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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 6 August 2008

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Witnesses

Dr G. Lester, forensic psychiatrist, and

Professor P. Mullen, professor of forensic psychiatry, department of psychological medicine, Monash University and Victorian Institute of Forensic Mental Health, Thomas Embling Hospital.

The CHAIR — I welcome Grant Lester and Paul Mullen. Thank you very much for your submissions and the materials that you sent us and for your appearance. You are giving very generously of your time this morning. Before I introduce the rest of the committee I need to advise you that our discussion takes place under Victorian legislation which affords you parliamentary privilege. Anything that you say here that might be possibly subject to litigation is protected, but that protection is not afforded to you outside the confines of this hearing. Hansard staff are recording our discussion. You will be sent a copy of the transcript, to which you can make minor changes. We have just under an hour, so we will leave it to you to step us through your presentation, which I hear is interesting, and then we will have a general discussion and pick up some questions that we need some clarification on.

Dr LESTER — Thank you for inviting me. I am going to be talking about the pathology of complaint. Obviously I think we have got to start with recognising that we are talking about a spectrum, and vexatious litigants are at one end. Of course being vexatious litigants does not make them particularly part of psychiatry's purview; some of them are, and you will understand a bit more as we go along.

If you look at the second slide I have distributed, essentially what we have to recognise is that there are three discourses out in the internet airwaves: there is psychiatry, which is about querulents' querulous paranoia; there is the legal discourse, which is about vexatious litigants; and nowadays there is a third discourse, which is really about the alternative dispute resolution and ombudsmen's' offices, which is about unreasonable complaint behaviour, and that is the work that we are currently doing with a consortium of Australia's parliamentary ombudsmen's' offices. We are looking at developing a management suite to work with these people, because unreasonable complainants start a long way away from the courts these days. There are lots of alternative ways in which they impinge on government and governmental organisations.

If we look at no. 3, we look at complainants and litigants. Very quickly I am going to be talking about a spectrum. I will talk to you about querulous paranoia, which in psychiatry is its heartland, if you like, and then perhaps one of the discussion issues — I will not talk about it unless you want to — which would really be the role of psychiatry, the role as it has been in the past, what we currently do and we could do in the future.

If we look at the normal complainant, looking around here I am sure we are all normal complainants. To understand what a normal complainant is, perhaps I will give a sense that it is all about focus and perspective.

As an example I quickly give you perspective. I get home and find that there is a bill from a water board that is \$20 too much. The issue of perspective would be this: I would ring up, and if I can get through the automatic phone system to a real person they would say to me, 'Yes, sir. You will have your \$20 back in 5 minutes'. Obviously that does not happen. That is not going to happen. What will happen is I will get through the phone system, I will get on to a person and they will say, 'Yes, sir. If you send us in the last 30 years of your water bill, we will in return give you a 30-page document which we would like you to fill out, and then in three months time — if in fact everything you have told us is true — we will take 20 bucks off your next bill'.

Perspective will say to me that for 20 bucks, all that time, I have not got all those documents, and I cannot stand 30-page questionnaires. So to hell with 20 bucks. Perspective is not that I give up. Perspective is the amount that I stand to gain or lose is weighted in comparison to the amount of emotional, physical, financial and legal effort I put into it. The first thing about normality is, when you look at them, you can see what they stand to lose or gain for the amount of effort they are putting in. Perspective — that is all we are talking about.

The second thing is focus. I get on to that person and they are inordinately rude; they have had a very bad day on the phone and they are sick of people complaining about insignificant things, and they are just rude. They say, 'Why don't you get a life, Doc? Twenty bucks is nothing to you', and slam the phone down. I say to myself one of three things. Firstly, I can say, 'They are right. Who cares about 20 bucks? Why don't I get a life?', and I forget it. Secondly, I could say, 'No, I am a middle-aged bloke. I have got a family. Twenty bucks could come in handy somewhere along the way in that situation. I am going to ring back and try and get on to another person. I know they have had a bad day; I will just get on to another person'.

The third thing I could say is, 'How dare they speak to me like that! Do they not know they are talking to a world-renowned expert in querulence? They have made a big mistake today! I am going to ensure this person is roundly chastised and punished. I want her sacked, and before she is sacked I want a public apology from her, I want a public apology from the CEO of the board, and I will also ensure that she is whipped and scourged'. For

those of you who are knowledgeable, you know that whipping and scourging is the same thing, so I want her doubly whipped. That is the key to me, because I am not going to rest until I get that.

What you are seeing there is a loss of focus. I had a fighting chance — actually I never had a chance — to get my 20 bucks back, but I pretended I had a fighting chance of getting my 20 bucks back. But now I am spreading my effort out. When you see people beginning to lose focus on what their primary grievance was and beginning to find lots of other things, you begin to think to yourself, ‘What is going on?’, and the question psychiatry answers is: why? It is because you find when people lose perspective and lose focus there is normally a psychological reason that you will not be aware of underlying the drive for these things.

