that is impervious to reason
- an incapacity to be deflected from their course by logical argument
- a loss of focus on their grievance over time
- written communications that have an idiosyncratic look (but not always) — for example, use of uppercase, underlining, bold, highlighting; numerous notes of exclamation and interrogation; references to themselves in the third person by name or, for example, as "the defendant"; repeating the substance of their complaint in several different ways; and extensive use of inappropriate "legalese"
- other idiosyncratic characteristics of communications may include attaching voluminous documentation (which may or may not be relevant to the issue); sending emails with multiple ccs; including unnecessary detail and background information, but without clarity as to the central issue of the complaint or grievance.

12 G Lester et al, "Unusually persistent complainants" (2004) 184 *British Journal of Psychiatry* 352.

Research into querulous paranoia undertaken since the 1800s[13] has found that:

- as noted above, querulous behaviour develops over time — there is an initial trigger, often a traumatic event such as a court case or other legal problems, disciplinary action, dismissal from work, divorce, etc, and as the number of grievances and parties escalates over time, the collateral damage to the person's life can be described as a downward spiral to self-destruction (which might include unemployment, divorce, bankruptcy, violence and/or suicide, etc)
- 70–80 per cent of persons affected are male and in the majority of cases, the querulous behaviour first manifests when they are in their 30s–50s, and there can be a period of some years between onset and first manifestation
- the author's own experience with persons manifesting behaviours characteristic of querulance is that affected persons are generally of at least average intelligence and competence — the description "bright and manipulative" is apt.

What can be expected as a conflict escalates?

In the late 1990s, Dr Friedrich Glasl[14] developed a model that explores the internal logic of conflict relationships, identifying nine levels of escalation.

In the context of complaint handling, the Glasl model contains many useful insights that can assist complaint handlers to analyse what is occurring when confronted by an ongoing and escalating dispute, particularly those involving complainants exhibiting behaviour described as "querulance".

Taken together, the Glasl model of conflict escalation, the Mullen and Lester (et al)[15] research into unreasonably persistent complainants (and "querulance"), and common anecdotal evidence from experienced complaint handlers give some insight into what may well occur when a conflict escalates. Such an insight is important if complaint handlers wish to address or appropriately respond to the forces underpinning and shaping the development of the conflict, for example to attempt to move the conflict towards a more constructive path.

The relevant conflicts in the complaint-handling context might be between complainants and the persons or organisations the subject of their original complaints, and/or other parties drawn into the conflict as it escalates, for example a complaint handler or its case officers, court registry staff and/or presiding officers. While Glasl writes in terms of both parties to a conflict being at each conflict level concurrently, in the author's experience they can exhibit the behaviours associated with different levels, and it is not necessary that both paerties even be aware there is a conflict! In fact a competent complaint handler should not get to Glasl's first level, and no complaint handler should ever go beyond level 1.

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13 In a paper entitled: "Inventor, entrepreneur, rascal, crank or querulent? Australia's vexatious litigant sanction 75 years on" (2006) 13(1) *Psychiatry, Psychology and Law* 1, Dr Grant Lester and Simon Smith refer to research/papers by, among others, E Esquirol (1845), Von R Krafft-Ebbing (1879), E Kraepelin (1904), Von H Dietrich (1968), C Astrup (1984), I Freckelton (1988), PE Mullen and G Lester.

14 F Glasl, *Konfliktmanagement. Ein handbuch für führungskräfte, beraterinnen und berater*, Paul Haupt Verlag, Bern/Stuttgart, 1997; and F Glasl (P Kopp trans), *Confronting conflict: a first-aid kit for handling conflict*, Hawthorn Press, originally published in German by Freies Geistesleben as Selbsthilfe in konflikten, 1997.

15 Lester et al, above n 12; PE Mullen and G Lester, "Vexatious litigants and unusually persistent complainants and petitioners: from querulous paranoia to querulous behaviour" (2006) 24 *Behavioral Sciences and the Law* 333 at 345.

The following scenarios are just as likely to arise in the litigation context if the references to "complainant" are read as "litigant", the references to "complaint handler" are read as "court" and the reference to "head of the complaint handling organisation" is read as "presiding officer". Looked at in the context of the Glasl model, what may occur as a conflict escalates includes:

Win-win

Level 1 — "Hardening": Rational arguments — the focus is on finding a solution, but in the context of fixed and mutually inconsistent views. The complainant may begin to perceive, and give more weight to, negative information about the other party to the dispute, while at the same time not disregarding or discounting positive information. Glasl describes this as "personal differences",[16] where the relationship between the parties breaks down. At the same time, a selective filter may increasingly affect the perception of relevant information about the reasons for, and background to, the dispute. Glasl refers to this as "conflict about the conflict" where the reasons and background to the conflict are interpreted differently.

