C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 13 August 2008

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Dr C. Atmore, policy officer, Federation of Community Legal Centres; and

Mr C. Singh, human rights and advocacy worker, Brimbank Melton Community Legal Centre.

The CHAIR — Welcome. Thank you both very much for coming. We have received material that you sent and that is very welcome. I will cover a few preliminaries: our discussion takes place under the protection of parliamentary privilege so you have a fair amount of latitude in what you can say here and no-one can take legal action against you, but if you say the same things outside the confines of this hearing then parliamentary privilege is not afforded to you. Hansard reporters will be recording our discussion this afternoon and you will be sent a copy of the transcript afterwards. You can make appropriate editorial and slight changes to it but obviously you are not able to change the substance of the evidence.

We have got 45 minutes so we will leave it open to you to speak to the terms of reference and speak to your submission, and then we have got some questions. If we do not cover them then we will come back to them, and we will have an open-ended and informal discussion, I hope, on anything that arises out of what you say. Over to you.

Dr ATMORE — I will introduce my position and say a little bit about the federation, and then Charandev will talk a little bit about his particular work. I am one of two legal policy officers at the federation. The federation is the peak body for 54 community legal centres in Victoria. Community legal centres, or CLCs as they are commonly known, provide free legal advice, information and representation for more than 100 000 Victorians each year. This means that CLCs are well placed to advocate on behalf of the socially disadvantaged and marginalised Victorians in law reform and legal policy, and the federation is the peak body so it leads and supports those community legal centres to pursue social equity and to challenge injustice.

Mr SINGH — I have volunteered and worked at community legal centres for nearly 16 years now, both in Victoria, New South Wales, Queensland, Western Australia and in the commonwealth jurisdiction. My work focuses on working with imprisoned people and people who are institutionalised and their families, and particularly working with families of people who have died in custody, both commonwealth immigration detention custody, state prisons, state police custody and also working with families who have experienced death and homicide in mental health and protective custody situations. That is the scope of my work and where I am speaking from today.

Dr ATMORE — I will take you through our main concerns, which I reiterate in the submission, but we have framed them slightly differently for today just to give you another angle on it. Our background in relation to focusing particularly on the disadvantaged and marginalised is particularly important for this inquiry because we are concerned about the potential impact of any law reform on people who are often the least likely to be able to defend their rights.

First, we appreciate that a small number of what we might describe as 'genuine vexatious litigants' can sometimes cause considerable distress to other parties. However, we believe that strengthening the statutory framework is not the way to proceed for a number of reasons; first, because we think it would be an overreaction based on what the statistics on vexatious litigants tell us, and here we agree with Simon Smith in his arguments in his submission to this inquiry; also because our understanding is that most declared vexatious litigants or people who potentially have that label are in the Family Court and in our view that whole area probably needs to be examined separately. Even there we understand that for example the Family Violence Protection Bill actually has proposed provisions to deal with that issue.

We also note — and I think this is a particularly important point and perhaps one that is not always made in the submissions that so far have appeared on the website — that the group of 'difficult complainants' should not be equated with 'vexatious litigants'. We think that is sometimes what is happening in the public discourse around vexatious litigants. What tends to happen is that numbers and characteristics of problematic complainants are used to suggest the need for tighter statutory restrictions, and we would call that 'concept creep'. We are particularly concerned that in the issues that are debated and discussed in this inquiry that concept creep does not occur.

Perhaps most importantly, and again because few of the other submissions make this point, we are troubled by a number of unquestioned assumptions and slippages that occur in much of the discourse around the social problem of vexatious litigants concept creep, I have already mentioned. More broadly, I have a social science academic background as well as law, and so for that reason I have been thinking a little bit about what we might call the construction of vexatious litigants as a social problem.

There is a lot of literature on this in relation to social problems in general and I will hand out a small bibliography that I have prepared. The basic idea is that there is no such thing as a social problem sitting outside culture or

history so that at different times and places different problems and solutions to those problems will be identified, and there are lots of examples. We can perhaps discuss those in question time.

