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Law Reform Committee



Law
Institute
Victoria

27 June 2008

Ms Kerry Riseley
Executive Officer
Victoria Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002
By email: vpirc@parliament.vic.gov.au

Dear Ms Riseley,

Inquiry into Vexatious Litigants

The Law Institute of Victoria (LIV) wishes to make a further submission to the Victoria Parliament Law Reform Committee's (the Committee) *Inquiry into Vexatious Litigants*. We note that the LIV has previously made a submission in September 2007 in relation to this Inquiry. This current submission specifically directs its comments to the questions and issues highlighted in the Committee's *Inquiry into Vexatious Litigants Issues Paper April 2008*.

We note that the Committee's terms of reference require the Committee to:

- (a) inquire into the effectiveness of current legislative provisions in dealing with vexatious litigants; and
- (b) make recommendations which better enable the courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian courts.

Vexatious Litigants in Victoria

While the LIV is not in a position to conclusively comment on the incidence of vexatious litigation in Victoria, anecdotal evidence suggests that vexatious litigants most commonly present in the Victorian Civil and Administrative Tribunal.

The LIV notes that the Committee is consulting with various courts and tribunals to determine the effect of vexatious litigants on the justice system in Victoria and the individuals and agencies who are the victims of vexatious litigants. The LIV suggests that in the case of the Magistrates' Court jurisdiction, this process may benefit from the consolidation of information from the various registries to better identify vexatious litigants.

The LIV urges the Committee to further consider the impact of mental health issues in vexatious litigation.

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The Effect of Vexatious Litigants on the Justice System

The LIV submits that the main problem caused by vexatious litigants is the increased pressure on court and tribunal resources. Matters involving vexatious litigants by their very nature take up a significant amount of time and resources, both judicial and administrative.

The Effect on Individuals and Agencies who are Victims of Vexatious Litigants

The LIV submits that a significant problem caused by vexatious litigants is the effect that vexatious litigation has on the non-vexatious party. The non-vexatious party can lose faith in the justice system amid the often unreasonable and persistent legal proceedings. Further, the non-vexatious party is often left with the burden of legal costs as a result of vexatious litigation. Even where a costs order is made against the vexatious litigant in favour of the other party, such a costs order would not ordinarily cover the totality of that party's legal costs. Further, a vexatious litigant may not have sufficient means to satisfy a costs order.

Applying for a Declaration under Victoria's Vexatious Litigant Laws

The LIV repeats its submission made in September 2007 on this point. The LIV supports expanding section 21 of the *Supreme Court Act 1986* to reflect Order 21 Rule 1 of the *Federal Court Rules* which provides that a person can be declared to be a vexatious litigant:

- (a) on the Court's own motion; or
- (b) on the application of the Attorney-General or Solicitor-General of the Commonwealth or of a State or Territory; or
- (c) on the application of the Registrar.

Further, the LIV recommends the inclusion of the aggrieved person as a class of persons who may seek to have a person declared vexatious. Order 21 Rule 2 of the *Federal Court Rules* provides an example of such a provision (emphasis added):

- (1) If a person institutes a vexatious proceeding and the Court is satisfied that the person has habitually, persistently and without reasonable grounds instituted other **vexatious proceedings in the Court or any other Australian court** (whether against the same person or against different persons), the Court may order:
 - (a) that any proceedings instituted by the person may not be continued without leave of the Court; and
 - (b) that the person may not institute a proceeding without leave of the Court.

The LIV considers that by expanding the class of persons who may seek to have a person declared vexatious, the problem of "forum-shopping" by vexatious litigants can be reduced.

The LIV is also concerned about the court process of having a person declared to be a vexatious litigant. By the very nature of the application, the application for a declaration should proceed through the court process quickly and efficiently to prevent any further proceedings being issued by the litigant. Anecdotal evidence suggests that applications for a declaration that a person is a vexatious litigant can take up to 2 years to proceed through the court process to final hearing and declaration. The LIV submits that this timeframe is excessive and contrary to the policy behind vexatious litigant provisions.

Who is a Vexatious Litigant under Victoria's Laws?

