C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 6 August 2008

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Witnesses

Ms D. Williamson, prison outreach worker, and

Mr C. Shilton, community legal education worker, Darebin Community Legal Centre.

The CHAIR — Welcome and thank you both for coming along from the Darebin Community Legal Centre. Thank you also for the material you have provided, which is terrific. I will just go through a few formalities. These proceedings are held under the Victorian Parliamentary Committees Act which gives you parliamentary privilege, which means that if you say something that is critical of some organisation or individual, you are protected by parliamentary privilege, but if you say the same kind of thing outside this meeting, it obviously does not apply. We have 45 minutes, so I will give you a bit of time to tell us about yourselves and about the legal centre's view of the terms of reference, and then we will have a general discussion.

Ms WILLIAMSON — We would like to thank you for the invitation to come here today. We would also like to acknowledge the traditional owners of the land that we are meeting on today.

Darebin Community Legal Centre is one of the many community legal centres in Victoria that assist — largely — people who are unable to afford or, or are ineligible for, legal assistance elsewhere through legal aid. A lot of members of our community come from culturally and linguistically diverse backgrounds. A lot of our clients are in custody. We run a specific program for people in custody due to the shortfall in services for people who are in prison or otherwise.

As well as doing a prison outreach program we are engaged in an indigenous access program to improve access for indigenous people in our catchment area. This was a need that was identified when we were based in our Northcote office and we were quite close to a number of the Aboriginal hostels in the area. We were getting a lot of clients coming in who had issues, particularly around guardianship, State Trustees, housing and things like that. We also run a family violence intervention order assistance service out of the Heidelberg court. That was previously located at the Preston court but it shifted to Heidelberg. We generally act for applicants who are seeking intervention orders.

I have been at the centre as a volunteer for 11 years now. I came on as a volunteer, then was employed for three years as an administrator, and went back to being a volunteer. My colleague, Cameron Shilton, is our current community legal education worker and as such has a lot of contact with community members, trying to impart legal information and increase people's understanding of the law.

In relation to this particular inquiry, it is the usual process for Darebin to try to engage the community when we are intending to make a submission and to get their opinions and advice so we can adequately reflect the views of our community. In this case the consultation that was undertaken was very limited, with only a small number of clients. That was partly because of resource restrictions and time limitations for our part. But it was also because a lot of people were not aware of what a vexatious litigant was or of the provisions that relate to being declared a vexatious litigant. In trying to explain the concept to people, a number of people reached for the dictionary to look for the literal term and thought that a vexatious litigant was someone who was engaging in conduct that was designed, or with the intention to harass, intimidate or annoy people.

From our point of view and the limited experience we have with vexatious litigants, that is certainly not the case. There may be clients who come for repeat visits to the centre mainly because they are having problems understanding advice that they have been given, or because of language barriers, or because they have been referred from legal aid and come to our centre expecting us to be just another office of legal aid therefore think that the referral itself indicates that their legal matter has some merit. Most people come to us hoping that we are able to fix their problem quite quickly. All they might want is just a letter from a solicitor to the other party, hoping that that letter will create some dialogue between themselves and the other party and lead to their issue being resolved.

There is certainly a bit of a problem in consulting with people given that there is limited knowledge around this area, and we do not claim to be experts on the area either. As I stated in our submission, we have had one experience of a client having been declared vexatious, and we were heavily involved in his legal matters prior to that declaration.

In respect to the provision itself, I guess from our point of view, given our limited experience with what is termed 'vexatious litigants', we do not see that there is really a demonstrated need in terms of the number of people who have been declared in the past and our contact with people.

The CHAIR — Sorry, a need for what?

Mr SHILTON — For reform, I think — —

Ms WILLIAMSON — For reform. In terms of the provisions and the definition that someone needs to have acted habitually or persistently and without reasonable grounds, there seems to be some perception among the clients we have consulted with that 'habitually' seems to indicate that someone does that as a matter of course without taking any steps of their own to resolve the matter, and that is certainly not our experience with clients we deal with.

