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Dear Ms Riseley

### Vexatious Litigants

The Law Institute of Victoria (LIV) takes this opportunity to make a further submission to the Victoria Parliament Law Reform Committee's (the Committee) Inquiry into Vexatious Litigants.

Our submission is attached.

If you would like to discuss any of the matters raised in the submission, please contact Irene Chrisafis, Solicitor, Litigation Lawyers Section on (03) 9607 9386 or by email [ichrisafis@liv.asn.au](mailto:ichrisafis@liv.asn.au).

Yours sincerely

A handwritten signature in black ink, appearing to be 'Tony Burke'.

**Tony Burke**  
President  
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# Submission

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## Litigation Lawyers and Administrative Law & Human Rights Sections

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### Vexatious Litigants

To: Ms Kerryn Riseley, Executive Officer, Victoria Parliament Law Reform Committee

A submission from the Law Institute of Victoria (LIV)

Date: 12 September 2008

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## **1 Introduction**

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 written submissions (in September 2007 and June 2008) and oral submissions (at the public hearing on 6 August 2008) in relation to this Inquiry.

This current submission specifically directs its comments to a consideration of the possible application in Victoria of a system of civil restraint orders, such as that used in England and Wales.

The LIV recognises that every individual has a basic right to a fair hearing before a court or tribunal. In the case of vexatious litigants, however, the question becomes whether the individual's right to access justice is outweighed by competing public interest considerations, such considerations including the faith of the greater community in the justice system, appropriate use of finite resources of courts and tribunals, and prejudice to the non-vexatious parties, who incur legal costs in defending appeals or applications brought against them by vexatious litigants.

## **2 Who may be declared a vexatious litigant?**

Section 21 of the Supreme Court Act 1986 (Vic) provides that:

1. "The Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.
2. The Court may, after hearing or giving the person an opportunity to be heard, make an order declaring the person to be a vexatious litigant if it is satisfied that the person has-

- (a) habitually; and
- (b) persistently; and
- (c) without any reasonable ground-

instituted vexatious legal proceedings (whether civil or criminal) in the Court, an inferior court or a tribunal against the same person or different persons."

### 3 The civil restraint order model being used in England and Wales

Under the relevant law in England and Wales, an application to declare a litigant “vexatious” can be made via a civil proceedings order pursuant to Section 42 of the Supreme Court Act 1981 (Eng) c 54, or a civil restraint order pursuant to The Civil Procedure (Amendment No. 2) Rules 2004 (Eng) No. 2072.

The LIV notes from the decision in *Bhamjee v Forsdick and others* [2003] EWCA Civ III3 (see generally paragraph 20) that a civil proceedings order can be made only on the authority of the Attorney-General or the Solicitor General acting on behalf of the Attorney-General, and by a Divisional Court of the Queen’s Bench Division. To succeed in an application for a civil proceedings order in England and Wales, the applicant must satisfy the Court that the person alleged to be a vexatious litigant has instituted civil proceedings which can properly be regarded as “vexatious”, and that that person has acted “habitually and persistently and without any reasonable ground”. The order remains in force for an indefinite period unless it specifically provides otherwise. Once a civil proceedings order is made, the vexatious litigant may not institute or continue any civil proceedings unless a High Court judge is satisfied that the proceeding is not an abuse of process and there are reasonable grounds for the proceeding. Copies of civil proceedings orders are published in the London Gazette.

The operation of civil restraint orders is arguably more flexible and less draconian than a civil proceedings order. According to Practice Direction 3c – Civil Restraint Orders issued by the Ministry of Justice (UK), there are three types of civil restraint orders, each order varying in the degree to which a litigant is restrained from accessing the Court system:

*A limited civil restraint order* can be made where a litigant has made two or more applications which are totally without merit. The order is limited to the particular proceeding in which it is made. A vexatious litigant may apply for permission to appeal the order but such an application is determined without a hearing.

An *extended civil restraint order* differs from a limited civil restraint order in that it prevents the litigant from issuing claims or making applications in any Court (specified in the order) that raise any matter that relates to the proceedings in which the order is made unless permission has been obtained from the judge identified in the order. Such an order can only be in force for a maximum period of two years, though application may be made to extend this period for further periods of two years each.

Where a limited or extended civil restraint order is not considered effective in preventing a litigant from instituting vexatious proceedings, a *general civil restraint order* can be made. A general civil restraint order restricts the litigant from issuing any claim or making any application in any Court without first obtaining permission from the judge identified in the order. Such an order can only be in force for a maximum period of two years, however the order can be extended for periods not exceeding two years at a time. A person subject to a general civil restraint order

may apply for permission to appeal a general civil restraint order but such an application will be determined without a hearing.

