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25 June 2008

Mr. Johan Scheffer MLC  
Parliament of Victoria,  
Law Reform Committee  
Parliament House  
Spring Street,  
EAST MELBOURNE VIC 3002

Dear Mr Scheffer,

**Inquiry into Vexatious Litigants**

I refer to your letter dated 24 April 2008 by which you invited the State Revenue Office to make a submission to the law Reform Committee's Inquiry into Vexatious Litigants by 27 June 2008.

Thank you for the opportunity to respond. You would appreciate that the SRO collects revenue and often there is a great deal of sensitivity associated with this function. Having said that in my experience as Commissioner of State Revenue (since 2002) and in previous roles with the SRO over the last 10 years, there have been a handful of so called "vexatious litigants".

Though the numbers have been small, the limited resources of the SRO have been stretched in managing these people.

I enclose the SRO submission to the issues you have raised.

Please contact Aspasia Georgiou, Executive Director of Legal Services on 9628 -0554 should you care to discuss the issues in more detail or require any clarification of any matter.

Yours sincerely,

Paul Broderick,  
Commissioner of State Revenue

# Parliamentary Inquiry Into Vexatious Litigants

## Vexatious litigants in Victoria

- How common are vexatious litigants in Victoria's courts and tribunals?  
The State Revenue office can only report on its experience with vexatious litigants. In the past ten years there have been 4 persons who could fall into this category. Whilst the number is small the impact on SRO's business has been significant – that is, dealing with such matters is resource intensive.

- Are vexatious litigants more common in some courts or tribunals, or in some types of legal disputes, than others?

The SRO conducts matters at VCAT and the Supreme Court, (through its statutory objections and appeals process), and before the Magistrates' Court in relation to unpaid state taxes. In SRO matters there is revenue at stake, sometimes a significant amount, sometimes an insignificant amount. In our experience, where revenue is at stake or the jurisdiction is a no costs/low costs jurisdiction there is more likelihood of vexatious litigants.

- Why do you think some people become vexatious litigants? Do they try to solve their legal disputes in other ways before going to court? If so, are there features from their previous attempts to solve disputes that contribute to the becoming vexatious litigants?

It is not clear to me why persons become vexatious litigants. It may be a combination of not having been given an adequate explanation for a decision, it may be the manner in which they have been treated or the manner in which a decision has been conveyed, or it may simply be an unwillingness or inability to accept the decision.

It is difficult to comment on whether earlier attempts at resolving disputes are a contributing factor where a person becomes a vexatious litigant. It could be that previous attempts to resolve matters have not been successful, leading to less confidence in a positive outcome and therefore a desire to litigate to get someone to listen, or even to attempt to intimidate or "shame".

- Do vexatious litigants have any common characteristics?  
In the experience of SRO, the so called vexatious litigants have been determined, convinced that they are right, and will go to great lengths to put a position or make a point. Vexatious litigants usually send voluminous volumes of correspondence, often containing threatening or inflammatory language, they are demanding of time, resources and attention, and sometimes manipulative, or feel the world is out to "get them".

- In 2007 the Victorian Law Reform Commission suggested that the Victorian Parliament Law Reform Committee should consider the relationship between mental health and vexatious litigation. What is the relationship, if any, between mental health and vexatious litigation?

Whilst the SRO does not have experience in identifying mental health issues, in its experience with vexatious litigants, particularly correspondence and other dealings, the behaviour and communication styles of these individuals suggest that there may have been some underlying mental health issues in those individuals.

### **The effect of vexatious litigants on the justice system**

- What effect do vexatious litigants have on courts and tribunals in Victoria? What are the costs for courts and tribunals?

In our experience, the effect on the Courts and Tribunals is to take up or clog up court lists and court time. While self represented persons (vexatious or not) deserve a fair hearing, the time taken in assisting vexatious litigants can be significant, with the corresponding increases in costs and diversion of resources from other matters. More than the usual amount of staff may need to be allocated to manage such matters due to the way in which such persons conduct themselves, their “campaign” or the way such persons litigate (ie volumes) or due to the inherent characteristics of the litigants themselves. Additional expenditure may also be required in terms of security and staff wellbeing/safety or counseling.