A whole range of steps are taken, whether they write to the actual parties themselves, or make contact with telephone calls, or use the Ombudsman's office or internal complaint mechanisms. We have very little experience of people who would automatically file in court rather than trying to seek some kind of alternative resolution to the process first.

A point was made by one of the clients we consulted with as to the term that someone is 'persistent'. They had recently undertaken the citizenship test and they thought that that was a good Australian value. They were a bit confused as to why someone would be sanctioned for behaving in that manner. From our point of view it seems fairly obvious that there is a lot of confusion around what constitutes vexatious conduct and why someone would be declared so when they are just taking advantage of their rights to access the courts.

The case with prisoners specifically is of great concern to us and has in a way led to us making the submission in the first place. The issues that a number of our clients who are in custody raise with us tend to be related to decisions that are made by prison administrators. They come to us after they have tried to resolve the matter at a local level. There has been no response, or in their opinion not an adequate response to their concerns. They would usually approach the Ombudsman's office for some assistance. We have recently had a meeting with the Ombudsman's office about the handling of prisoners' complaints.

We have received quite a number of letters from our clients stating that their interactions with the Ombudsman's office have not been very helpful and that the Ombudsman's attitude is, 'You need to resolve it at a local level with the prison administrators, and we are not going to get involved in it'. The clients will say to us, 'We have attempted that; that is why we are going to the Ombudsman's office'.

In some cases issues that are raised will be resolved by us liaising with prison authorities and trying to come to some agreement about how the matter will be dealt with. In other cases we have had to approach the Ombudsman's office ourselves to seek its intervention. That has met with varying degrees of success, depending on the issue. There have been others where we have been forced to initiate legal action against authorities. There have been some cases of where we have had mediation, which has again been successful to varying degrees.

You will notice from our submission that we quite often tend to avail ourselves of pro bono services because of our lack of resources and that we will often seek the intervention or assistance of the Public Interest Law Clearing House or the Law Institute of Victoria and Bar Association pro bono schemes.

Given the limited experience we have with people who could be termed 'problematic' in terms of making complaints, we do not see the issue of vexatiousness as being a great issue for the community. As Cameron pointed out, we do not really see the need for reform, other than that the definition could probably be tightened to better reflect what it is that the legislation is aiming at, what kind of behaviour it is aiming at preventing. Do you want to add anything?

Mr SHILTON — I think you have pretty well covered it — only to reinforce the idea that in our experience usually when people are engaging in conduct in the courts which might be characterised as vexatious it is generally, in our experience, because of a failure of internal grievance procedures or a lack of access to merits review or other means of resolving a dispute short of going to court.

Mr BROOKS — Following on from your last point, I would be interested to know if you have any ideas on what sorts of improvements could be made to the complaints handling systems inside the prison system. Following on from that, if they were implemented do you think that would see a reduction in the number of people who were considered to be vexatious litigants?

Ms WILLIAMSON — In prison where you have an issue the tendency is first you raise it with your unit housing officer, and then a process either does or does not follow from that. A lot of the contact we have with clients is as a result of them raising issues with the unit housing officer and they are not getting any response. They then write a formal letter to the governor, perhaps. Where it is an issue may be around their access to education or

programs, for instance. It may take some months for them to get any response, if they do indeed get a response from the prison administration, so they are left kind of in limbo, if you like, where they are unable to access programs or education.

In some cases, if they are undertaking external education where they have got to pay fees or have assignments in on time — if they do not have access to a computer for instance — it jeopardises their ability to carry out their education, and it is at great cost to them, because people in prison do not earn a lot of money.

In terms of their complaint mechanisms, it seems like there are directors instructions, but in our experience they are very rarely followed, and when they are we are told they are just guidelines for officers to follow and it is not the letter of the law. We get a number of complaints from people about the conduct of governor's disciplinary hearings. That is a big problem that we see, in that these hearings are held within the prison and the prisoner does not have a right to have a legal representative present. According to the legislation and the directors instructions they are allowed to call witnesses, to view evidence et cetera — the same rights that someone would have if they were to come to court on the outside.

