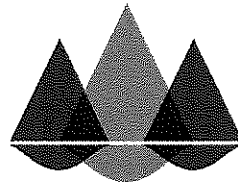


Submission No. VL/39
Received 07/07/2008
Law Reform Committee

SUBMISSION TO PARLIAMENT OF VICTORIA LAW REFORM COMMITTEE
INQUIRY INTO VEXATIOUS LITIGANTS
(ISSUES PAPER APRIL 2008)



**Federation of
Community Legal Centres**
VICTORIA

7 July 2008

This submission was prepared by the Federation of Community Legal Centres (Vic), in consultation with member centres.

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty four community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

The Federation appreciates that a small number of what might be termed 'genuine' vexatious litigants can create resource and time burdens for courts and tribunals, and in some cases also cause considerable distress to other parties. We refer the Committee to the submission from our member centre, Women's Legal Service Victoria, in this regard.

We are not able to provide data concerning the incidence and distribution of persons who might potentially be declared to be vexatious litigants, nor to document the effectiveness of the declaration process or the impact of such persons on the justice system. We submit that if comprehensive information is not obtained via this Inquiry, consideration should be given to recommending a research reference on the issue before any legislative amendments are contemplated.

Our main concern in this submission, informed by the work of our member centres for disadvantaged and marginalised individuals and communities, is with the implications for access to justice posed by some current framings of and responses to the vexatious litigant issue. In order to address these implications, it is necessary to set the problem of vexatious litigants in context and to carefully distinguish the separate strands of the issue.

Vexatious litigants in Victoria

Overstating the problem

In the absence of systematic data concerning the scope of the problem, we suggest that the present climate may contribute to an overstatement of the significance of the issue, consequently risking a legislative over-reaction.

This climate includes a recent defeated law reform initiative to include vexatious applicant provisions in freedom of information legislation¹ and an increase in agency publications concerning strategies to deal with unreasonable complainants.² The Federation is concerned that this trend is associated with growing psychological and psychiatric labelling of litigants/applicants/complainants as vexatious,³ which may in turn contribute to an exaggeration of the extent of the vexatious litigant 'problem' and an over-classification of people who pursue a complaint. It may thus become increasingly routine for frontline workers at all levels to mentally tick a checklist and dismiss someone as a person to be 'managed' rather than to be responded to seriously and effectively.⁴

Silencing dissent

Care must also be taken to ensure that any legislation and procedure concerning vexatious litigants does not become a mechanism to silence unpopular causes and 'difficult' people. It is of concern to us that much of the present discourse around vexatious litigants assumes that the present legal and complaints systems always work to achieve justice and fairness, and therefore that people who have been consistently unsuccessful must have issues unsuited to litigation or invalid complaints.

On the contrary, major social justice changes have sometimes been achieved by people who simply insist on pursuing justice over a long period and who refuse to be deterred.⁵ As one such activist who was subsequently declared a vexatious litigant is described:

¹ Freedom of Information (Amendment) Bill 2007.

² *Unreasonable Complainant Conduct: Interim Practice Manual: A Joint Project of the Australian Parliamentary Ombudsman* (2007).

³ See, eg, Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, 'Unusually Persistent Complainants' (2004) 184 *British Journal of Psychiatry* 352; Grant Lester, 'The Vexatious Litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17.

⁴ See, eg, Simon Smith and Grant Lester, 'Inventor, Entrepreneur, Rascal, Crank or Querulent? Australia's Vexatious Litigant Sanction 75 Years On' (2008) Faculty of Law, Monash University Research Paper No 2006/56, 16-17; Grant Lester, Beth Wilson, Lynn Griffin and Paul Mullen, 'Unusually Persistent Complainants' (2004) 184 *British Journal of Psychiatry* 352.

⁵ See, eg, Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour' (2006) 24 *Behavioral Sciences and the Law* 333, 340-342.

