



Submission to the Victorian Law Reform Committee

Inquiry into Vexatious Litigants

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About Fitzroy Legal Service

Established in 1972, Fitzroy Legal Service (“the FLS”) was the first of Australia's Community Legal Centres. Since its establishment, the FLS has assisted more than 70,000 clients through a range of free legal advice services offered every weeknight in Fitzroy and at various outreach locations. The FLS currently has over 150 volunteers actively involved in the organisation, and remains one of the busiest Community Legal Centres in Australia.

Presently the FLS continues to operate a substantial legal practice, providing advice and representation for individuals engaged in legal proceedings. The legal practice's clients have predominantly required representation in relation to criminal charges, family law matters, infringements, and victims of crime applications. Legal services are provided holistically within the context of strong partnerships in the community sector.

Overwhelmingly, the people who use Community Legal Centres are on low incomes, with most receiving some form of pension or benefit or in casual or low paid employment. Many clients are experiencing severe disadvantage and discrimination, and may struggle for a range of reasons to engage effectively with legal processes and complaint bodies without significant support.

FLS has a strong commitment to undertaking community legal education and law reform. The organisation works closely with its community to ensure that its involvement in policy development and law reform is informed by the experiences of its clients. FLS works to achieve systemic responses to the legal issues facing its clients through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework. A broad based commitment to improved access to justice underpins all its activities.

Introduction and Overview

FLS welcomes the opportunity to participate in the Law Reform Committee's Inquiry into Vexatious Litigants.

We believe the terms of reference raise issues around access to justice and human rights that are of great relevance to Community Legal Centres, whose significant work with community members otherwise unable to access suitable legal services provides what we believe is a crucial perspective.

In this submission we strongly argue that reforms should be focussed on improved access to representation in court and tribunal proceedings, as opposed to wide legislative reforms with the potential to marginalise and exclude unrepresented litigants from accessing justice. We further suggest a broad, multi-faceted approach across sectors is required to improve appropriate management of the concerns and expectations of community members who may currently be over engaging with the legal system.

The FLS works to maintain realistic expectations of the legal system in the community, including provision of clear advice where appropriate of potential costs, stress, and adverse outcomes of legal proceedings where initiated. At the same the FLS shares a commitment

with State government, Community Legal Centres, Victoria Legal Aid, and the legal profession generally towards improved and equitable access to justice.

Part of this commitment involves ensuring bias as a result of personal characteristics does not under any circumstances interfere with clear identification of possible causes of actions/ remedies and communication of appropriate advice. This is consistent with the principle that access to justice should be equally available to all persons regardless of their background or circumstances.

We take this opportunity to state our opposition to the reinvigoration of discourses around “querulous paranoia” as having the overt potential to breed prejudice and contempt for those seeking to pursue their rights (whether misguided or not) on the basis of conduct traits shared by a good many persons involved in legal proceedings generally.¹ It is also our concern that this discursive trend would tend to reinforce the systemic exclusion, loss of autonomy, and sense of injustice that in many cases is the self-ascribed cause of over reliance on legal forums in the first place.

It is our view that the resource implications of such patterns of behaviour would be better dealt with through provision of adequate legal support and representation in order to distil the legal issues involved, and clarify what outcomes are possible or likely at an early stage. We do not subscribe to the view that over engagement with the legal system itself should be regarded as a primary indication of mental illness. The potential to further marginalise and discriminate against those already experiencing significant vulnerability, and often subject to high levels of state intervention in their lives, must be borne in mind in this context.

Comment on Terms of Reference

We take this opportunity to query the terminology of “vexatious litigant” as utilised throughout the Inquiry. The Committee will be well aware of the small numbers of persons who have been declared vexatious litigants under the Supreme Court Act, section 21. There is then a further category of persons whose specific proceedings will have been declared vexatious under legislation or inherent powers specific to the court or tribunal.

However, the content of the inquiry would seem to imply a conception of “vexatious litigants” as broader than those litigants declared so by existing legal mechanisms. The terminology without further definition implies the validity of subjective assessments of vexatiousness, assessments that are not adjudicated against objective criteria, and are necessarily located in existing relationships of power, economics, culture, knowledge and/ or experience. We believe there is likely to be divergent perspectives on what constitutes this category of persons.