We have had occasions where that has not been observed, where witnesses have not been called for one reason or another, or the person has been denied the right to view evidence which is being held against them, whether that be documents or items they have been accused of having as contraband. We see that as a breach of natural justice for that person to be able to state their own case.

The only avenue they have when something like that happens is to go to the court to file an originating motion in the Supreme Court, so there is not really any review of any decision that is made within the prison. There is no internal mechanism where they can say, 'The governor has made this decision. I do not agree with it', and to have perhaps a governor from another prison or someone from Corrections come in an adjudicate on the matter. There is no internal complaint mechanism other than coming to see us, go to the Ombudsman or to file.

Mr BROOKS — So you are suggesting an independent review mechanism for those sorts of things?

Ms WILLIAMSON — Yes.

Mr SHILTON — Certainly. The other crucial aspect is access to thorough and empathetic legal advice to gain some insight into the complaint and whether it is suitable for court proceedings.

Mr BROOKS — What is a unit housing officer? I assume that is second-level management in the prison, is it?

Ms WILLIAMSON — Yes. In each prison accommodation is divided into separate areas depending on your classification or your rating in the prison system — the level of security required to manage your sentence. The unit housing officer is simply the officer who is in charge of the men or women in that particular unit. They take care of all their welfare needs in theory.

The CHAIR — I want to come around another way at this. I think we all appreciate what you have said about people being informally termed vexatious in what is really an attempt to achieve justice on their part, and we are responsive to what you have said in your submission and what you have said now about the difficulties that people who are hard up getting access to justice.

That is appreciated and understood. In the work that the committee has done so far and the submissions we have received and the people we have spoken to earlier today there is concern being expressed to us about how the court system is used — not often maybe, but on occasion — by people who are using the courts as a tool to attack somebody else.

One of the areas where this could play out — and the figures seem to show that in the number of people who are termed vexatious litigants in the Family Court in some of the evidence we have received — where in those particular dynamics, as distinct from the prison system that we have just talked about, where there are those kind of tensions. You say in your submission that you do a lot of work around family violence issues. When you look at that particular set of issues, do you see that the courts are being used in this way — by one party to attack another?

Ms WILLIAMSON — For me personally, because I am not heavily involved in that area, I think there are instances of cases where people may go to court. You have raised the Family Court, and I believe the Women's

Legal Service put in their submission as well, about concerns around stalking. We acknowledge that. Prior to coming in we were talking about this. If that is an issue, then there needs to be dedicated legislation to deal with that particular area, rather than having a blanket kind of provision that captures people who may not necessarily fall within that category.

Mr FOLEY — A bit like the economic harassment stuff that is now going to be in the family violence legislation?

Ms WILLIAMSON — Yes. I am not sure, but I thought there was a family law proceedings or family proceedings bill, where they are talking about legislating against people who are harassing and intimidating. That is probably a good move, but to confine it to that area, rather than having a provision in the Supreme Court Act — that is a catch-all that is intended to apply across all the jurisdictions.

Mr BROOKS — Why would that be? Why would you narrow it to one another? I can understand why you would want it to apply to that area.

Ms WILLIAMSON — That seems to be where the problems are arising. With the reform of the provisions of the vexatious litigants legislation we cannot see where the need for it is. You are talking about family violence and stalking, and I understand that aspect of it and the need to bring that to an end, but I am wondering whether this is the appropriate way to do it, or whether there should be dedicated provisions or legislation that focuses on what the real problem is.

The CHAIR — Obviously we asked you to come in — and we read your submission — to talk about it from your experience of it from the point of view of the legal centre. What you are saying to us very clearly is that, on the basis of the caseload that you have, you do not see that 'vexatious litigants', as defined in the act, applies appropriately to the people who you see. What you are saying is that where there are particular instances, such as one or two out on family violence, then you think that might need a particularly targeted legislation that would deal with that particular issue.