The next slide is about the difficult complainant. ‘Difficult’ is not a psychiatric term. ‘Difficult’ is simply the term that the judges and ombudsmen’s offices use at the end of the day when they come home and talk to their spouses. These were difficult people. Why are they difficult? They are aggrieved, just like anyone else, and it is important to recognise that the quality of being difficult is not related to whether their grievance is righteous or not; it is related to their behaviour in the pursuit of the justice. ‘Difficult’ is the way in which they are behaving.

The first thing you pick out is that they have victimisation. Their language is one of being victimised — that is, ‘This is being done, and this is typical of what has happened to me in my life, and I am not going to stand for it this time. I have stood for it before, but not this time’. Or you hear them saying, ‘I do not know why it was done, but I will work it out. This was done deliberately’. So there is victimisation coming from the difficult person, and their language is all about, ‘How dare they do this to me!’. There is an overly optimistic expectation of what is going on and of the damage. ‘Do you not understand that this is being done to me!’. So they inflate what they want — the compensation — and they inflate the reparation. They want punishment of others, and essentially what you get is a sort of sticky, irritable, altogether unpleasant experience for everybody.

But the vast majority of the difficult people do finally settle, and they reason they do is perspective — that is, there is still light and they have life left. They have something that they are not willing to spend in the pursuit, so the majority of people only settle because it is a time value element. It is very important to recognise that the vast majority of people — and we have lots of unreasonable complaint behaviour — do not go on to become querulous. That is because they have still got something in their life.

There is no psychiatric list of ‘difficult’ complainants; this is just a list of those who can become difficult. We do not have time to go into it today. You will see that some are because they are badly managed, just like the woman who was rude to me. I could have gone on to become difficult.

Social activists, because they lose focus, are not interested in the 20 bucks. They are interested in changing the computer system of the water board. And so for the person at the end of the line who can give them 20 bucks but nothing else, it is in a sense a mismatch of what they can do and what they want. And then there are a range of personality issues and complicated groups all about experience — an emotional experience that somehow or other triggers off a response. As I say, we can talk about that later if you want.

There is of course a small group of people whose claims arise from active schizophrenia or an active psychotic illness, and all complaints organisations, ombudsmen’s offices and judicial officers will have had in their courts at times people who believe they are persecuted, who believe there is a conspiracy against them and who believe someone — probably the army — has implanted something in their ear which now broadcasts their thoughts to Queen Elizabeth, who is specifically telling the Victorian Parliament exactly what he wants, because every time he goes near the Victorian Parliament he hears his thoughts broadcast out the doors. Those issues are very important to recognise. They do not become vexatious litigants, by and large, because they do not have the obsessional quality, the drive and the consistency. They have bizarre beliefs that vary from day to day and from moment to moment, and you cannot actually manage their complaints. You can really only try and get them into some form of assessment of psychiatry. So there is that sort of group. That is the blind Freddy group — blind Freddy can tell these people are not well.

There is another group, which of course is the group Professor Mullen and I have the most interest in, which is the querulent group, and they are not the blind Freddy group. They in fact look just like you and me. In fact I am hoping they look more like you than me. They are essentially individuals who are not born querulents. No-one is born a querulent and no-one is born a vexatious litigant. You become that over a series of events, and we will talk very quickly about those. What is it about the querulent? Essentially, at the heartlands, they show a relentless and

prolonged pursuit of justice. They have had something gone wrong, and it is not that they want their 20 bucks back. It is that 'This has been done to me. This is the injustice that I have experienced, and I am not going to put up with it anymore. This is typical of my life, and now see what's going on!'. So it is not just the 20 bucks; it is the fact that this woman was rude. 'I was humiliated, and now the water board has shown negligence in not sacking this woman, so I am going to sue the water board, not just for the 20 bucks and not even for the humiliation, but for negligence. I am going to sue the ombudsman, who has not taken this up and is in fact I think, negligent if not conspiratorial. And then I will probably at some stage or other have a lawyer in front of me in court' — and I will talk to you about that perhaps later on — 'whom I will very quickly get rid of because that legal counsel never quite says what I want them to say and in fact gets in the way between me and the judicial officer, because this is a moral issue' — and we will talk about that in a moment. 'This is morality. This is something that has been done inside of me. It is almost like everything in my world now is either getting in my way of getting justice or helping me, and I can switch back and forward very quickly'.

The key to understanding this group is that you can offer them everything they ask for and they will then reconstruct. You can bring them to mediation, give them everything they want and then a day later — as I heard one of the gentlemen before me say — they will come back with something else that has not been met, because there is something missing in the understanding of the process. You might think that they want what they say — they want reparation and they want compensation — but in fact psychiatry has found that they really want vindication. We do not really have time to talk about that deeply now, but vindication is essentially that they are looking for proof of worthiness of their life through the pursuit of this particular complaint, and that is something I have never heard given to them in a court or given to them in an ombudsman's office.

