ACCESS TO JUSTICE – PROBLEMS OF SELF-REPRESENTATION THE QUERULANT LITIGANT

The Hon Justice James Douglas
Supreme Court of Queensland

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Equal justice to all

My oath of office, prescribed by the Queensland Constitution, requires me at all times and in all things to do equal justice to all persons. The importance of the oath, in its historical context, cannot be overstated. It explains why judges remain so aware of the importance of judicial independence, not only from the government of the day but from the larger economic interests against which ordinary citizens may fear to seek protection, not least because of their own limited financial resources. It is why we declare our interests in companies involved in litigation before us and disqualify ourselves if there is a legitimate apprehension of bias.

I think I am representative of my colleagues, however, in saying that the oath of office rarely makes me anxious. We have been brought up in a profession which is independent and intellectually honest. We assess arguments on their merits, regularly disagreeing with particular results, but very rarely questioning the good faith of the decision makers. We recognise that assessments of witnesses' credit can vary from person to person and that the law's application is not always as certain as we may like it to be. That is one reason why the law can develop to adapt to society's changing circumstances, especially in novel areas where justice requires a solution to developing or new problems.

Querulant self-represented litigants

I am sure I am not alone, however, in having to steel myself to do equal justice to one particular type of person, the querulant, self-represented litigant.

We frequently encounter self-represented litigants. It is axiomatic in our system that parties may appear in person or by a lawyer.[1] Most of them represent themselves because they cannot afford representation or are faced with a problem which does not represent such a threat to their interests, either economic or to their liberty, as to demand professional help. Objectors to a development might not like the proposal and be willing to stand up in a hearing to say why but will also rationally assess the likely impact on their own homes' value to be so small as not to justify the expense of legal representation. Similarly, the first time, low-range drink driver who has not harmed anybody may decide that legal representation is a luxury.

I have few problems with the system that recognises that such citizens should be able to represent themselves. The problems I do have arise from the inability of some such litigants to deal with the rules of evidence and procedure which are second nature to efficient litigating lawyers and which facilitate the conduct of litigation so much, but that is not the focus of my talk today.[2] QPILCH and similar bodies can and do help many litigants in person very usefully by giving them procedural advice about how the system works and sometimes substantive advice about their particular problem if it meets their public interest test.

The particular type of self-represented litigant I wish to talk about today is, as I identified earlier, the querulant one. That was a term I was introduced to by a Melbourne psychiatrist, Dr Grant Lester, when I attended the judicial orientation program in 2004. Typically they are frequent litigants who do not want legal advice or representation. The psychiatric description of the type of individual to whom I am referring may strike a chord with some of you. When I was a barrister I was lucky. I cannot recall encountering a real example as an opponent. Unfortunately, for many judges, the description of the symptoms of the querulant litigant makes us shudder. Dr Lester has described them well:[3]

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1 See, eg, s 209 of the *Supreme Court Act* 1995 (Qld).

2 Cf the argument for limiting the right of self-representation by Rabeea Assy, "Revisiting the right to self representation in civil proceedings" (2011) Civil Justice Quarterly 267.

3 Dr Grant Lester, "The Vexatious Litigant" (2005) 17 Judicial Officers' Bulletin 17, 18-19.

"At times, these chronic grumblers may become 'querulant' (morbid complainants). In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others). There will be evidence of significant and increasing loss in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge, rather than compensation or reparation.

Despite 150 years of psychiatric research into querulous paranoia, there is no consensus as to the underlying pathology. Theories range from an underlying organic disease process, similar to schizophrenia, through to psychogenic processes; that is, certain vulnerable characters are sensitised by certain life experiences and are then struck by a key event which triggers their complaining. Preceding the querulousness, they have often received some form of blow to their individual sense of self-esteem or security. This was often in the nature of a loss of relationship, through separation or death, ill health or loss of employment.

