DEALING WITH REPEAT APPLICATIONS

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PURPOSE OF PAPER

The purpose of this paper is to put forward for debate possible options that could be made available for agencies and external review bodies to deal with unreasonable numbers of applications made by individuals exercising statutory rights to make FOI, privacy and other similar types of applications.

1. BACKGROUND

Resource allocation and equity

Agencies have limited resources, and in their interactions with members of the public the more resources they spend in dealing with one person, the less they will have available to spend on dealing with all others. This applies whether or not interacting with the public is part of an agency's core work (for example front line service providers such as police, health, education, welfare, complaint handlers).

People who interact with an agency multiple times generally have valid and appropriate reasons for doing so. It is in the public interest that more resources are devoted to people who are genuinely in particular need of assistance. A problem arises where people interact with an agency multiple times without a valid and appropriate need or for an inappropriate purpose. This raises resource and equity considerations that agencies cannot ignore.

Unreasonable conduct by complainants

The experience of the various Australian Parliamentary Ombudsman and many other organisations that deal with complaints is that some complainants act unreasonably when interacting with them. For example, they can be obsessive, overly demanding, overly persistent, rude or aggressive. While such complainants make up a fairly small percentage of all complainants to an organisation and they may be well-intentioned or have the highest of motives, dealing with them can take up an inordinate amount of time and resources and can result in staff stress and complaints. In effect, a small number of people can cause serious cost issues for the agency and equity issues in relation to other complainants. Anecdotal evidence from a wide range of sources suggests that this problem is growing, both in terms of numbers of complainants who act unreasonably and the seriousness of their 'unreasonable' interactions with agencies and external review bodies.

Dealing with unreasonable conduct by complainants

To better deal with unreasonable conduct by complainants, the eight Parliamentary Ombudsman of Australia have joined together in a national project to apply new management strategies and to study the effectiveness of their application. This National

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Project aims to minimise the adverse impact of unreasonable conduct on resource management and the relevant processes of each Ombudsman's office, minimise staff stress, minimise harm to people displaying unreasonable conduct, ensure equity across matters handled by Ombudsman offices and to achieve consistency of practice across all Ombudsman offices.

The Ombudsman have identified five categories of unreasonable conduct by complainants:

- *unreasonable persistence* – eg persisting with a complaint even though it has been comprehensively dealt with, reframing a complaint in an attempt to get it taken up again, showing an inability to accept the umpire's decision;
- *unreasonable demands* – eg insisting on outcomes that are unattainable, wanting what is not possible or appropriate, issuing instructions and demands;
- *unreasonable lack of cooperation* – eg presenting a large quantity of information which is not sorted, classified or summarised, presenting information in dribs and drabs, refusing to define the issues of the complaint;
- *unreasonable arguments* – eg holding irrational beliefs, holding conspiracy theories, and
- *unreasonable behaviours* – eg confronting, aggressive, threatening behaviour.

The Ombudsman have identified management strategies to address each category of unreasonable conduct:

- *unreasonable persistence* – through management strategies that are about *saying 'no'*;
- *unreasonable demands* – through management strategies that are about *setting limits;*
- *unreasonable lack of cooperation* – through management strategies that are about *setting conditions;*
- *unreasonable arguments* – through management strategies that are about *declining or discontinuing* involvement at the earliest opportunity;
- *unreasonable behaviour* – through management strategies designed around a *risk management* protocol.

The causes of unreasonable conduct by complainants and applicants

Broadly speaking, from their experience complaint handlers tend to find a variety of possible, sometimes overlapping, explanations for unreasonable complainant conduct, including:

- *aspirational*: seeking justice – a reaction to injustice, or perceived injustice, particularly where this has spiralled into a series of complaints/applications, counter accusations, conspiracy theories, justifications, etc [can last many years and increasingly involve previously uninvolved parties and a change in focus from the original injustice, or perceived injustice];
- *attitudinal*:
    - a sense of frustration with life generally;
    - dissatisfaction with government generally;
- *emotional*, eg due to anger or frustration arising out of:
    - a reaction to a problem for which an agency is seen as responsible, or

  - aggrievement and indignation arising out of how the complainant was treated or the complaint was dealt with by the agency, often due to unmet expectations (whether reasonable or unreasonable);

- *psychological*:

  - an unreasonable sense of entitlement or unreasonable expectation of favourable treatment and outcomes (possibly associated with a mental disorder);
  - an inability to accept responsibility and a need to blame others for misfortune;
  - an obsessive or rigid focus on aggrievement;
  - a mental disorder [in the USA it is estimated that at least one in five adults suffer from a diagnosable mental disorder in a given year; about 6% of adults suffer from a serious mental illness, ie, mental disorder that interferes with some area of social functioning; and 2.6% of adults have severe and persistent mental illness, eg schizophrenia, bi-polar disorders, panic disorders, obsessive-compulsive disorders];

- *recreational*: a cheap and interesting, although often challenging, hobby [particularly for complainants/applicants not in full time employment].