1. Level 2 — "Debates and polemics" : Emotional arguments — the focus is still on finding a solution, but in circumstances of decreasing trust, increasing resistance to rational argument, adoption of tactical and emotional/manipulative arguments, interactions become more and more confrontational. Verbal and written communications from the person may well shift from rational arguments to a focus on emotions and relative power issues. The complainant may adopt what Glasl refers to as "tactical and manipulative argumentative tricks", that is, quasi-rational arguments to advance his or her cause. For example, the complainant may strongly exaggerate the implications and consequences of the other party's position in an attempt to present it as absurd. The alternatives may be presented as extreme in order to get the subject of the complaint (or litigation) and/or any mediator, conciliator, reviewer or adjudicator to accept what the complainant believes is a reasonable compromise, etc.

   Level 3 — "Actions not words": Unilateral actions — the focus is on blocking the other party from achieving its goals. At this stage, the complainant may well disagree with the way the complaint is being, or will be, dealt with. For example, the complainant may object to the appointment of a particular person to handle or investigate the complaint, the priority given to the complaint, the methodology used to investigate the complaint, etc. Glasl refers to this as "conflict about the conflict resolution", where the parties seek to resolve the conflict in different ways.[17]

Win-lose

Level 4 — "Images and coalitions": Negative perceptions about judgment — the focus is on winning and no longer on the substantive issues in dispute. Over time, negative images of the subject of their complaint (or litigation) and/or particular staff of the complaint handler may dominate whenever the complainant interacts with them. The complainant may engage in what Glasl refers to as "deniable punishment behaviour", involving veiled slurs and/or attacks on the character of the other party (be that the subject of the original dispute, staff of the complaint handler, or both). Such conduct is intended to gain the "upper hand" in what the complainant believes to be a power struggle with the subject of their complaint and/or the complaint handler. Glasl argues that another characteristic of the dynamics of a conflict at this level is that the parties are likely to actively try to enlist the support of others, which increasingly can be expected to include the use of social media to bring pressure to bear.

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16 Glasl notes that as a conflict escalates, over time there is a change in focus from: "factual differences", to "personality differences", to "conflict about the conflict" (that is, the reasons and background to the conflict are interpreted differently), to "conflict about the conflict resolution" (that is, each seeks to resolve the conflict in different ways): Glasl, above n 14, pp 23–24.

17 ibid.

Level 5 — "Loss of face": Negative perceptions about morality — the focus is on defeating the other party, following the "revelation" that they are not just wrong but unethical or even "evil". Over time, the conflict may move from a focus on the substantive issues originally in dispute to a focus on victory or defeat. If the complainant continues to escalate the conflict, he or she may well experience the "revelation" that the other party is not merely wrong but unethical, immoral, malicious, dangerous, corrupt, criminal or just plain "evil". A complainant's loss of focus on the original grievance is a not uncommon phenomenon experienced by complaint handlers. A party at this level will not want to appear week, so the chances of an apology are minimal.

2. Level 6 — "Strategies of threat": Threats of sanctions — the focus is on making strategic threats of sanctions that could be applied to the other party. The focus may move to the making of strategic threats of sanctions. The complainant may threaten to escalate the dispute, for example, to the media, the chief executive officer and/or the board, a professional body, regulatory agency or oversight/watchdog body, a relevant minister or parliamentary committee, etc. Complainants may also make veiled threats to harm persons or damage premises related to the dispute if their demands are not met. In this regard, Dr Lester has written that: "It is important to recognise that these individuals make threats of self harm and violence to others. About 50% will make threats of violence to others".[18] In referring to the results of their research into "unusually persistent complainants",[19] Professor Mullen, Dr Lester and others noted that: "Over half of the persistent complainants made some form of threat of violence directed at the complaint professionals" and "threats are very much a part of the behaviour of the querulant".[20]

Lose-lose

3. Level 7 — "Limited destructive blows": Application of sanctions — the focus is on damaging or destroying the other party and its losses are perceived as gains. Malice may well become a driving force and the complainant's calculation of the consequences of his or her actions may become increasingly skewed. What the complainant perceives to be "losses" experienced by the subject of their complaint and/or the complaint handler may be counted by the complainant as "gains", even though these outcomes do not give any benefits to the complainant in terms of the substantive issues originally in dispute.