The key event is usually a genuine grievance and seems to echo previous losses. The key event is often of a type to threaten the (male) status symbols of prestige, position, power, property and rights. Environmental factors influence their complaint.

In general, these difficult complainants are middle-aged and males predominate 4:1.

Prior to the development of the complaint, they are reasonably high functioning, with a past history of education and employment. The majority of querulant complainants have had partners, however, their relationships or marriages are often failing or have ended. It is uncommon for them to have a past criminal history, psychiatric history or a history of substance abuse.

Their premorbid personality has been described by a variety of researchers over the years. Kraft Ebbing described them as having a 'rough, irritable, egotistic personality, defective in their notions of justice'.[4] Kolle described them as 'restless, excitable, irritable, inflated

[4] R Krafft-Ebbing, *Text Booking of Insanity: Based on Clinical Observations. For Practitioners and students of Medicine* (trans C Chaddock, MD), 1905, FA Davies Co, Philadelphia.

self esteem, assertive, combative, defiant and fanatical'.[5] Ungvari described them as 'inflexible with difficulties with intimacy, assertive, hyper-sensitive to criticism, and distrustful'.[6]

They present as highly energised with labile emotions. They will have an overflowing suitcase, briefcase or box. They will appear to have pressure of speech such that interrupting them is difficult and they will speak to you as if you already know all the details of the case. Their speech is vague and full of unnecessary and often confusing and irrelevant detail.

Written communications have the appearance of having been written in excitement with numerous notes of exclamation and interrogation. These are often like a legal document except the entire surface is covered with script (including the margins). The substance is repeated in several different ways with undue grammatical emphasis and underlining. They will often refer to themselves in a third person legalistic style, for example, as 'the defendant'. Coloured inks are used for emphasis as are the star asterisk key and the use of capitalisation. Cut outs from newspapers, personal diaries and irrelevant materials abound. They will be initially seductive and recruiting, however, if you show any lack of response they rapidly become angry and will speak to you as if you are part of the persecuting opposition.[7]

Recent research has found that the majority of these individuals will commence litigation, and when and if they become exhausted, either through a lack of financial capacity; emotional exhaustion or through being declared a vexatious litigant, the complainant will now rest and recuperate in complaints departments and ombudsman's offices.

In court they will nearly always be self-represented, as they desire vindication which is best gained through their 'day in court'. Their legal counsel will be viewed as an impediment, needlessly taking the focus away from themselves and 'the truth' of the matter. They will appear legally hyper-competent, but will show no true understanding of the cases they cite. They will be disorganised and overwhelmed and will constantly request more time.

While not appearing low in mood, they will often describe the failure of their claim as life threatening and may overtly threaten suicide or violent consequences to those frustrating their efforts.

Past psychiatric management was dependent on the behaviour of the querulant. Those who made threats, harmed self or others were

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5 K Kolle, 'Uber Querulanten. Archiv fur Psychiatric and Nervenkrankheiten", 1931, Verrlag von Julius Springer, Berlin.

6 GS Ungvari, A Pang, C Wong, "Querulous Behaviour" (1997) 37 *Medicine Science and Law* 265.

7 G Lester, B Wilson, L Griffin, PE Mullen, "Unusually persistent complainants" (2004) 184 *British Journal of Psychiatry* 352.

> institutionalised. Prior to the advent of psychopharmacology, they showed a chronic waxing and waning pattern over decades. With the advent of anti-psychotic medication, it has become evident that use of this medication, along with psychotherapy, is able to normalise their behaviour and thinking over a period of months. However, the querulant rarely commences any treatment voluntarily."

Dr Lester gives some useful advice about handling such individuals in court, which I have been able to put into practice on quite a few occasions. My concern today is not, however, at that individual level but to ask: how can the system handle such litigants better?

Is a better civil legal aid system a solution?

In 2009 my associate was a young French judge who, at the age of 28, had just commenced his judicial career in that country. I was able to recruit him for a year with the assistance of the French National Judges' school because I have an interest in comparative law and they were interested in exposing their graduates to other legal systems. It was an instructive year for both of us.