Experts in the field offer a number of explanations for the behaviours that complaint handlers have identified from their own practice as difficult or unreasonable. For example, two of these that have been written about are the 'unusually persistent complainants' identified by Professor Paul Mullen Dr Grant Lester, Beth Wilson and Lynn Griffin[1]; and 'high conflict people' by Bill Eddy.[2]

Professor Mullen *et al* found in a study published in the *British Journal of Psychiatry* that unusually persistent complainants 'pursued their complaints for longer, supplied more written material, telephoned more often and for longer, intruded more frequently without an appointment and ultimately were still complaining when the case was closed'. They found that these complainants often wanted what a complaint handling system could not deliver – vindication, retribution, revenge. They identified this behaviour with querulance. The research undertaken in this area indicates that the distinguishing features of a 'querulant' may include:

- the querulous behaviour is most likely to have developed slowly, often precipitated by a court case (or other legal problems), or dismissal from work;
- the behaviour is disproportionate compared to the motivating loss or injury, it persists in the face of resulting negative personal or social consequences, and it will dominate a significant proportion of the querulant's mental life;
- there is likely to be an emotionally charged belief of being unjustly treated and a need to restore their rights, often with over-optimistic expectations of compensation which over time change to a quest for total vindication and vengeance (ie, retribution and/or revenge);
- over time the focus on their grievance may be lost and the number of grievances multiply, with an associated increase in the number of involved parties;
- they are likely to reason correctly, but from false premises;
- they are likely to reject all responsibility for any shortcomings or negative events;
- they will often present with significant volumes of paperwork;
- written communications may include:

- numerous notes of exclamation and interrogation;
- all surfaces covered with script (including margins);
- the substance of their complaint often being repeated in several different ways;
- undue grammatical emphasis and underlining, and use of capitalisation for especially important expression of frustration and coloured inks for emphasis;
- references to themselves in the third person by name or, for example, as 'the defendant'.[3]

Bill Eddy, attorney, mediator and clinical social worker, associates the behaviour of what he calls 'high conflict people' with the four personality disorders described in the Diagnostic and Statistical Manual of the American Psychiatric Association. His approach is published in his book, *High Conflict People in Legal Disputes*. Eddy identified a number of distinguishing features of high conflict personalities which could include:

- repeatedly getting into interpersonal conflicts;
- denial of inappropriate behaviour – focusing intense energy on analysing and blaming others;
- seeking to punish those 'guilty' of 'hurting' them;
- denial of responsibility for any part in causing conflicts, or responsibility for resolving conflicts, while trying to get others to solve their problems;
- constantly identifying as a helpless victim;
- emotional reasoning – assuming facts from how they feel;
- an inability to reflect on their own behaviour.

In the end, what experts describe and analyse, no matter what approach is taken, boils down to what complaint handlers and others observe in practice, namely people who:

- make complaints or applications that are, under the circumstances, excessive in number;
- make inappropriate attempts to take control of a particular interaction or how their complaint/application is being dealt with, either generally or in some particular aspect;
- inappropriately express anger or frustration, eg by abusing, threatening or assaulting agency staff.

2. REPEAT APPLICATIONS

Each Australian State, Territory and the Commonwealth has enacted Freedom of Information (FOI) type legislation, giving members of the public the right to apply for access to documents held by government agencies, and to make review applications to external bodies where they are aggrieved by agency decisions or inaction. A number of these jurisdictions[4] have also enacted privacy legislation giving individuals the right to apply for access to personal information held by government agencies, and to make complaints to those agencies and review applications to external bodies concerning alleged breaches of their privacy.

Clearly the rights given to members of the public under such legislation are in the public interest and the vast majority of people who exercise those rights do so appropriately and for one of the legitimate purposes that such legislation is intended to facilitate.

This paper considers people who exercise statutory rights to make applications, review applications and appeals under FOI and privacy legislation (in this paper referred to as 'applicants').

The problem for agencies is that because people have a statutory right to make such applications, in most cases agencies cannot refuse to deal with them. The question is, are there circumstances where it would be fair and reasonable for an agency to be able to decline to deal with such an application?

3. THE PURPOSE OF THIS PAPER

This paper attempts to address three questions:

- Does the number of applications made by some applicants unreasonably impact on the resources of the agencies that have to deal with them, and on equity considerations in relation to other applicants?

- What criteria could appropriately be used to identify conduct by applicants that is so unreasonable as to be unacceptable?

- How can such criteria be fairly and impartially implemented?

4. DOES THE CONDUCT OF SOME APPLICANTS UNREASONABLY IMPACT ON THE RESOURCES OF AGENCIES AND CONSIDERATIONS OF EQUITY BETWEEN APPLICANTS?

4.1 FOI applications to agencies

In terms of the resource implications for agencies, little information has been published about the precise numbers and financial impact of multiple FOI applications from the same persons seeking largely the same or related information.

In recent decisions handed down in the General Division of the NSW Administrative Decisions Tribunal (ADT), reference was made to the history of applications made by one applicant to a particular agency and the increased workload created by those applications. The Tribunal noted that the agency had estimated that over the past year approximately 70% of the work that the agency did pursuant to the FOI Act was generated by this one applicant.

