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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Mr. M. Thomas, policy officer, Mental Health Legal Centre.

The CHAIR — I welcome Martin Thomas. Thank you very much for coming, and thank you for the material you have provided which we have looked through. There are just a couple of preliminaries before we start. The discussion we are going to have this morning is covered by legislation which affords you parliamentary privilege. Some of the things you might say here might be upsetting to people, but they will not be able to take any legal action. But if you say similar things outside the confines of the hearing obviously that protection will not be afforded to you. Hansard staff will be taking down what we discuss this morning, and you will be sent a transcript afterwards to which you can make minor editorial changes but obviously not changes to the substance. We have just under half an hour. I will leave it to you to talk to your submission and to the terms of reference, and then we will see where we go from there.

Mr THOMAS — I would like to thank you for the opportunity to attend today to present the legal centre's position on vexatious litigants. I should let you know in advance that I did not prepare the submission; the policy coordinator, Vivienne Topp, did that, but unfortunately she is on leave at the moment and so I have been asked to attend in her place. I will do my best. It is not my area of expertise, but I have done as much research as I can on the matter.

I think the position we would like to convey at this point in time, in summary form, is that a lot of clients we see are very frustrated at the thought of not having being heard. This is a fundamental point that can come from the current state of the system in terms of lack of legal representation and the maze of bureaucracy that a person has to encounter when they have a mental illness, and they find things particularly difficult by being affected by an illness and also by procedures not being properly explained to them in terms of VCAT and the courts in general, and especially in the preliminary stages not having a clear understanding of where they stand, what they can expect and what other parties will be saying. This comes from an inability in terms of the legal representation they receive to spend and the amount of proper time spent with them.

Our position is that a lot of actions are threatened but the actual state of vexatious litigation is not extreme. There are not many people who are actually labelled vexatious litigants in our client base, but people are threatened with that, and to a large extent that can actually be avoided by people having more time given to them early on especially in terms of legal representation. I would like to speak to that issue today.

I would also like to challenge the notion of querulous paranoia which seems to be back on the agenda. It is a very interesting historical idea which seems to have re-emerged in a different format. I think the actual phrase that is being used at the moment is ' unusually persistent complaints', which is a very contemporary way of saying annoying people you have had enough of at this point. We would like to challenge the notion of querulous paranoia as a diagnosis and unusually consistent complaints, and try to contextualise that in terms of a person's experience in trying to understand the bureaucracy.

One other point I would like to make is with regard to the model that is being proposed — the role of the Attorney-General. We think it is very important that only the Attorney-General has the ability to act in the matter in terms of declaring someone a vexatious litigant. I will be happy to respond to any questions you may ask with regard to our client base.

The CHAIR — Your submission notes that people with a mental illness who are frequent users of the legal system are vulnerable to being labelled as vexatious. You said that currently you are not dealing with any who is labelled 'vexatious'.

Mr THOMAS — Currently.

The CHAIR — We have the formal declaration, but then we have people in that middle area who are regarded as being a nuisance or an over-complainant, if I can put it like that. You are saying that that whole syndrome that people get caught up in is a failure of the system to support them properly through that?

Mr THOMAS — I would not say it was entirely a failure of the system. I am saying the system does make things difficult for people who are experiencing ill health, and I also think that the system is intolerant of unusual ways of presenting an argument. It is a system that can create that particular phenomenon where a person gets upset and represents themselves in what is perceived to be an uncomfortable manner, but predominantly I think it is the idea that whilst no-one has been labelled a vexatious litigant, there is a threat there and that threat — —

The CHAIR — Is that actually articulated to people, 'If you persist with this, we will seek an order', or how does that happen?

Mr THOMAS — I can give you an example that was put forward to me by the principal solicitor of our legal service. It is an example from the Office of the Chief Psychiatrist. Do you mind if I just read it out to you?

The CHAIR — No, absolutely not.

Mr THOMAS — That would probably be the easiest way of communicating the information. This has also been forwarded to the Federation of Community Legal Centres, so you may have heard this material already, but I think it is important to have it in the Hansard transcript.

The CHAIR — Go ahead.

