

The Commonwealth's Cry of 'Vexatious Litigant': Is it a Case of The Boy Who Cried Wolf or The Pot Calling The Kettle Black?

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Abstract

There are claims going around that vexatious litigants and complainants are on the increase. Whilst there is no doubt that vexatious litigants and complainants exist and are, indeed, a drain on the system, there is little persuasive evidence being produced that the rate of vexatiousness is on the rise. What APS Dignity has been finding, however, is a trend in the Commonwealth misusing the label 'vexatious' against genuine litigants and complainants to devalue and dismiss their claims with the intent of preventing the legitimate exercise of their legal and policy rights.

In this paper, APS Dignity examines the shortcomings of three articles that potentially encourage pathologising of determined litigants and complainants as suffering from mental illness based on discredited literature from the late-1800s to the mid-1900s. This pathologising approach has parallels with the use of punitive psychiatry against political dissidents in the Soviet Union. The three articles refer to such mild and innocent apparent attributes of 'vexatious litigants' and 'unusually persistent complainants' (without even examining the nature of the complaints) that essentially anyone could be at risk of being mislabelled and suffer the subsequent consequences. Ironically, the attributes of vexatiousness identified in the three articles can be used to demonstrate that the Commonwealth, itself, can be a vexatious litigant.

This paper concludes that the current focus on individual litigants and complainants' behaviour is severely misguided and the real focus should be on exploration, acceptance and reform of the inadequacies of complaint systems, set up by government, that more likely create so-called vexatious litigants and complainants.

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Introduction

APS Dignity recently came across a legal article by a Mr Gregory Camilos, titled 'In the pursuit of justice AGAIN: Understanding and managing vexatious litigants', published in 2011. The article can be interpreted as a rather denigrating critique of 'vexatious litigants'. Our first impression after reading the article was that it was oddly written and we could not help but wonder about the author's professional background. A quick search of Mr Camilos's profile on LinkedIn revealed that he had a history of working for the Commonwealth Government in various roles, including as a Senior Executive Lawyer for the [Australian Government Solicitor](#). All of a sudden, Mr Camilos's strong position on 'vexatious litigants' began to make some sense.

For those readers who are unaware, vexatious litigants are those who:

- have the intention to annoy, embarrass, harass or engage in other wrongful purposes (see, for example, the case of *Attorney-General v Wentworth* (1988) 14 NSWLR 481);
- seek to achieve a collateral purpose (see, for example, the case of *Re Cameron* (1996) QCA 37);
- pursue untenable or manifestly groundless claims as to be utterly hopeless (see, for example, the case of *Walton v Gardiner* (1993) 177 CLR 378).

The consequence of being found to be a vexatious litigant is severe - the stripping of the right to pursue particular legal actions that other citizens are entitled to. Of course, giving the courts the capacity to stop vexatious litigants in their tracks is very important, as vexatious litigants can chew up huge amounts of public resources and can cause great financial and emotional distress to those they target.

However, the courts have made it clear that the use of vexatious litigant defences are not to be invoked lightly. For example, in the case of *Re Davison* (1997) ALR 259, it was said that it was only in 'very clear cases' that a decision to declare a litigant 'vexatious' can be made. It was said that 'if, on the face of the "process", there is a possibility that it is not ... vexatious ..., the matter will be left to be dealt with in accordance with the ordinary curial processes'.

Despite the courts' clear guidance on the need to be very cautious and reserved with the use of the label 'vexatious', APS Dignity is aware that the word 'vexatious' has been disingenuously bandied around by the Commonwealth for some time in an attempt to unfairly devalue and discredit *genuine* litigants and complainants in order to absolve the Commonwealth of its legal and ethical responsibility without going through the effort of arguing a case on its merits.

The label 'vexatious' is a powerful weapon against individual litigants and complainants since the Commonwealth enjoys the presumption of legitimacy and legal authority, and, therefore, the authenticity of the Commonwealth's accusations of vexatiousness is less likely to be questioned or doubted. Furthermore, the label can mask the real cause of the perceived vexatiousness, which can actually be the Commonwealth's own vexatious, unreasonable or

unethical behaviour previously directed at the individual. Thus, the Commonwealth may well exhibit double standards.

The potential opportunity that Mr Camilos's article offers (since he has been a solicitor for the Commonwealth) is a window into the mindsets of Commonwealth lawyers and bureaucrats when faced with objections from individuals, and how they think when formulating and mounting vexatious litigant/complainant defences. We offer our observations below.