As a result of this increase in work, the agency had to re-direct a second member of staff to assist in the unit that dealt with FOI applications. According to the agency, the most significant single cause of the need to retain this extra staff member had been the applications made by this applicant. The annual report of the agency in question for 2005 contained the following statement:

> The [agency] received an unprecedented number of applications in 2005 [the statistics reported in the annual report indicate 29 new applications]. Nineteen internal reviews were conducted and eight external reviews were finalised. Over half of all applications, including internal and external reviews, were generated by one person. Additional resources continued to be directed towards managing the increased number of applications.

Another NSW agency has advised that in the 2005-2006 financial year, two FOI applicants (not being members of the media or Parliament) between them made 10 FOI applications and then lodged six review applications to the NSW ADT (one later withdrawn) against the agency's decisions. Processing the FOI applications cost the agency $2,230 (towards which

$480 was paid by the applicants) and the legal costs incurred in defending the appeals was $40,920 (a total net cost to the agency of $42,670).

The costing structures of all Australian Freedom of Information (FOI) type legislation incorporate socio-political policy objectives so that the fees an agency may charge were never intended to achieve full cost recovery. It was noted in the annual report of the former FOI Unit of the Premier's Department that:

> After assessing all factors, it was decided that NSW charging policy, in summary, should recognise the socio-political desirability of FOI, tempered with the recognition that scarce public resources are being used. The charging policy was therefore designed to have the following characteristics:
>
> - be as simple as possible;
> - for commercial users, be strongly based on a 'user pays' principle; and
> - for individual users making personal requests, public interest groups and persons who are experiencing financial hardship, be readily accessible and therefore inexpensive.
>
> The resulting policy, established by Ministerial order under section 67 of the Act, incorporates these features…
> The overall effect is to balance the value of the information provided against the cost and effort involved, even though the proportion of costs incurred is still small.[5]

The social policy objectives of FOI type legislation would seem to fully justify such a cost structure.

At the present time there are no fees prescribed under the NSW *Privacy and Personal Information Protection Ac 199t*. While s.73 of the *Health Records Information Privacy Act* 2002 refers to fees for copies, inspection of documents, amendments and fees prescribed by regulation (of which there are none) – it does not refer to fees for internal reviews or providing access to information.

4.2 Complaints to the NSW Ombudsman

While there is little available data about the impact on agencies of multiple applications from individuals seeking largely the same or related information, a glimpse of the problem can be seen from multiple FOI complaints made to the NSW Ombudsman. FOI complaints in the three and a half year period January 2004 to June 2007 (not including FOI complaints from MPs and journalists, which invariably relate to a range of issues and agencies) included:

- 25 from one individual (primarily about two related agencies),[6]
- 11 and 12 from another two,
- seven from another,
- six each from two more,
- five each from another two, and
- four from five more.

Thirteen individuals (3% of complainants) made 97 of the approximately 546 non-MP or journalist FOI complaints to the Ombudsman in that period (ie, 18% of such complaints).

People who are inclined to make multiple FOI complaints and/or review applications, appear generally to either make FOI complaints to the Ombudsman or make review applications to the ADT. It appears that less than 2% of FOI complainants to the Ombudsman also made review applications to the ADT. Of these, only four people made multiple FOI complaints to

the Ombudsman and also had multiple ADT decisions on review applications (35% of all such ADT decisions on FOI matters) between January 2004 and June 2007.

4.3 FOI review applications to the NSW ADT

In the judgment handed down in July 2006, the President of the ADT noted that one review applicant '… had filed 17 applications to which the respondent in the present proceedings…is respondent (6 have been finalised and 11 pending). He has 11 other applications in the Tribunal to which other agencies are respondents'. One year later (as at 30 June 2007), information on the ADT website indicated that this review applicant had been a party to 31 published decisions in the ADT (20 General Decision and 11 Appeal Panel[7]) – 21 in relation to one agency and 10 in relation to another five. This constituted 18% of all FOI decisions handed down by the General Division and almost 40% of all FOI decisions by the Appeal Panel since 1 January 2005. This applicant is also a party to two Supreme Court decisions on appeals against ADT decisions. In addition, at time of writing there were:

- a large number of further applications made by the applicant still before the General Division of the ADT (at least 27 matters with 5 respondents as at 30 June 2007);
- four decisions awaited from the ADT Appeal Panel, and
- several decisions awaited in Supreme Court appeals brought by either the applicant or a respondent agency.*

Of the 20 published General Division decisions relating to this review applicant (as of 30 June 2007), 11 primarily dealt with procedural/jurisdictional/cost issues and nine looked at the merits of certain applications. In only two of the merit cases was the agency decision to refuse access to documents overturned by the ADT, and in one of these the General Division decision was in turn overturned by the Appeal Panel. Fifteen of the General Division decisions have been the subject of an appeal to the Appeal Panel either by the applicant or the respondent agency.