For this reason, in response to some questions we have framed our responses around the concept of persons engaging with legal services, complaint bodies, and legal processes that may be in danger of being defined as vexatious litigants (“the relevant persons”) and who are

¹Lester G MD ‘The Vexatious Litigant’ *Judicial Officer’s Bulletin* Judicial Commission of NSW April 2007 Volume 17 No 3; Mullen P & Lester G ‘Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour’ *Behavioural Sciences and the Law* Wiley Interscience 24: 333-349 (2006)

not represented by legal counsel; and when using the terminology of vexatious litigants will refer to the paradigm delineated in the Supreme Court Act, section 21.

It is our experience that the relevant persons fall into a broad continuum wherein many complex factors are likely to be in operation. Some do have valid causes of action, which has become apparent when adequate legal representation is resourced. For others, engagement with the legal system may be inherently compulsive and often technically misguided, and even free legal counsel may be rejected as too constraining.

Vexatious litigants in Victoria

How common are vexatious litigants in Victoria's Courts and Tribunals?

The Committee will be aware that only a small number of persons have formally been declared vexatious litigants nationally or in Victoria. These figures do not reflect the many proceedings that may be dealt with individually as irregular, frivolous, vexatious, or an abuse of process through other means such as the inherent powers of courts and statutory powers attaching to particular jurisdictions (e.g. the Family Court or the Victorian Civil and Administrative Tribunal, “the VCAT”).

It is our view that these low numbers reflect the value that long term preclusion of access to legal processes is a very serious infringement of human rights that should only be exercised where entirely necessary.

In relation to the work of the FLS and our experience of ‘relevant persons’ who may be made subject to future reforms, we would make the following comments:

We believe there are very few persons accessing our services who could conceivably satisfy the vexatious litigant test as per the Supreme Court Act section 21. However there are a large number of relevant persons experiencing frustration that their concerns are not treated seriously or are unable to be adequately resolved.

It is our experience this may be related to:

- a. absence of legal support/ representation/ duty lawyer service
- b. disempowerment, for instance, due to incarceration, involuntary treatment orders, social/ cultural/ economic factors, prejudice and discrimination
- c. broader barriers to accountability/ transparency in some contexts (e.g. complaints regarding police misconduct or other abuses of power)

The line between those who have valid legal issues but are unable to adequately navigate legal processes and become increasingly frustrated, and those for whom the goal sought has become the legal process itself as opposed to any identifiable and/ or plausible outcome, is fine, and some cases be a continuum. For instance, the more that has been invested in seeking resolution by an individual, the harder it can be to let go.

Are vexatious litigants more common in some courts and tribunals, or in some types of legal disputes, than others?

It is our view that litigants are more likely to be considered vexatious when they are without representation. This removes focus from adverse impacts on the efficiency and effectiveness of legal processes when represented parties in commercial litigation engage in tactics purely to cause delay and increase costs.

Nevertheless, it is our view that relevant persons are more likely to be representing themselves in the VCAT, the family law jurisdictions, the civil jurisdiction of the Magistrates Courts, and forums of appeal, such as the County Court, Supreme Court and the Administrative Appeals Tribunal.

It is our view that where self-represented litigants are struggling in their comprehension or navigation of the legal system, increased availability of legal representation whether through duty lawyer services or otherwise would improve efficiency and use of court or tribunal resources without compromising access to justice and the right to a fair hearing.

This is particularly evident in forums such as the VCAT, which though seemingly accessible, can often lead to quite complex proceedings where absence of counsel is a significant disadvantage.

We cite as good practice approaches taken to dealing with family violence matters in the Magistrates' Courts, where duty lawyers from Victoria Legal Aid, community legal advocates and support workers ensure that all litigants have some form of legal representation and support.

As a consequence of this well resourced approach, litigants who have a good cause of action or defendants who have reasonable grounds to defend allegations against them have a well facilitated opportunity to have their matters negotiated and resolved, and their views and experiences taken into consideration.

Additionally, in relation to the very small percentage of matters where insufficient evidence is available or proceedings may have been initiated inappropriately, some form of resolution can generally occur in a manner that has minimal impact on court resources, despite the often emotionally charged nature of the particular jurisdiction.