One of his early observations to me was to express surprise at the number of self-represented litigants. In France and most European jurisdictions, where the judiciary has a more active role in the conduct of litigation, in a court with a jurisdiction like the Supreme Court's, there is no right to appear except through a lawyer. There is, however, a properly funded legal aid system for civil disputes in France, unlike here, and an obligation on the lawyers to appear for legally assisted clients at the appropriate fees. Much as I would like to see such a régime implemented here and believe that it would enhance the efficiency of our system, I doubt that, politically or economically, it would attract sufficient support in what are said to be straitened times for the various Australian governments.

That having been said, it is useful to recall the comments of Chief Justice Gleeson to the Australian Legal Convention in Canberra on 10 October 1999:[8]

> "Our system proceeds upon the assumption that a just outcome is most likely to result from a contest in which strong arguments are put on

[8] See at: http:/www.highcourt.gov.au/speeches/cj/cj_sta10oct.htm. (Emphasis added.)

> both sides of the question, and the court adopts the role of a neutral and impartial adjudicator. If parties are not legally represented, then the assumption is often invalidated, partly or completely. A senior English judge said that 'the adversary system calls for legal representation if it is to operate with such justice as is vouchsafed to humankind'[9].
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> What is not so well understood outside the court system and the legal profession is the cost to the system, and the community, in terms of disruption and delay, of the unrepresented litigant. If the work which the courts routinely leave to be done by lawyers is left in the hands of the litigants themselves, in most cases the work will either not be done at all, or it will be done slowly, wastefully, and ineffectively. If the judge or magistrate intervenes then his or her impartiality is likely to be compromised, and the time of the court will be occupied in activities which would ordinarily be unnecessary. The result is often confusion and delay in the instant case, with consequences for other litigants waiting their turn in overburdened court lists.
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> Legal aid is a controversial subject, with political implications, and it is not my intention to intrude into political debate. Resources are limited, and governments must establish priorities between competing needs. Governments are also entitled, and bound, to see that public funds are not poured into a bottomless pit. There is, however, one point that judges are well-placed to make. The expense which governments incur in funding legal aid is obvious and measurable. *What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.*"

Nor do I believe that the provision of more civil legal aid would, of itself, solve the problem I am addressing. It would need to be coupled with a removal of the general right of self-representation. That right is, in my view, and, I suspect, in the view of the vast majority of the Australian population, a very significant democratic right which would be lost at our peril.

More importantly, most litigants of the type I am discussing, would neither want nor deserve legal aid or representation. This is because no competent lawyer would advance an argument of the type many of them wish to make or in the form they

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[9] Lord Simon of Glaisdale in *Waugh v British Railways Board* [1980] AC 521 at 536.

would want it to be made. Nor would any competent legal aid authority wish to spend public money on worthless arguments.

Declaration as a vexatious litigant – is that a solution?

The system does have an existing remedy for the querulant litigant, the declaration of a litigant as vexatious. It is, however, not a complete solution. To declare a litigant vexatious one must show a significant history of vexatious proceedings in Australia, in the words of the Queensland legislation - which is a recent Act - that the litigant is someone who has "frequently instituted or conducted vexatious proceedings**".**[10] Many querulant litigants end up being declared vexatious but waste a lot of time and resources on the way to that end, including the resources of the unfortunate citizens, companies or governmental bodies whom they have sued. Some of them also then turn up at the wrong end of a lawsuit themselves, re-enlivening the opportunity to push their previously losing arguments, without the need to satisfy a court that they are entitled to bring proceedings.

