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Mr Johan Scheffer MLC
Chair
Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002

Submission No. VL/45
Received 17/07/2008
Law Reform Committee

Dear Mr Scheffer

Ombudsman Victoria submission to the Law Reform Committee of Parliament

Thank you for your invitation to make a submission to the Law Reform Committee of Parliament (the Committee)'s Inquiry into vexatious litigants.

While I understand that the terms of reference for this inquiry relate to the effect of vexatious litigants on the court system, you have asked in your letter of 24 April 2008, that I address the following:

- my office's experience with difficult or persistent complainants
- advice on the policies and practices that my office has adopted in response to such complainants
- the extent to which vexatious litigants in the courts and tribunals are interacting with my office.

In doing so, I will provide you with some more general information regarding my office and its jurisdiction, as well as our complaint-handling policies and procedures.

Ombudsman Victoria

The principal function of my office, as statutorily defined under the *Ombudsman Act 1973* (the Act), is to review, investigate and resolve complaints about administrative actions taken by or on behalf of government

departments, public statutory bodies, and officers and employees of municipal councils.

As such, I have jurisdiction over approximately 600 Victorian government agencies, 79 local government councils, 12 professional boards, universities and government schools, public and private prisons and authorised officers under the *Transport Act 1983*.

This jurisdiction was extended in the 2006-07 year to include further functions in relation to monitoring compliance with the provisions of the *Domestic (Feral and Nuisance) Animals Act 1994*; investigating human rights complaints against the requirements of the *Charter of Human Rights and Responsibilities Act 2006*; and investigating the administrative actions of not-for-profit, non-government providers of welfare services under the *Children, Youth and Families Act 2006*. My office is also the only external body that people held under the *Terrorism (Community Protection) (Amendment) Act 2006* may contact to lodge a complaint about their treatment.

My office provides a no-cost, independent and impartial dispute resolution service for the public. This attracts a number of enquiries, requests for advice and complaints from the public, of both a jurisdictional and non-jurisdictional nature.

In the 2006-07 reporting year my office received a total of 3,628 complaints and approximately 11,000 enquiries from the public. This represented a 15 per cent increase on the previous year and was consistent with the overall increase in complaint numbers over the preceding three years.

Complainants exhibiting challenging or difficult behaviours

Complaint-handling is the core business of Ombudsman Victoria. As such, my office has a number of comprehensive policies and procedures to guide staff in their work and ensure that we communicate clearly, effectively and consistently with the public. These include codes of conduct, investigation and complaint management guidelines and advice on the appropriate handling of service delivery complaints.

However, some contacts are more complex to manage. The nature of our work can involve people who are angry or dissatisfied with the service that they have received from other agencies or who have become disheartened following involvement in protracted complaints and grievance procedures. These factors, as well as others, may lead to complainants exhibiting

challenging, unreasonable or uncooperative behaviours when interacting with members of my staff.

Responding to challenging behaviours has been the subject of considerable attention by many complaint-handling organisations in recent years. My office is currently participating in the Unreasonable Complainant Conduct Project (the UCC project), which is a joint project of the Australian Parliamentary Ombudsmen, initiated and overseen by the New South Wales Ombudsman's office.

The UCC project, incorporating the work of Professor Paul Mullen, Dr Grant Lester, Ms Beth Wilson and Ms Lynn Griffin, identifies a group of complainants they define as 'unusually persistent complainants'. These complainants are stated to have 'pursued their complaints for longer, supplied more written material, telephoned more often, intruded more frequently without an appointment and ultimately were still complaining when the case was closed'¹.

In my office's experience, I would expand on the above definition to include complainants who exhibit aggressive, uncooperative, obstructive or defiant behaviours towards complaint-handling staff, which impact on an agency's ability to efficiently and effectively resolve complaints.

The aim of the UCC project is to trial a new approach to managing unreasonable behaviours, by focusing on the conduct of complainants rather than pathologising or labelling the complainants themselves. The UCC project is also designed to gather data from the Australian Parliamentary Ombudsmen on the percentage of complainants that exhibit difficult or unreasonable conduct and the types of conduct that are exhibited.

The UCC project has also trialled a practice manual to assist staff of public sector agencies in their interaction with the small percentage of complainants who exhibit challenging behaviours, with strategies and scripts that may be used when faced with unreasonable conduct.

The UCC project's practice manual identifies the following behaviours as being associated with unreasonable complainant conduct:

- unreasonable persistence
- unreasonable demands
- unreasonable lack of cooperation

¹ Lester G, Wilson B, Griffin L and Mullen P.E, Unusually persistent complainants, *British Journal of Psychiatry*, 2004, 184, p354. Quoted in NSW Ombudsman, *Unreasonable complainant conduct: interim practice manual*. A joint project of the Australian Parliamentary Ombudsman, August 2007, p1.

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- unreasonable arguments
- unreasonable behaviours such as rudeness, threats, aggressiveness, manipulation

In response to the conduct above the UCC project practice manual promotes the use of informal tools and strategies, such as setting boundaries and limits, managing complainants' expectations and communicating effectively to negate or manage the unreasonable conduct. Many of the informal strategies suggested were examples of methods that my complaint-handling staff have been utilising for some time, with reasonable success.