Where is the Evidence?

The most prominent flaw in Mr Camilos's article is his frequent use of sweeping statements and generalisations with little referencing. For example, he states that 'persistent complainants, who in turn become vexatious litigants, seem to have become more prevalent within our State in the past decade, compared to earlier times.'

There are a number of problems with Mr Camilos's statement. Firstly, Mr Camilos does not cite any evidence that 'persistent complainants' go on to be 'vexatious litigants'. Secondly, Mr Camilos does not cite any reference material for the claim that vexatious litigants are more prevalent. Thirdly, Mr Camilos appears to have failed to take into account that the number of laws and complaint channels has grown over the past decade, which could account for any increase in the *number* (as opposed to *percentage*) of supposed 'vexatious litigants'.

Mr Camilos goes on to pathologise vexatious litigants by claiming 'they are often described as suffering from querulous paranoia' and cites a supporting article by Dr Grant Lester, a psychiatrist, titled 'The Vexatious Litigant', published in 2005. Turning our attention to Dr Lester's article, we discover some of the exact same sweeping statements and generalisations (that are also poorly referenced) that are made in Mr Camilos's article (arguably with inadequate acknowledgement).

Psychiatric Labelling of Potentially Normal Behaviour

So at this stage, we have followed Mr Camilos's linear argument that there are many 'persistent complainants' who turn into 'vexatious litigants' who, in turn, suffer from querulous paranoia, without any real supporting evidence. Notably, this amateurish psychiatric labelling is akin to the Commonwealth's use and abuse of compulsory psychiatric referrals against genuine Commonwealth employee complainants, designed to undermine their mental stability and the substance of their complaints (see APS Dignity's blogs titled ['Australian Public Servants Subjected to Soviet-Style Abuse'](#) and ['The Australian Public Service Knows that Compulsory Psychiatric Referrals are Unlawful, Unethical and Abusive'](#)).

We then turned to Mr Camilos's descriptions of the apparent behaviours commonly displayed by the querulous paranoid (again with barely any citations of supporting material) that can help

identify a vexatious litigant, and it suddenly strikes us that Mr Camilos could be describing any aggrieved litigant. Here is a sample (with our questions in brackets):

- 'They believe they are relentlessly driven by a "pursuit of justice"'. (Is the pursuit of justice a bad thing?)
- In written communications 'they will often refer to themselves in a third person legalistic style, for example, as "the applicant" or "the appellant"'. (Isn't this how all professional legal documents are ordinarily drafted?)
- They 'believe that they have suffered a loss caused solely by persons other than themselves'. (Can't this actually be a true appraisal?)
- 'They feel angry, innocent of responsibility and a victim of an unjust act'. (Isn't it natural for aggrieved individuals who have suffered an injustice to feel this way?)
- They 'invoke the various complaints officers, ombudsmen commissioners and, ultimately, tribunals and courts'. (Isn't this usually the normal order of hierarchical complaint channels, designed by government, that complainants/litigants have to go through when incorrect decisions have been made and should be challenged/overturned?)
- They 'have over-optimistic expectations for compensation'. (Doesn't behavioural economics espouse that it is human nature to over-estimate chances of success and under-estimate chances of failure?)
- 'Their finances, social relationships and other interests are ruined'. (Don't many lower to middle class Australians suffer in this way following litigation due to time involved in, and the high costs of, accessing the legal system?)

Mr Camilos's article then goes on to make some rather confronting specific and personal 'critiques' about the general character and life circumstances of vexatious litigants. For example, they are usually middle-aged males with failing or ended relationships. Again, much of this was uplifted from Dr Lester's article with limited referencing.

At this point, being somewhat confused as to how such articles of questionable quality came to be formally published, we decide to explore a singular referenced source in both Mr Camilos's and Dr Lester's articles - 'Unusually persistent complainants' by Dr Lester, himself, as well as Ms Beth Wilson, Ms Lynn Griffin and Mr Paul Mullen, published in 2004. Finally, a cause of our confusion seemed to have been unravelled!