What makes a problem come to prominence usually depends on the strength of various claim-makers who have different stakes in the problem being defined in a particular way and so they will advance competing claims to try to influence politicians like yourselves and also the media. We will have more to say about that claims-making model in relation to the putative link between vexatious litigants and mental illness later on.

We also think that the framing of the current debate unfairly singles out as potential targets of statutory reform only some people who could be said to waste courts' time and resources, and arguably not those who waste it the most. Again here we agree with Simon Smith who well makes the point about corporate misuse of courts and legal processes. We think that that is a particularly dangerous slip in a time where in our view unpopular people and causes are being shut down by a range of methods that we regard as antithethical to participatory democracy.

Finally, we think strengthening the statutory framework will also not be good law reform because it will not address the issues underlying the actions of persons who are vulnerable to being labelled vexatious, and in doing so risks compromising their human rights under the Victorian Charter.

We do not believe Victoria's vexatious litigants law should be changed in any of the proposed ways, bar one, and that is that we are interested in the possibility of the Supreme Court being able to declare a person as partially vexated where it considers a declaration to be the only option. At least then, where there is a client who may be pursuing a range of legal matters at the same time, it may often be the case that even if some of those matters are regarded as being without merit, one or more may have merit, and that is a way to distinguish amongst them.

Finally, in our overview, just briefly, we have some suggested alternative ways to respond to the vexatious litigants issue. We are interested in the Victorian Law Reform Commission's civil justice review suggestion that there be a special master for case management of unrepresented litigants — bearing in mind that of course unrepresented litigants and vexatious litigants are not the same. Ideally, there should be a channelling of those few litigants who are at risk of being labelled as vexatious in order for them to be able to access legal advice and representation, regardless of matter, including free advice and representation where that is necessary. And of course we do have slightly vested interests here, but CLCs are very well placed to offer that sort of advice and representation, but we would need increased funding and resourcing in order to be able to do that.

We also think more exploration could be done of the efficacy of existing remedies, like summary dismissal, for abuse of process. We think more generally that there probably needs to be a lot more research and exploration around how the system is currently working or not working before we rush into law reform. We also like the suggestion in the Mental Health Legal Centre's submission that there be a hub point to track and refer complaints, so that people do not just get bounced from referral to referral — although, again, we reiterate that difficult complaints are separate from but obviously connected possibly in some ways to the issue of vexatious litigants.

That is our overview in a nutshell. We have actually prepared some answers in relation to possible question areas, so we are happy to respond to questions and then take it from there.

The CHAIR — Charandev, did you want to make any comments at this stage?

Mr SINGH — No. I am happy for you to lead straight into questions.

The CHAIR — Perhaps just to start off, you have talked to us about how vexatious litigants laws can be mobilised against people who are representative of unpopular causes and how we can build a construction around that, but in your experience and the experience of your membership organisations, how do you think the current laws are actually working out? Are they being deployed towards that end that you have described, are they generally being used in a positive way, or are they useless?

Dr ATMORE — So you are meaning — —

The CHAIR — Well, given there are 14 people who have been declared vexatious litigants.

Dr ATMORE — Sure, so section 21 in particular?

The CHAIR — Yes.

Mr SINGH — I guess there are two issues. One is when section 21 has actually been applied and the other is the impact of having section 21 threatened in relation to groups or classes of people. I mean one group we work with are imprisoned people. Certainly the 13th vexatious litigant was an imprisoned person. That person is the only imprisoned person in the entire prison history since 1928 to have been declared vexatious. On a rough estimate 60 000 people would have been imprisoned or gone through Victorian prisons in that time, so that is 1 person in 60 000. That does not indicate that prisoners as a class of people, historically and now, are prone to engaging or do engage in behaviour that should or would attract section 21.