Why do you think some people become vexatious litigants? Do they try to solve their legal disputes in other ways before going to court? If so, are there features from their previous attempts to solve disputes that contribute to them becoming vexatious litigants?

Again we note that we believe the terminology of vexatious litigants is disputed terrain, and between vexatious litigants as defined under the Supreme Court Act versus the relevant persons who may or may not be affected by any future reforms.

We note research has been conducted whereby complaints professionals have attempted evaluation of initial complaint handling against a control group and a group of complainants

considered to be “unusually persistent”.² These results showed that only around half from both groups were considered by the complaints professionally to have “been dealt with appropriately and reasonably by the agency, or individual, receiving the initial complaint”.³ Problematic factors identified included unreasonable delay, complainants being met with “overt hostility”, “blanket denials”, or “suggestions they had only themselves to blame”.⁴

Against this backdrop we believe it is not surprising and quite reasonable that some persons become highly persistent in pursuing management of their own complaints. The outcomes of the research are consistent with the experiences of many Victorian Community Legal Centres.

Do vexatious litigants have any common characteristics?

We assume the parameters of this question go beyond those factors stated in the Supreme Court Act section 21.

As such, we would, regarding our experience with persons who are engaged in an ongoing fashion with legal processes, cite the following as some factors that may be relevant.

- high levels of coercive intervention or control in the relevant person's life on a one off or ongoing basis, e.g. through incarceration, involuntary treatment, police harassment
- unsatisfactory outcomes through previous engagement with complaints processes or legal proceedings
- inability to resolve legal proceedings because legal aid cap has been reached or legal aid is not available
- unwillingness to accept infringement of rights or to let go of sense of injustice

We assert that the absence of legal supports should not be sufficient to deem a person a vexatious litigant. However, it is our view that the reality is that, whether or not a person has a valid claim/ defence/ complaint, their perceived vexatious status is closely linked to the absence of legal support. As such, it is our view that a significant amount of the negative impacts on processes and resources could be prevented through the introduction of increased free legal support in those forums where they do not presently operate.

We note in this context that the relevant provision of the Supreme Court Act has been “irreverently known as the ‘Blackfellows Act.’”⁵ In reflecting on the use of this terminology, R J Hamer “suggests that it derives from the kind of provision then to be found in the

² Lester et al ‘Unusually Persistent Complainants’ *British Journal of Psychiatry* (2004) 184, 352-356, 354

³ Ibid.

⁴ Ibid.

⁵ Victoria, Parliamentary Debates, Legislative Council, 10th September 1963, 89 cited in Smith S ‘Vexatious Litigants and their Judicial Control – The Victorian Experience’ *Monash University Law Review* Vol 15 March 89, 55

Australian Constitution which in effect treated Aborigines as ‘non persons’ so that they were to have no vote nor to be counted in the census. They were to be placed outside the law.”⁶

These reflections are consistent with some of our experiences with the relevant persons, wherein it has been stated to us that the priority is to be recognised as a member of the community with rights like everyone else.

In 2007 the Victoria Law Reform Commission suggested that the Victorian Parliament Law Reform Committee should consider the relationship between mental health and vexatious litigation. What is the relationship, if any, between mental health and vexatious litigation?

As stated above we are opposed to reinvigoration of psychiatric discourse around vexatious litigants and querulous paranoia, and any suggestion that compulsory treatment be an appropriate management tool for those seemingly obsessively engaged with the legal system.

Clearly where consistent and serious threats of harm to self or others are involved, or such harms in fact occur, broader considerations will apply, including the occupational health and safety of those involved in provision of legal services or decision making forums.

Our view is informed by the experience that many of the characteristics described in the literature could be conceived of as shared quite broadly by our client base, many of whom face consistent barriers to justice equality and dignity on many fronts in their lives. Whether this often very real and reasonable frustration is played out in legal forums or otherwise should not be determinative of its characterization as a specific psychiatric disorder.

The effect on individuals and agencies who are victims of vexatious litigants

What effect do vexatious litigants have on the individuals or organisations who are victims of their conduct?

The relevant persons may be represented or unrepresented.