Let me illustrate part of the problem by referring to an example from personal experience, something which might be generally inadvisable in this area, but one where time has given the events some perspective. Early in 2005, when I had been a judge for a little over a year, and several months after I had first heard of the querulant litigant at the judicial orientation program, a visiting American judge asked me what I was doing that day in court. In retrospect, I have always wondered at his ability to keep a straight face when I told him that I was hearing a case where the main factual issue was whether some Queensland Parks and Wildlife Service rangers had trespassed on the plaintiff's property when trying to retrieve a red kangaroo he was keeping there without a permit. "Only in Australia!" I sighed to myself.

The plaintiff's case for trespass was pretty clearly compromised by a video recording from his side and an audio recording from the rangers' side, both of which persuaded me that the plaintiff invited the rangers into his house so they could remove the kangaroo and assisted them to bag it to allow it to be removed.

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[10] See the *Vexatious Proceeding Act* 2005 (Qld) s 6(1).

There was also a legal issue as to whether the kangaroo was in the plaintiff's possession unlawfully which I resolved against him and which excited some further attention in the Court of Appeal when the matter, inevitably, went there. The appeal was unsuccessful.

The trial took three days in evidence and argument. A day was set aside for the hearing in the Court of Appeal. The judgments were reserved. Mine took some time to write and the Court of Appeal's reasons show all the signs of care in their preparation. The time of the court had also been taken up in interlocutory proceedings where a judge had identified the legal issues that needed to be resolved, it being apparent the plaintiff was not capable of pleading the case according to the rules of court. There was no acceptable evidence of loss suffered by the plaintiff and Mitchell, the kangaroo, died accidentally shortly after he was taken from the plaintiff's premises and well before the proceedings.

During the hearing it became apparent to me that the plaintiff was receiving advice from, forgive the phrase, a "bush lawyer", about the status of Mitchell as a protected animal. It is not uncommon in such litigation to find that the nominal plaintiffs are receiving support from others, sometimes others who have themselves been declared vexatious or who are people with a particular "idée fixe" about some area of the law. Commonly those ideas used to involve *Magna Carta* and/or the political and legal results of Australia going off the "gold standard" but there are many other unusual obsessions "out there".

It was also apparent that the plaintiff and his daughter were inordinately distressed by the loss of the kangaroo. There was no real object to be attained by the litigation other than, perhaps, the plaintiff's attempt to express grief, for which the courtroom was not the appropriate forum. There was no suggestion that the plaintiff had previously acted vexatiously in the sense required by the legislation, nor did he display all of the symptoms of the querulant litigant as he was polite, not aggressive in putting his case. In many ways it was a sad experience for all involved. But there is certainly a legitimate question why the court's limited resources should have been devoted to such litigation at the expense of other litigants who wish to attain tangible results.

I have come across many examples since of litigation which was unnecessary or pointless, a waste of the courts' and the other litigants' time and resources. It is important not to approach such cases in a blinkered fashion, however. Not long ago I heard a case where a litigant in person had been required by another judge to refine his hundreds of pages of confused submissions and evidence to isolate the real grievance he claimed to have suffered. Having done that, he came before me and argued the point, as refined, reasonably cogently and successfully.

That case is the subject of further proceedings so I shall say no more about it than the obvious, that a litigant in person who adopts a scattergun approach to his grievances may well have a valid point lurking beneath the dross. That makes the judge's task much more difficult but one that the judge needs to approach conscientiously. A litigant of that type, if required to use a lawyer, may well achieve a legitimate aim without affecting the proper operation of the system.

A range of possible responses

The problem is to identify such litigants at an early stage of proceedings before they do too much damage to their opponents and the system. An early warning sign is their common inability to articulate their claims in the form required by the rules of court or at all. One frequently encounters documents of the type described by Dr Lester, written in excitement, covering the entire surface of a page, repetitive, confusing and often incomprehensible. Typically they will be attacked by the defendant with an application to strike out the document. That is likely to be successful but normally it will be replaced by another document equally incomprehensible which will again be the subject of an application to strike out.

Costs orders and orders staying an action until previous orders for costs have been paid can provide some redress but do not provide a complete solution. Many of those litigants have no fear of costs orders because they are impecunious. Costs orders can impede the inarticulate or unintelligent litigant with a legitimate grievance from having proper access to the system.

