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Ms Kerry Riseley,
Executive Officer,
Vexatious Litigants Inquiry,
Victorian Parliament Law Reform Committee,
Parliament House,
Spring Street,
EAST MELBOURNE VIC 3002.

Dear Ms Riseley,

Vexatious Litigants Inquiry

I have just completed four years of research into the vexatious litigant sanction in Australia and have recently submitted a Monash Ph D legal history thesis for examination entitled *Maverick Litigants: a History of Vexatious Litigants in Australia 1930-2007*. My research involved the compilation of the first Australian Vexatious Litigants Register and a detailed profiling of six of the ten persons declared as vexatious litigants in Australia in the first fifty years of the legislative sanction (1930-1980). This is the first time that such detailed research has been done. The thesis also includes a critical assessment of the sanction and of current reform proposals. I attach a soft copy of my thesis to assist the work of the Committee.

Please note that as the thesis is currently before examiners I would ask that the integrity of that process be respected and that the thesis not be published on the Inquiry web site for the time being. I will advise when the examination process is complete. That should occur during September 2008. I have no objection to this covering letter being published.

I make the following observations distilled from my research.

Definitional and threshold issues

1. At law the words 'vexatious litigant' have a narrow application. They refer to a person formally declared by a Supreme Court justice under the *Supreme Court Act 1986* (Vic) s 21. Usage of the term by court administrators, the media and other commentators is broader and looser and commonly includes litigants not so declared. Because of its pejorative overlay it is a term that should be used circumspectly lest it unfairly shape discussion.¹

¹ An example of value laden terminology in this arena is the 1999 recommendation of the Western Australia Law Reform Commission to rename that states vexatious litigant legislation the *Malicious Proceedings Act*. The Commission published no data to support that recommendation. The Western

2. There is inappropriate use of the term ‘self-represented litigant’ to describe a litigant in person. This expression implies that the natural order for a litigant appearing before a court is always with representation. Use of this term can unfairly shape discussion on issues surrounding the right to access the court. The term ‘litigant in person’ is the more neutral and is to be preferred. Here, the words of Professor Webb are apt:

...it needs to borne in mind that the primary function of the court system is to resolve disputes between citizens without them having to resort to force. In a sense courts are the original alternative method of dispute resolution. Advocates exist for one reason – to assist litigants in resolving those disputes. Litigants are practically and logically necessary for disputes to be settled: advocates are not.²

3. There is a threshold question about which litigants access the courts and why? The common assumption that vexatious litigants are necessarily impecunious and unmeritorious litigants in person needs to be viewed cautiously. Recent corporate duelling in the Federal Court for strategic and related reasons saw the resources of that court tied up for 120 sitting days over five years with the corporate plaintiff unsuccessful in every application. In finally dismissing the case *Sackville J* said;

In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.³

On one calculation the legal resources tied up in that one case was more than that for the combined twenty-eight declared vexatious litigant cases in Victoria and Queensland in the period 1930-2007. Accordingly, if misuse of court resources is truly a major catalyst for reform of the sanction then corporate use of the court system invites greater scrutiny.

Issues about data

4. In 1928, Victoria became the first Australian jurisdiction to enact the vexatious litigant sanction. Since the first order was made in 1930 (*Rupert Millane*) there have been a total of fourteen orders made over a seventy-seven year period (1930-2007). That is an average of one declaration every 5.5 years.
5. The total number of persons declared as vexatious litigants by ten of the nations eleven superior courts (Family Court excluded) in the period 1930-2007 is forty-seven.
6. There have been fifty-two formal vexatious litigant declarations in those same ten jurisdictions in the period 1930-2007. Four persons have

Australian government did not adopt that recommendation. See further Western Australia Law Reform Commission, *Civil and Criminal Justice System*, Report 92, 1999, 165.

² Duncan Webb, ‘The right not to have a lawyer’, (2007) 16 *JJA* 165, 168.

³ *Seven Network Limited v News Limited* [2007] FCA 1062, 1064.

declarations from two courts and one of those has declarations from three courts. There is no evidence of large scale interstate ‘forum shopping’ amongst declared vexatious litigants.