Where individuals or organisations are represented and are engaging in conduct that adversely impacts on the efficiency or effectiveness of courts and tribunals *for tactical reasons* that obstruct the course of a justice, a range of impacts may occur. These include persons without means bowing out of proceedings due to delay and costs.

Where the relevant persons are *not acting necessarily on legal advice* and are not operating to gain a technical advantage, significant resources may similarly be consumed in appearances, court time, gathering of evidence, defending claims, and so on.

In some proceedings, significant stress may be experienced by other parties as individuals also. This may be especially evident in family law proceedings.

If you think you or your organisation has been the victim of a vexatious litigant, describe the impact on you. What were the financial costs? Were there other costs?

⁶ Private Correspondence of Sir Rupert Hamer dated 7/ 7/1987 cited in Ibid.

As a service, we have over the years been engaged in various forms of litigation with bodies who have engaged in obstructive conduct despite the existence of legitimate causes of action against them.

As a provider of free legal advice, we have had contact over a time with many litigants who may be relevant persons within the terms of this inquiry. Some of these relevant persons may have valid causes of action and require a minimum of legal assistance to achieve a desired outcome. Others are more interested to obtain advice as to the relevant legal process to adopt, and are resistant to advice on the merits of their action or to discussion of probable outcomes. There is a wide continuum between these two poles, where for a range of reasons, it is the challenge of the advising practitioner to elucidate precisely where the legal issues lie and how best to provide accurate advice that facilitates management of realistic expectations.

Where the relevant persons are highly involved with legal processes and seek to maximise the support we are able to provide, a range of “costs” may arise, including time and resources. However, it is considered within the service a professional challenge to endeavour to invariably deliver equitable services and impartial advice, while maintaining appropriate management of resources to need and a safe working environment for staff and volunteers.

In summary, we have not been the “victim” of a vexatious litigant, but as would be expected, have some level of contact with many of the classes of persons who may be captured by the terms of this inquiry.

Applying for a declaration under Victoria's vexatious litigant laws

Are there people in Victoria's courts and tribunals who are vexatious litigants, but have not been the subject of action under the vexatious litigant laws? If so, why do you think no action has been taken?

We have no submission to make to this point at this time, other than to raise the existence of powers in relation to particular proceedings discussed in question one that would limit the need to make an application under the Supreme Court Act section 21.

If you think you or your organization has been the victim of a vexatious litigant, did you take any action to have the person declared a vexatious litigant? If not, why not? What other action did you take?

We have no submission to make to this point at this time.

Should the Attorney General be the only person who can apply to have a person declared a vexatious litigant? Who else should be able to apply, e.g. senior court staff or other parties to the litigation?

It would seem the application should have to be made and justified to a third party like the Attorney General. This process makes clear that the decision to seek to have a person made a vexatious litigant is a serious one and that the right to access legal decision makers should only be removed in very extreme circumstances.

We perceive problems may arise where applications are able to be initiated directly in the courts or tribunals by parties to litigation. Should the power to make declarations be

extended, it would be more appropriate that such application was made by the court or tribunal's own motion as an extension of their existing powers. We repeat our view that we believe adequate powers already exist to manage the relevant persons and their engagement with legal processes.

Should the courts and tribunals other than the Supreme Court have the power to declare a person a vexatious litigant? Should they be able to make a declaration on their own motion, i.e. without an application from another person?

We believe adequate powers already exist through inherent powers and legislatively derived powers to manage the issues raised by the relevant persons in their engagement with legal processes.

Who is a vexatious litigant under Victorian laws?

Does the law in Victoria make it too easy or too difficult to be declared a vexatious litigant in Victoria?

We have been unable to identify how many applications to the Attorney General have been made and refused. As such it is difficult to identify whether it is too easy or difficult to pursue the existing avenues to have litigants declared vexatious under the Supreme Court Act.

We repeat our observation that there are numerous powers in place to manage litigation that may be inappropriately initiated, and that these powers are regularly used. We repeat also our view that a long term declaration of vexatiousness precluding a person from utilising court or tribunal proceedings unless leave is sought should be considered a last resort where all other management approaches have failed.

What should the test be for determining whether a person is a vexatious litigant? For example, should the test be that the person has brought the vexatious legal proceedings 'frequently' rather than the stricter test of 'habitually' and 'persistently'?

