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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 6 August 2008

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Mr G. Garde, QC, chair,

Mr T. O'Donoghue, member, and

Mr F. Holzer, member, law reform committee of the Victorian Bar Council.

The CHAIR — I welcome Greg Garde, Tony O'Donoghue and Franz Holzer from the Victorian Bar law reform committee. Thank you very much for sending in the written material, and we have had an opportunity to look at it. There are just a couple of very quick preliminaries. As you know, these hearings are subject to parliamentary privilege, and I do not need to explain all that to you. Anything you say in here is fine, but if you say the same thing outside, it may not be fine.

Hansard will be recording our discussion this morning, and you will get a copy later. You can make minor changes to the transcript but obviously you cannot change the substance. We have 30 minutes, so we will leave it open to you to speak to your submission, and also to the terms of reference, then we will jump in with questions.

Mr GARDE — Thank you very much for that welcome, Chair. Initially might I say on behalf of the law reform committee of the Victorian Bar Council that we very much support the function of this committee, and just a moment earlier I mentioned how many different tasks there are which confront and challenge us. From the point of view of practising barristers, we see that our clients experience many of these issues almost on a daily basis, so we are very much in favour of streamlining the process, enhancing the administration of justice, and overcoming barriers that should not be there. In that way I empathise with you in what you are seeking to do through the work of this committee.

I think probably the best thing for us to do is to spend just a few minutes. I can see from what Kerryn has supplied that as a committee you are already very much across many of the issues and are fully into it, and I will therefore speak but briefly to some of the points that we have made in the submission behalf of the Bar Council. I will leave, if I may, the bulk of the time for you to ask us whatever you like because I guess as people appearing before the committee we probably see more vexatious litigants and experience vexatious litigants, some of whom are personally well known to me through experience in the courts, and therefore you might wish to test us and ask us questions about different things, because I think there are a fair number of myths about vexatious litigants, and we need to look at what the best way to handle this issue for the community. I will be brief and will almost confine myself to one-liners, which you might say is unusual for a barrister.

I will just pick up on some of the feedback we have had through Kerryn. As you would be aware from our submission, the Bar Council would support an expansion of standing so that people other than the Attorney-General can apply for an order. Might I comment that the Attorney-General's department, the Department of Justice, has an enormous amount on its plate. This is not necessarily the most important topic on its plate, and it has been the real experience that it can take months or years for a particular person who may be causing mayhem to come to the attention of the department and for the department to accumulate the necessary material to support affidavits to make an application.

I am not being critical of the department; I am just saying that is the reality of experience. Therefore, we might say to clients, 'You could seek the Attorney-General's intervention, but in reality it will take too long. It will not happen and it will not be relevant to you because in all reality, by the time there is any action your particular litigation will have been completed'. There is a need for expansion of standing, and we would certainly support that.

There is a need for modernisation of the test for determining whether a person is a vexatious litigant. It should be both more modern and somewhat less onerous than it is at the moment — from the 1922 or thereabouts formulation that we have in our legislation which we have all inherited. There is a need for a register of vexatious litigants to be maintained in some form so that other people who are subjected to problems that may be caused by vexatious litigants can become aware of the fact that they are vexatious litigants.

There is a balance between privacy and public need to know, and I think a register of litigants is probably an essential matter that needs to be put in hand given that inquiries will now go beyond the Department of Justice in terms of the identity of vexatious litigants and given that there may be a wide interest in vexatious litigants than exists at the moment.

We also support and would agree with the idea that courts should have the capacity to make a wider range of orders. It has certainly been our experience that you get people who are acting in concert with vexatious litigants. You get some people who stand behind vexatious litigants. You get situations where vexatious litigants are encouraged, or who act, if you like, as front man or front woman for some other purpose, so that there is a need for

a wide range of orders to be open to the court to address, and a little later I will pick up on the VCAT topic that was mentioned earlier.

Certainly the Attorney-General needs to be kept in the picture, and we do not see any problem with a mechanism for making sure that the department is across what is going on in the context of a particular litigant.

