



3 October 2008

Ms. Kerryn Risely
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
Melbourne Vic 3002

Email: vpirc@parliament.vic.gov.au

Dear Ms. Risely,

Inquiry into Vexatious Litigants

The Public Interest Law Clearing House (PILCH) makes the following further submission to the Victorian Parliament Law Reform Committee's Inquiry into Vexatious Litigants pursuant to the Committee's request at the public hearing on the 13th August 2008. It is intended that this submission be read in conjunction with our joint submission with the Human Rights Law Resource Centre dated 27 June 2008.

This additional submission covers:

- A. An assessment of the use of civil restraint orders
- B. The vexatious litigant provisions outlined in the Family Violence Protection Bill 2008.

A. Civil Restraint Orders

1. PILCH refers to the additional submission of the Litigation Lawyers and Administrative and Human Rights Sections of the Law Institute of Victoria dated 12 September 2008 (LIV submission). The LIV submission usefully describes the system of civil restraint orders in England and Wales, established by the Civil Procedure (Amendment No. 2) Rules 2004 (England) No. 2072 (**Rules**).
2. PILCH considers civil restraint orders provide a more individualised and human rights-based approach to dealing with vexatious litigants.
3. PILCH endorses the LIV submission and notes in particular that civil restraint orders under the Rules:
 - a) provide a flexible, cascading approach to limiting an individual's access to the courts whereby vexatiousness can be declared in respect of a particular proceeding, cause of action (or subject of a claim) or to an individual in general; and

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- b) balance the individual right to access to justice against public interest considerations such as preventing an abuse of process, protecting the finite resources of the court and maintaining confidence in the administration of justice.
4. PILCH considers that a right of appeal should exist in respect of any type of civil restraint order. Such rights should be analogous to appeal rights in respect of any other court order.
5. PILCH is concerned that Rules provide for an appeal against a civil restraint order to be decided "on the papers", which may amount to a breach of section 24 of the Charter of Human Rights and Responsibilities Act (2006) (Vic) (the Charter). Section 24 guarantees a right to a fair hearing and, as stated in our earlier submission, only an oral hearing can ensure that a litigant's right to be heard is meaningful in any way. A hearing "on the papers" may also further entrench a litigant's sense of grievance and their experience or perception of unfairness in the legal system, and could possibly exacerbate further vexatious behaviour.
6. PILCH also believes that a cautious approach should be taken in respect of *general* civil restraint orders, given that they restrict the litigant from issuing *any* claim or making *any* application in *any* Court without first obtaining permission from a judge. PILCH is not convinced that such a wide reaching order is necessary although the ability to limit a general civil restraint order to two years (albeit with the potential for extensions) is an improvement over the vexatious litigant order available under the Supreme Court Act that has no time limitation. PILCH considers that, given the serious consequences which may follow, general or extended civil restraint orders should only be made by Supreme Court or Federal Court Judges. The Committee should also consider whether an application should be made by the Attorney-General to these courts before a general or extended civil restraint order can be made.

B. Family Violence Protection Bill

7. The Family Violence Protection Bill 2008 (**Bill**) was introduced to establish a system of protection for those who have experienced violence from a member of their family. Part 11 of the Bill provides a regime for those who abuse the court system and harass family members by vexatiously making applications under the Bill to be declared vexatious litigants and have restrictions placed upon their access to the court.
8. A person declared a vexatious litigant under the Bill 'must not without leave of the court make an application for a family violence intervention order, or the variation, revocation or extension of a family violence intervention order, in relation to a person stated in the [vexatious litigant] order or the person's children'¹.
9. The test as to whether a vexatious litigant order should be made under the Bill is the same as the test under s21 of the Supreme Court Act 1986. This test ensures a rigorous examination of any application for a vexatious litigant order by requiring that the court must be satisfied that a person

¹ Family Violence Protection Bill 2008, s193(2)

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has habitually, persistently, and without reasonable grounds instituted proceedings under the Bill².

10. The Bill allows an application to be made by the Children's Court or Magistrates' Court for a vexatious litigant order by the Attorney-General³, in keeping with the analogous provisions under the Supreme Court Act 1986. However, a person against whom applications or complaints have been made under the Crimes Family Violence Act may also make an application for a vexatious litigant order with leave of a Magistrate⁴.
11. The Bill establishes a right of appeal against an order declaring a person to be a vexatious litigant, subject to leave being granted⁵. There is no provision for such appeals to be heard 'on the papers'.
12. PILCH is concerned that the duplication of vexatious litigant provisions in multiple Acts may not lead to clarity and consistency in the law relating to vexatious litigants. We note, however, that legislation on vexatious litigants under a specific area of law with special needs is not unprecedented. The Family Law Act 1975 (the Act) allows the Family Court to make an order prohibiting a vexatious litigant from instituting proceedings under the Act without leave of the court, due to the specific needs and sensitivities of family law matters.
13. PILCH also considers that limiting a vexatious litigant order to individual courts is a less restrictive means of achieving a balance between the individual's right to access to justice and competing public interests.
14. If the committee is satisfied that the current vexatious litigant laws provided for by the Supreme Court Act 1986 do not adequately address vexatious litigation within the context of family violence (and that measures cannot be introduced to increase the effectiveness of the existing laws in this area), then PILCH is broadly supportive of the specific provisions for vexatious litigation under the Family Violence Protection Bill.
15. In this instance, PILCH submits that the requirement for a Magistrate to assess whether leave should be granted for an individual to apply for a vexatious litigant order is essential to thwart an abuse of process. However, consideration should be given as to whether such applications should only be heard by the Chief Magistrate or Deputy Magistrate, or the President of the Children's Court, given the authority to make vexatious litigant orders under the Bill resides solely with these officers.
16. Section 200 of the Bill requires the Magistrates' Court and the Children's Court to report annually to the Attorney-General the number of vexatious litigant orders made. PILCH considers this an essential mechanism to ensure accountability and transparency in the making of such orders by the courts, given the serious consequences which follow for individual litigants.

² Family Violence Protection Bill 2008, s193(1)

³ Ibid, s189(1)(a)

⁴ Ibid, ss(1)(a) and (b)

⁵ Ibid, s195

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17. It appears that the sections of the Bill that deal with notification, the appeals process, and the power of the Attorney-General to request documents from courts to assist in determining whether to make an application for a vexatious litigant order, deal with the specific needs of family violence situations. At the same time they appear to balance individual and human rights considerations with the public interest of preventing an abuse of process.

We hope this additional submission is useful to the Committee. Please contact us if we can be of any further assistance.

Yours faithfully,

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