7. The Family Court is the eleventh superior court in Australia. It does not formally publish data about the persons declared as vexatious litigants in that jurisdiction. The *Family Law Act 1975* (Cth) s121 precludes such publication. The Family Court declined to participate in my research. However, in 2006 Bryant CJ told an international conference that in the thirty year period 1976-2006 the court had made 195 vexatious litigant orders.⁴ That is more than three times the number made in the other ten Australian superior court jurisdictions combined. On its face it suggests particular challenges that would benefit from detailed research.
8. State and Territory superior courts do not appear to keep publicly accessible data on the numbers of litigants in person in their jurisdictions. Despite the lack of official data, the observations of court administrators and judiciary suggest a surge in appearance by litigants in person. One judicial observer has described it as ‘the greatest single challenge for the civil justice system at the present time.’⁵ In the absence of data it is suggested that such observations should be treated with caution.
9. Two federal jurisdictions keep data on the number of litigants in person appearing in their courts:
 - a. In 2006-2007 in the High Court 70% (495) of all civil appellate special leave applications filed were from litigants in person.⁶ Analysis of those figures indicated that 62% (439) related to immigration matters. It is suggested that this case load is linked to the former Howard Governments policy settings in relation to mandatory detention.
 - b. In 2006-2007 in the Family Court, the number of cases involving a litigant in person was estimated to be as high as 34%.⁷ Here some commentators suggest that substantive law changes in the family law arena in relation to the welfare of children have contributed to an ‘endless cycle of court orders’⁸ and by direct implication an increase in litigants in person. By contrast substantive law changes through the *Child Support Assessment Act 1989* (Cth) removed child maintenance cases from the court system by making assessment of child maintenance an administrative matter supervised by the Child Support Agency and the Australian Tax Office.

⁴ Diana Bryant, *Self Represented and Vexatious Litigants in the Family Court of Australia*, Access to Justice Conference, Monash University, Prato, Italy, 2006.

⁵ Geoffrey Davies, ‘The Reality of Civil Justice Reform: why we must abandon the essential elements of our system’, (2003) 12 *JJA* 155, 158.

⁶ High Court of Australia, Annual Report 2006-2007, 11-12.

⁷ Family Court of Australia, Annual Report 2006-2007, Table 3.21, 54.

⁸ Belinda Paxton, ‘Domestic Violence and Abuse of Process’, (2003) 17 *Family Lawyer* 7, 11.

The nature of the vexatious litigant

10. Until my research there had been almost nothing written or published on the individual stories of vexatious litigants. In the first fifty years of the sanction only one declaration was reported in the official law reports.⁹ This is surprising given the rarity of the order and the fact that access to justice is a fundamental tenet of the democratic system. One would have thought an order limiting that access to be worthy of report especially given the precedent value of the early decisions interpreting new legislation.

11. Despite the lack of published research the common perception of a vexatious litigant is that they are an impecunious litigant in person who raises:

...spurious claims or defences, flout time limits to cause delays, pursue unmeritorious applications, refuse reasonable settlement offers, fail to pay orders for costs and launch frivolous appeals.¹⁰

My research, through the prism of history, suggests that there is a less one dimensional view. It is that vexatious litigants are larger than life and most can properly be described as people of ideas and talent. They are reformers, activists and performers seeking to advance their ideas and talents through the legal system and beyond. As such they fall within the broader definition of a Maverick being 'bohemian, dissenter, extremist, malcontent, nonconformist, radical.'¹¹ This is supported by the detailed case studies contained in Chapters Six to Eleven canvassed in the attached thesis particularly Bienvenu¹² and Soegemeier.

12. Australian psychiatrists Professor Paul Mullen and Dr Grant Lester have recently researched the challenge of managing vexatious litigants, or in medical parlance, 'querulents'. These are broadly defined as individuals who exhibit:

a pattern of behaviour involving the persistent pursuit of a personal grievance in a manner seriously damaging to the individual's economic, social, and personal interests, and disruptive to the functioning of the courts and/or other agencies attempting to resolve the claims.'¹³

This interest has been stimulated by the emergence over the last two decades of Alternative Dispute Resolution (ADR)¹⁴ schemes, such as

⁹ *In re Millane* [1930] VLR 381.

¹⁰ Western Australia Law Reform Commission, *Civil and Criminal Justice System*, Report 92, 1999, 161.

¹¹ See Thesaurus.com *Roget's New Millenium, Thesaurus, First Edition* (v 1.3.1), Lexico Publishing Group, LLC. <http://thesaurus.reference.com/serach?q=maverick&x=46&y+15> (August 29 2006).

¹² See further: http://www.law.mq.edu.au/html/AJLH/vol11/1_02Smith.pdf (11 June 2008).

¹³ Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour', (2006) *24 Behavioural Sciences and the Law* 333, 334.

