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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 6 August 2008

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Mr M. Carroll, acting chief executive officer; and

Mr C. Thwaites, manager, investigation and conciliation unit, Victorian Equal Opportunity and Human Rights Commission.

The CHAIR — Thank you very much for coming in to talk to us this morning and helping with our inquiry. Before we begin with the evidence there is a quick formality with which I am sure you are familiar. This hearing operates under Victorian legislation which affords you parliamentary privilege, meaning that anything you say here that might be contested by somebody will not have any effect, but obviously if you say the same kinds of things outside the confines of the hearing, you are on your own. So you do have parliamentary privilege in here. Hansard will be recording our discussion for the next half hour, and you will receive a transcript of proceedings subsequent to the meetings.

We will leave it to you to talk to the terms of reference and say whatever you need to say on behalf of the commission, and then we have some questions and matters we want to raise, and if you have not covered them already, we will talk about those.

Mr CARROLL — Thank you very much. I thought I would make some introductory comments based on the particular issues that Kerryn had alerted us to, and then respond to any questions you may have. Chris Thwaites, who is with me, is the manager of our investigation and conciliation area, and is particularly able to talk about our experience, directly, of dealing with problematic and repeat complainers, and I think it is fair to say that we identified with some of the testimony we had the opportunity to listen to.

The CHAIR — You were not the only ones!

Mr CARROLL — I suppose to set the framework for our comments, it might be worthwhile providing the commission's perspective on the way in which this issue of responding to the challenge of vexatious litigants engages with the Charter of Human Rights and Responsibilities.

The starting point there is that essentially the response to this issue engages with at least two key rights that vexatious litigants hold, as do all members of the community, and that is equality before the law under section 8 of the charter, and also the fair hearing provisions which, in addition to having a procedural dimension, also have an element of access as well.

Generally the mechanisms to ensure the management of and access to the courts and tribunals are appropriately confined to or located within the powers and procedures of the court to deal with ad hoc matters expeditiously, if that is what is warranted; but of course there is that small cohort for which a more proactive and broader response is required, rather than simply dealing with matters as they arise.

In terms of identifying the humans rights issues that are engaged, it is important to recognise that there is a dual engagement. It is consideration not simply of the right of a person who may or may not be vexatious; but the response to that scenario is also about protecting the rights of people who may be the subject of that litigation themselves.

In particular, depending on the nature or the course of a particular person's vexatious program, for want of a better term, there can be issues arising in terms of the rights of individuals who are the subject of that litigation not to have their privacy and in particular their reputation unlawfully or inappropriately interfered with. There is also the broader, less specific right of other members of the community to have access to courts and tribunals and to not have that access delayed by court and tribunal resources being inappropriately or unnecessarily directed to matters which really are unmeritorious.

In looking at the international human rights jurisprudence that exists around these issues, there is a certain amount of precedent that recognises that responding to and, if you like, cutting off vexatious litigants can be entirely compatible with human rights — that it is not, of itself, an inappropriate response.

What the jurisprudence tells us, however, is that in responding to and dealing with these individuals it is important that the response is proportionate and is not so extreme as to totally extinguish their rights.

The particular framework that would be used under the charter to assess whether a particular legislative regime for dealing with vexatious litigants is or is not compatible with human rights would draw on section 7, which sets down a test for when it is reasonable and appropriate to limit rights in particular situations.

That test requires consideration of the nature of the right which is, of course, equality before the law and a fair hearing; and the importance and the purpose of the limitation, which is where the consideration of the rights of victims of vexatious litigation and the need for the courts to manage their own affairs comes into the equation.

There is also a need to analyse the nature and extent of the limitation and the relationship between the limit and its purpose in that it is a rational response and a proportionate response, and ensuring that it is within a range of the least restrictive options for dealing with a particular scenario.

In light of that, although it would be incorrect to say that the commission has a definitive position on what an appropriate legislative regime may or may not look like, it would be useful to put cards on the table, if you like, in relation to the existing framework under section 21 of the Supreme Court Act, and I have to say that on our examination of that, the position is one of a high level of comfort with the framework that is already there.

Its particular strengths are that it is administered by a superior court, although I hasten to say that that is not essential to ensuring that the response is appropriate. There is also another limitation through the initiation being confined to the Attorney-General, but again there is room for variation on that, without creating immediate problems, in terms of the charter or human rights compatibility.

The criteria seem to be at an appropriate, high level, and the fact that they are cumulative is also important. There is scope for graduated or variable orders in that it can be specific to a particular matter or broader as the case may be; and the leave provisions, which not only empower the Supreme Court but, where appropriate, lower courts to enable exceptions to the vexatious order is another strength. Also it is a judicial process that governs these decisions.