   Level 8 — "Fragmentation of the enemy": Targeting members and supporters — the focus is on attacking the members and/or supporters of the other party. At this stage, the complainant may target perceived allies and supporters of the subject of complaint and/or the complaint handler and complain and/or make verbal attacks/defamatory comments about particular complaint-handler staff. If the complainant perceives that these complaints have not been dealt with satisfactorily, the complainant may make complaints about the head of the complaint-handling organisation to third parties such as the media, a professional body, a regulatory agency or oversight/watchdog body, a relevant minister or parliamentary committee, etc. Professor Mullen and Dr Lester have noted that:

   > "Attacks by the querulous on court officials, claims officials and politicians are by no means uncommon. In such cases there has often been a course of conduct characterised by increasingly threatening and intrusive activities, usually over many months …".[21]

18 "The vexatious litigant" (2005) 17(3) *JOB* 17.

19 Lester et al, above n 12.

20 Mullen and Lester, above n 16.

21 ibid.

Dr Lester has also written that:

> "It is unknown how many actually carry out … threats [of harm] but it is not rare for secure forensic psychiatric hospitals to treat querulants who have threatened and harmed others."[22]

Level 9 — "Together into the abyss": Self-preservation instinct overridden — the focus is on destroying the other party at any cost — self-destruction is seen as an acceptable price to pay. Particularly in the "querulant" context, the complainant may well neglect his or her self-preservation instinct and the crusade will be pursued no matter the personal cost, be that unemployment, bankruptcy, divorce, imprisonment, etc.

However, there are some differences between the Glasl model and what the author has observed in the complaint-handling context. For example:

- some of the behaviours do not proceed in a linear fashion, for example, complainants on occasion will engage in level 8 type behaviour very soon after making level 6 threats, or even skip level 6 altogether
- the model does not directly address the circumstances where frustration leads a complainant to self-harm, including suicide — apparently a not uncommon occurrence at the bottom of the downward spiral of querulance.[23]

How do differing perceptions complicate problems caused by unreasonable conduct?

It is not uncommon for people to view the same circumstances or events very differently for a range of reasons, including for example:

- emotional reasoning where persons allow their emotions/sentiments to colour their judgment about the facts — believing what they want to believe
- the common human practice of giving more weight to (or being more aware of) factors that support their preconceptions and prejudices and less to those that don't — selective awareness
- different personalities and life experience
- different understanding of the applicable law or standard practices and procedures that apply
- differing levels of competence/intellectual ability[24] — which can lead to such problems as misunderstanding of the facts, misinterpretation of the facts, erroneous inferences drawn from agreed facts, etc
- different perspectives/awareness of relevant facts — complainants (and litigants) often have limited access to/awareness of all relevant facts and circumstances about what caused their problem, or impacted on or were relevant to the cause(s) of their problem.

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22 Lester, above n 19.

23 In their writings on querulance, Dr Lester and other researchers have commented on the significant risk of physical and sexual violence, as well as death through suicide.

24 What is commonly referred to as the "Dunning and Kruger effect" is a cognitive bias in which incompetent individuals mistakenly rate their competence much higher than it is (that is, the poorest performers are likely to be the least aware of their own incompetence). They fail to learn from their mistakes or take much notice of negative feedback: J Kruger and D Dunning, "Unskilled and unaware of it: how difficulties in recognising one's own incompetence lead to inflated self-assessments" (1999) 77(6) *Journal of Personality and Social Psychology* 1121; D Dunning et al "Why people fail to recognise their own incompetence" (2003) 12(3) *Current Directions in Psychological Science* 83.

Differing perceptions about the relevant facts and circumstances are a fact of life for complaint handlers and courts, if not a primary reason for their very existence.

Complaint handlers and presiding officers of courts must reach conclusions based on available evidence. They cannot accept the unsupported claims of either side as being the truth. They recognise that there are generally two sides to every dispute and that sometimes it is not possible to conclusively prove who was right or wrong on the evidence available.