Essentially if you are a querulent you are most likely to become a vexatious litigant when you are middle aged. You will most likely be a bloke — four to one in comparison to women. You will find in the history that this will have grown from a little \$20 water bill to suing for negligence and humiliation, and they will be suing their legal counsel and their legal counsel will be suing them, until one of the more senior members tells them, 'Do not do this. This is not good for you'. They are going to be suing judges for being conspiratorial or negligent. There are going to be complaints all around. They are going to be using FOI — enormous amounts of FOI. They will be in a sense consuming everything. I heard you talking about monetary punishments. I give a lot of talks to insolvency practitioners, and they will hate you for the thought of using monetary punishments because it is not going to stop them. All that does is provide them with another avenue and another area for them to pursue their legal complaint. So unfortunately when you get to the extreme end — and you may pick up some along the way; remember, it is a spectrum — money ain't going to solve it. In fact it just gives them another place for them to take themselves to court. Perhaps I will just move on.

Aetiology: it is a wonderful exploration of understanding, and there are societal factors. You can see some of those factors there, and we can talk about it later if you want. I am only going to focus really on the individual factors. You need a specific personality structure. There are going to be obsessional traits, because they have to put that much effort into it. They are going to be pedantic. They are the ones who love the 30-page documents; they are the ones who love filling out every detail in the whole process. They are combative. There is energy to them. They feel the world has done them badly, and they are not going to let themselves be mistreated this time, so there is energy to them. 'Egotistic' means that they have got no empathy. This has been done to them. It might have been done by a mistake, but they cannot understand that human beings make mistakes. 'No, this cannot be'. There is a paranoid element to it, so that they are distrustful of the world. 'Whatever happens does not happen by accident; it happens deliberately. It has been done to me'. They are going to ensure that they make someone pay for it. There is this sort of mixture of personality traits.

Then ageing comes along, and most of us here I can see have got to middle age — some of us have not — and will recognise that mortality is something we actually are aware of. Our parents become sick or die, our best friend has a heart attack or we might have a serious health scare. We begin to recognise that truly life does end. What that means for these individuals is this, and it is very important to recognise: these people have always lived for the future, and they feel that they have never achieved their goals in life and they never really did what they wanted to do in life, but that they will in the future. So what happens when ageing tells them that the future now is foreshortened? This is a massive shock to these individuals. They now find the threat of not being able to achieve their goals in the future so frightening that should, for instance, a \$20 water bill go astray, they may vent for the rest of their life or they may vent all their energy in trying to have this particular complaint be the vehicle by which they achieve greatness. In other words, what they are wanting from the courts and from the complaint organisations is for them to say finally at the end of the day — vindication — 'Yes, you truly were a great person. You truly could

have achieved a lot, but you were held back by the vindictive and malicious individuals in your life; everyone from the obstetrician who delivered you through to the mortuary attendant who will bury you finally. They have all been malicious’.

Then, as I say, there are traumas. It is not bad enough being middle aged, but middle age brings life experience, and eventually it has its traumas. What is the commonest? Marital trauma. That is why of course the Family Court has the highest number of vexatious litigants — not that I actually know how many it is, but I hear round the traps that there are enormous numbers of vexatious litigants in the Family Court. What is the next most common? If it is not family, it is going to be work, and so of course we find that there is employment-related trauma. And, interestingly enough, because I do a bit of work with tertiary education, we are finding a younger group now being drawn into it by their doctorates not being passed or a range of things of that nature. So there is some major trauma in their life. Then, finally, it could be physical injury, resulting in workers compensation and the like.

I will jump from the querulents. We have got a spectrum of people moving and becoming more and more difficult. When they get into court, it is very important that in court the querulent is generally voluntarily self-represented — generally — which takes me to the second point: it is a moral issue. This is a moral issue; this is not legal. They are in court — and we will talk about how they get into court in a moment — and this is a moral issue, not a legal issue. If only they can look into the eyes of the judge, the judge will see them as a worthy person and they will know — truly know — the righteousness of their cause. Unfortunately there is this big bugger of a legal counsel in the way, so they get rid of them fairly quickly.

There is a religious element here. Without going too far, sometimes they feel the court is the place where they can be given life worth, and the judge can say, ‘Yes, come unto me. Sit at my right hand. I will raise you above the dross. You are truly a great person. Let all see that you are truly great’. This is how they are feeling about this whole experience. When they are in court they are hypercompetent. They have studied lots. They will use the court’s libraries, they will be hanging around the courts and they will be using the internet these days. It is interesting that some of the judges have noticed that the legal arguments of the really querulent types change, and they change into a North American sort of structure, which is no longer relevant, but they have got it from an internet site. They develop these sorts of hypercompetencies, knowing lots about a little bit, but with no depth and obviously no real legal knowledge. They use things like the Magna Carta and the constitution. Everything is about rights and about morality.

One fellow talked about the bill of rights in the UK — 1688. Of course we have to be wary of how the Victorian charter of human rights and responsibilities is going to be used. I would say it is inevitable that that is going to be a wonderful avenue for them to use. Whether used correctly or not, they will cite it.

As I say, these days even if you make someone a vexatious litigant — I think you have spoken to or will be speaking to Simon Smith, who is a legal researcher — on the work he has done and we have done looking into the early Victorian vexatious litigants, it is a wonderful area. When they make vexatious litigants they hang around the courts and become in a sense McKenzie friends for others, they become secret advisers and/or they marry someone and then make them into their hobbyhorse and then these people, their spouses, eventually have to be made vexatious litigants. So there is no stopping them easily. There is no doubt about that, that some of them just go and on. Through these websites they will develop interest groups, and you will see them in the back of the court. So it is a fascinating job.