'It was the inability of the legal system to provide solutions to help advance [her] reform agenda that saw the litigation veer off on its own direction. . . [A]most blind faith is. . . what distinguishes the vexatious from the ordinary litigant.'⁶

Such people often occupy the margins of society due to their living with mental illness or other disability, or being imprisoned. The last category is often comprised of long sentence prisoners who already experience significant obstacles in bringing litigation.⁷

Added to this context is the corporate use of ultimately groundless legal actions in an attempt to silence public interest critics (SLAPP suits),⁸ and an apparent recent tendency for costs orders to be pursued and awarded against protesters,⁹ thereby chilling democratic dissent. We note in this last respect that the State Government as opposing party has also intimated that at least some of these claims are vexatious.¹⁰

It must also be stressed that s 21 of the *Supreme Court Act 1986 (Vic)* was intended primarily to protect public bodies/officers.¹¹ There is no evidence of systematic enforcement against commercial litigants who in order to advance their business interests waste court resources and time, including using SLAPP suits.¹² Similarly, parties such as credit houses who use default procedures of the court against private citizens have never been subject to statutory provisions equivalent to s 21.¹³

Exacerbating vexatiousness

Even apart from those 'vexatious' litigants who may well turn out to have a cause of action, current processes of complaint and lack of redress tend to push genuinely unreasonable complainants and potentially vexatious litigants even further towards the 'vexatious' category.¹⁴

For example, one early study which typifies the vexatious litigant as suffering from 'querulous paranoia' describes how

'[p]rior to the onset of their querulousness there was a high level of traumatic events in their lives resulting in severe disturbance of living conditions with 60% having a preceding stressful court case and 31% had been dismissed from work.'¹⁵

In the absence of more recent and Victorian data, this finding suggests the need for genuine and effective dispute resolution, complaint and injustice acknowledgment, and effective programs to ameliorate the losses experienced, along with defusing of the situation if appropriate, at an early stage.

Current systems are frequently inaccessible, lack transparency and accountability, or are ineffective. We endorse the submissions of our member centres, Disability Discrimination Legal Service and Mental Health Legal Centre, in this regard. We note particularly the comments of Mental Health Legal Centre that people may be perceived as

⁶ Simon Smith, 'Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant' (2007) 11 *Legal History* 31, 61.

⁷ Hugh de Kretser, 'Prison Litigation: Barriers to Justice' (2007) 81 *Precedent* 29.

⁸ See, eg, Brian Walters, *Slapping on the Writs: Defamation, Developers and Community Activism* (2003).

⁹ See, eg, *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 900 (13 June 2008); Ewin Hannan, 'Costs Pursued Against Dredge Protesters', *The Australian* 19 June 2008.

¹⁰ See, eg, David Rood, 'Defiant Brumby Stands by Water "Liar" Claim', *The Age* 7 March 2008 www.theage.com.au.

¹¹ Simon Smith, 'Vexatious Litigants and their Judicial Control - The Victorian Experience' (1989) 15 *Monash University Law Review* 48.

¹² Brian Walters, *Slapping on the Writs: Defamation, Developers and Community Activism* (2003).

¹³ See, eg, Simon Smith, 'Vexatious Litigants and their Judicial Control - The Victorian Experience' (1989) 15 *Monash University Law Review* 48, 67.

¹⁴ See, eg, Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour' (2006) 24 *Behavioral Sciences and the Law* 333, 343-4.

¹⁵ Simon Smith and Grant Lester, 'Inventor, Entrepreneur, Rascal, Crank or Querulent? Australia's Vexatious Litigant Sanction 75 Years On' (2008) Faculty of Law, Monash University Research Paper No 2006/56, 15; see also the example in Paul Mullen and Grant Lester, 'Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour' (2006) 24 *Behavioral Sciences and the Law* 333, 338.

tenacious in seeking to 'have their day in court' due to a failure of the legal system and its personnel to adequately address their concerns in a respectful manner that explains legal procedures and is honest at an early stage about whether the issue has legal merit.

We respond to some of the specific issues raised by the Discussion Paper below.

The test for declaring a vexatious litigant should not be expanded

The test for declaring a vexatious litigant should not be expanded. The existing test and the powers of courts to control their own proceedings (including dismissing applications and awarding costs) provide adequate mechanisms for dealing with the issue of potentially vexatious litigants.

Only the Attorney General should be able to apply for a declaration under Victoria's vexatious litigant laws

Given that a declaration is an extremely significant limitation of a person's rights, we believe that the Attorney-General should be the only person who can apply for such a declaration. We recommend consideration being given to developing publicly available guidelines about how the Attorney-General will exercise his discretion to apply for a declaration. These guidelines would promote consistency and transparency in applying the discretion.

Only the Supreme Court should be able to make a declaration under Victoria's vexatious litigant laws

Given that a declaration is an extremely significant limitation on a person's rights, we do not support extension of the declaration power to courts or tribunals other than the Supreme Court.