I have to say that on our initial assessment of it, really the only feature of the current system that stood out as a possible gap was that even though orders can be revoked or varied from time to time, there is the absence of a review mechanism in that the order is there and in place until such time as an application may give rise to it being varied, rather than there being an automatic review after a set period of time. That was really, at this stage, the only possible gap that we could identify.

The CHAIR — Would you like to contribute anything at this stage, Chris?

Mr THWAITES — I suppose what I could contribute today is that we were asked specifically how the commission deals with repeat complainants and whether we have any policies and procedures in relation to this, and I might point out that we do not have any policies as such in relation to repeat complainants. Also, it is the nature of the jurisdiction and some of the attributes that are protected under the jurisdiction that it is highly likely — or we found that in the past at least — that someone who has suffered detriment from discrimination may have suffered multiple examples of detriment, and therefore just numbers of complaints do not necessarily point to whether they are vexatious or lacking in substance as such.

I suppose one of the other challenges for the commission as well is the beneficial nature of its legislation in that we are obliged to provide redress for people who are seeking redress in relation to those who have experienced discrimination and sexual harassment.

We are also a gateway in that respect as in if anybody does want to seek that redress outside the original organisations that this might have happened in through internal processes, they must come to the commission in relation to that before they get access to VCAT or any other sort of determinative process around that.

Coupled with that, we also have an obligation under our act to facilitate the lodgement of complaints in relation to discrimination and sexual harassment. We have a very accessible front end of our complaint processes in relation to that. We provide a telephone service as well as a face-to-face service for people who want to come and see us to talk about possible discrimination matters.

I suppose one of the ways that we first start to manage or help people identify where the most appropriate complaint mechanism may be is that first face-to-face contact, so we spend a lot of time with people on the telephone or face-to-face working out whether what they have experienced might come within our jurisdiction or not.

If it does not, we also provide them with a range of referral options as well that may well be back to local members and things like that that fall outside our jurisdiction. That is one of our up-front sort of processes that help people understand the limits of this jurisdiction and what they might be able to achieve through that, but it is balanced with that absolute opposite obligation that if someone insists that they want to lodge a complaint, we facilitate that.

That does not mean that they have a right to lodge a complaint that has absolutely no characteristics of an antidiscrimination complaint. They do obviously have to provide an attribute in an area and a respondent in order to do that, but we work with people around that.

As I said before, the nature of the jurisdiction is that we have multiple complainants in relation to complaints. That can be against individual respondents or multiple respondents as well, depending on the nature of the attribute that they are claiming and the experience that they are alleging to have happened. I did a preliminary scan of our stats over the last 10 years just to give you an understanding.

We do have a power in relation to our complaints, a decision-making power, when we make a decision on a complaint whether to decline it or refer it to conciliation, and this is after a matter has been lodged and investigated. We have a vexatious ground, but it is very rarely used. The preliminary figures — and I must stress this, and I am happy to go back and firm them up — are that in the last 10 years we have made 8400 decisions and 27 of those were based on a vexatious ground, so it is very, very rare that we would make that decision. There are a lot more grounds in relation to what we would normally base a decision on, and the decisions usually go to lacking in substance or referral to conciliation.

The CHAIR — Are they disproportionately time consuming and resource intensive?

Mr THWAITES — Certainly some complainants can be resource intensive in relation to that. It may be because of a vexatious nature, but it can also be because of the nature of their attribute in relation to communication issues or language issues or mental health issues in relation to being able to formulate a complaint out of a frustrating fuzz of what has been happening to them.

We do a lot of work in relation to helping people to ensure that they can get through the formal barriers that our act requires in order to proceed with a complaint. I suppose that is some of the filtering service that I was talking about before in relation to the inquiry line and the face-to-face. Some people can take up a certain amount of resources, whereas others are a lot more articulate or they have representatives or they have support agencies that can work them through this system as well.

The CHAIR — I do not know if you know this, but let us say those 27, do they come to a conclusion and end more or less happily or are you just part of one sequence in a history that preceded you and a history that will go on after they have been to you?

Mr THWAITES — I would have to go back and actually trace some of these decisions, but certainly the process that the legislation sets out is that even if the commission declines a complaint, and it could be on this ground, although that is very rare, the complainant has a right to seek referral to VCAT and can do so by exercising that right within 60 days. This is in relation to the Equal Opportunity Act. There are slightly different processes in relation to the Racial and Religious Tolerance Act.

In fact if there is a decline on that ground, they have to apply for leave from VCAT in relation to that act, but the decisions around that act are minuscule compared to the decisions in relation to the Equal Opportunity Act. Complainants who get declined by our commission do have a right to ask for the matter to go further, and that further step is for it to be referred to VCAT.

The CHAIR — To start off, Matthew, you talked about the charter itself, and you also talked about whether the current legislation complies with the requirements of the charter. Can I move it on bit further from that and extend it a bit? The Standing Committee of Attorneys-General, as you would know, has put out model legislation that has been picked up by Queensland and the Northern Territory. Could you just talk about the provisions in that and offer some views on it and also — to pick up two things — the UK's civil restraint orders as well.