This particular FOI review applicant is not the only multiple user of the ADT. Out of 112 FOI Act related published decisions handed down by the General Division between January 2005 and 30 June 2007, information on the website of the ADT indicates that 52 (46%) concerned review applications made by just seven applicants. While 20 concerned the review applicant referred to earlier, a further nine concerned another applicant (13 decisions since 2004 and at least 11 matters still on foot as of June 2007), six concerned a third applicant, five another applicant, and three applicants had four decisions each.

Looking at the 29 FOI published decisions handed down by the Appeal Panel between January 2005 and 30 June 2007, 11 concerned the review applicant referred to earlier and a further seven concerned people whose review applications were the subject of multiple decisions handed down by the General Division (in total approx 62% of Appeal Panel FOI related decisions). In this period, only nine Appeal Panel decisions in FOI related matters did not concern people who had multiple decisions in the General Division.

4.4 Privacy review applications to NSW ADT

Looking at the issue of applicants exercising statutory rights of access, it is also interesting to consider privacy review applications made to the NSW ADT.

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* *Some of the matters noted above are currently on foot and have not been resolved. Nothing in this article should be taken to be, nor is it intended to be, a reflection on the correctness, validity or proper outcomes of these cases*

As with FOI Act applicants, the majority of privacy related applicants to the ADT are the subject of only one decision (and very few take their matter to the Appeal Panel if they lose). However, there have been occasions over the years where some people have exercised their rights under the *Privacy and Personal Information Protection Act* to make numerous review applications to the ADT.

Between January 2004 and June 2007 one applicant to the Tribunal was a party to 19 privacy related decisions of the ADT and another applicant was a party to 16. Of the 83 privacy related published decisions handed down by the General Division and the Appeal Panel of the ADT in the three and a half years 2004 to June 2007, almost 40% concerned just these two review applicants[8]. Between them they were parties to 21 decisions by the General Division and 14 decisions by the Appeal Panel. Looking at individual years, the percentages of total privacy related ADT decisions concerning one or the other of these two applicants were:

- for 2004 – 29%
- for 2005 – 53%
- for 2006 – 37%
- for 2007 – 55.5% (30 June).

Between January 2004 and June 2007, over 50% of ADT privacy related decisions concerned just four people.

4.5 Cost and equity implications for external review bodies

External review bodies generally have fixed resources to deal with review applications – their budgets are not increased automatically in response to increases in the number of review applications lodged with them. In NSW, while a fee is charged to lodge a review application in the ADT, it is only $55.00 for each matter[9], which of course is in no way intended to cover the costs incurred by the ADT in dealing with a review application, whether or not it proceeds all the way to a published decision.

Generally speaking, only a certain number of review applications can therefore be dealt with by an external review body in any given period. Where particular individuals lodge numerous applications, this has equity implications for all other applicants.

4.6 Repeat complaints/review applications/appeals to Ombudsman and other external review bodies

The common link between the people who have made the most FOI and privacy related complaints/ review applications/appeals to external review bodies is that these primarily appear to concern, relate to or arise out of a particular event (or in some cases a series of related actions or events) involving the applicant personally and at least one of the agencies the subject of their complaints/review applications/appeals. Generally speaking, while such people will often make complaints/review applications/appeals concerning other agencies, these can generally be traced back to this single event (or related events). This reflects certain findings from research in this area that:

> The persistent complainants themselves were more likely to involve other agencies as the complaints procedure progressed, with 77% contacting at least one other agency (V.21%; P<0.001), and 37% contacting four or more (V.0%; P<0.01).[10]

Information from the Australian Ombudsman and Information Commissioners that deal with FOI complaints indicates that:

- repeat complainants are common (referred to variously as 'reasonably common' and 'very common');
- with very few exceptions, people who lodge multiple complaints/review applications/ appeals were concerned about one originating issue, and
- most complained about just one agency (or on occasion two related agencies).

5. WHAT ARE APPROPRIATE CRITERIA FOR IDENTIFYING CONDUCT BY APPLICANTS THAT IS UNACCEPTABLE?

5.1 Should the rights of the public to make applications and review applications/appeals be unlimited?

In principle, people should have the right to pursue a strongly held issue to the extent that the relevant legislation provides. For example, the FOI editor of *The Australian* newspaper taking a matter all the way to the High Court, or the FOI editors of daily newspapers making hundreds of FOI applications to a wide range of agencies about numerous issues.

The question is, should the rights of the public to make merit review applications be unlimited in all circumstances? If not, at what point and in what circumstances would it be reasonable for an agency to be able to take steps to seek to have an applicant's rights curtailed, to be able to recover from the applicant the full costs incurred in processing and determining each application, or for an external review body to limit an applicant's rights to lodge a review application.

While this issue is relevant to merit reviews generally, the scope of this paper is limited to applications/review applications/appeals under FOI and privacy legislation.

5.2 Are there existing statutory criteria for decisions or authorisations to refuse to deal with applications or applicants?

A wide range of different statutory provisions are in place in many Australian jurisdictions (and the UK and NZ) which authorise agencies to decline or refuse to deal with applications/applicants, or which allow decisions to be made by a tribunal/information commissioner to restrict an individual's ability to exercise rights under legislation.[11] Such provisions are generally intended to achieve equivalent outcomes to the powers of the courts to declare a person a vexatious litigant.