Flexibility in a vexatious litigant declaration?

Where the Supreme Court considers a declaration to be the only alternative, the Court should be able to declare a person to be 'partially vexated'.¹⁶ There is a real danger in blanket declarations of vexatiousness. Clients at risk of being labelled vexatious may be pursuing a range of legal matters at the same time. In our experience, while some of the matters may be without merit, one or more may have merit and may be the result of a real injustice. A blanket declaration of vexatiousness could unnecessarily restrict access to redress for matters with merit.¹⁷ A more flexible declaration would permit the client to litigate certain issues without the need to obtain leave, while still imposing the leave restriction on the other vexatious matters.

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

We do not support the automatic application of a declaration from another jurisdiction. The existing Victorian vexatious litigant laws and the powers of courts to control their own proceedings (including dismissing applications and awarding costs) provide adequate mechanisms for dealing with the issue.

Other ways to respond to vexatious litigants

Access to legal representation

Access to legal advice and representation is critical in addressing issues around potentially vexatious litigants.

Where a potentially vexatious litigant cannot afford legal representation, there are strong policy reasons for providing access to free legal advice or representation through legal aid or a community legal centre.

¹⁶ The phrase refers to the prohibition on people issuing proceedings against particular defendants, rather than banning them from issuing any future proceedings without prior leave: Simon Smith and Grant Lester, 'Inventor, Entrepreneur, Rascal, Crank or Querulent? Australia's Vexatious Litigant Sanction 75 Years On' (2008) Faculty of Law, Monash University Research Paper No 2006/56, 17.

¹⁷ See for example *Attorney General v Knight* [2004] VSC 407 where the Court noted that in at least two of the cases, Mr Knight achieved the objective of the litigation. The Court considered making some form of partially vexated declaration.

Trust and rapport is critical in a relationship between a lawyer and potentially vexatious litigant. Community legal centres and legal aid are experts at working with clients with complex social and legal issues and building their trust. Because the assistance is free, lawyers can demonstrate to the client that their only interest in providing objective advice on the merits of the case is the client's best interests (as opposed to any financial interest). Building trust improves the chances that the client will follow the lawyer's advice. This assists the client, the court and other parties by maximising the chances of the litigant pursuing only meritorious matters and doing so in a more efficient manner.

The right to a fair hearing under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) may also require access to free legal representation in certain cases where a fair hearing would otherwise be impossible without legal representation. This may occur if a case is particularly complex or serious or where the denial of legal assistance would put one party at a considerable disadvantage or render them effectively incapable of bringing the proceeding.

Early advice and ongoing support will reduce the risk of vexatious litigation. Where litigation is already commenced, appropriate referral schemes for self-represented litigants to obtain assistance will promote more efficient litigation that focuses on matters that have merit.

Unfortunately, current funding levels for community legal centres and legal aid are inadequate to meet the demand for advice and representation, particularly in civil matters. Legal aid guidelines are very restrictive in relation to civil matters. A significant group of users of the Victorian court system are self-represented.¹⁸

The Federation believes that increased funding legal advice and representation will ultimately be cost effective and a more consistent response to the obligations of a court to self-represented litigants¹⁹ and potentially vexatious litigants.

Litigation management

If the Inquiry produces substantial evidence that the present approach under s 21 is failing to prevent vexatious litigation, existing 'pre-emptive control'²⁰ remedies should be pursued. These approaches include registrars refusing irregular documents, closer case management and tracking, and summary dismissal as abuse of process. The efficacy of these remedies would first need to be researched. For more detail concerning possible strategies to improve court processes, we refer to the joint submission from our member centres, Human Rights Law Resource Centre and Public Interest Law Clearing House.

If these methods are systematically developed and evaluated, they should be accompanied by enhanced processes of transparency and public accountability.

Community legal centres and other organisations working with persons vulnerable to being labelled as vexatious litigants should be facilitated to engage in conversation with courts and tribunals about the best implementation strategy.

¹⁸ Victorian Law Reform Commission, *Civil Justice Review* at 581.

¹⁹ *Tomasevic v Travaglini & Anor* [2007] VSC 337 (13 September 2007).

²⁰ Simon Smith and Grant Lester, 'Inventor, Entrepreneur, Rascal, Crank or Querulent? Australia's Vexatious Litigant Sanction 75 Years On' (2008) Faculty of Law, Monash University Research Paper No 2006/56, 18.