There has been relatively little legal research about the vexatious litigant which we can draw a lot on from psychiatry, but one interesting piece is by Steve Hedley, an English fellow. He looked at about 16 years of vexatious litigants in England and Wales. What he found from our point of view was interesting. One, he found that around 85 per cent are male, so more males than females, as our querulents tend to be, and they cluster in the age range of 50 to 70, which is sort of interesting, because it coincides with the psychiatric literature. He said that what is interesting is that they were brought into it through domestic, small issues — they were drawn into court through small legal matters — and they were drawn in as defendants. This is really interesting. These people are not keen on the courts prior to being drawn into them. They are suspicious of societal structures, so they are not going to throw themselves into it voluntarily; they are drawn into it. But once they are in the courts, do they find something there which is very attractive, very seductive. As I say, I think it is about this moral issue and about the judge being able to now give them validity to their life.

More particularly, he found he could construct the vexatious litigants — and there is a little Venn diagram there. About 5 per cent are in the rubber ball strategy, a tiny number. They are essentially people who bring in the same piece of litigation over and over again; despite losing every time, they just bring the same thing over and over again. The second group, which is the conspiracy strategy and is about half, was I think mapping fairly closely onto what I would describe as the querulent — that is, someone whose initial grievance was about being overcharged by the water board, then they started to have grievances about a humiliation and then it was about conspiracy and negligence. So why they might be in court might not be anything to do with the \$20 now. They might be suing their lawyer repetitively or the judge or the Ombudsman or someone else. It has spread, but you can logically see how it has grown.

Then there is a third group, which is again nearly half, in what he described as litigation lifestyle — that is, people who enjoy just suing the hell out of everybody. They are probably grumpy buggers. They do quite well; they do not destroy their lives. The thing about the querulents is that they exhaust their life energy in this process. The other half do not; they just enjoy the whole process. They might be blighted law students or, God knows, individuals who just have a sense of self where they believe the world is lesser, or for that matter they might be greedy. They just want more money and maybe they make quite a lot out of it. So there is this group and only half, say, of vexatious litigants in England actually mapped onto querulent and the other half were completely different and not, perhaps, something that psychiatry would be involved with.

This is the final slide, which is really about the role of psychiatry. I will not go on to that at the moment. Perhaps I might just leave that and I will let you go. I have given you a sort of whoosh through the world.

The CHAIR — It was indeed a whoosh through the world. Paul, would you like to add to that?

Prof. MULLEN — No, I am happy. Grant has given a very good run through. I think the only slight thing to add is that Grant and I did the research on the chronic complainants and that is where what we would call the querulents turned up — as a small but very salient minority who were consuming vast amounts of resources. This was why the complaints organisations were interested. They form a tiny fraction of the total number of people who contact complaints organisations, but the various organisations gave estimates that between 10 and 30 per cent of all resources are being eaten up by less than 1 per cent of complainants and that of course has an impact on the function of these whole organisations. Of course clinically we see people who are the end stage. In other words, we do not see them until they threaten to kill the judge or they turn up at the Ombudsman's office with a gun or, as in one case, they abduct the person that they blame for their predicament et cetera. So it is after a criminal offence that they get sent to us, by and large. The earlier research was using the ombudsmen's offices as a way into a much wider range of these individuals than we would see clinically.

The only thing I would add is that on a contract from the British Home Office I have been involved in a group looking at those who harass, threaten and attack prominent public figures. One of the interesting subgroups in there are people who have a history of chronic complaining, querulous behaviour and vexatious litigation.

The end point for some of these people is the appeal to either Parliament — or, very often, the Queen — at least, not just from people in Britain but also from Australia. This group can become really very troublesome and occasionally violent. They are the very end point. We looked at all fatal and near-fatal attacks on European politicians, including British, over a 20-year period. The largest single group were end point vexatious litigants, who were responsible for most of the deaths.

So at the very far end of it you are looking at a very extreme. Given a population of our size, that is never going to become visible, although, if you look at judicial officers who have been attacked and even at prominent public figures, they are there certainly.

The CHAIR — It is a bit hard to know how to tackle this. What you are saying is really interesting. In the conclusion to the paper that you provided *Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour* — —

Prof. MULLEN — Sorry about the title.

The CHAIR — We understand these things. One of the things you conclude there is:

The disorder, we believe, and therefore the pathology, lies first and foremost in the behaviour —

which is what you said —

and its consequences, and only secondarily in any abnormality of mental function postulated to drive the behaviour.

You say elsewhere, I think, that therefore it is phenomenological and not aetiological. What I do not understand in that is: it is a behaviour that is a nurture behaviour, that it develops out of people's life experience and you are saying without any kind of physiological ground or substructure? Is that what you are saying? What I am getting at is that with education and different kinds of experiences, a person may not end up that way, whereas when you are speaking about schizophrenia you say it is a condition that has to do with the hard wiring and it needs different kinds of treatments?

Prof. MULLEN — Mind you, even with schizophrenia the modern research suggests it is a vulnerability — so that of those with the capacity, as it were, to become schizophrenic, only a small proportion do.