**4 What would be the advantages of introducing a civil restraint order system in Victoria, such as that which is operating in England and Wales?**

There are a number of advantages in implementing in Victoria a system similar to the model of civil restraint orders operating in England and Wales. Firstly, it is a flexible system allowing for a three stage approach in restricting access to the courts. Under such a system, an order can be tailored to be confined to only a particular court or tribunal proceeding, or can extend to any future proceedings in any court or tribunal depending on the number and extent of vexatious proceedings or applications brought by a litigant.

Secondly, imposing an expiry period of two years for a civil restraint order would ensure that a vexatious litigant's right to access justice is balanced against public interest considerations. The Court would have an opportunity to further extend a civil restraint order after a period of two years if appropriate in the circumstances, but such an extension could be only for a further period of no greater than two years at a time.

The introduction of a civil restraint order system would also ensure that the finite resources and time of courts and tribunals is not being wasted on applications that lack merit. Under a civil restraint order system, a vexatious litigant would be able to appeal a civil restraint order, but such appeals could be dealt with "on the papers" without the need for the parties to attend court. Groundless appeals or applications could be dealt with from an early stage and disposed of without causing financial burden and distress to the non-vexatious parties.

If a system of civil restraint orders were to be introduced in Victoria, the LIV submits that the following should also be considered:

- a) If any application or statement of claim is dismissed on the basis that it is without merit, the order made by the Court should specify that fact. The litigant instituting the proceeding should have the opportunity to be heard and to make submissions as to the merit of the proceeding prior to it being dismissed in these circumstances. Furthermore such a litigant should have ordinary appeal rights in this regard.
- b) A County Court Judge or a Supreme Court Justice should be empowered to make an order for a limited civil restraint order on the "Court's own motion" that a person be declared a vexatious litigant. Such an order should only be made with the approval of the Chief Judge of the County Court or the Chief Justice of the Supreme Court.

- c) Extended and general civil restraint orders should be permitted to be made only by a Supreme Court Justice or a Federal Court Judge.
- d) Where an order is made for an indefinite period of time and the litigant wants to be removed from the list of vexatious litigants, the Court could determine whether that person should be removed. This should be done only with persuasive evidence as to why they should be removed and such applications could be determined “on the papers”.

## 5 Application of the Charter of Human Rights & Responsibilities Act 2006 (Vic) to courts and tribunals

Under the *Charter of Human Rights and Responsibilities Act (2006) (Vic)* (the Charter), a court is required to consider relevant human rights when exercising various powers and functions.

Section 38 of the Charter provides that “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.” The definition of “public authority” in s4 of the Charter includes courts and tribunals, only when they are acting in an administrative capacity. A legislative note to s4 suggests that “committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.”

Section 6(2)(b) of the Charter provides that the Charter applies to “courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3.” Pt 3 Div3 refers to the functions of courts and tribunals in relation to statutory interpretation: s32 provides that “so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.” The effect of s6(2)(b) in respect of Pt 2 of the Charter is less clear and is yet to be decided by a Victorian court. Bell J has acknowledged that “the question concerning the proper construction of s 6(2)(b) is one of fundamental importance”.<sup>1</sup>

Part 2 of the Charter consists of twenty categories of human rights which the Charter seeks to protect and sets out a test for determining when human rights may be limited (s7(2): the “reasonable limitations test”). Some scholars are of the view that s6(2)(b) grants courts and tribunals the power to enforce directly any of the rights that *relate to* court or tribunal proceedings, of which only s24 (right to a fair hearing) is relevant to the discussion about vexatious litigants.<sup>2</sup>

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<sup>1</sup> Korteš v Mirik & Mirik [2008] VSC 103 [18].

<sup>2</sup> See Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act*, (2008), [1.40] – [1.44].

## 6 Assessment of civil restraint orders against the Charter of Human Rights & Responsibilities Act 2006 (Vic)

The LIV considers that the following human rights are relevant to the issue of vexatious litigation and use of civil restraint orders to prevent abuse of court processes:

- section 8 of the Charter relating to every person's right to recognition as a person before the law and equal protection of the law without discrimination; and
- section 24 of the Charter relating to the right to have a fair and public hearing.

