

## **Submission to Productivity Commission 2014**

### **Access to Justice Arrangements**

#### **Response to Information Request 12.6**

**The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?**

#### **Executive Summary**

1. Lawcover proposes that the Commission recommends all Australian States and Territories consider reforming their approach to vexatious litigants in a manner similar to the approach currently being considered by the Victorian Parliament in the *Vexatious Proceedings Bill 2014*. The three tiered regime contemplated by the Bill should manage some of the more negative impacts caused by vexatious behaviour.

#### **Lawcover's experience**

2. Lawcover Insurance Pty Ltd (Lawcover) is the sole supplier of legal professional indemnity insurance to solicitors in NSW and an insurer of choice for ACT solicitors.
3. Lawcover manages civil claims made against solicitors from first notification by the solicitor to finalisation of the matter, either by way of resolution or court process. Lawcover's claims arise from all areas of private legal practice and from all manner of size of law practice.
4. In a history spanning more than 30 years, Lawcover's claim staff has handled more than 22,000 claims and potential claims. A small proportion of these matters have been brought by claimants who may be considered 'vexatious', adopting the spectrum used by the Victorian Parliamentary Law Reform Committee and shown in figure 12.2 of the draft report.
5. It is Lawcover's experience that vexatious claimants or litigants have had a financial and emotional impact on the parties involved in their litigation, disproportionate to their small number.

6. The impact of vexatious litigation is most keenly felt by the legal practitioner in sole practice or in a small law practice. More than 95% of the law practices in NSW have between 1 and 3 partners. The length of time and frustration associated with vexatious litigation, as well as the challenging behaviour exhibited by many litigants, places an emotional toll on such practitioners who often have limited avenues for managing the stress associated with such behaviour. Frequently the litigant will continue to badger and even harass the principal and employees of the law practice. In some instances, the litigant has actively and publicly campaigned against the law practice leading to distress, emotional trauma and illness among the solicitor and his staff.
7. The cost of defending claims brought by vexatious litigants is almost always a multiple of the cost of handling non-vexatious litigation. This creates a burden for the lawyers' insurance scheme generally but particularly for the practitioner against whom the claim is made as defence costs, and any payment that might be made to the litigant, form part of the practitioner's claims history and can impact on their future premiums.

#### **The rationale for a managed response towards vexatious behaviour**

8. The approach taken by Lawcover and the legal practitioners it insures is that vexatious litigants and litigation are a fact of life. Such litigants are entitled to have the claim they make and any subsequent proceedings they bring considered for merit. Lawcover's philosophy is that the early investigation, assessment and resolution of claims where possible, benefits the practitioner, the insurance scheme generally and the claimant, by saving time and financial cost and by securing the certainty of an outcome at the earliest possible opportunity.
9. However a key characteristic of vexatious litigants can be their obstructive behaviour which, as the Victorian Parliamentary Law Reform Committee in 2008 identified, was exhibited in "their motivations, expectations, personalities and even mental or behavioural disorders". It is Lawcover's experience that such behaviours frustrate any early claims handling process. The litigant with an obstructive behaviour frequently refuses to provide proper particulars, listen to another point of view, consider the weaknesses in the claim made, and then very often refuses to accept the advice of the Lawcover claims solicitor that they should seek independent legal advice.
10. Vexatious litigants end up in a Catch-22 situation: assuming for the moment that a litigant does have a claim which has merit, their behaviour can put them in a position where they are unlikely to seek or obtain skilled legal advice, often on the grounds that they are frustrated with the legal system.



The failure to obtain proper legal advice means that the claim is never properly articulated or the pleadings particularised so that the claim can be assessed expeditiously. This then leads to frustration with the progress of the litigant's claim, with the legal system and an often expressed desire to make them (in this case the lawyers) pay.

11. The problems created by disproportionate use of time and resources on the part of the judicial system as well as insurers and other defendants are identified in the draft report. Also identified is the opinion, shared by Lawcover, that the current regime has been of limited utility in controlling vexatious behaviour in the courts and tribunals. A more managed approach is therefore necessary.

**Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts?**

12. The description of the reforms undertaken in the United Kingdom involving a series of graduated restraint orders. These have been adopted by the Victorian enquiry resulting in the *Vexatious Proceedings Bill 2014* currently before the Victorian Parliament.
13. As an insurer who has handled a significant number of vexatious claims and litigants, Lawcover considers the graduated or three tiered regime attractive and worthy of further consideration by the Commission as a reform that might be put as a recommendation to other states and territories.

**Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system?**

14. It follows from the discussion thus far that Lawcover agrees with an approach that sees vexatious behaviour on a spectrum as illustrated in figure 12.2 of the draft report. There are currently in place significant and difficult hurdles to overcome in order to declare a litigant vexatious. Lawcover's experience has been that it can be too difficult and not worth the time, expense and risk of pursuing action to a declaration. Consequently, Lawcover has only been rarely involved in declaring a litigant vexatious. However, this does not mean that the practitioners insured by Lawcover, as well as its personnel and external panel lawyers it retains to handle vexatious claims, are not significantly affected by vexatious behaviour.
15. An argument to 'lower the bar' so as to attract a response from the justice system should not be seen as an attempt to confine the rights of litigants. Indeed, the emphasis should be that in responding the justice system provides better management of such claims and increased care for other parties affected by vexatious litigation.



**Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?**

16. Lawcover does not have a firm view in response to this question. On the one hand there are the obvious privacy considerations and the risk that such a register would need to be managed and include the ability of litigants to review registration of orders. On the other hand, a publicly searchable register of orders would enable both defendants and courts to quickly ascertain whether the litigation being brought is vexatious.