The CHAIR — Could you just reflect on that a bit? Is that the right way of seeing it?

Prof. MULLEN — Yes, I think it is. Partly the argument there is very much geared towards psychologists and clinical psychologists. What we were trying to point out to them was that if you spend all your time trying to distinguish whether this belief is a delusion or not a delusion, whether this person is psychiatrically or not psychiatrically ill, you are just going to find it an almost impossible task. So look at what they do, look at the damage they do to themselves and look at the damage they spread around them.

That is the way to first of all distinguish this group as a group with problems that need to be dealt with. Then go into the elements within this particular individual that have led to these behaviours — and there is going to be a whole variety of routes. Grant gave a whole series of scenarios. There is not one way to finish up as a vexatious litigant; there is a multitude of ways, which have certain common elements. I mean, it is quite remarkable, when you look at their time of life and the pressures on them, how at least 50 per cent of them fall into this really rather narrow group of people with very similar backgrounds and similar experiences. Then there are a lot of people out there like that.

The CHAIR — That is the other bit. Our responsibility is to get in a broad sense to the science of things so that we can recommend to government how to change law and procedures to make things better for people. That is the broad brief. When you were taking us through this, Grant, I kept thinking to myself, 'We all recognise a lot in what you say', which makes it very seductive, because we identify with what you are saying. But I was thinking to myself — and I am saying this rhetorically; I am not trying to criticise you — 'Is this poetry or is this science?'. The footnotes and your allusions to research suggest it is science, but why is it not poetry?

Dr LESTER — It is poetry but only in the sense that psychiatry is not something — we call ourselves a science but it is a continuing, growing understanding of the human brain and its connections with the environment. There is an element of poetry in what we are saying, but I have to say it is not my poetry: there has been research for 150 years. It is not made up. These people have been in existence. Psychiatry was first called in by the courts for those who threatened to kill or injure others, and we observed them.

The CHAIR — It is true but Shakespeare is not made up either but it is not a basis for legislation.

Prof. MULLEN — Can I perhaps take this one? I think it is a very good question. In a sense the research that Grant and I did started off, if you like, with poetry. I am a great fan of Dickens and I think *Bleak House* is the account of the courts and their interaction with what we would call vexatious and unrepresented litigants. Of course Dickens' view was very clear — it was the courts that were at fault: these people were driven mad by the complexity and the obtuseness of English civil law.

When we set out on our research we had the poetry, if you like — the descriptions — and we had a notion which I borrowed very straightforwardly from Dickens: let us see if the way these people are dealt with is actually what makes the difference. In other words, is it the system which is creating this problem?

It does not make very much of a splash in that first page, which Grant is the first author on, because it was totally negative. We found no evidence whatsoever that our control group was dealt with in any way differently from our group that went on to become querulous, chronic complainants. We guess that they experienced the way they were dealt with very differently, but the actual way they were dealt with did not differ in any way that we could measure.

I think that is, in a sense, science, in the sense that you have got a control group and you look at the differences. What we hoped to find, and what I hoped to find, was something to demonstrate that Dickens was right. Dickens detested and hated the law and all lawyers. I do not go as far as that; I have even got a daughter who is one, and I almost forgive her, but I would have loved — —

The CHAIR — But you were not in the debtors' prison as a kid, were you?

Prof. MULLEN — That is right. We would have loved, and we really did search for, something in the way these people had been dealt with which would distinguish them, but we did not find it. I think if we were more subtle, we may have found a few things, but I think what you have is vulnerable people drawn into a system at a particular moment in their lives and then they go down that route. I still think if we dealt with them somewhat differently they would not, as many of them do, follow that route.

Although the science says we have not yet discovered any key elements, our experience I suppose and our hope is that if you shift the way you deal with this group, you will finish up with less catastrophes for them. Our interest as psychiatrists, in all due respect, is not the functioning of the law. We do not really mind what happens in making life difficult for complaints organisations or the legal system, our interest is in these individuals and the total wreck they make of their lives and the chaos they create for themselves. Many of these people finish up in a terrible, terrible state.

Mr CLARK — I would like to follow on from where you finished there and what we as a community do with and for querulous complainants. I suppose that goes to Grant's last slide and also to the remarks that were made by the witnesses from the Bar Council about possibly referring people to mental health professionals, which seemed to me good in principle but perhaps easier said than done.

I suppose the question I would like to pose to both of you is what opportunities do you believe there are for your profession or related professions to assist with querulous complainants both in respect of complaint organisations and in respect of the courts? Does it make sense to expand the litigation support service in the courts to have psychologists or other people on staff who could help with these sort of things? If you do believe there is a role for your profession or related professions, what particular role and what particular skills would you recommend be deployed?

Dr LESTER — If I could start, I think there are three areas that we work in now and a couple of those are already doing this. One is training and education. With the National Judicial College of Australia over the last five or six years I have been training judicial members, particularly new judicial members, in what they call the Phoenix program on the experience of vexatious litigants. It is really about querulents and these sort of difficult individuals and how best they might deal with them within a court system — that is, how to work with litigants in person who have unreasonable litigation behaviours.