¹⁴ See further Peter Condliffe, 'The Rise of Alternative Dispute Resolution', in Simon Smith (ed), *In the Consumer Interest: a selected history of consumer affairs in Australia 1945-2000*, SOCAP, 2000, 149-162.

industry Ombudsmen that promote accessible, speedy and informal dispute resolution for consumers.¹⁵ This access, free of fees, expensive lawyers and procedural formality, has given access to extra-judicial dispute resolution on a large scale but has also increased the numbers of persistent complainants.

Mullen and Lester argue that querulousness is foremost a disorder of behaviour and only secondarily an abnormality of mental function. As such they distinguish the older research that focussed on paranoid or delusional disorders as the primary driver.¹⁶ In their view there can be a number of contributors to querulous behaviour, such as personality traits, social situation, contemporary sources of distress and disturbance, even the dispute resolution systems themselves. Mental disorder is only one further contributor.¹⁷ As such they suggest that querulents are not born, rather they are made, most likely after a 'key event'. They conclude that querulousness is a legitimate concern for modern mental health professionals and that individuals 'caught up in a querulous pursuit of their own notion of justice' are amenable to treatment. In turn this can provide insights conducive to the better management in courts and complaint organizations of querulent/vexatious complainants/litigants.¹⁸

The case studies in my research demonstrate the difficulty the legal system has with taking a multidisciplinary approach to dispute resolution. The focus of the civil court is primarily on applying legal principle based on admissible evidence. With the benefit of hindsight it seems clear that all the litigants in the case studies were somewhere along the path of querulence as defined by Mullen and Lester.¹⁹ Recognition of that condition as driver of the persistent litigious behaviour may have enabled an earlier diversion/resolution.

Modernising the vexatious litigant sanction

13. Since 2004 the Queensland Government has led a process through the Standing Committee of Attorneys-General (SCAG) to develop a model piece of vexatious litigant legislation as a national template. No empirical data has been published to explain and support that process. The model legislation was enacted as the *Vexatious Proceedings Act 2005* (Qld). To date only the Northern Territory has adopted the model legislation

¹⁵ See for example Kristie Dunn, Colin Neave and David Niven, 'Banking on the Future: From Central Banking to Deregulation', in Simon Smith (ed), *In the Consumer Interest: a selected history of consumer affairs in Australia 1945-2000*, SOCAP, 2000, 49-61.

¹⁶ For a summary of the earlier research see Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour', (2006) 24 *Behavioural Sciences and the Law* 333, 334.

¹⁷ *Ibid* at 348.

¹⁸ *Ibid*.

¹⁹ Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainers and Petitioners: from Querulous Paranoia to Querulous Behaviour', (2006) 24 *Behavioural Sciences and the Law* 333.

although the recent Victorian Law Reform Commission *Civil Justice Review* has endorsed most of the reform proposals.²⁰

14. The reforms propose a number of changes to the traditional vexatious litigant sanction 'regime'. They focus on making it easier for vexatious litigant orders to be sought and obtained. They studiously avoid the issues of the nature of vexatious litigants and vexatious litigation, whether the sanction is effective anyway and the possibility of invoking a multidisciplinary solution. By failing to be precise in defining what 'vexatious' means there continues to be large discretion vested in the judge. This simply fosters inconsistency and frustration. They are very much legal reforms by and for lawyers. There is no reason to think they will be any more effective than the 1930 model. Indeed, the impact of many of the reforms may well be counterproductive. For example, by introducing new definitions of what constitutes 'vexatious proceedings' and allowing for orders to be sought by people with 'sufficient interest' and against persons 'acting in concert' a whole new area of jurisprudence and evidentiary challenge is introduced. At the same time, by placing the court at the centre of controlling who may make an application for a vexatious litigant order, it raises the spectre of perceived bias if the court or its officers too readily assume the role of initiating vexatious litigant applications. It may move them too far toward an unsatisfactory dual role of prosecutor and judge. On this point Professor Taggart may prove to be right in his concern about the wisdom of eroding the law officers' 'monopoly' over initiation of the sanction when he discussed the developments in *Bhamjee v Forsdick*.²¹
15. Perhaps the most concerning thing about the modernisation trend is the formalisation and prescriptive tightening of procedures surrounding leave applications. Given that this is intended as a largely administrative procedure, it vests much power with registrars. Not only are the requirements onerous but they lack transparency to the point of being unfair, particularly for litigants in person. Here, the power of court registrars to refuse to accept documents and the inevitable trend (as in the High Court for special leave applications) for applications to be dealt with in private is of particular concern. If this is to be the trend there needs to be much greater transparency and accountability in that process to ensure fairness and the maintenance of public confidence in the legal system.
16. One reform proposal of interest is the recommendation of the Victorian Law Reform Commission (VLRC) for the appointment of a Special Master to help guide difficult cases through the system.²² This would break new

²⁰ See further:

<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

²¹ Michael Taggart, 'Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896', (2004) 63 *Cam L J* 656, 681.