Given that sort of empirical fact, I think if you look at the recent Freedom of Information Amendment bill 2007, there was a provision in there about vexatious applicants, so an expansion beyond vexatious litigants, and that was said to have been based on a recommendation of the Ombudsman in terms of his FOI review. Their recommendation was based on 81 words in the whole report, and yet the focus of the public reporting in the *Herald Sun* seemed to focus on prisoners and named a number of examples.

We wanted to research, because the Ombudsman only provided one case study. He did not indicate whether the case study about an applicant who made 60 applications was an imprisoned person or not and did not indicate whether the applicant knew that they could make one application for 60 documents or whether they believed they had to make 60 applications for 60 documents. There was no sort of context or precision about that case study, which then formed the basis for the provisions in the bill, which were defeated in the upper house.

We looked at some of the case studies that were put out in the *Herald Sun*. One of them was about a prisoner who made an FOI application about noise levels in prison vans. That may appear to be incongruous and irrelevant, potentially vexatious, unmeritorious — all of those sorts of perceptions. We actually researched that and identified that the person was an elderly man with a very severe hearing disability which was extremely painful and debilitating and that he was being transported long distances across the state in the back of prison vans. He found the pain from the noise in the vans excruciating. He made an application under the Freedom of Information Act to know whether the noise levels in the back of prison vans, which are completely enclosed, were consistent with the Occupational Health and Safety Act. We believe they were not consistent with that. He used that information to try to get some hearing protection because he was in excruciating pain. He was denied that hearing protection and then finally he was begrudgingly given a bit of hearing protection to protect his hearing.

When you look at the full context of those facts — and they may be contested, but those were the facts that we were able to drill down to — that puts a very different facet on the representation of a vexatious applicant, or someone who is undeserving of the capacity to use procedures of law that are provided to all Victorians. So there you have the empirical fact of one prisoner who raises a number of issues in his submissions — and I cannot speak to his submissions. I am just interested to know whether the committee is actually talking to people who have been declared vexatious litigants.

Mr FOLEY — We had an application from one prisoner who has been declared vexatious.

Mr SINGH — And the other litigants?

The CHAIR — We have not had any submissions from people who have been declared vexatious litigants. But obviously — and you can see that on our website — we have tried to cast our net very wide to capture as much evidence as we can from people who can give us information about that.

Mr SINGH — What we can be saying is that prisoners as a class of people, just in terms of educational access and achievement, are among the most disadvantaged and deprived in the community. In terms of information on the law, although they are enmeshed in the legal system, they have some of the least access to effective and holistic legal advice. That was picked up by this committee in its 2001 report on rural and regional legal services. Recommendation 73 was that a prisoners legal service should be instituted. That has not happened. There has been one small LSB grant just in the last few months for a three-day-a-week lawyer to prisons.

It is also something that resonates precisely with the submission of Corrections Victoria. In paragraph 7 the acting commissioner, Jan Shuard, talks about the importance of legal representation at an early stage to assist in identifying issues that prisoners bring forward in potential litigation or actual integration. She is saying in effect that if prisoners had access to competent and informed legal advice at an early stage, many — and I think almost all — of the matters that they may bring to court would be effectively resolved outside of court. In all of the prison

litigation I have been involved in and seen, there are very few that I thought necessitated going to court to determine important legal issues. Most, if not all, could have been resolved at the level of the prison.

It is not just the necessity to have legal support and advice to prisoners as a class of people to resolve issues effectively and in an empowered way but also for the department to think about that as well. There is no necessity for them to litigate to confirm what they already know about their powers and their discretions. It can engender great conflict and a spiral of conflict that leads to greater costs to everyone and few benefits, I think.

The CHAIR — Accepting what you are saying about the prisoners and the issues that they have and some of the processes that could be set in place, that could improve the situation.

Mr SINGH — Absolutely.

The CHAIR — Coming back to the question about the actual laws as they exist now around the declaration, how would you pull that together about your assessment of how adequate those laws are at the moment? Do you think that they should be altered in any way or changed, or do we just build processes around them in ways that you have described?