- What effect do they have on judges and tribunal members, court staff, lawyers and witnesses?

Again, we can only offer a view from the SRO experience. It appears that vexatious litigants can stress and unsettle staff and in some cases threaten to physically harm staff. Whether or not the threat would ever be carried out, is irrelevant, the effect is the same – it creates fear or concerns about safety.

### **Applying for a declaration under Victoria’s vexatious litigant laws**

- Are there people in Victoria’s courts and tribunals who are vexatious litigants, but have not been the subject of action under the vexatious litigant laws? If so, why do you think no action has been taken?

Again, the SRO can only express a view based on its experience, and would say that there are people who are/or have been vexatious litigants who have not been the subject of action under the vexatious litigant laws because these laws are out of date. In addition, the process to be followed in having someone declared a vexatious litigant is cumbersome.

- If you think you or your organization has been the victim of a vexatious litigant, did you take any action to have the person declared a vexatious litigant? If not, why not? What other action did you take?

The SRO did not take action to have the respective persons declared a vexatious litigant because the process was cumbersome. Instead, the SRO continued to rebut all allegations made by the person and advise them of their statutory appeal rights and to try to encourage them to seek independent legal advice with a view to getting an independent person to explain the position in a manner which the vexatious litigant was willing to accept.

- Should the Attorney-General be the only person who can apply to have a person declared a vexatious litigant? Who else should be able to - e.g. senior court staff or other parties to the litigation?

It is suggested that the Attorney General should not be the only person capable of declaring a person a vexatious litigant. Senior Court staff such as a Master/Registrar, Magistrate, Judge, on application, should be able to declare a person a vexatious litigant, but only on proper materials before them evidencing the so called vexatious conduct.

- Should courts and tribunals other than the Supreme Court have the power to declare a person a vexatious litigant? Should they be able too make declaration on their own motion, i.e. without an applications from another person?

Courts and Tribunals should be able to make a declaration that a person is vexatious litigant. All circumstances are different and it may be that a Court or Tribunal ought to be able to declare a person a vexatious litigant, depending on circumstances, as they may be in a unique position to monitor proceedings being issued and make a decision about whether the Court processes are being abused.

#### **Who is a vexatious litigant under Victoria's laws?**

- Does the law in Victoria make it too easy or too difficult for a person to be declared a vexatious litigant?

The provisions relating to the declaration of a person a vexatious litigant are found in the *Supreme Court Act 1986* (SCA). Section 21 SCA, sets out the procedure and it is only the Attorney (AG) who can bring these proceedings. Given the commitments of the AG it may be difficult to get approval for commencement of proceedings in a timely fashion. Given there is no inherent jurisdiction in the Supreme court to prevent the commencement of a proceeding, and only the AG may apply to the court if it is too difficult. One can understand the need for a "gatekeeper" given the seriousness of denying someone reasonable access to the law, but perhaps it is timely to review these provisions in light of the Charter of Human Rights and the balance of competing rights required by section 7 of the Charter.

- What should the 'test' be for determining whether a person is a vexatious litigant? For example, should the test be that the person brought vexatious legal proceedings 'frequently'. Rather than stricter test of 'habitually' and 'persistently'?

It would appear that there are varying ways in which a person could be or become "vexatious". This might include issuing proceedings "frequently" or "habitually" and/or "persistently". There is no one single test and any legislative proposal for reform may need to consider each of the factors listed, because in any case all the factors must be considered in deciding whether a person is a "vexatious litigant".

It may be appropriate to consider some of the issues outlined by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 492, being such matters as follows:

- If proceedings are instituted to embarrass or annoy the person against whom they are brought
  - If the proceedings are brought for collateral purposes
  - If the proceedings are manifestly untenable ( no matter the motive)
  - Note also the decision of *Attorney General ( Vic) v Weston* [2004] VSC 314, and the consideration of section 21 of the SCA
- Should the Supreme Court (or other courts and tribunals if appropriate) be able to consider other criteria? For example, should it be able to consider:
    - The way the person has conducted the litigation?
    - The person's motive for bringing the litigation, e.g. whether the proceedings were brought to harass or annoy another person or to cause delay or detriment?