The *Supreme Court Act 1970* (at s 8.4) sets out provisions for a litigant to be declared by that Court to be a 'vexatious litigant' in relation to either proceedings against a particular person or, if brought by the Attorney General, in relation to proceedings generally in that court or an inferior court (not including a tribunal such as the ADT). These provisions require three criteria to be met:

- a criteria relating to observable conduct, ie, 'habitually and persistently…institutes… proceedings', and
- a criteria requiring an assessment of the merits of each of the proceedings in question, ie, 'without any reasonable ground', and
- a criteria generally requiring an assessment of the intention or motivation of the litigant in relation to each of the proceedings in question, ie, 'institutes vexatious legal proceedings'[12].

All three of these criteria must be met for such an application to the Supreme Court to be successful, which may explain why so few such orders are made.

Western Australia (in 2002), Queensland (in 2005) and the Northern Territory (in 2006) have each passed vexatious proceedings legislation that incorporate a range of alternative criteria covering the effect or the merits of proceedings as alternatives to the motivation/intention of the litigant.

In NSW the ability of agencies and the ADT to refuse to deal with applications or applicants is limited. Other than where documents are exempt or otherwise available, or advance deposits have not been paid, the only power available to agencies in NSW to refuse to deal with an FOI application is where this would substantially and unreasonably divert the agency's resources away from the exercise of the agency's functions (s 25(1)(a1)). However, this power can only be exercised by agencies in relation to individual FOI applications, not to repeat applications made by the same applicant.

The ADT has the power to dismiss individual proceedings if it considers those proceedings to be frivolous or vexatious, or otherwise misconceived or lacking in substance (*Administrative Decisions Tribunal Act 1997*, s 73(5)(h)). The few occasions where this power has been used by the Tribunal still involved a hearing prior to dismissal, which meant that resources were still expended on such things as planning meetings, document exchange and other Tribunal processes.

The ADT also has the power to award costs where it is satisfied that there are special circumstances warranting an award of costs. This power is seldom used as the ADT has held that the circumstances need to be out of the ordinary (while not having to be extraordinary or exceptional). In this regard, the ADT has held that an award of costs may be warranted where one party causes another party to incur costs because of unreasonable delays, or by making misconceived, frivolous, vexatious or insubstantial procedural or substantive applications (*Brooks Maher v Cheung*[13]).

Although related to complaints rather than applications, both the Ombudsman (at s13(4)) and the Privacy Commissioner (at s 46(3)) have the power to decide not to deal with complaints that are frivolous, vexatious or not in good faith, or where the subject matter is trivial. The Privacy Commissioner's powers extend to complaints that lack substance.

5.3 What are the possible criteria for decisions or authorisations to refuse to deal with applications or applicants?

The various criteria for decisions to refuse to deal with applications or applicants are analysed in various tribunal decisions looking at whether agencies can refuse access to information or refuse to deal with an application or applicant, or Tribunals/Information Commissioners can dismiss review applications or restrict the rights of individuals to exercise certain rights under legislation. These analyses often include references to such grounds as trivial, frivolous, repeated, irrational, vexatious, malicious, not in good faith, misconceived, and/or lacking in substance.

Table 1

Key Words	Definitions (for the purposes of this paper)
'*trivial*'	• an application of little substance, significance, importance or value
'*frivolous*'	• an application of minimal weight or importance, completely lacking in merit or unworthy of serious attention; an applicant's conduct that lacks seriousness, or • an applicant's motives that lack good sense or any good purpose
'*repeated*'	• a number of applications to the same agency for largely the same information • a very large number of applications to the same agency for information concerning or arising out of one event/issue (or possibly several related events/issues) • or a large number of external review applications concerning the same agency for largely the same information or information concerning largely the same events/issues
'*irrational*'	• an application that is nonsensical or misconceived; or an applicant's motives or intentions that lack good sense or any good purpose
'*vexatious*'	• an application that no reasonable person could properly treat as *bona fide*, ie, in good faith (a *vexatious application*); or • conduct that is clearly unreasonable and that creates serious inequities or a serious nuisance, eg unreasonable conduct causing annoyance, inconvenience, disruption or unwarranted expense (a *vexatious applicant*)
'*malicious*'	• an applicant motivated by an intention to cause harm, pain, suffering, unconscionable personal embarrassment or distress (particularly where it is clear the application serves no good or socially useful purpose)

As set out in Table 2 following, the key grounds or criteria set out in legislation and/or used by courts or tribunals for refusing/dismissing applications/ appeals can be categorised as relating to one of the following:

- the *motive* of the applicant
- the *conduct* of the applicant, or
- the *content* of the application.