The judge can also try to focus the litigant in person on proper methods of proof and argument, a task which is easier to describe than to achieve with a determined and aggressive litigant who does not understand or will not understand normal procedures in a courtroom.

Striking out an action as well as a pleading or part of a pleading may bring some resolution to the proceeding but not necessarily so if another action may still be brought within time. Proceedings may be stayed as an abuse of process, however, or restrained if the party seeks to re-litigate matters already determined.[11] But all of these approaches take time and use up the resources of the other parties and the courts.

Other approaches may comprehend empowering the court to refer the need for the litigant to have a litigation guardian to the Guardianship and Administration Tribunal.[12] Another legitimate issue to consider is whether such litigants are as impoverished as they claim. They often ask for the waiver of filing fees on the basis of impecuniosity and it is appropriate for registry staff to require proper information about their financial resources and to investigate them further if necessary.

In England, the power to make restraining orders against the making of unmeritorious claims has been extended to cover wider circumstances than are dealt with by our *Vexatious Proceedings Act* 2005, commencing with limited orders where a party has made two or more applications totally without merit.[13]

A requirement that querulant litigants be represented by a lawyer

What I suggest as a further possible statutory and procedural response is to allow the court, faced with litigants who will not produce a coherent pleading or initiating document or who are manifestly incapable of conducting proceedings, to stay their action until they are represented by a lawyer. Ideally such an order would be coupled

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11 *Grepe v Loam* (1887) 37 Ch D 168; *von Risefer v Permanent Trustee Company Ltd* [2005] Qd R 681, 688.

12 See Dr Ian Freckelton SC, "Vexatious Litigants: A Report on Consultation with Judicial Officers and VCAT Members" at p. 21, but cf *Bahonko v Moorfields Community* [2008] VSCA 6 and *SB (Guardianship)* [2007] VCAT 333 discussing s 66 of the *Guardianship and Administration Act* 1986 (Vic).

13 See Freckelton, fn 12, at pp 23-24.

with a régime entitling the litigant to a consultation with a legal aid body but which would not impose an obligation on legal aid to represent the litigant.[14] Another approach may be to stay the action until a legal practitioner certifies that the applicant has produced an application or a pleading that conforms with the rules of court and does not amount to an abuse of process.

There are obvious problems with such a system's potential to create barriers for anxious or challenging litigants from having access to the courts. The blocking of that opportunity for citizens to vent their concerns may lead to other socially inappropriate behaviour or a general feeling of resentment against "the system". The courts can operate to some extent as a democratic safety valve but that is not their proper function, which is to resolve real disputes justly in accordance with the law.

The ethical duty of lawyers acting for querulant litigants

Such a course would be of no assistance to the system if the litigant in person ends up briefing an advocate who ignores his professional duty to the court, the most relevant aspect of that duty being not to abuse the court's process by advancing untenable arguments. Counsel in such cases need to be astute to the problem and to be able to distinguish between the arguable and the hopeless case, but that is part of their professional discipline, a feature of normal practice and a salient reason why courts in our system rely, and are entitled to rely, on their choice of the arguments that they put on behalf of their clients. There are also remedies that can be used against lawyers who do not behave professionally.

Applications by querulant litigants to disqualify judges for bias

Before closing may I discuss one more topic relevant to the judicial oath that I mentioned at the beginning. Such litigants, faced with a judge who has decided a case against them previously, are very likely to object on the ground of bias if the judge is listed to preside on a case involving them again.

The general test for disqualification for apprehended bias is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind

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[14] For a more extended justification of such a system see Rabeea Assy, fn 2.

to the resolution of the question the judge is required to decide. Generally speaking the mere fact that a judge has previously decided a different case against a litigant would not be regarded as a sufficient reason for disqualification. In that context it is worth recalling that judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong.