To run this by you and get your reaction, we have heard evidence that people who fit the description of vexatious litigants are people who have behavioural issues where they pursue this litigation through the courts as a way of prosecuting a perceived victimisation or a perceived lack of success in other areas, so the courts are used as a vehicle for causes that may be real or imagined — usually imagined in this case. Do you see that kind of tendency presenting itself to you?

Ms WILLIAMSON — Not in my experience. We are not clinicians.

The CHAIR — It is one of those intersections. It has been a very interesting day for us, hearing the different viewpoints from the courts and from people who do have clinical backgrounds and research in that area. It is useful for an organisation like yours that operates on the ground, as it were, in the community to validate that, at least your experience.

Ms WILLIAMSON — The people who come to us are frustrated, certainly, about any efforts that they have made — that they have not moved forward in resolving their issue. I think one of the big things as well is people from CALD backgrounds — it is very difficult to get a point across to someone. Obviously we have the benefit of telephone interpreters but when meeting people outside the centre getting interpreters out is a big cost, but if you are going to be able to advise someone and give them the information that they need, it is a necessity. Most of the people who come to us, if you take the time and you sit down and you go through the legal issue step by step and you lay it all out in terms that they can understand, they are quite happy.

In terms of the link between mental health or whether they have behavioural issues, it is not something that I would say we see a lot. They may have issues but they will be separate to why they are pursuing this course of action. Maybe someone who has no mental health issues behaves in the same way. It is not something we generally ask people, whether they are suffering from mental health issues.

Mr FOLEY — We have also looked around at other comparable jurisdictions and I am aware of the UK civil restraint orders with a graduated series of responses from really specific, narrow-end, 'you cannot apply to do this' all the way through to — I forget what the jurisdiction is but generalist equivalents of the bans that we have

got in place, or technically are aware under the Supreme Court Act. Does the centre have a view on whether there is a graduated approach that might be useful? Do you have any views on the UK model?

Mr SHILTON — We are not deeply familiar with the UK regime. We would say that we would probably be opposed to anything which would generally lower the bar in terms of obtaining declarations against people. However, there might be some usefulness in the situation where a person would otherwise have a broad-ranging declaration made against them in having that capacity to take a more graduated approach or a partially vexated-type of approach where there are proceedings which are characterised as vexatious against a particular defendant for instance.

Also, Donna makes the point in our submission that that would not be appropriate where the defendant is an institutional defendant which has great control over that person's life and there is that kind of reason for instance.

Mr FOLEY — Because who else are you going to take it against?

Mr SHILTON — That is right.

The CHAIR — You talked about, Donna, when you have clients come in and if you step them through the issues and explain the law to them then things can pan out in a better way. I know you said you have not seen people who kind of fit the bill of that small group that we are talking about, but I was asking in relation to alternative dispute resolution. Do you use those sorts of processes?

Ms WILLIAMSON — We do, particularly where there are neighbourhood disputes, where there may be a conflict between people who live in the same street. We get a lot of fence disputes about fences and things like that, boundaries. We do encourage people to take advantage of the dispute resolution processes. We may explain to them the conciliation or mediation processes available to them, explain what the process will be and encourage them to take advantage of that rather than going to court or going to VCAT or whatever. We have had formal mediation in regard to some of our clients in custody. That has been in some cases successful and dealt with the issue, in other cases maybe not so. I guess from our point of view we would lay all the options out.

The CHAIR — With that, among the clients who come in you must get a range of people who are more or less comfortable and calm about the legal situation, to those who are in the middle and those who are extremely agitated and riled up and confused and stressed out about the situation they are in. Do you find that when you have laid out the cards and tried to guide them towards some alternative dispute resolution process that that has an ameliorative effect on them?

Ms WILLIAMSON — I think it assists in respect of them being able to tell their whole story from beginning to end in that process and being able to negotiate across the table rather than letters going backwards and forwards and the tone of the letter being misinterpreted or something like that. I think it is beneficial to be able to sit down face to face where it is mediated and there is another party involved that is making sure that each party has a chance to put forward their story but also has a chance to listen to what the other party is saying.