²² See recommendation 110, Victorian Law Reform Commission, *Civil Justice Review: Report 14*, 40-41. See further:

<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

ground and may be the closest that our legal system can get to injecting an inquisitorial dynamic into the case management process in order to ensure the parties are on an equal footing in presenting their cases. It would provide a valuable focus at a senior level, enabling earlier diversion, intervention and management of more difficult litigant in person cases. In particular this early intervention may prevent the build-up of a sense of unfairness that can drive the actions of a vexatious litigant. The case studies provide guidance on when, where and how the legal system can fall into error and can thus be on its guard to prevent the mistakes of the past. For example, inquisitorial intervention in *Bienvenu* and *Soegemeier* may have got to the substance of the complaint earlier and not have been distracted by deficiencies in the *locus standi* of the parties or inadequacies in the form of the presenting documentation.

17. The further suggestion of the VLRC that the possibility of incorporating a medical path as part of the sanction, also has merit²³ This too would break new ground if it can be constructed in such a way as to promote the participation of the litigant and the court. Certainly further research is necessary on any such proposal, but the Collins case study provides insight into how the court allowed itself to get caught up in the provocations of a troubled litigant and saw the matter escalate into arguably inappropriate contempt proceedings when a medical path may have been more appropriate. However, as Lester and others have noted, the danger of too readily applying medical labels is to deprive individuals of legitimate rights or prerogatives, however poorly advanced.²⁴
18. Finally, as referred to above, what is missing from the emerging public discourse on modernisation of the sanction is a wider discussion on who accesses the courts and why. For example, it is surprising that following the ‘scandalous’ use of court resources in *Seven Network Limited v News Limited*²⁵ there has been no concerted judicial or political response on the need for supervision of the use of the courts by corporations for strategic or collateral purposes. Surely there must be a point when the community, through the courts, is able to say to such litigants ‘enough is enough’? There is an obvious disconnect here when viewed against the attention focussed on the litigant in person, for it seems probable that the court resources tied up in that one case were more than for the combined number of vexatious litigant cases in Victoria and Queensland in the period 1930-2007.²⁶ As the *Soegemeier* case study demonstrates, part of the

²³ Victorian Law Reform Commission, *Civil Justice Review: Report 14*, paragraph 1.3.10, 601. See further:

<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/ebe72602960b930/VLRC%20Civil%20Justice%20Review%20-%20Report.pdf> (29 May 2008).

²⁴ See in particular Robert Goldstein, ‘Litigious Paranoids and the Legal System: The Role of the Forensic Psychiatrist’, (1987) 32 *Journal of Forensic Science* 1009, 1014.

²⁵ *Seven Network Limited v News Limited* [2007] FCA 1062, 1064.

²⁶ In 2007 the cost of legal resources devoted to the Julian Knight litigation was estimated by one source at \$6.2M. Used as a conservative benchmark against the cost of the Channel 7 litigation that is the equivalent of 32.2 separate vexatious litigants. That is more than the total number of vexatious litigant declaration made by the Victorian and Queensland Supreme Courts in the period 1930-2007. See further ‘Pests cost \$6.2m’, *Herald Sun*, 11 September 2007, 4.

explanation may be the capacity of corporations to engage skilled counsel and other resources to construct legal arguments in a format and style less confronting to the court when compared with the inexperienced litigant in person. If misuse of court resources is truly a major catalyst for reform then this is something that deserves closer scrutiny in the interest of keeping the courts accessible and maintaining public confidence in the legal system.