Mr CARROLL — In terms of the reform there are a number of features that we were alerted to: firstly, that it extends the standing to initiate an application beyond the Attorney-General to a broader group, the court

itself and in some instances to individuals affected by the conduct. With regard to the court itself having a power to initiate an examination of these matters, as I said before, the fact that it is currently very limited as to how that mechanism is initiated is in one respect positive, but it does not necessarily have to be confined to the Attorney-General. It is about ensuring that the mechanism that facilitates these does not enable it to be extended too far.

With the courts taking on a role, that would not on its face appear to be problematic with the charter, and even with parties themselves or individuals themselves being able to initiate an application, because if vexatious conduct is occurring it is serious and needs to be responded to, it is quite legitimate to enable the subject of that to be part of initiating the process. It seems sort of counterintuitive to say we are dealing with this because it is serious, but it is not so serious as to give the victim, for want of a better word, themselves a right to trigger that process.

I am certainly not in a position to say how great the problem may be, but I think the bar council submission did refer to the possibility that consideration needs to be given as to how that standing is formulated in relation to individuals to protect it from becoming a strategic ploy, so that the initiation of an application is not part and parcel of rebutting or responding to what might otherwise be a legitimate action against you. It did appear that there may be — —

The current formulation of the test for vexatiousness in the Supreme Court Act does seem to be quite reasonable, as I said, geared towards an appropriate level of seriousness. There were two areas that we saw possible problems with if the grounds or the definition were to be expanded: firstly, using a test of frequent initiation of proceedings may be lowering the threshold beyond an appropriate level of seriousness to govern vexatious litigant orders. In that respect we note the courts have only used these powers very infrequently, and it would be unrealistic to say that there is a concern that there would be an avalanche of vexatious orders, but 'frequently' does seem to take it below the threshold that is established by notions of habitualness and persistence.

As to the other possible expansion or measure of vexatiousness which looks towards the impact of the proceedings, whether the person's motive for bringing litigation is to harass or annoy another person or cause delay or detriment, then certainly it would seem to me that that is already adequately dealt with by the way in which the courts here in Victoria have defined the notion of vexatiousness itself, and of course there is always the capacity for costs orders to reflect such considerations as well as the need for a vexatious order.

In terms of extending the scope of litigation that is taken into consideration to include matters that are occurring in other jurisdictions, again that would appear to be quite reasonable in terms of a human rights test. As I said before with regard to who initiates the process, if we are saying that the impact of these matters is sufficiently serious and sufficiently harmful, then it seem illogical to be saying the forum in which they are playing out somehow makes it different. It is looking at a particular pattern of behaviour, and it seems quite reasonable to look at the full range of that pattern of behaviour, regardless of jurisdictional differentiation. In terms of the United Kingdom civil restraint orders — —

The CHAIR — Yes, the graduated orders.

Mr CARROLL — Of itself there would not appear to be a problem with courts in the disposal of a matter before them where they think it is demonstrated that a matter is indeed vexatious, to be dealing with the entirety of the matter, if you like — so disposing of a matter before it and making appropriate orders to prevent further abuses of process.

With regard to a system like civil restraint orders or, more generally, devolving the power to make vexatious orders to courts beneath the Supreme Court, there may well be a dividing line — allowing the lower courts and tribunals to deal with matters and conduct within their own jurisdiction would appear to be quite reasonable and effective and an appropriate way of dealing with this pattern of conduct.

Looking at the broadest vexatious order that the Supreme Court can currently make and which I understand are called 'general civil restraint orders' in the UK system — so where it is not just about a particular set of facts or not just about your conduct within a specific jurisdiction but your broad right to pursue access to the courts — as I said at the beginning, vesting that very extreme power in our highest court, the Supreme Court, would appear to be an appropriate mechanism and maintaining that may well be important in ensuring ongoing compliance with human rights.

Mr CLARK — Could I come back to the aspect of the complaints that you have handled and their characteristics? You referred to the fact that people who complain to the commission and whose complaints are declined can then take their complaint to VCAT. Out of the people who do exercise that right, do you have a feel for what proportion of those you might regard as being vexatious or completely lacking in any merit — in other words, what proportion of those, if any, is an abuse or unjustifiable use of the system?

Mr THWAITES — It is hard to quantify. We have only ever made very few vexatious decisions, as it is. Most of our decisions, if we were to decline a matter, would be more lacking in substance rather than vexatious.

Mr CLARK — Yes, and I am covering all of those, not just the ones you have declared vexatious.