We support the retention of the existing test. We consider it particularly important that lack of legal representation is included as a consideration when determining whether a person's engagement has been misguided.

What rights should a vexatious litigant have?

What rights should an alleged vexatious litigant have when the Supreme Court (or other courts or tribunals if appropriate) hears an application? For example, should he or she have the right to free legal representation?

It would seem provision of legal representation as of right for those subject to any formal application to be declared a vexatious litigant is a necessary protection that must be afforded to maintain the integrity and reputation of the justice system. The legal representation afforded would need to be adequate in terms of available time and resource to ensure a fair hearing of the relevant allegations and history of proceedings could be ensured.

We also believe that where an individual self-represented litigant's particular proceedings are deemed by the court to be vexatious or frivolous or an abuse of process, it will often be appropriate that some form of legal representation is facilitated to identify if there is a cause of action and where relevant to assist the litigant in bringing the appropriate proceedings.

What rights of appeal should a vexatious litigant have?

It would seem appropriate that a litigant who has been formally declared vexatious – should such powers be introduced widely – should have available the normal rights of appeal. Provision of adequate legal representation would generally expedite this process and ensure a fair hearing.

Different considerations may apply where it is only a particular proceeding that has been declared vexatious as opposed to a litigant, as the relevant person is not precluded from bringing further proceedings with for instance representation or more clearly elucidated grounds.

The powers of the court to control vexatious litigation

Should the Supreme Court (or other courts and tribunals if appropriate) be able to make other orders to control vexatious litigants? For example, should it be able to:

- *impose conditions on the right of the person to continue or bring litigation, such as a power to order that the person cannot bring proceedings unless they are legally represented?*
- *prevent a person from entering court premises?*

We would suggest that any orders requiring a person be represented in order to continue or bring further proceedings would need to be predicated on the availability of legal representation. That is, there would need to be some discussion of who would facilitate and finance representation. While we acknowledge the ideal situation to be one in which all litigants do have access to legal representation, there may be difficulties in ensuring the provision of such. A situation where litigants are precluded from bringing proceedings on the basis that they do not have legal representation is problematic, particularly where it is the absence of representation that in many cases will have led to their alleged status as vexatious to begin with.

However, where the circumstance is one that an application will otherwise be made to bar completely a litigant from lodging proceedings, the capacity to impose such orders (provided resources are available to make them meaningful), may be preferable to a vexatious litigant declaration with its long term consequences of preventing a person from accessing legal processes altogether.

A consideration arising is that some litigants may for a range of reasons be more challenging than others to provide representation for. Most advocates will have experienced clients who do not accept the legal advice they are provided with, or who have other characteristics in communication background or personal experience that increase the challenges of obtaining and acting on instructions in an efficient manner.

We believe it is important that such individuals are not precluded from accessing the justice system where a valid cause of action or process of appeal exists.

We also believe it is important that there is some broader discussion in the legal profession around appropriate ways to deal with these relatively common situations without prejudicing clients or the practitioner's reputation.

We draw attention again to our experience that for many people tribunals and courts are the only avenue where an objective and unbiased assessment of their rights and any infringements thereof is likely to occur. For example, the rights of those serving prison sentences or held in detention, the rights of those subject to involuntary treatment or detention due to mental health diagnoses, and the rights of those who have been made subject of police harassment or violence. It is to the credit of the legal system in the State of Victoria and the support of the many layers of professionals engaged therein that as far as possible Victoria has maintained an approach that maximises access to justice.

In relation to the issue of excluding persons who have been declared vexatious from premises, occupational health and safety considerations may be relevant and justify such an approach in some circumstances. We are opposed to any changes that would generate increased hostility generally and lead to the potential for criminal charges to be laid that would not otherwise.

The effect of a vexatious litigant declaration

Are vexatious litigant declarations effective at stopping vexatious litigants? How do they try to press their claim after a declaration is made?

It can probably be assumed that some of those declared vexatious litigants under present laws may continue to attempt to bring proceedings for a time. However, we would also assume vexatious litigant declarations have been reasonably effective, as once the declaration is made it would be relatively straight forward to dismiss any proceedings initiated.

