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Mr Johan Scheffer MLC
Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Mr Scheffer

I refer to your letter dated 24 April 2008 inviting WorkSafe to make a submission in relation to the inquiry into vexatious litigants. Attached is WorkSafe's submission.

We are happy to discuss any aspect of this submission. Please contact Shelley Werner on (03) 8663 5476 if you have any questions.

Yours sincerely

A handwritten signature in black ink that reads "Greg Tweedly".

Greg Tweedly
Chief Executive
Victorian WorkCover Authority

INQUIRY INTO VEXATIOUS LITIGANTS

Victorian Parliamentary Law Reform Committee

Vexatious litigants in Victoria

How common are vexatious litigants in Victorian Courts?

WorkSafe manages many thousands of litigated workers compensation matters every year, less than 1% of whom could be considered vexatious. WorkSafe rarely pursues an application against a person who's conduct is troublesome or may even qualify as vexatious within the legal meaning. For the purpose of this paper we will use the term vexatious litigant more widely than its strict legal definition to include those litigants who issue volumes of repetitive litigation but against whom no declaration is sought.

The problem is not the number of such cases but the disproportionate use of resources to manage this litigation as compared with other types of litigation. For example, one current claimant is the subject of over 40 published decisions over the last 4 years. All of these arise from the same event or circumstance (the litigant's termination from her employment and her consequent claim for compensation). The proceedings span the state and Federal jurisdictions and include no fewer than 4 High Court applications.

Are they more common in some courts or types of disputes than others?

Why do people become vexatious litigants? Do they try and solve their legal disputes in other ways before going to Court? If so are there features from their previous attempts to disputes that contribute to them becoming vexatious litigants.

We have observed that a vexatious litigant has an enduring sense of unfairness and persecution. It seems it is neither success in the Court process nor failure which dissuades a person from continuing their litigation.

Do vexatious litigants have common characteristics?

The WorkSafe scheme is familiar with managing claims of people who have a sense of being wronged unfairly because they are injured workers or people who believe they have suffered an injury at work. In vexatious litigants this perception extends to an extreme sense of persecution and failure of justice.

What is the relationship between mental health and vexatious litigation?

Certainly in the examples in our scheme, the question of a person's psychiatric competence to manage their litigation arises as a key issue. In the absence of legal representation who is placed to evaluate this?

Recommendations might be made to a person in the course of litigation but this advice is often unheeded. An opponent's capacity to secure a psychiatric assessment is restricted and family members are not often a part of the process.

Judges may make observations about a person's demeanour but the courts appear reluctant to take the step of determining whether someone's psychiatric competence ought to be reviewed by referring the person to VCAT for appointment of a litigation guardian. Judges may be assisted by access to more training on this issue and the provision of resources for the rare occasions when this occurs.

Effects of Vexatious Litigation on the Justice System

What effect do vexatious litigants have on the courts or tribunals in Victoria? What are the cost for courts and tribunals?

It has been observed that zealous litigants by reason of their impecuniosity are often afforded a waiver of court fees and charges. This permits access to commence further legal proceedings without any barrier. The court ought to consider the form of pleadings, the number and frequency of related proceedings when considering applications to waive court fees.

The usual costs orders made against unsuccessful litigants are not obstacles to vexatious litigants and yet the risk of costs orders underpins many aspects of our legal system. Costs orders are either not sought, or not executed for public policy reasons or are futile having regard to the person's financial circumstances. Hence the vexatious litigant knows that they are at liberty to bring actions without any financial risk.

What effect do they have on Judges, Tribunal members, Court staff, lawyers and witnesses?

While a person's right to appear unrepresented is to be preserved, it is well recognised by WorkSafe that the area of workers compensation rights have become so complex by statutory regulation that it is often difficult for the inexperienced to navigate.

As vexatious litigants are most often unrepresented, attempting to assist a person through the unique procedural requirements of the scheme occupies significant resources from court officials, judges and other lawyers. Unfortunately this is usually done in an environment of mistrust by the unrepresented litigant.

Our lawyers are often placed under considerable pressure and regularly subject to unfounded criticism of incompetence and lack of professionalism/ethics by vexatious litigants. Vexatious litigants become aware of the obligations of lawyers acting on behalf of a government organisation and supplement their formal litigated appeals with complaints, tying the lawyers up in attending to constant, repetitive and unfounded complaints and requests for review outside of management of the litigation itself. Lawyers have also been subject to threats of violence.