That goes for not just judicial members but also court support and a whole range of others — ombudsmen's offices, insolvency practitioners, lawyers. It goes right through. I am constantly surprised by who is interested to know about managing this group. I should not be because of course they start somewhere and they are just as difficult to manage when they are complaining to the water board as they are when they are in the Supreme Court with their final, or one would hope it is their final, appeal against something or other.

You would have to say as an aside, and this is just what was told to me when I was in Queensland and did some work with their Supreme Court and their appeals, they felt that most of those litigants in person at that level, appealing in the Supreme Court, had a range of these sorts of behaviours. While they are small in number down one end, they can get concentrated higher and higher in different environs.

One is education and training. The second is, in fact, Professor Mullen and I do see in our forensic psychiatry environment individuals who are referred to us after they have broken the law. Usually it is threats. The bottom line is, however, the number who come to us being a tiny number of the ones who actually could be referred to us through breaking the law. In our research I think over 56 per cent were making threats of various sorts.

The great Australian way is of course to ignore the threat. I think one of the things is when people start to threaten they put themselves into quite a separate group and they could be brought into psychiatry a little bit earlier if you like to assess, to see what is going on. We see them once they have threatened and it has been so severe that a judge or others have decided to act. We see them mandated.

The question was brought up whether they would see us voluntarily. Would they see a psychologist working with the court support environment voluntarily? I would say that once they get into that top third there is not a chance. In fact, the very suggestion that they should go and see a psychologist would cause some form of anaphylactic reaction where they felt you were demeaning and dismissing their whole case and calling them crazy to boot and they are going to take you to somewhere and ensure they get satisfaction. We have not had any experience of voluntary treatment. We have been mandated by the courts for a variety of reasons — parole and other things, court assessments — but not voluntary work.

Prof. MULLEN — I think that psychiatry has a very small role to play in this. The best we can do is to help understand some of the mechanisms that are at work in the hope that the legal system and the complaints system can adjust in a way which manages these people through their systems with the least possible damage to the individual and the least possible disruption to the courts or the complaints organisation.

Mr CLARK — Given you say that approach is not going to work, are there other things that can be done to help the querulous complainant? To respond to the point about helping them with the least possible damage, what I gather from what you have said is that basically these people keep on bashing their heads against the wall until they are exhausted or die or what have you.

Is there anything else that can be done? Is there cognitive therapy or something that is not formally psychological counselling but, 'Let us look at the broader issues surrounding your problem and see if we can find some other way forward for you'?

Prof. MULLEN — I think you can make more use of mental health services by making more use of compulsory referrals when people actually break the law, which many of these people do in a way which would in other circumstances have led them to be psychiatrically examined. The difficulty with that is the number of people we have managed to interest in this area among our mental health colleagues is not large. Anyone who knows anything about this area, by and large, knows enough to try and avoid it at all costs.

When I see one of these people I almost feel like writing both to the medical council and to my defence insurers to inform them that at some time over the next six weeks to six months there will be a complaint about my conduct from this individual and I just want to tell them in advance.

Mr FOLEY — Or a claim from your estate, one or the other.

Prof. MULLEN — That is right. I think there is a small bit there we can do. But much more important I think is working with organisations to assist them in testing out and seeing what works with easing these people through. We have one advantage with them: most of these people declare themselves very early. For many of the complaints organisations to actually pick them out all you need is a set of bathroom scales and you just weigh the initial set of complaints.

It is not going to spot all of them but there are few straightforward complex complaints in there but there is this massive output, particularly of written material, with a lot of characteristics. You can spot these people, and it is not terribly difficult to distinguish them fairly early on. That does give you a chance of arranging a process for managing this group which is likely to be less destructive. Any process that manages them, in my opinion, has to be to their advantage, or to be more precise it has to be to the advantage of any individual who has been wrongly identified as one of these querulous complainants.

Some of them are just going to be people who are bad at expressing themselves, have a slight difficulty understanding the legal system and are perfectly reasonable people with perfectly good and solid complaints. If you have a mechanism for dealing when them which is separate, it has to be advantageous should you have someone in it who is not actually in any way querulous. That I think is the challenge, not to find a way of getting them out but a way of managing them through which if it wrongly identifies someone will be to their advantage. Otherwise I just do not think it is ethically acceptable.

Dr LESTER — Can I just say that I think the potential for psychiatry is in two areas. One is when it is attached to the vexatious litigant legislation — that is, as part of, 'You have been made a vexatious litigant', or we are considering that or whatever, we need you to have a psychiatric assessment. There does need to be some sort of filtering process, particularly for the more severe. There is a group of people who are vexatious litigants who you would say have delusional disorder or a schizophrenic-type spectrum disorder. They are the ones psychiatry could

well begin to work with, particularly if there are associated threats, even if they broke things. When you talk to them, you will find that they have a list of 20 people who they are going to get even with.

Prof. MULLEN — After they have spoken to you it is 21.

Dr LESTER — That is right, but being a psychiatrist I know how to keep my name down at 21 rather than being at no. 1. Part of the training we do for people is to help them understand what their behaviours are that bring them up with list. We can look at that group and bring those into treatment involuntarily, but that is a very small number. I think involuntary treatment is only evidentially useful when it is preventing them from committing a violence crime.