Mr THOMAS — The Office of the Chief Psychiatrist found that there had been a breach of the Mental Health Act in the case of a man who was given ECT, which is electroconvulsive therapy, without a fresh consent after seven days had passed between treatments. The office referred the client to the health services commissioner to attempt to resolve the matter. Mental health services refused to attend conciliation or provide more than an apology and substantial amendments to its ECT policies. It should be noted that a leading personal injuries firm advised that the client should expect to get an amount of between 5000 and 8000 in settlement. So this is a genuine matter. A commercial law firm has said this is a genuine matter. The health services commissioner did not have the power to force parties to conciliation. However, they also seemed alarmingly untroubled by the fact that this client would receive no opportunity for conciliation let alone compensation.

It seems to our centre that the health services commissioner may have formed the view that this person was an unacceptably persistent complainant. They had placed a bar on him complaining about matters that relate to concerns more than one year old. So it is not pressing legislation, it is putting procedures in place to actually stop people from pursuing things, even though it is not legislatively based; it is just procedural in that concern. This was subsequently modified when our centre sought a change to allow the client to complain about the matter not previously raised with the health services commissioner.

In our centre's experience the health services commissioner and similar bodies can be far too ready to determine that complaints from complainants with psychiatric disability are likely to be unmeritorious. Too readily declaring people vexatious litigants only compounds the difficulty for people such as this client, who have legitimate grievances in attaining justice. It will only increase the likelihood that bodies such as the health services commissioner will not take a rigorous approach to securing justice for complainants and well-resourced parties who have engaged in unlawful or tortious conduct will further avoid appropriately compensating injured parties. Had this man been barred from action, he may not have obtained an apology and the bar on him raising older matters with the health services commissioner may not have been lifted.

It is the threat of being labelled vexatious and the perception of being troublesome that really is concerning to our legal centre for our client base.

The CHAIR — Is that frequent?

Mr THOMAS — I can get back to you on that matter. It seems to be not unusual, is the way I would like to phrase it at this point. It is not uncommon. Frequency is not a matter I can speak to at this point, but I can get back to you on that.

Mr CLARK — We have received a lot of evidence from different perspectives, and a lot of people have provided us with very helpful examples that illustrate particular points such as the one that you have just given. My own conclusion, tentatively so far, is that you have got a huge spectrum of different types of people who could become persistent litigants or complainants. I suppose my question is, do you agree that notwithstanding there are people who have got legitimate complaints, there is also a category of people who regardless of whatever reasonable thing you or the system might be able to do for them, will persist in bringing complaints that most of us would regard as unmeritorious? Do you agree with that proposition, and if so, do you have any view as to what gives rise to that sort of behaviour and how the system should respond to it?

Mr THOMAS — From our perception, people who are referred to the centre have not had things explained to them very well at all. They are in a position of vulnerability. They are usually financially insecure. They have not received good legal advice up until that point. What I would say is that people are needing to have more time spent with them very early on. People just want to be heard, and if someone can sit down and hear their argument, be it a legal representative or even in court, if it can be explained to them more clearly and more succinctly and a bit more time spent at that part in the proceedings, then a whole lot of things could actually be avoided. I do not doubt that there are examples of vexatious litigants in other areas, but from our understanding, in terms of our demographic, it tends to be more a perception of their behaviour rather than the actual case in point. So it is the way they respond to it in terms of their emotionality that is off-putting to people rather than the actual issue at hand, and that is what clouds it for our client base.

A person can be labelled vexatious because of their mannerisms, because of the way they conduct themselves, and that detracts from the very fact that they do have a genuine legal concern. So with our client base I would say it is more a matter of having things explained to them, more resources being dedicated to people who are particularly vulnerable financially and in terms of their health. That means, obviously, more money for community legal centres and the like, which will actually take time to sit down with the person and perhaps spare them and the system from unnecessary financial cost. A small allocation earlier on can actually save the system a great deal later on and can actually defend the person from being labelled vexatious which will affect their future conduct.

Mr CLARK — In your opening remarks you seemed to question whether or not there was a recognisable mental condition or disorder relating to querulousness. Is that a fair conclusion from what you have said? And if so, could you elaborate on what leads you to that conclusion?

Mr THOMAS — It is an interesting diagnosis. I am sure you are all aware it was something that was early 20th century and eventually sort of faded away, thankfully, with time. It does seem to be back and it does seem to be a common — not a common, but it now seems to be an emerging way of explaining particular people who find bureaucracy baffling. I do not think that is an unusual thing, to find bureaucracy baffling, and some people respond to it in ways that are perceived to be threatening or are perceived to be unfortunate and that make them uncomfortable. I keep forgetting the present terminology — unusually persistent complainants — which is in the paper by, I believe — —

Mr FOLEY — Mullen?