On the other hand, experience suggests that the starting point for many complainants is that it is only fair and reasonable that their concerns be fully addressed and that the outcome will be one which they are entirely satisfied with. Thankfully, where desired outcomes are not achieved, most

complainants are able to "normalise", that is, they are able to balance the possibility and practical value to them of success against the effort/cost of further pursuing their issue. Unfortunately, experience shows that there remain a significant proportion of complainants who are unable to normalise and "move on". These complainants:

- hold an honest belief about the truth of the facts and circumstances in issue and that their cause is just
- will not be deflected from their preconceived views about the "truth" in the face of evidence to the contrary or lack of evidence in support[25]
- view the "adjudicator's job" as requiring acceptance of their view of the truth.

What are the detrimental impacts of such conduct?

While in practice, complainants and litigants who engage in unreasonable conduct make up a very small proportion of the total numbers of complainants and litigants, the detrimental impact of their conduct on others (and even themselves) is vastly disproportionate to their numbers.

Work health and safety impacts

Dealing with unreasonable behaviour will inevitably cause stress, which in turn raises issues relating to work, health and safety and the common law duty of care. In research conducted in various complaint handling organisations in Victoria, Professor Mullen and Dr Lester found that 48 per cent of case officers reported avoidance behaviour in their dealings with persistent complainants compared to zero per cent in their dealings with the control group.[26]

Some litigants and complainants who do not obtain the desired outcome will then complain, as a matter of course, to oversight bodies, ministers, etc, about the conduct of the presiding officer, complaint-handling organisation, or the case officer, etc. This can adversely affect the people involved and the organisation generally. Verbal attacks on those seen as responsible, often in the most intemperate terms, are not uncommon. One judge has described people who regularly complain about the conduct of any judicial officer who decides against them as people who are

25 At least one commentator has argued that this might be a problem shared by the legal profession! In his final article for *The Sydney Morning Herald* in 2013, Richard Ackland referred to "one of the enduring qualities for which the law is justly famous — clinging to a belief in the face of overwhelming evidence to the contrary": *The Sydney Morning Herald*, 27 December 2013, p 15.

26 Lester et al, above n 12, p 353.

"prone to impute the worst motives to those who are opposed to him or who have to adjudicate upon his case".[27] It is not uncommon for self-represented litigants to also make complaints about the presiding officer to the Judicial Commission,[28] to the Law Society about the solicitors representing the other side, and even to the Bar Council about the conduct of opposing counsel.

There can also be a risk of violence. As Professor Mullen and Dr Lester noted in a 2006 paper:

> "Attacks by the querulous on court officials, claims officials and politicians are by no means uncommon. In such cases there has often been a course of conduct characterised by increasingly threatening and intrusive activities, usually over many months, which, with the benefit of hindsight, takes on a sinister import. In a number of cases of serious or fatal violence, of which we have knowledge, clear and specific threats had been used."[29]

Resource implications

The number of complaints made by some complainants, and the way some complainants pursue their complaints, can have a disproportionate impact on the resources of an organisation.

From the author's discussions with complaint handlers in complaint-handling organisations across Australia, New Zealand and Canada, the general consensus is that approximately three to five per cent of complainants take up 25 to 30 per cent of resources. However, many examples were also given where one or two unreasonable complainants had taken up 70 to 90 per cent of the available resources for considerable periods of time.

The litigation and/or complaint activities of certain people can also have resource implications for more than one organisation. Experience with, and research into, the activities of unreasonably persistent complainants indicates that a number spread their attentions across a range of organisations. For example: "The persistent complainants themselves were more likely to involve other agencies as the complaints procedure progressed, with 77% contacting at least one other agency … and 37% contacting four or more …".[30]

Equity implications impacting on other users of a service

Most complaint handlers have limited resources, so the more that are devoted to a few number of people, the less there will be available for others. This is a very important equity issue and one of the objectives of properly managing unreasonable conduct is to ensure equity in the distribution of complaint-handling resources between complainants.

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27 *R v Collins* [1954] VLR 46 at 57–58 (Sholl J).

28 Interestingly, in each of its last five annual reports (at least) the Judicial Commission has specifically commented on the high proportion of complainants to the Commission by persons who were self-represented: 2012–2013 (49%), 2010–2011 (27%), 2009–2010 (37%), 2008–2009 (40%).

29 Mullen and Lester, above n 16.

30 Lester et al, above n 12, at 354.

Impact on the complainant/litigant

Unreasonable conduct taken to an extreme can also have serious impacts on the complainants themselves as their crusade gradually takes over and destroys their lives. Professor Mullen and Dr Lester referred to this as a "gradual but ultimately devastating social decline"[31] in the course of which vexatious litigants and unusually persistent complainants have "laid waste to the financial and social fabric of their lives".[32]

What strategies are available to courts to deal with unreasonably persistent litigators?