Any proposal to limit or deny a person's right to access the courts in the context of vexatious litigation would engage the above human rights under the Charter. However, under s7(2) of the Charter, these human rights could be subject to "reasonable limits" (such as a civil restraint order), provided the limits can be demonstrably justified in a free and democratic society, taking account of all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Few Victorian cases have applied the reasonable limitations test in s7(2).<sup>3</sup> It should be noted, however, that the Charter expressly provides that "international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision" (s32(2)).

The nature of the right to a fair hearing has been discussed widely in international jurisprudence, including by the Human Rights Committee (the UN Treaty Body which has responsibility for monitoring implementation of the *International Covenant on Civil and Political Rights*).

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<sup>3</sup> See e.g. P 09-003 [2008] VMHRB 1, [178]; Director of Housing v TP (Residential Tenancies) [2008] VCAT 1275, [38] – [39]; Carwoode Ply Ltd v Cardinia SC (Red Dot) [2008] VCAT 1334 at [237] (obiter).



The Human Rights Committee has commented that “the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law”.<sup>4</sup> The Committee notes that the right to a fair hearing encompasses the right to access to the courts, commenting that “access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice”.<sup>5</sup>

The nature of the right to a fair and public hearing is thus twofold. The hearing must firstly be fair to ensure the proper administration of justice. This means each party has a right to be heard and to respond to any allegations made against him or her. Secondly, the right requires a court to be unbiased, independent and impartial. This goes to the issue of procedural fairness rather than substantive fairness. What constitutes a fair hearing will depend on the facts of the case and will require a weighing of a number of public interest factors including the rights of the other party.

The England and Wales Court of Appeal discussed the impact of the jurisprudence of the European Court of Human Rights on a court’s power to respond to vexatious litigation in *Bhamjee v Forsdick (No2)* [2003] EWCA Civ 1113. The Court of Appeal held that the right of access to the courts may be subject to limitations in the form of regulation by the state, so long as two conditions are satisfied:

- (i) the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired;
- (ii) a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>6</sup>

The rights of the vexatious litigant must therefore be weighed against the individual rights of other parties to the proceeding together with any other competing public interest considerations.

In circumstances where the litigant’s behaviour is considered vexatious, there are legitimate purposes sought in limiting the individual right to access to justice. The legitimate aims sought to be achieved can be summarised as follows:

- protecting the functions of courts from abuse of processes;
- protecting courts from unmeritorious waste of resources;

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<sup>4</sup> Human Rights Committee, General Comment No 32 - Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (21 August 2007).

<sup>5</sup> *Ibid*, [9].

<sup>6</sup> [2003] EWCA Civ 1113, para 18. The Court of Appeal relied on the governing as set out in the judgments of the European Court of Human Rights in *Golder v UK* (A/18) 1 EHRR 524 at paras 36 and 38-39; *Ashingdane v UK* (A/93) (1985) 7 EHRR 528 at para 57; and *Tolstoy-Miloslavsky v UK* (A/323) (1995) 20 EHRR 442 at para 59.

- maintaining confidence in the administration of justice and the court's character as a court of justice;
- preventing unrealistic expectations on the part of the vexatious litigant; and
- preventing unfairness to the defendant resisting the vexatious litigant causes of actions and costs applications.

Having recognised there are legitimate purposes in limiting a vexatious litigant's right to access justice, the next critical step in determining whether the rights can be reasonably limited is understanding the nature and extent of the limitation posed by a civil restraint order. Answering this question will always turn on the facts on a case by case scenario. Some general observations can however be made:

- In cases where the civil restraint order is itself limited, say to apply to a particular proceeding in which the order is made, the nature of that limitation is likely to be considered proportionate to the importance of the purpose of the limitation. This is because there remains opportunity for the vexatious litigant to bring proceedings relating to other matters.
- In cases where the restraint order is extended, applying to proceedings issued in various courts, the nature of that limitation may, depending on the facts of the case, be proportionate and unlikely to be considered a breach. The civil restraint order should be limited in operation to 2 years for this reason.
- Civil restraint orders that seek to restrict the individual's right to access to justice for extended periods of time must be justified having regard to the vexatious litigant's conduct.
- Provided the right to access to justice is not irrevocably lost and can be revived in some way, the civil restraint order could be considered demonstrably justified.
- A civil restraint order is very likely to breach the Charter when it purports to extinguish an individual's right to access to justice and cannot be reinvoked.

A final factor for consideration is whether, in each case by case scenario, there are less restrictive means reasonably available to the courts to achieve the purpose that the civil restraint order seeks to achieve.

Whether a civil restraint order is consistent with the Charter will therefore depend on a case by case analysis, having regard to all relevant factors, including those discussed above.