Other matters

19. The case studies, especially Collins and Soegemeirer, suggest that local government can be the birthplace for many disputes. In one sense it is not surprising that there is potential for local government to fall into dispute with its residents. It is after all the level of government that intersects most often with daily life whether it is over home renovations, rubbish collections, school crossings or parking controls. The potential for dispute is significant. That is what makes it all the more surprising that in the early twenty-first century, local government has not fully embraced Alternate Dispute Resolution mechanisms and still relies on the legal system to resolve disputes. Were they to be obliged to adopt, for example, explicit service standards backed by penalties for failure and have in-house Ombudsmen with the power to intervene and settle disputes earlier, it seems clear that standards would rise and dispute levels fall. Certainly, this is the recognised experience in sectors such as banking and insurance where such initiatives are now standard.
20. Although formally outside the jurisdiction of this Inquiry the ‘elephant in the lounge-room’ is the large number of persons declared as vexatious litigants in the Family Court (195 in the period 1976-2006).²⁷ As has been noted, this figure alone is remarkable and indicates that there are special challenges with litigants in person in this jurisdiction that would benefit from specific research. It would be unfortunate, though, if the experience of persistent litigants in person in this court were to be allowed to indiscriminately drive legislative change to the vexatious litigant sanction in other jurisdictions as on its face different dynamics apply.
21. The rise in extra-judicial industry based ombudsman schemes, particularly in banking, insurance, energy and telecommunications over the last fifteen years now significantly shape popular perceptions about the nature, delivery and fairness of the Victorian justice system. Whilst it is common ground that the schemes have led to better and more efficient complaint handling in those sectors their coverage is by no means universal or accountable. This can lead to inconsistent standards of dispute resolution, particularly when compared to the state legal system. These schemes largely operate outside parliamentary scrutiny. In the United Kingdom,

²⁷ Diana Bryant, *Self Represented and Vexatious Litigants in the Family Court of Australia*, Access to Justice Conference, Monash University, Prato, Italy 2006.

although such schemes have been brought back under greater statutory supervision, consumer groups have referred to the explosion of such schemes as *Ombudsmania*.²⁸ They have called for greater supervision to ensure they are in step with the demands of a modern society. This is an area in which the Inquiry could encourage further research.

Finally

It is suggested that this Inquiry is not about vexatious litigants but the rising challenge of litigants in person. It would appear that this realignment, particularly in the superior courts, is here to stay. Once more the words of Professor Webb are instructive:

‘While it may be true that self-represented litigants do not fit into the system perfectly, this may be due to the poor design of the system rather than the lack of ability, understanding or good faith of the litigants.’²⁹

Here, the difficulty for reform is compounded because of the continued lack of data about the numbers and nature of litigants in person. It is a case of ‘what you do not measure you cannot manage, let alone reform’. As a result it appears that current responses of the judiciary and government to the case management pressures of increased numbers of litigants in person are very much driven by perception, if not anecdote. That this has occurred can perhaps be explained by the persistence and even outrageousness of individual vexatious litigants that gives them a prominence in the judicial mind beyond their numbers. As a result it has led to a focus on reform of the vexatious litigant sanction out of proportion to the actual numbers of vexatious litigants. As such, the nature of the challenge of litigants in person has been misconceived and thus the nature and effectiveness of the solution.

As I have argued in my research, the vexatious litigant sanction was always only a ‘last resort’ legal solution to a more complicated challenge. It did not work in 1930 and it is unlikely that the 2005 modernisation, if and when adopted nationwide, will be fully effective either. Here, it is instructive that States and Territories have been slow to adopt the changes and that even in Queensland, in the nearly three years since the ‘modernisation’ has been adopted, there has only been only one further vexatious litigant order (Mansukhani: 2007). This is hardly evidence of a large scale problem.

In this post 9/11 period when some governments appear increasingly to be eroding hard fought for and won civil liberties in prosecution of the ‘war on terror’ I would urge the Committee to go cautiously before hardening vexatious litigant provisions. As I have argued in my research, vexatious litigants are larger than life and most can properly be described as people of ideas and talent. They are reformers, activists and performers seeking to advance their ideas and talents through the legal system and beyond. As such they fall within the broader definition of a Maverick being ‘bohemian, dissenter, extremist, malcontent, nonconformist, radical.’³⁰ Certainly, few if any, of the litigants, their ideas or talent won full acceptance in their time. Most

²⁸ http://www.ncc.org.uk/nccpdf/poldocs/NCC198ft_ombudsmania.pdf

²⁹ Duncan Webb, ‘The right not to have a lawyer’, (2007) 16 *JJA* 165, 166.

³⁰ See Thesaurus.com *Roget's New Millenium, Thesaurus, First Edition (v 1.3.1)*, Lexico Publishing Group, LLC. <http://thesaurus.reference.com/serach?q=maverick&x=46&y+15> (August 29 2006).