The Original 2004 Study

The 2004 study was a survey of bureaucrats in six Australian ombudsmen's offices about their observations of so-called 'unusually persistent complainants' they dealt with compared to your run-of-the-mill complainants. The 2004 study drew links between 'unusually persistent

complainants' and 'querulant personality disorder' by referencing literature published between the 1870s and 1950s. The reason for the authors' citation of dated literature was because, during the 1980s and 1990s, querulous paranoia fell into disrepute, as psychiatry accepted that it was wrong to pathologise those with the energy and commitment to pursue their rights (see, for example, Olli Stalstrom's 'Querulous Paranoia: Diagnosis and Dissent', published in 1980). Accordingly, it is surprising that this 'mental disorder' is being resurrected in the 21st century after it was discredited, and it is particularly concerning that it is being raised in a bureaucratic context - a context known for its emphasis on conformity and obedience. Furthermore, given that psychiatry had a shady history during the 20th century (for example, anorexia was treated with lobotomies during the 1940s and 1950s, homosexuality was still classified as a mental illness up until 1973, and political dissidents in the Soviet Union were diagnosed with 'sluggish schizophrenia' and forcibly institutionalised up until the 1980s), the credibility of literature from that era will always be questionable in many people's minds.

It became clear that Dr Lester (and, vicariously, Mr Camilos) had automatically extrapolated the identified attributes of 'unusually persistent complainants' in the 2004 study to 'vexatious litigants'. Again, some of the identified attributes the 2004 study came up with could even more noticeably apply to any complainant and, bizarrely, the implication of the study was that all such attributes were viewed negatively. Here is a sample:

- They were more likely to communicate by email.
- They were more likely to use three or more methods of communications (for example, postage, email, fax and phone).
- They were more likely to attach supporting material.
- They enclosed endorsements of their good character (the study did not mention whether this was because their credibility had come under attack).
- They sought acknowledgement of mistreatment and some form of specific apology.
- They sought personal vindication.
- They sought acknowledgement of the wider social implications of their complaint (the study did not analyse the nature of such complaints to demonstrate that the complaints did not actually have wider social implications).
- They sought public exposure (this was strangely classed by the authors as a 'more extreme form of revenge').
- They demanded justice based on claims of principle.
- They used rhetorical questions.
- They were more likely to use inverted commas in written communications.
- They behaved in an overly ingratiating manner.

The authors then seemed to take a somewhat elitist approach with what they identify as attributes of persistent complainants (and it did not appear that they took into account the complainants' socio-economic backgrounds and education levels). Here is a sample:

- They were more likely to use medical and legal terms inappropriately.
- They used unusual methods of attempting to emphasise words.
- Their written communications were lengthy and difficult to follow.

Given the absurdity of some of the attributes identified in the above lists, and the failure to analyse the context and nature of the complaints, a frightening picture emerges: bureaucrats and litigators (who have no psychiatric qualifications and have no clinical information about individual complainants) are being nudged into construing such attributes as symptoms of querulous paranoia, and into having their focus directed to superficial content rather than substantive content when assessing the merits of complaints.

But here is the kicker - the authors of the 2004 study make very significant concessions at the end of their paper:

- The authors state that the study is a 'preliminary study' requiring further research.
- The authors state that the 'capacity' to identify the 'abnormally persistent' is 'worse than useless' if it does not mitigate damage caused to complainants and stigmatises complainants.
- The authors admit that if they actually had direct access to the complainants' initial experiences, 'a different picture might have emerged'.
- The authors admit they had to rely on 'second-hand, and potentially partial, impressions' of the bureaucrats who participated in the study and this may be why they could not 'obtain direct evidence that persistent complainants were more likely to be subjected to hostile, rejecting or blaming responses' from the bureaucrats.

Thus, such serious concessions bring into question the validity of all three articles we have analysed, and questions need to be asked as to why Mr Camilos and Dr Lester were not forthcoming with the limitations of the 2004 study.

Could the Reality be that the Commonwealth is a Vexatious Litigant?

Whilst reading the three articles that we have analysed above, APS Dignity noticed that many attributes used to describe individual vexatious litigants could also apply to the Commonwealth and its officers in the way they handle and litigate matters. APS Dignity has been in touch with a number of individuals who have had the unfortunate experience of having to deal with the Commonwealth as a litigant that engages in unscrupulous and antagonistic behaviour. Private plaintiff lawyers have made comments such as 'for some reason the Commonwealth is often

unreasonable and unethical in settlement negotiations' and 'the Commonwealth's behaviour never ceases to amaze me'. Some examples of the Commonwealth's behaviour in litigation, that APS Dignity is aware of, include:

- putting paper over parts of email print-outs and letters that do not favour the Commonwealth, and then photocopying them and presenting them with the gaps;
- claiming that the individual litigant made damaging statements in documents when, upon viewing the original documents, it is clear that no such statements were made (and the Commonwealth does not even retract the statement after the fabrication has been exposed);
- claiming that the individual litigant sent certain emails which were never actually sent (and the Commonwealth does not even retract the statement after its claim has been exposed as false);
- engaging in behaviour that is so obstructive during mediation/conciliation conferences, that the mediator/conciliator has to invite the Commonwealth representatives to leave the room;
- rejecting every single claim made by the individual litigant even when certain claims are clearly evidenced in emails, letters and electronic recordings;
- falsifying/manipulating the application of case law relating to cost orders to frighten the individual litigant into pulling out;
- when a freedom of information application lodged by the individual litigant coincides with litigation, grossly exaggerating that the documents requested (contained in one average-sized folder) would take over 20 hours to retrieve and over 200 hours to process, thereby amounting to thousands of dollars in fees for the individual litigant, and then using this as a bargaining tool against the individual litigant in settlement negotiations;
- lying about the order and timing of events, and inserting falsified information and withholding relevant information from that timeline, to create an outrageous conspiracy theory to damage the individual litigant's credibility;
- dehumanising and devaluing the individual litigant by maliciously painting them as mentally unstable and promiscuous despite a lack of supporting evidence;
- apologising to the individual litigant for wrongful acts during mediation/conciliation conferences and then immediately retracting the apology when the individual litigant does not accept the full terms of the Commonwealth's settlement offer;
- bypassing the individual litigant's legal representative and wrongfully dealing directly with the individual litigant with the intention of coercing the individual litigant;
- claiming that certain Commonwealth employees agreed to mutual terms in a deed of release (the terms of a settlement agreement) and the individual litigant later discovers

that the employees did not even know about the existence of the deed of release or its terms, let alone agree to them (and the Commonwealth threatens to come after the individual litigant for costs if they pursue their concerns about the Commonwealth's fraud);

- threatening to take a defamation action against the individual litigant's legal representatives for straight-forward counter-arguments, made on behalf of the individual litigant, in legal documents sent exclusively to the Commonwealth's legal representatives.

No doubt, many of you will be experiencing shock and feelings of abhorrence after reading the above examples of the Commonwealth's atrocious conduct in litigation. The fact that the Commonwealth can continually get away with such behaviour shows that the current bureaucratic and legal systems are failing to adequately address power imbalances in these David and Goliath battles. But it begs the question: what can be done in the absence of real mechanisms to hold the Commonwealth to account? Well, perhaps it is time for individual litigants and complainants to throw back at the Commonwealth its accusations of vexatiousness, and publicly expose the Commonwealth for what it really is - a vexatious litigant (and worse)! We need to finally dispel the myth that the Commonwealth is infallible and always ethical.

Conclusion

It is apparent that the label 'vexatious', and its sister label 'unusually persistent', is being bandied around by bureaucrats, lawyers and psychiatrists to the point where the labels can be applied to just about anyone, thereby effectively rendering the terms meaningless. What our analysis of Mr Camilos's article, Dr Lester's article and the 2004 study shows is that harmful claims have been allowed to enter the public sphere based on incomplete evidence, selective use of evidence, and a limited application of critical thinking and fairness on this issue. Ironically, these shortcomings in the three articles we have analysed closely reflect the manner in which the Commonwealth has been known to behave in litigation and its bureaucratic handling of complaints.

The 2004 study (which was really the basis of Mr Camilos's article and Dr Lester's article) most notably lacked recognition that the bureaucratic complaint systems, that complainants are thrown into, have many significant flaws: they have built-in time delays that artificially postpone resolutions; the services offered can be so limited in scope that they are effectively useless; power imbalances may not be ameliorated; bureaucrats can be inadequately trained in competently handling relevant issues and parties; and bureaucrats can be unnecessarily rude and dismissive, thereby adding to complainants' frustrations (see APSbullying.com for further information). It is more likely that so-called 'unusually persistent complainants' and 'vexatious litigants' are made by the systems created by governments, not born. The fact is that it is the

systems that require attention and reform, perhaps with a focus on investing in independent and inexpensive advocacy services for individual complainants and litigants.

It is reckless, if not dangerous, when publications focus solely on the behaviour of individuals and pathologise individuals, without paying adequate attention to the nature of individuals' complaints and the system inadequacies they confront - it is essentially putting the cart before the horse. A modern and healthy democratic society needs more individuals to be encouraged to fight for what is right.

References

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