Mr THWAITES — It is hard to track what proportion that would be. There is always an option with respondents in relation to any matter that is lodged with the commission or goes further to the tribunal to seek a strike-out application. So there is a possibility that the respondents themselves can say, 'Look, we don't think that this has any further merit, and we should not have to go through the process any further'. Strike-out applications generally are quite rare. I do not have the statistics on that, but they are generally quite rare. On the matters that proceed to VCAT, again the statistics that come from VCAT, generally speaking, do not show at what point most matters drop out of the system, but the number of matters that we referred last year was just over 200. The number of those matters that eventuated in the hearing dropped right down into — and I can check these for you, but these are VCAT's statistics — single digit numbers in relation to hearings.

Whether they drop out of that system because they are mediated — because VCAT quite often takes things to mediation and they resolve at that stage — is unclear from the statistics. They do not give back too much information about why a matter is withdrawn from their lists or not. It is unclear whether a matter is resolved and therefore withdrawn or the complainants stopped pursuing it and therefore withdrew it without a result. So it is very unclear to tell which ones are merit based in relation to further litigation around that. But the statistics certainly drop off quite fast.

Mr CARROLL — I think it is fair to say, just in light of what Chris has said, that the vast majority of matters that are pursued beyond the commission, where we have said, 'Look, for whatever reason, we don't think there is much to this', really do fall into that category of someone just disagreeing with the decision and wants to access — it is not a review mechanism formally — or take the next step to have that revisited. A significant number — the vast majority of those — do drop off. Ninety-nine per cent of our service users are still in that frame of mind where they disagree, they want to check, but then when they find out what the checking mechanism actually involves often let the matter go.

I suppose an observation to add in is that the interesting thing about the remaining 1 per cent is that there is probably an element of organisational psychology there, where they are so demanding in terms of both our resources and, I imagine, the resources of VCAT that they become embedded in the psyche of the organisation, and their problem can appear to be a little more magnified than what it is. It is a tiny cohort of people who we are talking about. Whether they start with us or we are at the middle or the end of a very long pattern of litigation, they will do whatever they can to keep the matter going.

Mr BROOKS — As you mentioned, you heard some evidence we received regarding a medical or psychological link between vexatious litigants and the problems that they could have perceivably caused in the courts. I am interested to know what issues you think would arise under the charter in particular if the courts were to start to refer people off to psychiatric or medical assessment.

Mr CARROLL — The recognition that for some of the people their problem is essentially a medical or psychiatric issue more so than legal is a positive development, and referral to potential supports is a positive response to that syndrome. Issues would emerge if there were any form of compulsion related to that direction; whether it is simply a recommendation or whether there is any form of compulsion, there is an existing framework for involuntary treatment. Those should be the criteria against which people are assessed rather than necessarily just their conduct in isolation in a litigation framework.

The other point I would make — and it depends, I suppose, upon where in the court network referrals are being made, whether it is through judicial officers or whether it is through administrative officers as well — is that it is certainly very positive for courts both judicially and administratively to be aware of the fact that people can present with psychiatric conditions. Looking at how some response systems have worked in the past, with any response

which is about being alert to these things and referring people on where you think it is appropriate there needs to be a second message in there that reminds people that not all people with a psychiatric illness are in fact vexatious; that their matters can be genuine and real. So any training about how to refer people appropriately needs to include an element of assisting them to understand where referral is not warranted or is not appropriate as well.

The CHAIR — The other matter that has been raised through our submissions is whether courts should be able to decide leave applications on the papers or whether they should have an oral hearing alternatively. Would that be an issue under the charter?

Mr CARROLL — Generally the right to a fair hearing would incorporate a process whereby you have the ability to hear what is being said and respond to it. A process on the papers is not automatically and always contrary to human rights, but certainly the alarm bells go off and there is a need to look at it closely. If the process was one where all the court was looking at was the material that the potential litigant themselves was providing to demonstrate that that matter was not an abuse of process, and they have had an opportunity to put all their material into the papers and have that considered, then a process on the papers may well be more than adequate. But if the court were also considering the potential subject of the litigation's view on that, and there was not an opportunity for the vexatious litigant to comment on what is being put forward there may be difficulties around a fair trial. But if it is simply an ex parte unilateral process where it is just for the litigant to demonstrate that this particular matter is not vexatious, then having a full opportunity to do that on the papers may well be sufficient.

The CHAIR — That seems to cover it. As a last question, does the commission have a view on whether courts should be able to make additional orders affecting vexatious litigants such as an order preventing a person from entering court premises or an order requiring a person to obtain legal representation?

Mr CARROLL — We have not looked at that issue. I must say it is not one I can comment on straight away.

The CHAIR — Thank you very much for coming along. It is good that you were able to come, Mitra; it is terrific to meet you. We will send you the transcript, and Kerryn and/or Susan may be in touch about any matters they need clarification on as we go along.

Mr CARROLL — I am happy to do that at any point.

The CHAIR — Terrific. Thank you very much.

Witnesses withdrew.