Dr ATMORE — Our view would be to build processes around them. Just linking in with Charandev's point — and it does take us back to claims making — clearly we are talking about the 14 declared vexatious litigants, but in terms of the impact of the laws more broadly, I think a classic example recently was in relation to Your Water Your Say. I think the state government was quoted as suggesting that some of the claims made by the protesters were 'vexatious' and actually used that word in the media. It is interesting that 'vexatious' itself now has a currency as a term of denigration. I think that would not exist if we did not to have a) a section 21, but b) a broader discourse now around, 'Oh, you are the vexatious litigant'. One of the increased amplifications of the power of that word is also that 'vexatious' has become associated with 'mentally ill', which is also used to silence dissent and unpopular people. You have sort of got a double whammy going on that 'vexatious' now can be trotted out for 'Clearly you are crazy', and, 'There is no justification for what you are saying'. In that sense I think it has a much wider impact than at present than simply the 14 who are the subject of a declaration.

Mr FOLEY — You touched on the Family Violence Protection Bill in your submission. You have a whole section there dealing with vexatious litigants and freeing up well beyond the Attorney-General the people who can make application to have someone declared vexatious, including people who are the subject to or the victims of family violence intervention orders, but with the leave of the Attorney-General. What is your view on that kind of a model, given that we have heard from one of your members that works in this area that, broader than this, it supports an approach whereby the applications for who can lodge vexatious litigants more generally under section 21 of the Supreme Court Act should be significantly broadened. What is your view on how it applies at the family violence bill and on that as a model for dealing with areas where some of the evidence we have heard was pretty horrendous in terms of how people are abused through the court system?

Dr ATMORE — In relation to the Family Court vexatious litigants specifically, as a federation we do not have a defined position on that as yet. I guess that links back to what we were saying before that we think, particularly because there are more vexatious litigants in the Family Court than anywhere else, that should be treated as a separate issue and subject to further investigation and discussion. That is also why we do not have a position on it. We are aware that our member centre at Women's Legal Service does support a broader — —

Mr FOLEY — Approach.

Dr ATMORE — Yes. But in general, outside of the Family Court in relation to other vexatious litigants, we do not support any kind of broadening. Basically we are saying the status quo is perfectly adequate for the size of the problem and that the other issues that need to be addressed can be addressed in a non-legal manner or using the existing powers of court or other processes.

Mr O'DONOHUE — Is your position the same even if Family Court proceedings move into the criminal jurisdiction?

Dr ATMORE — Again, we have been primarily addressing civil issues for vexatious litigants. The Family Court is kind of outside the realm of what we have been commenting on, I guess.

Mr O'DONOHUE — I suppose what I am saying is that issues that originate in the Family Court end up in the Magistrates Court or other courts with other causes of action that can themselves go on for years and years and that is one of the points that has been made by previous witnesses. Do you have a position on that?

Dr ATMORE — Not today, no. We would want to see that addressed as part of an investigation of Family Court matters more generally rather than qualify our general non-Family Court position.

Mr SINGH — I guess you need to understand the pathways from the Family Court into other jurisdictions to properly assess and inform your responses to those rather than just go from a focus on the Family Court to an overlap or an escaping from the Family Court and then thinking what processes need to respond to both of those situations to try to intervene to respond to issues earlier.

Mr O'DONOHUE — That is right. That is why I asked the question.

The CHAIR — Just building on from that again, and we are going to probably push this a little bit because of the evidence we have heard this morning, but besides Family Court issues, we have also heard evidence of people using the court system and the justice system to prosecute attacks on family members or ex-partners and so forth, but also organisations where banks loom very largely, and they are obviously very powerful institutions, but nonetheless we have been given evidence that sometimes this can cost them over $1 million in people using the law in this way. So we are presented with some very serious cases where people who are up to no good, apparently, are using the courts and the justice system in this way, so we have to try to find a way through this. I think it would be fair to say on our part we are very sensitive to the things you have been talking about, and it is very important to ensure people's rights, but we have to make these balances. I appreciate your response to Mr O'Donohue, but would you care to comment more broadly about that general situation?