The LIV submits that the "test" as to who can be declared to be a vexatious litigant should be expanded to include and consider proceedings issued in non-Victorian courts and tribunals. The LIV again refer to Order 21 Rule 1 of the *Federal Court Rules* which allows for consideration of a person who institutes vexatious proceedings habitually, persistently and without reasonable grounds in the Federal Court or any other Australian court.

The LIV suggests that by including consideration of vexatious proceedings issued in all Australian courts, it will be easier to identify vexatious litigants and address the problem of vexatious proceedings across jurisdictions.

What rights should an alleged vexatious litigant have? Balancing rights and interests

The LIV notes that the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter) came into full effect on 1 January 2008. The LIV urges the Committee to consider in full the extent to which courts and tribunals are affected by the Charter in their dealings with alleged and declared vexatious litigants.

In particular, the LIV draws the Committee's attention to section 4 of the Charter providing that a court or tribunal will be a public authority, and therefore bound by relevant provisions of the Charter, when acting in an administrative capacity. The LIV notes that several of the rights in the Charter might be relevant to alleged or declared vexatious litigants. For example, a person has a right under s24 of the Charter to have a 'charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.' Under s8 of the Charter, every person 'has the right to recognition as a person before the law' and 'to enjoy his or her human rights without discrimination.'

The right to a fair hearing and other rights under the Charter could be relevant to an alleged or declared vexatious litigant as well as to the victim of a vexatious litigant. In balancing rights, it is important to note that under s7 of the Charter, '[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The Powers of the Court to Control Vexatious Litigation

The LIV considers that the Supreme Court should impose conditions upon vexatious litigants or potential vexatious litigants in order to deter and prevent vexatious litigation and ultimately better enable the courts to more efficiently and effectively perform their role.

(a) Identification

The LIV repeats its previously made submission that the registrar of each Victorian court and tribunal should develop and maintain a list of litigants with outstanding costs orders relating to proceedings which have been struck out or dismissed. This would lessen the opportunity for a litigant to bring frivolous or vexatious matters before different members of the judiciary.

Further, the LIV proposes that a litigant who has initiated multiple actions in relation to the same matter should have all related matters heard by the same judicial officer on each occasion. This would save court time and resources, as the judicial officer hearing the matter will already be familiar with its history and the history of related proceedings.

(b) Costs deterrents

The LIV suggests that vexatious litigants should be subject to a rule that where outstanding costs orders exist, the person against whom the costs orders were made cannot initiate further related proceedings. However, it recognises that such a rule would not be effective in all circumstances, particularly where litigants initiate various unrelated proceedings, are vexatious in relation to defences, and have the financial means to meet all costs orders. Further, it is noted that the general approach of some courts to impecunious litigants is often to waive filing and photocopying fees, and this approach would detract from any such rule.

The LIV repeats its previous submission that vexatious litigants with outstanding costs orders (see (b) above) and vexatious litigants in general should be required to provide security for costs for any proceedings in which they are involved. A security for costs order could be reviewed and potentially reversed if, at the directions hearing stage, the judicial officer agrees that the litigant's claim had merit.

(c) Requirement for a solicitor to be on the record

The LIV submits that a requirement that a solicitor be on the record for all proceedings involving a vexatious litigant would be a useful mechanism to help filter out unmeritorious defences and claims. Vexatious litigants should either be required to obtain legal representation or be required to have a solicitor sign off on any proceedings in which the vexatious litigant is involved.

Other Ways to Respond to Vexatious Litigants

The LIV notes that the Victorian Law Reform Commission has considered the issue of education in its *Civil Justice Review*. The LIV refers to the report flowing from this review in which the Commission considered various means by which additional assistance may be provided to self represented litigants who have claims or defences which appear to have merit.

The LIV repeats its submission that the education of litigants is important and essential in addressing vexatious litigation. Education on the issues of costs where a proceeding is unsuccessful is of particular importance, and should be highlighted in any education program.

The LIV would appreciate the opportunity to present on this submission at the public hearings to be conducted by the Committee later this year.

If you have any questions regarding this submission, please contact Irene Chrisafis, Litigation Lawyers Section lawyer at IChrisafis@liv.asn.au or on (03) 9607 9386.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Tony Burke', written in a cursive style.

Tony Burke
President
Law Institute of Victoria