Table 2

Categorisation of criteria

Motive	Conduct	Content
Frivolous, ie, an application made frivolously; with no serious purpose	**Frivolous**, ie, dealings with the agency that lack seriousness and promotes waste of public resources	**Frivolous, trivial and/or lacking in substance**, ie, the content of an application is of minimal weight or importance, is lacking in substance, is of no serious value or merit, or have no tenable basis in fact or law
Obsessive, ie, a strong idea, feeling or preoccupation that dominates or controls a person's thoughts and affects the person's behaviour	**Repeat** applications, ie: • a very large number of applications to the same agency concerning or arising out of one event/issue (or possibly several related events/issues), or • a very large number of review applications concerning the same agency (particularly where a significant number lack merit or merely raise procedural or interpretation issues) • any other obsessive or habitual behaviour or patterns of conduct that amount to an abuse of the right of access or review	**Repeat** applications for the same information, ie, applications to the same agency for largely the same information or about largely the same issue
Misconceived, eg to use the system or to exercise rights: • for an improper purpose • for a purpose other than that for which it is or they are designed and intended, or • for a purpose that cannot be attained	**Fundamental errors**, eg a failure to comply with mandatory requirements or preconditions for the making of such an application	**Exempt**, ie, it is apparent from the nature of the documents as described in the application that all the documents to which access is sought are validly exempt.
Vexatious intent, ie: • an application intended to cause annoyance, inconvenience, disruption or unwarranted expense • not in good faith	**Vexatious or unreasonable** conduct, ie, the conduct of an applicant in his or her dealings with the agency is clearly unreasonable and creates serious inequities or a serious nuisance, eg annoyance, inconvenience, disruption or unwarranted expense	**Unreasonable or irrational**, eg manifestly unreasonable or irrational demands or requests

Malicious intent, eg an application designed or intended to cause harm, pain, suffering, unconscionable personal embarrassment or distress (particularly where the application clearly serves no good or socially useful purpose)	**Threats**, ie, an applicant threatens violence or harm if the application is not approved	**False or misleading**, ie, clearly and intentionally false or misleading statements **Rude or defamatory**, ie, the content of an application is intentionally and unreasonably rude or defamatory

In practice, anecdotal evidence from a wide range of sources both within NSW and the other states and territories strongly indicates that the major problem area for agencies and external review bodies concerns repeat applications. I note that while it is not necessary for the purposes of this paper to conclude whether the applicants who have made the multiple applications referred to earlier in this paper fall into any of the above categories, the sheer numbers and their resource implications raise concerns that need to be considered.

5.4 Is success a relevant criteria in considering whether the making of a large number of applications is unreasonable?

It could be argued that because some repeat applicants are occasionally successful, their conduct is therefore not unreasonable. Some of the applicants who have made numerous review applications to the ADT have on occasion been successful – one such applicant was awarded $4,000 and the ADT ordered the agency to make a written apology and another successfully argued that the ADT had a public interest override power to release exempt material in certain circumstances. The possibility that people who make numerous applications to agencies or numerous review applications to the ADT might sometimes be successful does not justify or mean either that they were acting reasonably in making so many applications, or that it is reasonable for the agencies concerned or the ADT to be required to deal with all such applications. The other side of the success coin is that some journalists and MPs make large numbers of FOI applications to agencies with little success, but are clearly justified in doing so given the purposes of the FOI Act and the nature of their roles.

5.5 Can FOI legislation be an effective corruption fighting tool?

Some applicants might argue that they need to be able to make multiple FOI applications to agencies in NSW, followed by multiple complaints and review applications, to uncover ‘corruption’ that the agency concerned is trying to hide, or a failure by other agencies to uncover or properly address such corruption.

A primary distinction between corruption on the one hand and maladministration, incompetence or negligence on the other is that corruption requires an improper intention. Because it is agencies that are responsible for determining FOI applications, the proper implementation of FOI legislation relies to a significant extent on their good intentions. It could therefore be argued that FOI legislation is in practice unlikely to be an effective mechanism for a member of the public to uncover any corruption that an agency might be trying to hide. It could also be argued that if an FOI applicant is unsuccessful in obtaining evidence of corruption through one or two FOI applications and internal review applications to an agency, and one or two FOI complaints or review applications to external review bodies, multiple applications or complaints are unlikely to achieve a different result.

FOI legislation is in practice likely to be far more effective in corruption deterrence (through transparency) than corruption detection.

5.6 Should a distinction be drawn between members of the public and MPs and journalists?

When considering issues raised by people who make numerous FOI applications, it is important to distinguish between members of the general public on one hand and members of Parliament (MPs) and journalists on the other:

- members of the public who make numerous FOI applications are usually primarily concerned about one event or issue (or possibly several related events or issues) that concerned them personally, and generally make those applications to a limited number of agencies;
- MPs and journalists who make numerous FOI applications are usually concerned about any number of events or issues that do not concern them personally, and may make those applications to a significant number of agencies, and
- in NSW MPs and journalists seldom make review applications to the ADT.

The use of FOI by MPs and journalists serves one of the primary purposes of FOI legislation, ie, to enhance public participation in debate on public interest issues. In *Re Eccleston*,[14] the Queensland Information Commissioner noted that the enhancement of public participation in government was not an explicit purpose of the FOI law, but was implicit in some of its key concepts:

> Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them. The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of "that right".