Unreasonably persistent litigants may be divided into at least two broad categories. The first category comprises litigants who exhibit some or all of the characteristics of querulants, obsessives, "crusaders" and the like, including the more recent typical manifestation of the vexatious litigant (that is, litigants who institute numerous actions and appeals against a growing number of respondents, generally arising out of a single issue). The chances are that this type of litigant may present the greatest challenge to courts. Such litigants are likely to reason logically and clearly, but from a false premise — the underlying assumption that is the foundation of their view about the wrong they have suffered is likely to be incorrect due to such factors as erroneous inferences drawn from agreed facts, misinterpretation of the facts, emotional reasoning (that is, their emotions/sentiments have coloured their judgement about the facts), and the common human failing of more weight being given to factors that support preconceptions and less weight to factors that do not, etc.

The second category comprises hobbyists or those who in the past represented the typical manifestation of the vexatious litigant (that is, litigants who commence numerous actions against a range of respondents concerning a variety of issues, but seldom appeal unfavourable decisions).[33]

While we cannot change the person who is engaging in such conduct, there are a various strategies which can be used to manage the person's:

- interactions with the organisations and staff
- access to the services and premises
- expectations about the process that we will follow, their involvement in that process, and the likely outcomes
- perceptions about the fairness of the process
- perceptions about the fairness of how they were treated, including whether they were given adequate, accurate and timely information, and treated with respect and courtesy.

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31 ibid.

32 ibid; Mullen and Lester, above n 16.

33 Examples of vexatious litigants who commenced a flood of litigation against a wide range of respondents raising a wide variety of issues, include Alexander Chaffers in the United Kingdom in the late1800s, Rupert Millane in Victoria in the early 1900s, Ellen Barlow in Western Australia in the 1930s, Goldsmith Collins in Victoria in the 1950s.

Many of the strategies available to complaint handlers to respond to unreasonable conduct by complainants[34] could be used by registry staff to respond to the common scenarios outlined earlier in this paper. Unfortunately most of those strategies are unlikely to be options available to the presiding officers of courts in the management of unreasonably persistent litigants (particularly self-represented litigants) given that they are exercising a legal right to commence proceedings. However, depending on the nature of the activity and behaviour of a particular litigant, some or all of the following 10 strategies may be appropriate:

1. Dismissing matters where no apparent cause of action: Where there is a history of litigation, particularly unsuccessful litigation, a robust assessment should be carried out as to whether the originating documentation discloses a valid cause of action. The author is aware of irrational, fanciful or misguided complaints that the presiding officer has allowed to proceed,

   and which have resulted in the defence incurring considerable expense, and the court reaching an obvious conclusion. This may occur for a number of reasons, for example, there may be a reluctance to deny somebody the ability to exercise their right of access to the court, there may be a concern the decision might be overturned on appeal, or the presiding officer may be looking to the defence to develop arguments that could be included in the judgment.

2. Clarifying evidentiary requirements: Ensure that the evidentiary requirements for success are clear (that is, what the litigant must prove through evidence and that the litigant's absolute conviction about the truth of his or her claim is insufficient). It is important in any such discussion with the litigant to avoid challenging his or her underlying assumptions/beliefs, but instead to focus on the evidence that will be required to substantiate that assumption/belief.

   It is also important to explain the evidentiary requirements in simple, non-technical, language. While querulants, in particular, commonly use legal terminology that suggests a competence in the law, it is likely that they will not have any significant understanding of the legal concepts or principles or the relevant rules and procedures that apply (at least in their early litigation, although over time such litigants may well gain detailed knowledge through experience).

3. Managing litigant's expectations: It is very important that the presiding officer and registrar take steps at the outset to ensure that that the litigant is clear about:

   - the fact the court effectively "owns" and therefore controls its practices and procedures — they should have no expectation that they will be able to control (or even influence) the court's practices and procedures
   - the various limitations on the discretions and powers available to the court
   - the likely outcomes that might be achieved through the litigation, including the likelihood of significant compensation and/or punishment of the persons or organisations the litigant perceives to be responsible for the wrong (if deemed necessary this message may need to be regularly reinforced).

   Given that research and experience indicate that querulance does not appear fully formed from the outset but develops over time, attempts to manage the expectations of such litigants (including questioning the correctness of their underlying assumptions) are more likely to have some chance of success if undertaken at the outset of the litigation.