Data for the project was collected over the period 1 May 2007 to 30 April 2008. Complaint-handling staff at the various Ombudsman's offices completed questionnaires detailing whether a complainant exhibited unreasonable conduct, what form this took and what strategies they utilised in dealing with the conduct displayed.

Whilst the overall data will not be available until the New South Wales Ombudsman publishes its complete report in October 2008, interim advice is that the proportion of complainants that exhibit unreasonable conduct when dealing with my office is relatively small.

I have included a copy of the 'Unreasonable complainant conduct: interim practice manual' with my submission. Access to the manual is also available via Ombudsman Victoria's website at www.ombudsman.vic.gov.au.

Ombudsman Victoria's approach and experiences

There may be a variety of reasons why a person's conduct is unreasonable. Whatever the reason, a public sector agency should not assume that the person does not have a valid complaint.

It is a serious step for a public sector agency to decide it will no longer reply to correspondence on a particular topic. However, it is not productive, nor is it an equitable use of resources, to continue to engage in correspondence when all avenues for internal review have been exhausted.

Prior to an agency making the decision to cease correspondence with a complainant on a particular issue, I recommend that the following should be in place:

- the agency must have a complaint management system that complies with my complaint handling 'good practice guide' for the Victorian

public sector (copy attached), which is also available on Ombudsman Victoria's website

- the client/complainant must have been provided with the opportunity to exhaust the internal complaints process
- a senior officer must have reviewed the handling of the complaint
- the agency must record written reasons for its position on the matter
- the complainant should be advised of any external or additional appeal or review avenues available to them.

The decision to cease responding should be specific to that particular matter and should be made by a senior member of staff following a comprehensive review of the case. Agencies should not impose a 'blanket ban' on an individual and should continue to assess new complaints on their merits.

The above should ensure that a complaint, regardless of the actions of the complainant, is assessed appropriately and thoroughly. It will also assist in ensuring that the complainant is treated fairly and consistently in relation to other members of the public.

As well as having a responsibility to the public, every public sector agency also has a responsibility for the health and well-being of its staff, whose resolve may be tested by complainants exhibiting unreasonable conduct. In more serious cases staff may suffer physical or psychological symptoms of stress, if not provided with the appropriate tools and strategies to deal with unreasonable conduct and if not adequately supported by management.

This is why my office has designed internal policies to manage the small percentage of complainants exhibiting extreme behaviour that cannot be managed by limit setting, reframing or other techniques and strategies described above. These are the behaviours that may require my office to cease contact with a complainant on particular issues, terminate a phone call or deter an individual from attending the office. If these policies are utilised it is important that appropriate reporting and recording protocols are followed to ensure that the decision to cease contact is reviewed and in line with the approved policy.

It is also important that these policies, while promoting a consistent approach, are flexible to enable a complainant's special needs or individual challenges to be taken into consideration. The nature and jurisdiction of my office lends itself to contact from many vulnerable members of the public who may not be familiar with public sector agencies' complaint-handling requirements. This may lead to confusion or distress when they approach an agency with a

complaint, or frustration if they do not receive what they perceive to be the correct outcome or response.

To assist the public to effectively navigate the public sector's internal complaints or grievances processes, my office has published a fact sheet titled 'Tips for making a complaint to a Victorian public sector agency'. I encourage all of my staff to provide copies of this fact sheet to complainants who contact my office and have not yet made a formal complaint to the agency that they are complaining about. I have enclosed a copy for your information.

Impact upon Ombudsman Victoria

The obvious impact of unreasonable complainants on my office is in resource management. Resources may be over utilised by complainants who have multiple complaints, or are unwilling or unable to accept the outcomes reached.

Where this may become an issue for my office, the *Ombudsman Act 1973*, provides the power that I may refuse to investigate complaints in certain circumstances. Section 15 (a) (ii), permits this to occur where it is my opinion that "the complaint is frivolous or vexatious or is not made in good faith". Despite having this power, it is one that I rarely exercise, preferring to handle matters in this category with the use of informal tools. It is important to note that whilst a complaint that is brought to my office may, on some grounds, be frivolous or vexatious, or the complainant may exhibit challenging behaviours, this does not mean that all complaints brought by this particular complainant or about the same topic will be equally so.

With respect to the Committee's interest in the extent to which vexatious litigants in the courts and tribunals are interacting with my office, I cannot provide specific data on this occurrence. This is mostly due to a number of the provisions of the *Ombudsman Act 1973*, which limit my ability to enquire into the administrative actions or decisions of a court or tribunal, as well as with the discretion not to entertain complaints where a complainant has an available legal avenue to pursue. Therefore, a number of matters that have been, or could be, considered by a court or tribunal will not be investigated by my office.

I trust that my observations are of assistance to the Committee in its consideration of this matter.

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If your staff have any queries they may contact Stephen Mumford, Director of Investigations, on (03) 9613 6205.

Yours sincerely



G E Brouwer
OMBUDSMAN