There is also the risk that Judges, like the other participants become frustrated by the conduct of the vexatious litigant and consequently decision making can sometimes be impaired

“...In my view, the judge should have listened to what she wanted to say. Moreover, since it is incumbent on a judge to provide a self-represented litigant with the information necessary to enable him or her to have a fair hearing, [13] his Honour should also have told her that she was permitted to call evidence on the matter if she wished to do so, and given her an opportunity to get the evidence organised if that is what she wanted to do. He should also have disclosed to her what it was about his observations of her that inclined him to the view that the matter should be referred to VCAT, and thus given her an opportunity to respond to his perceptions. [14] I consider that his Honour’s failure to do those things was a plain breach of natural justice.

28 No doubt the judge was faced with a difficult task. I dare say that his Honour may have found the appellant’s behaviour to be both irritating and unpredictable. In this Court she has on occasion demonstrated a propensity to raise her voice, and repeat herself, and at times to speak most discourteously to her opponents and the Bench. It seems from the transcript that she behaved in a similar fashion before the judge below. But, unfortunately, stridency and discourtesy are no longer especially unusual amongst self-represented litigants, and without more they are seldom a sufficient reason for a judge to refuse to listen.

29 It is also to be acknowledged that the judge was especially conscious of the need referred to in this Court to expedite the proceeding and therefore to avoid delay. That too may help to explain why his Honour was prepared to proceed on the basis of Dr Entwisle’s report without affording the appellant an opportunity to rebut it. But plainly, no matter what the need for expedition, the requirements of the fair hearing rule must still be complied with.”

Bahonko v Moorfields Community & Ors 2008 VSCA 6 (5 February 2008)

The effect on individual and agencies who are the victims of vexatious litigants.

What effect do vexatious litigants have on the individuals or organisations who are victims of their conduct?

If you think that you or your organisation has been the victim of a vexatious litigant describe the impact on you. What were the financial costs? Were there other costs. A vexatious claim consumes many times more legal and financial resources than an ordinary claim. Lawyers acting in these matters are the subject of personal abuse and unfounded criticism. Again referring to the same litigant as the example above, the Justices Kirby and Heydon of the High Court recently commented:

“4. The applicant has now sought special leave to appeal to this Court from the orders of the Full Court. In her written case, she makes unparticularised allegations of denial of procedural fairness and abusive and scandalous references to judicial officers and others.

5. As in another concurrent proceeding seeking special leave to appeal, which has been dealt with this day, we have looked past the offensive material in the applicant’s application, lest some matter of substance might appear to warrant the consideration of this Court. In our view there is no such matter of substance. The application is a hopeless endeavour to involve this Court in a challenge to an interlocutory decision of the Federal Court, although with final effect, upon a matter concerned with the practice and procedure of that court.

There is no foundation for the intervention of this Court. The application for special leave to appeal is therefore refused."

Stanislawa Bahonko v The Commonwealth[2008] HCASL 357 M22/20

Applying for a declaration under Victoria's vexatious litigant laws.

Are there people in Victoria Courts who are vexatious litigants but have not been subject of any action under the vexatious litigant laws? If so why do you think no action has been taken?

*If your organisation has been the victim, did you take any action to have the person declared vexatious litigant. If not why not, what other action did you take?
Does the community know enough?*

Should the Attorney General be the only person who can apply to have a person declared a vexatious litigant? Who else should be able to apply?

Should the Courts other than Supreme Court have power to declare a person vexatious?

WorkSafe has experienced litigants who would in all likelihood qualify as vexatious had an application been brought however this is generally not done. It is unlikely that under existing laws an application would be brought against a person who has not exhausted their entitlement to pursue their claim for compensation for a work related injury. If more flexible orders were permitted in relation to vexatious litigants, perhaps to control the litigation rather than prohibit litigation without leave, parties to litigation may avail themselves of remedies in relation to vexatious litigation.

To this end we support the proposed amendment of the NSW legislation in the Vexatious Proceedings Bill 2008 and the recommendations of the Victorian Law Reform Commission Civil Justice Review 2008 to allow the Courts more flexible powers in relation to conduct of proceedings.

Potentially a court may have power and facilities to offer support to an unrepresented person to manage their litigation. In the event these steps were not successful the Court may then have the power to refer a matter under the vexatious proceedings law.

Court officials should also receive guidance about appropriate steps to take in the event an unrepresented litigant moves into a category of vexatious.

It would also be of assistance if the Courts having identified the person in this category were able to make more flexible orders.

The Supreme Court is the appropriate jurisdiction to declare a person vexatious because the exercise of this power should be tightly controlled.

Who is a vexatious litigant under Victoria's laws?

Does the law in Victoria make it too easy or too difficult for a person to be declared a vexatious litigant?