Dr ATMORE — Again, because I read the submission from I think it was the banking association on the website and a couple of the other commercial submissions, I would like to see hard facts about numbers of clients, because I think also Simon Smith makes the point that the avenue does exist there, that if those people are genuinely vexatious, was there ever an application to have them declared as such? I am not sure that the existing law would not work if that was what the bank really wanted to see happen. I am not sure about bringing in a more draconian form of that law. It seems a bit like using a steamroller to crack a nut, when we are not sure a) how many people this anecdotal evidence is referring to; and b) whether the existing channels have been explored in those particular situations or not.

I guess in a way that links to my point about claims making, that a classic situation is when a social problem rises to prominence, that the same few anecdotes get referred to again and again, and what you really want to know is how common are they and what really happened. I notice even the Law Institute does it in its submission. It canvassed its members and its members said, 'Oh, yes, vexatious litigants are a real problem', but there are no hard facts in there about who these people are or how common they are, so I guess that would be my reservation — let us not rush in. We already do have a law about vexatious litigants. We have section 21. Surely more to the point is to do some systematic research on how section 21 works and are there a whole number of applications using section 21 that have been unsuccessful or is something else going on there?

Mr DONNELLAN — In the community legal centre's work I guess you have a limited pool of funds. You probably have to make your own assessments, I assume, of what is possible and what is not possible. Do you have an internalised system? I know you are the peak body, but generally do the community legal centres try to work out what is possible to get up and what is appropriate to defend or put forward a case on behalf of someone's rights and what is not, and is it the wisdom of Solomon which comes in each time or — —

Dr ATMORE — I am not sure if this is a direct answer to your question, but I will just speak from my own experience, and I am sure Charandev will have things to say. I am currently doing the equivalent of an articled clerkship while I also work at the federation, so I see clients under supervision. I recently had the experience of spending quite some time with a client by the end of which I basically explained he had, in my view, no legal leg to stand on, and because he was quite angry when he was telling me the facts of his situation, I was expecting him to be either quite angry or quite disappointed. Instead, to my surprise, he got up, shook my hand and said, 'Thanks very much', and looked quite happy and left.

I think that underlines a lot of what we in the community legal sector try to emphasise, which is that people often want to be able to air their grievance and they want to be told the truth in layperson's terms about whether their

grievance can translate into a legal cause of action or not and sometimes even being told, no, or even having an avenue which comes to nothing is a more positive outcome for them than a lot of the processes that they have experienced before they have seen us. I know our Mental Health Legal Centre also really stresses that with their clients, that often it is perhaps the first time that their clients have had the opportunity to sit down with someone who is prepared to listen to what has happened to them in their lives and then prepared to explain to them, without being patronising but with clarity, whether they think they have got some sort of legal avenue or not. So it is not that we necessarily have a recipe that we follow, but I guess our overall ethos is that people deserve to be listened to with respect and that our role is as a kind of broker between the community and the very often intimidating legal process that they find very mystifying and frustrating.

Mr SINGH — In our work we work with people who have experienced and continue to experience severe multiple layers of disadvantage and trauma. I might be seeing a person in custody or outside custody who has a severe mental illness, an acquired brain injury, an alcohol-related brain injury, an intellectual disability who is homeless and criminalised and who is trying to make complaints within a system where he is systemically at the margin of at the best of times. What people are seeking is to be heard, to be acknowledged and to be told realistically what is possible and what is not possible given that many complaint bodies are more focused on the management of complaints and who do not have enforceable or compatible powers. That is the real difficulty; the capacity to have independent brokerage and independent resolution of complaints. The people we see are just fighting for survival. On the issue of vexatious applicants, they just do not have that capacity; they are fighting for their lives most of the time.