The evidence is that incarcerating them in any form of custody is of no value just for them, because it just goes on and on. These days we do have treatment for individuals who are querulents in the midst of a psychotic illness. We had an interesting case not too long ago of a fellow who was stalking doctors. He was arrested because he had explosives and chains in the back of his car in front of the doctor's office. He was brought in, was treated for three or four months with anti-psychotic medication and cognitive and psychotherapy therapy. He in fact responded very well and left the hospital and has not reoffended since. There is a group for which it is successful but it is only when it is involuntary treatment.

The second area that psychiatry might be of value, and I was thinking about the process, is in the question of competence to represent oneself. They are all self-represented at the stage where you are considering them becoming a vexatious litigant. The question that the courts or others might consider is: 'Are they competent to represent themselves?'. That is one where psychiatry and psychology could be another assessment tool to see whether these individuals are not competent.

Mr FOLEY — What is the equivalent for the vexatious querulent of the early intervention programs? Is it working with the complaint organisations or do you just have to wait until they spin out?

Dr LESTER — At the level of the complaint organisations, I have to say they are not really into therapy, which is understandable.

Mr FOLEY — It is not their role.

Dr LESTER — It is not their role. What they are really into is early recognition — —

Mr FOLEY — Isolation?

Dr LESTER — Not isolation but early recognition, because one of the key issues with these people is they spend their life energy — money, time, relationships, everything begins to fall apart. One of the key things for the alternative dispute resolution is to understand what you can do and to do as much as you can do and then stop the process. A lot of them find it very hard to say, 'No, we cannot do anything more'. What we have found is we have had an average of three to five years of these people with alternative dispute resolutions.

The organisations have held them for many years. Some have been out to 12 years complaining about a range of things with the same organisation — 12 years! Your children go from primary to tertiary, multiple careers. The bottom line is those organisations are really about saying, 'Right, when can we say no, we can no longer help you' and hold that? Because these people are very emotional, sometimes pathetic as in tears, other times very threatening.

The training we are doing is to really say, 'Don't waste any more of your time', but you know they are going to go on. By stopping there they are going to go on and there will be letters on your desk or the minister's desk. You cannot stop them through the alternative dispute resolution process when they are that small group, but you can pick up some. What we are doing is we are picking them up early.

Unlike Professor Mullen, I believe in fact that people declare themselves early and that once they have declared themselves they are on a trajectory that is almost impossible to stop. Professor Mullen is a very optimistic man, and he believes that the system can alter once that trajectory is established. I do not. I believe that once you pick them up and you can see their behaviours, the best way to do it is to minimise the expense — that is, the personal expense, the systemic expense and their own expense — and say, 'No, we cannot do any more'.

Mr FOLEY — I think we will have to get this team to work with Parliamentary Services and electorate offices. All of the characteristics you have described we see walk in our door, or generally in big letters tightly packed.

Prof. MULLEN — Almost all of them are going to come through you at some stage in their process. This is one of the things we found when we were looking at the Palace of Westminster and the royal palaces. It is part of the trajectory of these people that at some point they are going to appeal to their elected representatives or to the head of state. It is just part of the process.

The CHAIR — I will move to Professor Mullen because — —

Dr LESTER — He is an optimistic fellow.

The CHAIR — By your information he is an optimist. Coming from what was asked earlier about the transitioning from the court to some kind of health regime, I understand that New South Wales announced that it is looking at referring vexatious litigants to mental health agencies. Are you across that at all?

Prof. MULLEN — We have heard about it.

The CHAIR — Could you reflect on that a bit just as a practical example?

Prof. MULLEN — They are a very interesting group in the sense that they will be absolutely beside themselves with anger when you see them the first time after having been compelled to come for assessment. But if the court says, 'You have to attend once a week for the next nine months', this is the group that are always there on time, they do not miss. They will attend for nine months and the day the nine months is up most of them will stop coming — not all of them but most of them. Oddly enough a part of their behaviour is kind of a rather twisted respect for the law. If there is an order, they will by and large keep to it. So it does give you a little window of opportunity.

The CHAIR — You have to tell us about the optimism inside that, by the way. You cannot just leave it there and move on!

Prof. MULLEN — I reckon with some of them you can actually get them to shift. The other thing you have got on your side — and this is what the whole of success of psychiatry depends on — is that almost every disorder we deal with waxes and wains. So if you see someone long enough, they always get better — as long as you discharge them quick enough, they are better before they start getting worse again. So there is that. But I think we can do rather better than that at the particular moment.

I think we can help them to improve. I also think the system can help them through it with less damage — and this is where Grant and I disagree, or at least I am more optimistic about adapting systems to be able to ease these people through with less damage.

The idea of assessing someone's competence to be self represented I think is an interesting one. I think it is probably more important in the criminal courts than it is in the civil courts. We have disasters sometimes with men who are fit to plead but are very paranoid and who make hell for the victims of their crimes. Some of you may remember the man who did the shooting at the abortion clinic and represented himself in that trial.