What should the 'test' be for determining whether a person is a vexatious litigant? For example, should the test be that the person has brought vexatious legal proceedings 'frequently', rather than stricter test of 'habitually' and 'persistently'?

Should the Supreme Court (or other courts and tribunals if appropriate) be able to consider other criteria? For example, should it be able consider:

- The way the person has conducted the litigation?*
- The person's motive for bringing the litigation, e.g.*

Whether the proceedings were brought to harass or annoy another person or to cause delay or detriment?

Should the Supreme Court be able to take into account any interlocutory (or interim) applications that the person has brought during the litigation?

The current test is too stringent and the consequences of an order too inflexible.

In our experience appeals arising from rulings on interlocutory applications can be used to the same effect as originating proceedings and should be relevant in consideration of whether a person has proper intent in their use of the civil justice system.

What rights should an alleged vexatious litigant have?

What rights should an alleged vexatious litigant have when the Supreme Court (or other courts and tribunals if appropriate) hears an application? For example, should he or she have a right to free legal representation?

What rights of appeal should a vexatious litigant have?

Resources should be expanded and made available to persons wanting/seeking legal advice in relation to defending an application that they be declared a vexatious litigant.

Introducing a "right" to free legal representation may in fact present a series of further hurdles. E.g. willingness of the litigant to accept advice they receive, the propensity for the lawyer advising to become the target of the litigants proceedings, providing the litigant with another avenue of appeal against being given access to this right.

The powers of the court to control vexatious litigation

Should the Supreme Court (or other courts and tribunals if appropriate) be able to make other orders to control vexatious litigants? For example, should it be able to: – impose conditions on the right of the person to continue or bring litigation, such as a power to order that the person cannot bring proceedings unless they are legally represented?

- Prevent a person from entering court premises?*

Allowing the court more flexibility with the orders that can be made may assist in delivering fairness in an outcome. However conversely permitting exercise of discretion around such a fundamental right may in fact lead to a greater level of appeal. The considerations and test which correspond to the types of conditions/orders/limitations that can be made may require definition. The NSW bill suggests any other order the Court considers appropriate – it may be that order restricting appeal of interlocutory orders until finalisation of the principle action should be a specified order open to the Court.

The effect of a vexatious litigant declaration

Are vexatious litigant declarations effective at stopping vexatious litigants? How do they try to press their claim after a declaration is made?

Are there 'loopholes' in the laws that allow vexatious litigants to continue litigating, e.g. through relatives, friends or other associates? Should the Supreme Court be able to control litigation by people who act 'in concert' with a vexatious litigant?

Does the law make it too easy or too difficult for a vexatious litigant to get leave from a court or tribunal to continue or bring litigation? For example, should the vexatious litigant have to show that there are reasonable grounds for the litigation?

Under the current law, a vexatious litigant can apply for leave ex parte (without the court or tribunal hearing from anyone else). Should the Attorney-General, or any other people, be notified when a vexatious litigant seeks leave?

What rights should those people have?

Should courts and tribunals be able to decide leave applications 'on the papers', without hearing from anyone in person?

Should courts or tribunals be able to impose conditions when they grant leave to a vexatious litigant to bring litigation, e.g. should they be able to order the vexatious litigant to provide security for the likely legal costs of the defendant?

Should vexatious litigants have a right of appeal when a court or tribunal refuses to grant leave?

Use of family members to litigate does become an issue and should be a consideration in determining whether a person is vexatious and whether a legal proceeding is in contravention of an order that a person not bring further proceeding without leave.

Balancing rights and interests

Victoria has a Charter of Human Rights and Responsibilities that, amongst other things, protects the rights of people to a fair hearing. Do you think Victoria's vexatious litigant laws strike the right balance between access to the courts and the need to protect other parties and the justice system from vexatious litigation?

It is often overlooked that in many cases individuals (as opposed to statutory or large corporate entities) become the subject of a vexatious litigant's proceeding. These people are involved in litigation at significant personal and financial cost, oftentimes such costs are not likely to be recovered. Litigation against individuals or series of individuals should be a relevant matter considered by the court in the course of an application.

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

If a person is declared a vexatious litigant by a federal court or a court in another state or territory, what effect should that have in Victoria? For example:

- should the declaration automatically apply in Victoria as well?*
- should the Supreme Court (or other courts and tribunals if appropriate) be able to take account of the person's litigation in federal or other state or territory courts when they are considering whether to declare the person a vexatious litigant in Victoria?*

WorkSafe supports the NSW model that consideration be given to litigation in all states when considering whether a person meets the test of vexatiousness. A declaration that a person is a vexatious litigant in another state may be highly persuasive to a Court considering a vexatious litigant application in Victoria.