That is complex and confronting and resource-intensive personal work. I guess CLCs do it not because of their limited funding base but far beyond it. It is not a funding issue. We do it because of the necessity for those relationships to happen. The time we give might be the only time that individual gets time to talk. We may not get a resolution, but at least it provides a break for that person in a continuum of experiences, which is pretty uniform.

I was thinking about the banks and the departments, whether it is the defence department or state departments. There is this internal culture of, 'We will protect the department no matter what'. I was thinking about complaints with banks or complaints with the defence department or state departments, and there is a need to say, 'Have we got someone independent of the bank to look at the full spectrum of issues and try to broker some kind of resolution or acknowledgement, either informally or otherwise, that will break the chain of conflict here?'. I reckon that is such a threshold issue for dealing with people who may be seen to be problematic or vexatious or whatever. I was thinking of the context around what claims and what kind of litigation is doomed to failure or seen as worthless or likely to fail. I was just trying to think of some examples to try to give you a different perspective on two people who may have been seen, in a different context, without legal support and union support and community support, to be vexatious.

The first example is Bernie Banton. If Bernie Banton had not had legal support and had not had union support or community support, he and other survivors of James Hardie's products would have had to litigate and litigate to try to get remedies, because James Hardie and its lawyers, Arthur Robinson, constructed the corporate veil when it decamped to the Netherlands. They would have had to fight and fight pretty much unsuccessfully in court to get remedies against a huge multinational which had injured them with a product that it had known was lethal since the 1920s. So that is a very different perspective. I know Bernie was maligned even in the weeks leading up to his death, but in a very different context, stripped of the support and the institutions that rallied around him — and the Jackson inquiry — he could have been seen through a very different lens.

Another example is Rolah McCabe. Not many but some of the vexatious litigants have been litigants against big tobacco companies. If Rolah McCabe had not had the support of law firms and not had the support of others — health groups and so on — she would have been fighting the battle against British American Tobacco by herself. Potentially she would have been alleging that British American Tobacco and its lawyers were destroying documents that denied her a fair trial and a capacity to prove her claims. Stripped of any support and any context you could see easily how she may have been labelled as paranoid or delusional or of making spurious and vexatious claims against a great company and its lawyers.

Those are just two examples I was thinking of about the difference it makes when there is support — and legal support and expertise — that can attach to resolving certain issues that may take on a completely different representation.

The CHAIR — I think they are very compelling — —

Mr SINGH — They are compelling, but — —

The CHAIR — What you have just said is very compelling and it certainly gives one pause for thought when you put it in that light, but what if I said to you that the implication in what you are saying is that there may well be other Bernie Bantons buried in the system?

Mr SINGH — No doubt there have been.

The CHAIR — Yes, okay, but we have not got an ear to them. You think the system does not in itself winnow the meritorious cases and the cases that are misdirected or misconceived and without foundation.

Mr SINGH — I think the systems surrounding the bringing of cases, and just the support systems and the intervention systems to resolve or better address conflict need to be far better at first instance so you are not locked into litigation in the Supreme Court, Court of Appeal, Federal Court and so on, and are trying to winnow claims then because by then you are locked in a spiral of conflict. The legal system and the court system is such a blunt instrument, and such an unwieldy instrument to try to intervene at a human and at a legal level at the best of times for people who are underrepresented and unsupported. According to Grant Lester's own research for people who have recently experienced severe life trauma — loss of job, homelessness; life-changing trauma — it is a very blunt, unwieldy and impersonal instrument to respond effectively to resolving and addressing these issues. In my view, much earlier support and intervention and independence in that process is a much more practical, workable and human solution than strong legal responses at the highest level.

Mr FOLEY — I emphasise essentially your comments earlier about looking for alternative dispute mechanisms that are not as legalistic and disempowering. We have heard some evidence that that system is also off-putting to some of the same kinds of marginalised groupings.

Mr SINGH — It could be. I think you need to have a range of mechanisms and a range of supports that help people articulate what the real issues are and what some of the real responses could be for that.

Mr FOLEY — Such as?