4. Managing presiding officer's expectations: It is important for presiding officers to understand that for these litigants, the only acceptable outcome is likely to be total vindication. Anything less is likely to result in an appeal and most probably a complaint about the presiding officer's conduct to the Chief Justice of the court and/or the Judicial Commission (possibly along with complaints about opposing counsel to the Bar Council and about the opposing solicitors to the Law Society, etc).

34 Set out in the Managing Unreasonable Complainant Conduct Practice Manual, above n 1.

It is unlikely that such litigants will feel suitably vindicated by merely winning the action without an explicit acknowledgement that the respondent's conduct (and/or relevant staff) was criminal, corrupt or at a minimum, seriously negligent. This becomes more problematic in the case of querulants (and to a lesser degree other repeat self-represented litigants) as they typically "move the goal posts".

5. Requiring compliance with rules and directions: The court rules should be rigorously enforced, particularly time limits[35] for lodging or responding to submissions or the provision of information/documentation. Querulants in particular (and most probably other repeat self-represented litigants) are likely to be disorganised and overwhelmed by the pressures created by the growing number of actions, complaints, etc, they have taken or made as the issue(s) escalate. Granting more time is unlikely to result in compliance, or less confusion.
6. Orders for costs: In exercising any discretion to impose orders for costs, weight should be given to factors such as the numbers of:
    - actions the litigant has commenced (in total)
    - unsuccessful actions
    - actions against the same respondents
    - actions substantially concerning the same issues.

    For some years the author has tracked the campaigns of various repeat self-represented litigants in the Administrative Decisions Tribunal, a number of whom had also been repeat complainants to the NSW Ombudsman before we closed that door. When their names stopped appearing in the lists and in judgments, I found that this often followed the imposition of a costs order.
7. Redistributing the load: Since a presiding officer who hands down a decision that does not support the litigant is likely to be the subject of complaint (as well as the decision being appealed), it is not fair or reasonable to allocate all matters concerning the same litigant to one presiding officer.[36] When it becomes clear that an individual is commencing multiple actions, matters should be shared among available different presiding officers
8. Responding to threats: The presiding officer, registrar and/or other court staff, should react to all threats (to others or self), or implied threats, by a litigant by explicitly acknowledging and reproving them and directing the person to stop the behaviour. The person should be informed:
    - in all cases, of the courts protocols for responding to threats
    - in relation to less serious threats, of the repercussions that will flow if the behaviour continues
    - in relation to more serious threats, that they will be reported to police.

    If appropriate, affected persons could be encouraged to seek an order under the *Crimes (Domestic and Personal Violence) Act* 2007.
9. Reacting to aggressive or violent behaviour: The presiding officer, registrar and/or court security staff should react immediately to all aggressive or violent behaviour:
    - aggressive individuals should be directed to leave the premises and physically removed by security or the police should they fail to do so
    - violent individuals should be removed by police and charged with relevant offences

35 Dr Lester notes that: "More time granted will lead to more confusion. They are disorganised and overwhelmed and more time rarely changes this": "The vexatious litigant" (2005) 17(3) JOB 17 at 19.

36 ibid.

- in such circumstances, consideration should be given to whether the litigant should be barred from either representing themselves or appearing in person in any future hearings, or the matter should proceed on the papers.

If necessary, affected persons should be encouraged to seek an order under the *Crimes (Domestic and Personal Violence) Act*.

Maintaining boundaries: Presiding officers should maintain the formality of the court, discourage any over-familiarity during proceedings, and avoid any personal contact with the litigant outside the courtroom.

While in theory an order under the *Vexatious Proceedings Act* 2008 can be sought in extreme cases, as discussed below, the availability of such orders is severely limited in practice by the evidentiary requirements that apply.

What are the problems with the *Vexatious Proceedings Act* 2008?

The *Vexatious Proceedings Act 2008* replaced the vexatious litigant provisions of the former s 84 of the *Supreme Court Act 1970*. While the new provisions are an improvement on those they replaced (for example, they include a broader definition, application to certain tribunals, greater flexibility for the courts to make and rescind orders), arguably they do not go far enough.