They have got their opportunity to maybe walk in the other side's shoes and see it from their perspective. I think that does assist a lot of people or a lot of our clients, the fact that they are able to do that and say, 'Maybe I did not consider their point of view'. Alternative dispute resolution is very beneficial for a lot of our clients, I think.

The CHAIR — Part of our experience as members of Parliament is that in a lot of the conversation we have heard during the day from different witnesses we have identified and recognised — being a service like you but of a different type — that we do get the odd person who comes in who presents in ways that are very difficult for us. We are not observers of this kind of dynamic, we are participants in it as well.

The other witnesses and people who have been put in submissions, whether they are complaints-handling organisations or whether they are members of the legal profession, have similar kinds of experiences. I just whether, not necessarily specifically at the Darebin Community Legal Centre but other centres that you work in broad cooperation with, is this part of a discussion with them? I know it is part of a discussion with us as MPs, how we deal with difficult people coming in. Is that part of the discussion you people have too?

Ms WILLIAMSON — At a federation level. There is training organised to deal with difficult clients or clients where there are high-conflict situations. We have what is called the standard performance indicators manual

but I am not aware whether there is any particular rule about how you deal with people. We tend to take people on their individual merits. We try and steer away from categorising people or putting people into little boxes. It is more a case of having to deal with each person as they come to you. Some people react better than others.

From my experience the most difficult situation is often where a client will present with a family member or a friend and it steps outside the boundaries of you engaging with the client because you have got the other person who is giving them advice. They might be amenable or interested in what you are saying or willing to take it on board but then the other person will say, 'That is wrong', and they are all confused because they are getting advice from their family member. That is when the problems start, I think.

The CHAIR — Your submission, as we said earlier, had a bit to say about more funding and resources for community legal centres. How do you think that early access to legal advice could help? You have said you do not really have people presenting who you would describe as vexatious litigants, so it is a bit difficult to pitch the question, but do you think that front-end resources and support help prevent those problems?

Ms WILLIAMSON — Yes, in a word. Once someone is referred from legal aid often they will think that we are another legal aid office and just the fact that they have been sent to us means that their case has some merit. Going through the process and actually dissecting — and I think I make an analogy to mechanics, in the submission — people want advice, they want a quick fix, and they want to know how all that is going to occur, so I think getting that information at the first instance and saying to them, 'These are the possible outcomes. If you take this approach, these are the possible outcomes; if you take this approach …' , then they have got a choice.

The fact that it is an informed choice, they have made that choice and they have to take ownership of it, I think assists a great deal, rather than their not being informed so much and seeing someone or seeing a solicitor who says, 'Okay, this is what I am going to do' and not explaining why they are going to do it or what the outcomes may be. Then they feel as though they are kind of removed from their own matter and that someone else is making the decision, even though they have the expertise.

They are not informed as to the reasons that course of action is chosen over another course of action, for instance. So I think early access is — —

The CHAIR — Yes, so an early explanation. You did say in your submission that people are being labelled as vexatious litigants — is that something that your service particularly has experience of: where the courts of labelled somebody or tarnished their reputation in this way?

Ms WILLIAMSON — We have had direct experience — one of our clients has had a declaration made against him. In that respect it has had a lot of implications, not the least of which is the media focus on their situation. Since that declaration any attempts that he has made to raise issues and resolve issues by either going to prison authorities or the Ombudsman have been pretty much dismissed instantaneously, simply because of the fact that he has already been declared.

The CHAIR — That is that particular case, but in general has this been an issue, where people, by force of circumstance or lack of clarity or whatever the reasons, seek to push an issue because they are not getting resolution of it? Are you finding that they are being labelled in a way that is not useful for them and not constructive, other than that particular case that you mentioned?

Ms WILLIAMSON — More recently I think there is a greater tendency for — and I am not sure what policies and procedures each individual business or government department has; certainly we are seeing it — almost like a checklist: a list of qualities, and if people exhibit these qualities or types of conduct, then they must be vexatious. Their complaints are not even being considered on that basis; they do not get past first base basically.