The Supreme Court (or other courts or Tribunals if appropriate), should be able to consider other criteria, bearing in mind that there are legitimate court processes which can, and ought, be used appropriately. It may in some cases be a fine line between using court processes legitimately, as opposed to frustrate or annoy another person. The Court should be able to balance the factors it considers appropriate in any given circumstance, if relevant, including the way litigation has been conducted and whether the litigation has been brought to frustrate or delay. It should be borne in mind that if the court can take these other matters into consideration, then this process could become another process which could be abused by a vexatious litigant.

- Should the Supreme Court be able to take into account any interlocutory or (interim) applications that the person has brought during the litigation?  
Legitimate interim steps are often necessary, and have considerable benefits in the conduct of litigation. If a Court were to form a view that a party was deliberately bringing interim steps or taking interlocutory proceedings to delay the hearing of a matter, then the Court should be able to take this into account. Again, the line is likely to be a fine one and it will be a matter of balancing the competing interests.

#### **What rights should an alleged vexatious litigant have?**

- What rights should an alleged vexatious litigant have when the Supreme Court (or other courts and tribunals if appropriate) are able to make other orders to control vexatious litigations? For example, should it be able to:
  - Impose conditions on the right of the person to continue or bring litigations, such as power to order that the person cannot bring proceedings unless they are legally represented?
  - Prevent a person from entering court premises?

It is considered that a court should be able to control proceedings if it forms the view that the proceedings are "vexatious". Being able to order a person to be legally represented is one way of controlling proceedings. It needs to be borne in mind that often so called vexatious litigants have been represented at some point and have chosen not to continue being represented. In addition, in appropriate cases, a Court may need to prevent a person from entering Court premises/ or other government premises as restraining orders will not always

work when being applied for by a statutory authority. For example, it may be difficult to establish grounds for a restraining order when multiple "one off" threats are made to different staff as opposed to repeated threats to one person. In addition in the case of a statutory body there may be other hurdles to overcome such as who can take the proceeding to have someone declared vexatious.

### **The effect of a vexatious litigant declaration**

- Are vexatious litigant declarations effective at stopping vexatious litigants? How do they try to press their claim after a declaration is made?

Given the nature of vexatious litigants a declaration will often not "stop" a vexatious litigant, and such a person will continue to "appeal" in whatever way they can. Or even make allegations against the judicial officer who has made the declaration.

- Are there 'loopholes' in the laws that allow vexatious litigants to continue litigating, e.g. through relatives, friends or other associates? Should the Supreme Court be able to control litigation by people who act 'in concert' with a vexatious litigant?

In appropriate circumstances, the Court should be able to control litigation in which the court processes are being abused, by a vexatious litigant using these processes through a relative or associate. There are clearly ways in which a vexatious litigant can act through others.

- Does the law make it too easy or too difficult for a vexatious litigant to get leave from a court or tribunal to continue or bring litigation? For example, should the vexatious litigant have to show that there are reasonable grounds for the litigation?

This is a difficult issue which requires the balancing of competing interests. Often it is difficult for a court to fully apprise itself of a matter in the short time it has available and hence the erring on the side of caution - and there is always the tendency to be over accommodating and assist a self represented litigant (vexatious or not). If a vexatious litigant had to show "reasonable grounds", then this may curtail some of the vexatious litigation.

- Under the current law, a vexatious litigant can apply for leave ex parte (without the court or tribunal hearing from anyone else). Should the Attorney-General, or any other people, be notified when a vexatious litigant seeks leave? What rights should those people have?

All parties should be advised when a vexatious litigant seeks leave because with the benefit of hearing from other parties a court may be able to "control"/direct the course of litigation at an earlier point than might otherwise be possible. There is also more material on which to base a decision if the court has the benefit of hearing from all parties.

- Should courts and tribunals be able to decide leave applications 'on the papers', without hearing from anyone in person?

There may be appropriate cases where the Court or Tribunal should be able to decide applications 'on the papers'. It would be preferable for the courts to

give all relevant parties an opportunity to be heard or put material before the court prior to a court granting leave.