This point has also been made by the other tribunals,[15] government ministers introducing FOI laws in some States,[16] and academics.[17]

6. HOW CAN SUCH CRITERIA BE IMPLEMENTED IN WAYS THAT ARE FAIR AND IMPARTIAL?

6.1 What options might be available to implement criteria for refusing/dismissing applications?

It is far easier for both agencies and external review bodies to demonstrate that conduct and content criteria have been met (such as those set out in Table 2), than to demonstrate that any motive based criteria have been met. Such assessments would be very subjective and in most cases would require a detailed investigation/examination of relevant information and circumstances, often including the need to apportion relative weightings to conflicting evidence and degrees of credibility to witnesses. This may explain why bodies such as the ADT, the Privacy Commissioner and the NSW Ombudsman seldom decline or discontinue matters based on an assessment that the matter or complainant/applicant is vexatious, frivolous, not in good faith or misconceived.

Applicants who make a very large number of applications to the same agency concerning or arising out of the one event or issue (or possibly several related events or issues) could be motivated by, for example:

- an honest belief that things have gone wrong (eg, that an agency or its staff have committed 'corrupt' acts) and a desire to either get to the bottom of it or to get an agency to recognise that it or its staff have acted inappropriately (such a belief may arise out of a rational assessment of the available information or could be based on a faulty premise, faulty reasoning, a desire to find someone to blame, delusion, etc);

- stubbornness;
- a strong idea, feeling or preoccupation that dominates and controls their thoughts and affects their behaviour (eg an obsession);
- a desire to be difficult (eg, to teach the agency or its staff a lesson).

The problem is that agencies that receive applications will seldom, if ever, be in a position to correctly identify the actual motive of an applicant. In fact, it can be expected that agencies will not have the technical expertise, or the necessary face to face contact with repeat applicants, to correctly identify their motivations. Agencies can really only respond to the conduct of applicants, and to the numbers and content of their applications.

Mechanisms that could therefore be considered for implementation of criteria for decisions to be made to restrict the rights of individuals to make applications or review applications include:

- agencies making decisions to refuse to deal with a matter based on objective criteria which could be subject of external review;
- agencies making decisions to impose 'conduct' related conditions on applicants relating to behaviour, the provision of requested information, time periods for compliance, etc
- agencies applying to an external review body (eg in NSW the ADT) for a declaration that the rights of a particular applicant be restricted or made subject to conditions, (eg related to fees and charges, prior approval of the external review body, etc).

6.2 What criteria might be appropriate for dealing with unreasonable conduct by applicants?

The relevant legislation in the Northern Territory and UK allow for a person to be declared a vexatious or repeat applicant. Any such declarations only apply to applications to a particular agency and can only be made by the Information Commissioner. In the NT Act the criteria on which the relevant Information Commissioner is required to be satisfied include that:

- over a period of time, the person has repeatedly applied to an agency for access to information or review of agency decisions about access to information, and
- the repeated applications are:
  - unnecessary [eg without serious purpose or value], or
  - an improper use of the right of access or review [eg frivolous or trivial], or
  - made for the purpose of harassing or obstructing or otherwise interfering with the operations of the agency [presumably applications that appear to be intended to cause, and possibly those that have the clear effect of causing, such things as inconvenience or expense].

The problem with these approaches is that the issue is whether an applicant who makes a large number of applications to the same agency is 'vexatious', requiring an assessment about issues of intention or motivation. From a practical perspective, the issue should be whether the number of applications to an agency about the same or similar issues is unreasonable given the impact on agency resources and equity considerations. Criteria based primarily on observable conduct and/or the content of applications that could be considered for inclusion in relevant legislation might therefore include:

- a significant number of applications to an agency over a specified period of time [say f or example 12 FOI applications in any 12 month period – not including applications made by MPs or journalists];

- a number of requests that would, if dealt with, substantially and unreasonably divert the resources away from their use by the agency in the exercise of its functions [an extension of the scope of s 5(1)(a1) of the NSW FOI Act which would allow agencies to consider the impact of repeat applications on their resources], or
- a number of requests for the same or substantially the same information/documents as in previous requests that were unsuccessful [particularly if there has not been a significant interval in time or significant changes in circumstances relating to the documents between the requests].

Because such criteria are based on objective, observable conduct or content, they could be implemented by agencies in relation to individual applications, subject to rights of external complaint or review. Further criteria that could be made available to an external review body might be:

- a number of applications have been made to an agency over a specified period that are an improper use of the right of access or review: for example, because they are without serious purpose or value, are for trivial information, they are so obviously untenable or manifestly groundless as to be utterly hopeless, misguided or misconceived, or there are no grounds to believe there is any reasonable chance of success, or
- a number of applications have been made to an agency that can fairly be characterised as obsessive, habitual, persistent or manifestly unreasonable in the circumstances [for example where there have been frequent requests, or requests that otherwise form a pattern, such as a series of requests for documents that the applicant is or should be aware clearly are, and will in all likelihood be claimed by the agency to be, covered by an exemption clause];

If provisions are introduced into FOI and privacy legislation to allow enforceable decisions to be made to restrict the rights of individuals to make applications or review applications generally, the appropriate decision-maker in each jurisdiction would probably best be the external review body with determinative powers.