Recently, I was one of three judges listed to sit on the Court of Appeal in a matter involving a litigant in person. He objected to each member of the court sitting for differing reasons in each case. Each of us refused to disqualify ourselves. A judge faced with such an application needs to bear in mind that the proper operation of the system requires that the judge sit unless it is proper to refuse to do so, as the High Court said about the duty of judges in *Ebner v Official Trustee*[15]:

> "19 … They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
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> 20 This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

The system requires us to sit in order to do equal justice to all, remembering that the "all" in the oath extends beyond the parties to that litigation to citizens generally who rely on the efficient operation of the courts and the legal system.

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15 (2005) 205 CLR 337, 348 at [19] – [20].

Conclusion

The problem of the querulant litigant is one which requires attention and is receiving more consideration, at least among the judiciary. It is a distinct challenge to the rule of law affecting the proper operation of the courts. As the Hon. Patrick Keane, Chief Justice of the Federal Court, said at a recent judges' conference:[16]

> "When I was an articled clerk taking tentative steps towards entering the legal profession, I witnessed the first encounters between the judiciary and what was then a new phenomenon, the unreasonable litigant in person.
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> I say that it was a new phenomenon because, although there have always been litigants in civil cases who were obliged to speak for themselves because they could not afford a lawyer, these litigants were markedly different. Either they did not trust members of the legal profession to present arguments, the shining truth of which only they could see, or they could not find lawyers willing to depart from their ethical duty to the Court by arguing the unarguable. And hence they represented themselves. Often they were impecunious as well, usually having suffered reverses in business or having fallen foul of the revenue authorities but that was not why they were unrepresented.
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> I still remember quite vividly the genuine solicitude with which judges of the Superior Courts would greet people who came to court to argue that statutes were invalid because they were inconsistent with Magna Carta, or that the government had not been legally elected, or that the currency was invalid, or even, quite illogically, that the judge had not been validly appointed. Even judges who tended to be rather fierce in their dealings with the profession dealt with these cases with genuine, albeit, gentle good humour.
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> The judges seemed almost to welcome these cases, perhaps because they tended to see them as a form of light relief from the hard slog of serious cases argued by able lawyers. That was in the early 1970s.
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> Now, forty years later, no-one is laughing. The unreasonable litigant in person who will not take no for an answer, is recognised as a burden upon his or her fellow citizens, and a blight on the legal system which the unreasonable deploy, wittingly or not, as an instrument of oppression. Even those litigants in person who are not obviously unreasonable are now seen as a problem for the system.

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[16] PA Keane, "Litigants in person", paper delivered at the Supreme and Federal Court Judges' Conference, Melbourne, January 2012.

> They are now coming before the courts with increasing frequency.[17] It has rightly been said that 'it would be disregarding the obvious to fail to recognise that the [increasing] presence of litigants in person … is creating a problem for the courts'[18] in terms of increased demand on time, costs and resources.[19]"

A recent commentator has also concluded:[20]

> "When a litigant in person lacks the skills and expertise to conduct his or her case competently and imposes a disproportionate strain on court resources, the court should be entitled to require the litigant to obtain legal representation as a prerequisite for proceeding with the case."

In my view also, when querulant litigants affect the proper operation of the courts to the detriment of parties with real disputes, it is appropriate for the system to defend itself in such a fashion.

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17 The Hon. Justice Mahla L Pearlman AM and the Hon Justice Nicola Pain, paper delivered at the Australian Conference of Planning and Environment Courts and Tribunals, 5 September 2002, p 1; Louise Byrne and C J Leggat, Litigants in Person – Procedural and Ethical Issues for Barristers (1999) 19 *Australian Bar Review* 41.

18 *Cachia v Hanes* (1994) 179 CLR 403 at 415.

19 NSW Bar Association, Guidelines for barristers on dealing with self-represented litigants, October 2001, p 5.

20 Rabeea Assy, fn 2.