The CHAIR — So you are not so much talking about the courts, but you are talking about service providers: telephone, gas, electricity — —

Ms WILLIAMSON — Yes, service providers. The Ombudsman's office is probably a good example for us.

Mr SHILTON — There seems to be a move to a focus on people's conduct at the expense of the merits of their complaints in many instances. Would that be fair to — —

Ms WILLIAMSON — Yes.

Mr FOLEY — What is on your checklist?

Ms WILLIAMSON — The Ombudsman's office is an example. They have a checklist where — not so much a checklist, but in the draft manual that has been put together, they actually talk about the example of written complaints: whether someone is capitalising or highlighting or they write outside the margins.

Mr FOLEY — Compacted, all together?

Ms WILLIAMSON — Yes, they have a list of content and the look of the complaint. It seems that this has been used in not only the Ombudsman's office but other complaint bodies, and they are looking at this information and say, 'Okay, they fit these 8 criteria out of the 20 or so, so it is possible that they are vexatious'. I think that is dangerous.

The CHAIR — We are running out of time.

Ms WILLIAMSON — Sorry, I tend to waffle.

The CHAIR — No, you are not waffling. It is an interesting issue. You said in your submission — I think you used the word — there is a kind of hysteria around at the moment. It is fair enough. You are not the first person to have made that observation. Where do you think that is coming from? What is happening in our society so there has been welling up of people thinking that there is an overreaction to what is a very small problem?

Ms WILLIAMSON — I do not know whether I can answer. I probably have my own views. I think there is a bit of compassion-deficit disorder or something. I think people who have been working in a particular organisation for a long time maybe get a bit jaded if they have repeated contact with people who do not behave in a way that they would like. I think there is, to some extent, a bit of intolerance and a lack of recognition. Melbourne holds itself up as a multicultural city and there are lots of people who do not have the same skills with language or of being able to put their complaints in writing as others do. I think there is a bit of intolerance around that.

Mr BROOKS — Can I just go back to the point?

The CHAIR — Yes.

Mr BROOKS — I think you have touched on it, but I just want to get it clear in relation to the specific vexatious litigant laws operating in Victoria at the moment under the Supreme Court Act. Given there are very few people who have actually been declared as vexatious litigants, do you think there is a problem with those laws, or are you comfortable with what they are at the moment? I know you said before you would have a problem with lowering the bar — to paraphrase you — in being able to declare people as vexatious litigants, but in relation to that law do you have problems with the way it currently operates?

Ms WILLIAMSON — I would say yes in respect of — the definition talks about 'habitually', which seems to indicate as a matter of course that people just initiate legal proceedings. I think it has got the capacity to catch people who do not do that, those who actually explore every avenue and exhaust every avenue but are still coming before the court, and there is the capacity for them to be declared vexatious because they have brought a number of actions against a particular person or a number of people. As Cameron was saying earlier, if you are in a situation where you are institutionalised, whether that be in a prison, mental health facility, hospital or whatever, you are going to have dealings with someone who controls your life, your day-to-day living, and naturally they are going to be the people named. They may have valid causes of action, but the fact that they are naming these people over and over again goes against them because it is seen as being habitual and persistent. I am not sure that there is as much emphasis on whether they have got reasonable grounds as there should be. It appears from all the cases that I am familiar with — there are only 14; I have not gone back into all of them, but I have read some of the historical ones — I do not think there is a consistent application by various members of the judiciary in the way it is applied.

The CHAIR — We are out of time as well. Donna and Cameron, thank you very much for coming.

Ms WILLIAMSON — Thank you very much.

The CHAIR — Thank you for your submission. As I said before, it has been important for us to get the story as it comes from community legal centres, because that is the community for which we have a great deal of concern. We want to make sure that we get it right so that there is proper access to justice for people in different situations. Thank you very much. Kerryn and Susan may well be in contact with you for any further information, if we need that. You will receive a copy of the transcript, and you can make any slight adjustments just to clarify but obviously not to change it substantially. Thank you very much.

Witnesses withdrew.