When introducing the Vexatious Proceedings Bill 2008, then Attorney General (NSW), the Honourable John Hatzistergos, stated that the courts are:

> "... there to administer justice and help people to resolve their disputes. They are not for people to misuse by harassing, intimidating or embarrassing people. ... If people abuse the system we need to make it easier for judges to banish them from courtrooms, freeing up the justice system and protecting the good citizens of this State".[37]

These new provisions do not address a fundamental issue: the rationale for the largely unfettered right of access to the civil courts and tribunals is to seek the resolution of disputes. However, as research and experience have shown, the only resolution that is acceptable to many of the people who engage in litigation (and/or complaining) practices is complete vindication. Compromise is not an option and satisfaction is unlikely because the goalposts are commonly either quite unrealistic to start with or move in that direction.

Two of the key problems with the earlier provisions were that they required an assessment to be made of the litigant's motive in "habitually and persistently" bringing proceedings and it was necessary to show a history of failure in those proceedings. The new provisions have unfortunately largely retained these requirements (although in a different form):

- the person must have "frequently" instituted or conducted "vexatious proceedings"
- the definition of "vexatious proceedings" still requires the court to make an assessment as to the purpose or motive of the litigant (that all the proceedings were "instituted" *and* "conducted" so as to "harass or annoy", to "cause delay or detriment", or for/to achieve "another wrongful purpose")
- the proceedings must have been "instituted or pursued without reasonable ground".

37 J Hatzistergos, *New laws to stop legal harassment*, media release, NSW Attorney General's Department, Sydney, 11 May 2008.

Apart from the difficulties involved in identifying the motive of the person in each of multiple proceedings, to the satisfaction of the court, if the person has been successful in any of those proceedings, the chances of obtaining an order diminish considerably.[38]

Arguably, the *Vexatious Proceedings Act* was drafted primarily to address the impact of such litigation on the courts and tribunals, and on the individual respondents.[39] It appears that much less emphasis was placed on the broader resource and equity implications of persistent litigation outlined above. These considerations warrant a rethink about the threshold over which repeat litigation can be considered to be so unreasonable as to outweigh the public interest in allowing individuals unfettered access to courts and tribunals.

Is there a better approach?

It should be possible to draft a provision that would allow courts and tribunals to manage their interactions with people who are creating resource, equity and/or safety issues through repeat litigation (particularly involving self-represented litigants). What is needed is an approach that:

- labels the conduct not the person
- enables the courts to implement a number of management strategies to respond to different types and seriousness of problems
- contains criteria that do not focus on motive issues, but on such things as the numbers of proceedings, subject matter of proceedings and the conduct of the litigant.

This is not to say that the Act should not retain motive criteria as one option. However, given the difficulties associated with proving motive, it may be preferable to introduce an explicit "substantial" purpose test to reduce the evidentiary burden on the party seeking to demonstrate that the other party is acting unreasonably or inappropriately.

In relation to *content* issues, relevant criteria might include where the presiding officer believes, on reasonable grounds, that a number of proceedings have been instituted by a litigant that:

- are repetitious in relation to their subject matter and the respondent
- contain clearly false or intentionally misleading statements of a significant nature relating to matters in contention
- are made without reasonable grounds or are lacking in any substance
- are so obviously untenable or manifestly groundless as to be utterly hopeless, misguided or misconceived

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38 For example, a few years ago one litigant was a party to 23 decisions of the NSW Administrative Decisions Tribunal (the ADT) in its Privacy jurisdiction (of which only two were successful). While one of these decisions involved what was probably the first award of damages by the ADT for a breach of privacy, at one point this applicant and another repeat applicant between them were a party in approximately 40 per cent of the privacy cases in the ADT in a four-year period (involving 38 decisions). Another self-represented litigant was a party to 80 freedom of information (FOI) decisions of the ADT, including 46 decisions of the General Division of the Tribunal and 34 decisions of the Appeal Panel. He was also a party to 15 decisions of the Supreme Court of NSW and six decisions of the Court of Appeal. Of the General Division decisions, 20 related to procedural/bias/costs issues and 27 to merits issues. While this litigant was successful to one degree or another in a number of the cases before the ADT, Supreme Court and Court of Appeal, with few exceptions these were cases dealing with procedural issues only.

39 See for example the comment by Johnson J in *Attorney-General (NSW) v Bar-Mordecai* [2009] NSWSC 218, when referring to former s 84 of the *Supreme Court Act* and the *Vexatious Proceedings Act 2008*: "The provision is designed to protect the Court's own processes against unwarranted usurpation of its time and resources and to avoid loss caused to those who face actions which lack substance: *Jones v Skyring* (1992) 66 ALJR 810 at 814".