Are there 'loopholes' in the laws that allow vexatious litigants to continue litigating, e.g. through relatives, friends or other associates? Should the Supreme Court be able to control vexatious litigation by people who act 'in concert' with a vexatious litigant?

It is our understanding there is already precedent in existence suggesting clearly that vexatious litigants will be precluded from bringing proceedings through another acting 'in concert'.

We cite in this respect the authorities *In Re Langton* [1966] 1 WLR 1575 and *Attorney General for NSW v Solomon & Ors* [1987] 8 NSWLR 667

We would be wary of too broad a reading of such an approach, as a personal connection with a vexatious litigant should not have any effect on a person bringing proceedings in relation to a different or the same set of circumstances where they are personally affected. An example would include decision making processes that affect many members of the prison community.

Does the law make it too easy or too difficult for a vexatious litigant to get leave from a court or tribunal to continue to bring litigation? For example, should the vexatious litigant have to show that there are reasonable grounds for the litigation?

We believe the current laws provide a fair procedure through which a person who has been declared a vexatious litigant can bring further litigation before the court. Under the Supreme Court Act there is an implied requirement that the person so declared must persuade the Court as to why he or she should be permitted to bring the relevant proceedings. The existence of reasonable grounds for the litigation would in all likelihood be the relevant test applied to reach such a determination.

Under the current law, a vexatious litigant can apply for leave ex parte (without the court or tribunal hearing from anyone else). Should the Attorney-General, or any other people, be notified when a vexatious litigant seeks leave? What rights should those people have?

We believe an ex parte procedure is entirely appropriate to determine the preliminary question of whether a person declared a vexatious litigant should be granted leave to bring proceedings. The reason for this is that establishing of a prima facie right to lodge proceedings is the appropriate threshold to determine the leave question. If a person declared a vexatious litigant were expected to meet more than that threshold, and the preliminary issue were to become the result of extended negotiations or proceedings itself, the reputation of the integrity of the justice system would be thrown into question.

Should the courts and tribunals be able to decide leave applications ‘on the papers’, without hearing from anyone in person?

Where parties are represented this may be adequate. However, there may be circumstances where in the absence of representation some further inquiry needs to be made of the unrepresented litigant as to the nature of their application and grounds. Again, as such a procedure can be time-consuming it may be in the interests of an expedited hearing of the issues to ensure legal representation is made available in these and other circumstances.

Should courts or tribunals be able to impose conditions when they grant leave to a vexatious litigant to bring litigation, e.g. should they be able to order the vexatious litigant to provide security for the likely costs of the defendant?

It would seem where a prima facie case can be established, the court or tribunal should retain discretion in this respect.

Balancing rights and interests

Victoria has a Charter of Human Rights and Responsibilities that, amongst other things, protects the rights of people to a fair hearing. Do you think Victoria’s vexatious litigant laws strike the right balance between access to the courts and the need to protect other parties and the justice system from vexatious litigation?

As presently utilised we believe current laws do strike a reasonable balance between the abovementioned competing interests that is consistent with the Charter of Human Rights and Responsibilities (“the Charter”).

We again repeat our view that availability of legal representation can be crucial to a fair hearing in proceedings other than criminal proceedings, for example, administrative, coronial, civil, family proceedings.

The relationship between perceived vexatiousness and non-availability of legal representation should be further explored. Lack of representation may be linked to the nature of proceedings not being eligible for legal aid, and affected persons having reached their “cap” or lacking the resources generally to fund proceedings. The absence of duty lawyer services operating in some courts and tribunals or in relation to some matters further contributes to the inaccessibility of legal proceedings.

We believe the approach most consistent with protected rights under the Charter and the efficient, effective functioning of our courts and tribunals should focus on improved access to justice in this broader sense. The interests of third parties whether in the form of individuals, government authorities/ departments and so on are also further protected by such an approach whereby any legal issues in dispute can be more efficiently identified and negotiated or resolved.

Other ways to respond to vexatious litigants

What other laws in Victoria could be used to respond to vexatious litigation and vexatious litigants? Are they used too little or too often?

Are there any laws that would help courts and tribunals respond to vexatious litigants that should be introduced in Victoria?

It is our view that the laws presently operating in Victoria are generally adequate to respond to the occurrence of vexatious litigation. We would suggest the problem should not be overstated, and it should be recognised that a range of measures operate in courts and tribunals that already affect the relevant persons.