Fortunately there was a very good judge who kept reasonable control over him, but nonetheless this man traumatised the victims again by being allowed. There was no way of stopping him, once he was said to be fit to plead. We do not have a 'fit to represent yourself'. If that question had been asked, we could have said, 'No, this man does not know what is in his best interests and certainly is not going to behave in a way which society should tolerate'. The worst case was a case in New York where a man who shot up a subway killing a number of people represented himself and grotesquely retraumatised over a three-month period all of the survivors from that shooting.

So I think in the criminal courts sometimes it is very, very important for the persons there. Some of you may know of the man who shot and killed the commissioner for police in the ACT, who represented himself; it was awful. Now, of course, he is appealing on the grounds that he should never have been allowed to represent himself because he was patently and obviously mad — which he was. He wants a retrial so he can represent himself again, interestingly.

The CHAIR — The people experiencing this condition you have been describing, do they ever allow someone else to represent them?

Prof. MULLEN — Yes, and usually they finish up as unrepresented litigants, in part — exactly as Grant said — because no-one can represent them as well as themselves. But there is also the fact that they run out of money. I am afraid there are lawyers who usually pay — I do not think anyone does it twice — who do represent these people.

I think if you do, you inevitably finish up on the wrong end of complaints to the law society et cetera. But yes they do, and very often one of the reasons they become self represented is the reason that perfectly respectable people become self represented: they run out of money.

The CHAIR — Are there any further questions?

Mr BROOKS — Could you shed some light on what happens or what is likely to happen to people in this situation who are then declared vexatious litigants? If they are unable to pursue their cause through the courts any longer, where do they go? What happens?

Dr LESTER — They do not disappear; they inhabit the steps of the courthouses, they inhabit the law libraries, they inhabit ombudsmen's offices, they fall back and rest and recuperate in a range of alternative dispute resolution areas. Research has said that 25 per cent took their own life. We do not know whether or not that remains accurate at the moment. A smaller number of them end up becoming so frustrated that they threaten harm to others and they end up in the forensic system.

Prof. MULLEN — Certainly some do suicide, there is no doubt about that.

Mr BROOKS — Is there any data on that sort of stuff?

Prof. MULLEN — It is very difficult. We could get data on that. But so few are actually declared vexatious litigants, so the only way you can do that is on people who are blocked within various complaint resolution organisations. That is a much larger population, and certainly the suicides we know of have all been in that group.

But the other thing is that if they have any capacity to use the internet, they will find on the internet really quite good legal advice at chat rooms. If you just put in 'vexatious litigant' into your search engine, you will actually come across a large number of support groups of self-identified vexatious litigants who will provide you advice on how you could pursue your legal case even after you are declared a vexatious litigant. Most of the advice is for American jurisdictions, but some of it applies here. It is not bad. The answer is that anyone with a decent computer, the chances of you keeping them out of court by declaring them a vexatious litigant are pretty low.

But as Grant says, fortunately for the courts very often they simply move off into another area of complaint. One of the problems we had when we did our research was that of course it had to be totally anonymous because it is very ethically difficult to make it a proper piece of research to do. But what became clear when we were looking at the pro formas was that some of them look very similar. So we had to get a senior ombudsman to go through the names to see how many double hits we had from different organisations.

I cannot remember how many it was, but it was a good number. In other words, these people were known to several organisations and were causing chaos — not always at the same time, but they were coming and going. This is the difficulty. You block them in one place, they will pop out somewhere else. It is a matter of managing them in the place they are, in my view, rather than squirting them off to somewhere else.

Mr CLARK — I just want to pick up on one point you raised. I am concerned about the reference to the number of suicides. Are we leaving people at risk by just fobbing them out of the system, as it were? Is the propensity to suicide a consequence of being frustrated in pursuing their litigation, or is it something that is inherent in the personality types or personality disorders that lead people to become querulous litigants in the first place?

Prof. MULLEN — I think it is part of. When you meet them and when they are in full flight they are almost like someone manic; they are so energised, and I think they are very prone to intense despair. And they all go through these periods. One has to be careful about the 25 per cent suicide rate. In those days one of the things that used to happen when some of this data was gathered was that if you were declared a vexatious litigant and you

irritated the judge a bit more he would send you off to the local psychiatric hospital. That actually worked, because they could not get out. None of that happens anymore. I do not know from those figures how many of them killed themselves — —

Dr LESTER — They were not even deemed vexatious litigants; they had threatened. It was a whole range of individuals. They were the more aggressive, angry men. And as the professor has said, these individuals are full of energy when they are pursuing it, but outside they look depressed; there is no energy, there is nothing left.

They are very much despairing at times, and so a percentage of those — look, you are also in an age group where life is beginning to close down for you and you feel life only has meaning in the pursuit of this; if you cannot go any further, where is life? So it is not just the pursuit; it is who you are and where you are in your life stage and the intensities of your emotional experience.

Prof. MULLEN — These are damaged people, these are people at risk in lots of ways, and it is important to try to at least not add to the damage that they have suffered.

The CHAIR — Professor Mullen and Dr Lester, thank you very much for your contribution and the material that you sent. It has been a really absorbing and very interesting hour. You will get the Hansard transcript, and I hope you do not mind if Kerry or Susan get in contact with you later on for any follow up or any further information. It is much appreciated; thank you.

Witnesses withdrew.