- are on their face clearly delusional, imaginary, irrational, absurd or an exercise in futility (based on a "reasonable person" type test).

In relation to *conduct* issues, criteria might include:

- the conduct of the litigant has raised significant work health and safety issues for court staff
- a number of proceedings have been commenced that can reasonably be characterised as habitual, persistent or manifestly unreasonable in the circumstances
- a certain number of proceedings have been commenced within a specified period
- a number of proceedings against the same or related parties raising substantially the same issues as in previous proceedings that were unsuccessful (particularly if there has not been a significant interval in time between them or significant changes in relevant circumstances).

In relation to *resource* issues, criteria might include:

- the proceedings, considered together with previous or concurrent proceedings instituted by the same litigant, if allowed to commence or to continue, would substantially and unreasonably divert the court's resources away from their use by the court in the exercise of its functions.

What options should be available for courts to manage unreasonably persistent litigants?

Possible options include:

- requiring the leave of the court prior to the commencement of any further proceedings, either generally or in relation to a specific party
- requiring as a condition of the commencement of proceedings that the litigant agree to an indemnity/full costs order if the proceedings are unsuccessful, including the provision of security for costs
- imposing an upper limit on the number of separate proceedings a person can commence, either generally or in relation to a specific party, in any given period.

It would be important to also consider including an offence provision to deter people from aiding or abetting a person to avoid any such order or condition.

There are precedents for restraint-type provisions which are not based on assessments as to whether a litigant is vexatious. Under the Civil Procedure Rules (UK), a practice direction can be made which, among other things, sets out the circumstances where a court can make a civil restraint order against a party to the proceedings, and the consequences of such an order.[40] A supplementary practice direction on the making of such civil restraint orders contains provisions about the making of:

- limited civil restraint orders — "where a party has made 2 or more applications which are totally without merit", preventing the party from "making any further applications in proceedings in which the order is made without first obtaining the permission of the judge"

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40 3.11 Power of the court to make a civil restraint order
A practice direction may set out –
(a) the circumstances in which the court has the power to make civil restraint order against a party to proceedings:
(b) the procedures where a party applies for a civil restraint order against another party; and
(c) the consequences of a court making a civil restraint order.

- extended civil restraint orders — "where a party has persistently made claims or made applications which are totally without merit", preventing the party from "issuing claims or making applications"
- general civil restraint orders — "where a party against whom the order is made persists in issuing claims or making applications which are totally without merit", preventing the party from "issuing any claim or making any application without the permission of the judge identified in the order".

The circumstances in which such restraint orders can be made under these rules and the practice direction are based on criteria concerning volume and merit, not intent (that is, without any reference to the prejudicial term "vexatious").[41]

Conclusions

As the experience of numerous complaint handlers from across Australia, New Zealand, Canada and the United States, and various Asian countries has shown, a growing phenomenon over recent years is that more and more complainants are engaging in conduct that the complaint handlers find to be unacceptable. The seriousness of the conduct is also increasing. Anecdotal evidence suggests that courts and tribunals are experiencing a similar phenomenon relating to unreasonably persistent litigants, particularly self-represented litigants.

The Australasian parliamentary ombudsman has identified a range of strategies to assist complaint handlers to manage unreasonable complainant conduct, which have been well received both across Australasia as well as internationally.[42] While many of those strategies should assist the registry staff of courts and tribunals to manage unreasonable conduct by litigants, unfortunately they are not designed to address the issues that can confront the presiding officers of such bodies. This article identifies a number of strategies that may help to fill this gap.

The current statutory provisions empowering courts and tribunals to manage unreasonably persistent litigants are largely unworkable other than in rather extreme circumstances where a vexatious motive can be demonstrated. There is a need for legislative amendment in line with the approach that has been adopted in the United Kingdom and more recently in the NSW *Government Information (Public Access) Act 2009*, which authorise action to be taken using criteria based on merit, not intent.

41 In a Special Report to Parliament in 2009, the NSW Ombudsman suggested that the proposed new access to information Act contain a provision giving the ADT the power to make orders along the lines of civil restraint orders in the United Kingdom Civil Procedure Rules and the supplementary Practice Direction: NSW Ombudsman, "Opening up government — Review of the Freedom of Information Act 1989", February 2009.

42 For example, the *Managing Unreasonable Complainant Conduct Practice Manual*, above n 1, has so far been translated by other international ombudsman offices (or the equivalent) into Mandarin, French, and Farsi.