Mr THOMAS — That is correct — —

The CHAIR — Just to be clear, Professor Mullen and Grant Lester came to the committee and gave us a presentation, so we are familiar with what they were saying.

Mr THOMAS — There is very interesting response to the main article they have written by Dr R. Pal. It is in the *British Journal of Psychiatry*. His response to it is very interesting. Would you mind if I read out that response?

The CHAIR — No, not at all. Go ahead.

Mr THOMAS — There is a particular section, and if I can find it in my notes I would be delighted. I think he makes an excellent point. This is in the *British Journal of Psychiatry* (2004) 185 at page 176. This is a response to the article by Lester, Wilson and Griffin:

> The number of letters, phone calls etc. reported by Lester et al … may be part of 'normal' human behaviour and reaction to bureaucracy. In a democratic country, we all have a right to protect our civil liberties. Often litigants lack knowledge, have no idea of procedures, and are misled by authorities who have a vested interest in protecting themselves. To label this behaviour as an 'abnormality' or something that requires psychiatric intervention is ludicrous. Indeed, I note the Royal College of Psychiatrists runs a very successful anti-stigma campaign to stamp out discrimination against those with mental illness. The diagnosis of querulous paranoia runs the risk of misuse by those who wish to use psychiatry as a manner of silencing criticism. The behaviour exhibited in the study is indeed a normal reaction to the circumstances faced. 'Normal' of course depends on many variables such as response time of the complaint officers, failure to address questions, replies to phone calls —

and the likes —

> These factors have not been addressed.

In response to the study put together by Lester and others this doctor is saying that you have to understand that perhaps some people will respond to bureaucracy in this way and what needs to be considered is how the bureaucracy itself was attempting to deal with them, not just how a person is attempting to deal with bureaucracy.

In terms of the diagnosis, I think it is quite a dangerous one. It takes what is a legal issue and it applies a medical model to it. I think it is highly inappropriate to say that this person no longer has a legal matter; they have a medical matter. That is an incredibly dismissive approach to the legal system and to a person's legal concerns.

Mr FOLEY — I am not exactly sure of the client base that gets referred through to your centre, but having just recently done a submission to the state's mental health review on my own local area and the interaction with police and the justice system, if there is that sort of rough end of things — to be blunt — which comes through with mental illness and some of the exposures to the justice system, what does that do to pre-position some people with mental health issues in the justice system broadly? Does that contribute to the sorts of things you are talking about? Do your clients come with baggage through the justice system already?

Mr THOMAS — I am sort of hammering, banging on a drum here about being heard. But our client base tends to have an experience and a life where they are being ignored and overlooked. People who are referred to us have usually been found by other law firms or community legal centres as too difficult to deal with, for example. As I have said already, this is a client base that is usually financially insecure and is in need of good legal representation, as we all are when we are in positions of going through the legal system. The important point about aiding them in terms of having a therapeutic jurisprudential approach to their interactions with the legal system is to actually take the time to sit down with them and listen to their concerns and provide an ear and to provide good legal advice. That is often the best thing that can happen for them in terms of their health and in terms of their interaction with the legal system, which can be significantly improved in terms of time and resources.

People who come to us usually have a certain perception of a system which they see as ignoring them. What we try to do is give them information which will assist them in understanding that system better, and therefore a lot of emotional feelings they have that they have invested into their action or their claim or their issue tend to subside. The legal approach with proper legal advice can actually diminish an emotional response. That is what we find.

Mr FOLEY — Delivered appropriately and in a timely manner?

Mr THOMAS — Yes, because when a person goes to a lawyer they have got a certain time to say everything they need to say, and that is highly inappropriate to someone with a psychiatric disability. They often just cannot present information in a cogent, logical fashion. It is just asking too much of them. That can cause frustration and that can be enacted out upon bureaucracy itself. It is just one of those things where it becomes a way of expressing how frustrated they feel.

The CHAIR — It is a tricky area this, and it is not for the committee or for me to put a case on what Professor Mullen and Dr Lester put to us.

Mr THOMAS — Of course, yes.