Mr SINGH — ADR is one mechanism. I am not up on the literature and the evaluation of the effectiveness of ADR for potential vexatious litigants and applicants. Independent evaluation and determination, like arbitration, could be another model; just allowing people access to advice and time.

Mr FOLEY — Like anecdotal stuff?

Mr SINGH — Like we do, which is what we do whenever there is a need to do that. I do not think the responses need to be overly complex; they just need to be accessible, meaningful, sometimes enforceable, independent. Those are some of the characteristics or qualities of the responses that need to be engendered, in our view.

Mr DONNELLAN — It is a bit like early intervention. If someone has got a speech impediment when they are a young kid — I know this sounds a bit silly and unrelated — you need to get in early so you can actually deal with the issue. You are saying, deal with these issues at the very front-end stage to give people access to work out whether it is realistic, unrealistic, what are their rights, what are not their rights early, not by the time it is in the County Court or the Magistrates Court. It really needs in a sense to either be knocked out before it gets there, with logic and compassion and listening, then their rights are recognised and they go ahead.

Dr ATMORE — Which I think is also consistent with this government's policy around ADR and encouraging ADR. It is not just a question of encouraging more ADR but making sure that the quality of ADR is such that people find that a satisfying process of resolution. I think a lot of the submissions to this inquiry have emphasised that one of the issues for people who get labelled potentially vexatious or even just difficult is that they see the law as a sort of last resort that is actually going to be able to wield some power on their behalf. I think Darebin Community Legal Centre goes into some detail in its submission about prisoners' experiences with the Ombudsman's office. They have tried all those avenues, they have got nowhere, they have got more frustrated, they have felt more ill treated than before they started and legal action is the last resort. So from a cost-effective perspective alone it would make much more sense to invest more in those other systems and structures.

The CHAIR — I am conscious of the time, but in your submission you talk about pre-emptive controls that courts might have available to them that could ameliorate some of these issues. Could you just talk to us a bit about what you are thinking there.

Dr ATMORE — I think that is actually a phrase of Simon Smith's, a sort of catch-all for things like better case management and use of summary dismissal for abuse of process. But even more broadly, and I guess they are not really pre-emptive controls as such, but they sort of share with them a solution-oriented approach, which is continuing to emphasise trying to make the court systems more accessible: materials that are available to people who come to court should be in clearer language; assistance for people who have communication difficulties, whether that be because of a disability or because English is not their first language or any other reason; more interpreters; all those sorts of issues about making the law more transparent and more accessible so that people are also then assisted in understanding more about if you do go down this path what is required and what is appropriate and what is not appropriate.

Mr FOLEY — The view that you touched on a bit earlier about the English model, I think it is called, of the restraint orders and the gradated approach to partially vexatious and all that kind of thing, do you have any further view on how that system might work and whether that had any merit?

Dr ATMORE — I guess only to the extent that if it offered more options without upping the ante in terms of spreading out who can get someone declared vexatious and on what ground. We would not want to see something like that grafted on top of section 21. It is really more, I suppose, food for thought in terms of the partially vexatious strategy.

The CHAIR — The last one, which we have kind of moved around a bit but we will want to make sure we get your view on, is the mental health issue. You talked about Professor Mullen's work and Grant Lester's work earlier. I think you touched on it passing through. This has been brought to us, and we have met with both those researchers and heard what they have had to say. I understand what you are saying, that we have to be very sensitive to people's situations and not allow the labelling to obscure what the cause and what the legitimate claim is, and we also appreciate your observations about the construction of dispositions and pathologies and all kinds of things that we do as a society. But nonetheless, having said all that, it is also true that people can have conditions which are objective and factual which systems need to deal with because they manifest themselves in different ways — courts, for example, and members of Parliament. Indeed, I guess your own community legal centres would have to be dealing with this as well. Could you respond a bit to how you are seeing that problem?

Dr ATMORE — I appreciate all the caveats to your question — —

The CHAIR — Yes, because it is complicated.