Is there any other action that courts and tribunals could take to manage vexatious litigants, e.g. should there be more guidelines or training for judges, tribunal members and court staff on how to deal with difficult litigants?

We believe further training may be appropriate and that such training should include in its targets those legal practitioners and legal support workers likely to also be involved with the relevant persons. As mentioned above, we believe a broad based approach to appropriate management including the facilitating of legal representation where it is deemed to be in the best interests of efficient and effective management of resources and court/ tribunal time is appropriate. As mentioned above also, we believe the appropriate management approach must encourage impartial analysis of legal issues, and should not be experienced as “stonewalling” or as a failure to actually engage or listen.

We believe any approach to guidelines or training adopted should be consistent with a high level of respect for the subjective experiences of the relevant person, and be underpinned by the human rights paradigm, including the substantive right to self-determination, and the cultural and political importance of the right to a fair trial.

Should courts and tribunals be able to refer vexatious litigants to support services? What kind of support services would be required?

We note that the courts and tribunals should be able to refer any litigants to support services which they deem may be able to provide relevant assistance. For example, sometimes counselling may be appropriate to assist a person to deal with experiences of loss. However, such referrals should be optional for the litigant. We refer you to concerns raised in response to the subsequent question. Additionally, we would suggest that the most relevant support services in this context would generally involve those able to facilitate legal representation.

How should the law, and courts and tribunals, respond to any mental health issues arising from vexatious litigation?

Please note those comments made in the Introduction and Overview to this Inquiry. Further to this, we do not believe an analysis of mental health status should be linked to involvement in litigation. In particular, there are many cases in our experience where individuals involved in legitimate proceedings that ultimately have vindicating outcomes become extremely involved in those proceedings. There are many reasons this can occur, including deep experiences of loss, a complex need to have some public recognition of wrongs that have occurred, a desire to change policies or practices so that others do not suffer in the same way, and many more. Some jurisdictions where this can be frequently witnessed include coronial inquests, civil claims for damages against police, workers compensation claims, family law proceedings, Department of Human Services protective applications, and others. It would seem a high level of stress can be a fairly normal response to involvement of legal proceedings. We do not believe it is appropriate to follow a path of focussing on the mental health of relevant persons (whether or not there has been a declaration that the person is a vexatious litigant) is appropriate.

A further reason is that some persons engaged with the legal system do have diagnosed mental health issues. This is in no way a bar to the bringing of legal proceedings. It would involve a wholly inadequate approach to the protection of the relevant persons rights if such a practice were to come into being. Of the many barriers before those with mental health issues, including those presently serving prison sentences, subject to involuntary treatment orders and/ or detention, and otherwise, access to the legal system as an impartial forum to have their concerns adjudicated should not be added.

While we acknowledge there are some persons who compulsively engage with the legal system and whose legal proceedings do not seem to have grounds, or identifiable and/or likely outcomes, we believe the risks introduced through such an approach are too dire to permit. These risks commence at the time of first engagement with complaints bodies, legal advisers or others. It is the duty of the court, with as much support and assistance as can be garnered from the legal profession, to adjudicate in an impartial way on the legal issues brought before it without prejudice.

In summary, it is our view that there should not be a specific response based on the fact that a person is over engaging with legal processes. Sometimes there will be an underlying mental health issue, sometimes the circumstances giving rise to the proceeding will be sufficient to give rise to the characteristics, sometimes the complexity of proceedings and their navigation without representation will explain the characteristics.

The impact of vexatious litigation in other federal, state and territory courts

If a person is declared a vexatious litigant by a federal court or a court in another state or territory, what effect should that have in Victoria? For example:

Should the declaration automatically apply in Victoria as well?

Should the Supreme Court (or other courts and tribunals if appropriate) be able to take account of the person's litigation in federal or other state or territory courts when they are considering whether to declare the person a vexatious litigant in Victoria?

We can see nothing in the terms of the present test available under the Supreme Court Act that would prevent the court from considering litigation in other jurisdictions. However, we do not think it is necessary that a declaration automatically apply.

Conclusion

FLS thanks the Law Reform Committee for the opportunity to make submissions to this inquiry.