The CHAIR — Our job is to listen to expert views, and in the end we have to make a judgement about where we fit these things in in our final report and recommendations. But I think it is fair to say — and other members of the committee can correct me if I am wrong — that the approach they were coming from was not of saying that this querulous paranoia was a mental illness but that it was a behaviour that manifested itself. In the kinds of descriptions they give in their documentation it is a recognisable human trait. A whole lot of things are, and I know professionally you could identify and have come across people behaving in this way.

Mr THOMAS — Of course.

The CHAIR — Having said that, if it is something that needs particular responses to it, I think it would be fair to say that Mullen and Lester were sympathetic to having a responsive court, having a responsive bureaucracy and having a responsive complaints mechanism that are alive to the breadth of how people can react to things.

Mr THOMAS — I did not want to give the impression that I was undervaluing their research in any shape or form. The point I was trying to make was that it was transferring a legal concern over to a medical concern.

The CHAIR — That is exactly the point of our issue — that is, we absolutely did not want to medicalise a problem which we are seeing as a public policy issue and about how we can modify our laws and procedures so that we are able to give people full access to justice so that people can be heard properly, which is where we are coming from, but we did want to interrogate that particular area a little bit further.

Mr CLARK — I want to follow up on that, because we are converging in this respect to potentially a common view about where we go forward. You in particular made very cogently the point that often people just need more time to have things explained to them. From a public policy systems point of view the question then becomes how can you best achieve that, because it is very time intensive. Arguably it is a gradation between this sort of explanation and counselling and cognitive therapy. Whatever you label it or characterise it as, it all takes a lot of time and skill. Clearly your service provides that to some extent. You have mentioned how the courts could perhaps spend more time in explaining their judgements. Are there other reforms or approaches that you would recommend that can ensure that people get the sort of explanations that they need?

Mr THOMAS — I believe Vivienne in her submission had a few ideas that have been touched upon today. There is an interesting one, which is the idea of a way of tracking the proceeding and a way of reporting back to the person where they stand on a more regular basis so they do not have to pursue the matter themselves, so that on a regular interval they are allowed to know where they stand. I think that is a very important thing. She referred to a hub point, a centralised referral system, that tracks and refers complaints to assist a complainant to find the right complaints process, so that when they are starting out they do not get frustrated by entering into a system at the wrong point of entry. They can save a lot of time and frustration. Also, once the complaint has commenced, then there is the idea of allowing them to know where they stand at regular intervals. It is an excellent way of reassuring a person that they have not been forgotten and that their issue is important, and to take a certain pressure off the bureaucracy by not having different people throughout the process constantly having to provide a service that could be done automatically or could be done by a specified person.

The CHAIR — Some stakeholders have suggested to us that we could make better use of alternative dispute resolution processes. I know you have touched on that as part of the suite of tools that could be available, but do you have experience of that with your organisation? Do you process people that way?

Mr THOMAS — I could not personally comment on it. All I could say broadly is that we are in favour of alternative dispute resolution as long it does not become ghettoised — that is, because you have a mental health issue and you have a legal concern you automatically have to go to alternative dispute resolution because you may not really have a legal issue and may just need to have someone talk to you. Alternative dispute resolution is always a good idea that can prevent a lot of issues from going through expensive procedures. People with mental health issues are no different in that regard, but we are concerned in general that things do not necessarily get funnelled into alternative dispute resolution because a person has a mental health issue or because it is the Mental Health Legal Centre involved.

The CHAIR — What about training of judges and court officials?

Mr THOMAS — Unfortunately I did not get time to ask — —

The CHAIR — And lawyers.

Mr THOMAS — This is where legal education in general would be a good starting point. I have not had time to ask the principal solicitor whether we have actually provided that service or not, but I think it would be something we might actually be interested in doing. I can get back to you on that if you would like to know where that stands.

The CHAIR — That would be great. I think we are just about through the issues that we wanted to raise with you, and you have covered the ones that we have not raised.

Mr THOMAS — Thank you for understanding my — —

The CHAIR — No, thank you for your time, and we thank the centre for its submission. I am sure Susan and/or Kerryn will be in contact with you if there is more material that we need, and if there is anything you come across that might be useful, send it along.

Mr THOMAS — Sure.

The CHAIR — Thank you very much.

Witness withdrew.