6.3 What options could be made available for agencies and external review bodies to deal with unreasonable numbers of applications made by individuals exercising statutory rights?

In making a decision on an application by an agency to restrict the rights of individuals, options that could be made available to an external review body include:

- ordering that its consent was required for any further application to be made to the agency in question, or
- imposing a condition on any further applications to the agency in question that the applicant must pay the full costs incurred by the agency in dealing with them, or
- imposing an upper limit on the number of separate applications a particular individual may make to the agency in question in any given period.

If going down this track, it would be important to also consider including an offence provision in the relevant legislation to deter people from aiding or abetting a person to avoid or get around any such order or condition (for example people who step into the shoes of the person the subject of such an order to make further applications or who allow their names to be used to make further applications).

7. CONCLUSIONS

Experience from a range of jurisdictions shows that some people who exercise statutory rights to make applications/review applications/appeals under FOI and privacy legislation act

in ways that unreasonably impact on the resources of agencies, on equity considerations in relation to other applicants and/or the health and welfare of agency staff. While the numbers of applicants who act so unreasonably are small, their conduct or activities can have significant cost implications for agencies and external review bodies and create significant equity issues in relation to other applicants and to the work of the agency generally.

Legislation establishing such rights should address this issue in ways that authorise agencies and external review bodies to properly and fairly manage such unreasonable conduct/activities when they occur, without inhibiting or restricting the rights of the vast majority of applicants.

Endnotes

1 Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen 'Unusually persistent complainant', *British Journal of Psychiatry* (2004), 184, 352-356.
2 Bill Eddy, *High Conflict People in Legal Disputes*, Janis Publications 2006.
3 Dr Grant Lester, Literature Review 2007.
4 Commonwealth, New South Wales, Northern Territory, Tasmania, Victoria, Western Australia.
5 *Freedom of Information Act 1989* – Annual Report 1989-1990, published by the former Freedom of Information Unit of the Premier's Department of NSW (pp.5-6).
6 Not the record-breaking review applicant to the ADT referred to later in the paper.
7 Including four decisions handed down on appeals brought by agencies.

8 Identified as GA & NZ
9 If an applicant does not have sufficient financial resources, this fee may be waived.
10 Lester G, Wilson B, Griffin L, Mullen PE, 'Unusually Persistent Complainants'*, British Journal of Psychiatry*, 2004, 184, p354.
11 Frivolous and vexatious type provisions:
Northern Territory, *Information Act*, s.42;
Queensland, *Freedom of Information Act 1992*, s.96A and s.96B
Western Australia, *Freedom of Information Act 1992*, s.67
South Australia, *Freedom of Information Act 1991*, s.18(2a)
New South Wales, *Administrative Decisions Tribunal Act 1997*, s.73(5)
Australian Capital Territory, *Administrative Appeals Tribunal Act 1989*, s.43A
United Kingdom, *Freedom of Information Act 2000*, s.14 & s.50
New Zealand, *Official Information Act 1982*, s.18
Repeated request type provisions:
Victoria, *Freedom of Information Act 1982*, s.24A
Northern Territory, *Information Act* (in the context of vexatious applications) s.42
Queensland, *Freedom of Information Act* (in the context of vexatious applications) s.96A
United Kingdom, *Freedom of Information Act 2000*, s.14
All documents exempt type provisions:
Western Australia, *Freedom of Information Act 1992*, s.23
Commonwealth, *Freedom of Information Act 1982*, s.24
Australian Capital Territory, *Freedom of Information Act 1989*, s.23
Tasmania, *Freedom of Information Act 1991*, s.20
12 In *Attorney General v Wentworth (1988)* 14 NSWLR 481 Roden J held that proceedings are vexatious for the purposes of s.84 of the *Supreme Court Act* if they are: instituted with the intention of annoying or embarrassing the person against whom they are brought; brought for collateral purposes and not for the purpose of having the court adjudicate on the issues to which they give rise; or, irrespective of the motive of the litigant, so obviously untenable or manifestly groundless as to be utterly hopeless (at 491).
13 [2001] NSW ADT 18 at [11])
14 *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr 2, para 71.
15 *Re Cleary and Department of the Treasury* (1993) 18 AAR 83; *Re Veale and Town of Bassendean*, unreported Information Commissioner of Western Australia, 1994, *Decision Ref D00494*.
16 See the Second Reading Speeches of *NSW (Legislative Assembly Debates* NSW 2 June 1988 p 1399) and Queensland *(Parliamentary Debates*, 5 December 1991, p 3849).
17 Peter Bayne 'Recurring Themes in the Interpretation of the Commonwealth Freedom of Information Act' (1996) 24 Federal Law Review 287 at 288; Peter Bayne 'Freedom of Information and Democracy: A Return to the Basics?' (1994) 1 *Australian Journal of Administrative Law* 107; 'Freedom of Information and Political Free Speech' in T Campbell and W Sadurski eds *Freedom of Communication* (1994) at 199; Anne Cossins 'Revisiting Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law' (1995) 23 *Federal Law Review* 226.