Dr ATMORE — But we would still want to emphasise that it concerns us that the association between mental illness and potentially vexatious litigant has become a central feature of the debate, because I think, as the Mental Health Legal Centre pointed out, the vast majority of their clients, people with mental illness who pursue their rights, could not be labelled as potentially vexatious litigants, and people who are prone to be declared vexatious litigants are not necessarily mentally ill. The other issue, of course, is — and again this is the social construction of mental illness — that mental illness and so-called mental health are on a continuum. Just because somebody has been pushed over the edge does not necessarily mean that they are mentally ill.

The CHAIR — No, absolutely.

Dr ATMORE — Particularly someone who is suffering trauma or has a momentary lapse and flies into a rage. We have all been there in relation to hyper bureaucracy. The difficult complainants issue, I think — —

Mr FOLEY — Not us.

Dr ATMORE — So I guess our concern is that it does not just get channelled into 'people who are prone to pursue claims that we think are unmeritorious must automatically be mentally ill'. And we are not even sure whether concentrating on how you help those people who are mentally ill is really going to deal with most of the problem that you are interested in.

The CHAIR — You do not even think it is a useful question?

Dr ATMORE — I think it is a question out of proportion to the issue. Because I think the issue of assisting people who have dysfunctional behaviours — which does not necessarily mean they are mentally ill — is a separate question, which I think the Mental Health Legal Centre deals with well in its submission, and there is not much we can add to those suggestions, I do not think.

There are two other things, I guess, that we could add to qualify that. One is — and again this reflects our community legal sector focus — that in some of the literature about vexatious litigants there is an assumption that people who pursue hopeless cases must be mad. The reason why they must be mad is that the legal system and justice are the same thing, so that if they do not have a case in the legal system it must mean their cause does not really exist. Whereas in our experience — and historically this has also been shown to be true, with people like Nelson Mandela, for example — there have been many occasions when people have not been able to receive justice through the legal system and yet they are seen to be vindicated subsequently and that they did have a genuine cause.

Mr FOLEY — The whole relationship between courts and the legislature is full of that — one mucking up and the other stepping in.

Dr ATMORE — Yes. So it may well be that for some people the experience of that tips them over the edge, which is a situational form of madness, if you like; that is perfectly understandable.

The other thing that we would want to stress is that it is not for the legal system to decide who might be mentally ill, in the same way as we would not expect psychologists to be able to assess whether a case has legal merit. I think there is a lot of turf claiming going on from the mental health profession around this issue which I think has to be quite carefully delineated: where the legal matters end and where the mental health — —

Mr FOLEY — Psychiatric creep.

Dr ATMORE — Yes, and there is a lot of that.

Mr SINGH — Just quickly, in my 15 years of working with imprisoned people I have not seen a nexus between mental illness and behaviours or classifications in terms of vexatious litigant, none at all. What I have seen a nexus in and where I think the resources need to go is the nexus between mental health and harms and deaths in custody and prisons, homelessness, and being churned through the criminal justice and prison systems and institutionalised systems. I think that if you are looking at responding to mental health issues then you should face those issues front on and deal with them rather than see them through the lens of vexatious litigants and applicants, because certainly in the criminal justice system and the related systems, the forensic health systems, the issues are mental health issues and not vexatious litigant issues. And in terms of the resources that you apply to 14 people in 80 years, I think there has to be some real cost benefit and social justice considerations and ethical considerations applied to funding and resourcing for those issues rather than dealing with mental health issues through a very tiny prism. Those are compelling issues that need to be responded to still and will continue to be because of longstanding neglect and invisibility.

The CHAIR — Charandev Singh and Christine Atmore, thank you very much for coming along this afternoon and sharing your expertise with us, and thank you for the submission you have sent in as well. As I said earlier, you will receive a copy of the Hansard transcript and it may be the case that either Kerryn or Susan will make contact with you again to get some refinements on information we need. Thanks very much.

Dr ATMORE — Thanks.

Mr SINGH — Thanks for your time.

Witnesses withdrew.