- Should courts and tribunals be able to impose conditions when they grant leave to a vexatious litigant to bring litigation, e.g. should they be able to order the vexatious litigant to provide security for the likely legal costs of the defendant?

Courts and Tribunals ought to be able to impose any conditions they consider fit when granting leave to a vexatious litigant to bring litigation, including security for legal costs of the defendant. Obviously there needs to be sufficient flexibility in the types of conditions that can be imposed so as to balance the rights of a person with a genuine case labeled “vexatious” and the truly vexatious individual.

- Should vexatious litigants have the right to appeal when a court or tribunal refuses to grant leave?

There should be a right of appeal when leave is refused by a court or tribunal, but in a way which balances the needs of a so called vexatious litigant to appeal, and the need to curtail vexatious litigation. There may also however be instances where it would be appropriate for there to be finality without the ability to prolong unfounded/ or cases without merit through endless appeals.

### **Balancing rights and interests**

- Victoria has a Charter of Human Rights and Responsibilities that, amongst other things, protects the rights of people to a fair hearing. Do you think Victoria’s vexatious litigant laws strike the right balance between access to the courts and the need to protect other parties and the justice system from vexatious litigation?

Presently the balance would appear to be in favor of vexatious litigants. There is definitely a need to protect and balance the rights of people to a fair hearing, and access to the court to the rights of those administering justice and other persons to be able to curtail costly and sometimes unwarranted litigation. Getting this balance right will be the legislative challenge.

### **Other ways to respond to vexatious litigants**

- What other laws in Victoria could be used to respond to vexatious litigation and vexatious litigants? Are they used too little or too often?

Mediation may be a way of responding to vexatious litigants.

Use / amendment of restraining order provisions?

Use of counseling services or referral to other bodies to deal with possible mental health issues –this is a delicate issue and fraught if judicial officers and court staff and other government staff have no training in these areas.

- Are there any laws that would help courts and tribunals respond to vexatious litigants that should be introduced in Victoria?

It may be appropriate to enshrine in legislation some of the matters that a court needs to consider, and what it can do in its dealings or ability to direct or

curtail proceedings in the case of a vexatious litigant. It may be appropriate to follow some of the other models whereby the application needs to be made to a judge rather than a tribunal.

- Is there any other action that courts and tribunals could take to manager vexatious litigants, e.g. should there be more guidelines or training for judges, tribunal members and court staff on how to deal with difficult litigants?  
Undoubtedly training of judges, court officers and others exposed to vexatious litigants as to how to deal with vexatious litigants would be of benefit.
- Should courts and tribunals be able to refer vexatious litigants to support services? What kind of support services would be required?  
In some cases it is clear that a so called vexatious litigant has other “issues” including possible family or mental health issues and perhaps the referral to an on site Court counselor or court official or other counseling service may assist.
- How should the law, and courts and tribunals, respond to any mental health issues arising from vexatious litigation?  
The Courts and tribunals should be able to deal with any mental health issues arising from vexatious litigation as sympathetically as possible. The difficulty is in training court staff of all levels to recognize where there may be some underlying mental health issues, the complexities associated with making such judgments, and indeed the implications on others of making such a judgment.

#### **The impact of vexatious litigation in other federal, state and territory courts**

- If a person is declared a vexatious litigant by a federal court or a court in another state or territory, what effect should that have in Victoria? For example:
  - Should the declaration automatically apply in Victoria as well?
  - Should the Supreme Court (or other courts and tribunals if appropriate) be able to take account of the person’s litigation in federal or other state or territory courts when they are considering whether to declare the person a vexatious litigant in Victoria?

Appropriate laws should be introduced with appropriate safeguards and privacy protection for an individual and protection of an individual’s right to justice to enable cross border exchange of information in appropriate cases. In the same jurisdiction, there may be a need to ensure that there is such an exchange of information because a person could be using various different levels of the courts or tribunals and as a whole the behaviour/use of court processes could be considered vexatious. Appropriate trans border flows between states may also be warranted provided such exchange satisfies relevant privacy laws.