We would also support recognition of what is occurring in the commonwealth jurisdiction, so if something is happening in the Federal Court, it is not much good our maintaining a strictly state-based approach and not paying attention to that. Similarly what is going on in the courts and tribunals in other states and territories is something that ought be taken into account in a modern Australian context.

One of the things that we would just comment on is that vexatious litigants are, of course, a very small subset of litigants in person. The reality of courts in Victoria — magistrates courts and VCAT to take some examples, but even not uncommonly in the Supreme Court — is that many people appear in person either because of choice or for financial or other reasons. As you are aware, legal aid is quite restricted, and there is none at all in some fields. Practitioners and barristers are very used to the situation of litigants in person, and indeed the same ethical rules apply as apply in any other situation.

It is not as if there is any different set of ethical rules operative to litigants in person. Exactly the same rules of duty to the court, duty to the client, duty to act in a fair manner, duty to present the case — all of those fundamental duties as applicable to litigants in person as to represented litigants, which will not surprise you. They are the ethical rules. Barristers, in their readers course, receive significant ethical training. Ethical training is part of the compulsory professional education program for barristers, so each year a barrister is required to attend further training in that area. In many ways this is second nature stuff; it happens all the time, every day.

Vexatious litigants are really only a very small proportion of litigants in person. Speaking now from personal observation — and I certainly saw people like Jack Moran and Mrs Gallo in court cases causing havoc, if you like, in matters in which they may have had an interest — there is often what I will describe as a paranoia on the part of a vexatious litigant, a paranoia that the individual is being really persecuted. That is the actual belief of the person concerned, or that the system of justice is deliberately perverse to the individual. You have people coming from that sort of mindset in many cases. You also have people who can see that use of the justice system is an effective means of causing havoc, cost and distress to somebody else.

You get vexatious litigants who are calculating in their nature. They realise that the person on the other side will have to react to what they are doing and will incur cost and expense, and they see it as part of a wider scheme to cause adverse impacts on the other person. They are invulnerable to cost orders. The normal rule in a court of course is that costs may follow the event, but if you do not have any assets or your assets are unreachable, you realise you are invulnerable.

They think, 'Therefore it does not matter what I do any more, I can do something and effectively there is no sanction'. You do get vexatious litigants who do have that mindset and who pursue their own cues or causes in that way. There does need to be protection of people in the community who are subject to the adverse impacts of these things.

Looking at the UK position, if I can just comment briefly on that, again there is a benefit in expanding the remedies which may be available so that there can be a constraint on the making of new applications in existing proceedings. You do get people who make repeated interlocutory applications for no good reason. You have to be careful as to how these things are done, because such a refusal of leave has to be done on the papers.

An application for leave can be bracketed with an application for other things, and that all has to be met; and vexatious litigants are often in the situation where, if they are unsuccessful, they just automatically appeal, so you have multiple appeals. The judge says, 'I will not grant leave. I do not think the application is satisfactory', for whatever reason, and the vexatious litigant says, 'I do not accept that. I now appeal', and you can go all the way in the court system with a whole series of often unmerited appeals.

You will be aware the High Court was confronting this problem and a fair bit of its time was being spent, until the rules were changed 12 to 18 months ago, trying to manage this situation. So there is benefit in that.

There is benefit in the idea that a person can be precluded from commencing new proceedings arising from the same factual matrix, or the same circumstances in broad terms. You get vexatious litigants who are fixated on some particular scenario or series of events that have occurred and triggered them into the state of mind they may have. Two years is not long enough. Two years is but a short time frame, let me assure you, in the view of a vexatious litigant.

The current system where a person is declared a vexatious litigant until further order is probably a good way to go. That leaves it to the court to determine what the position should be. Remember that if a vexatious litigant really has a good claim, you can go and get leave from a court; the judge will look at it and say, 'Look, you were struck by a motor vehicle' or, 'Someone was negligent towards you. You have a good claim. You've got leave'. It is not an impermeable barrier. It is in fact a very permeable barrier, provided that the merits are there. That is important, too, from the point of view of justice for the individual. So two years is not enough.

In regard to professional guidelines let me say very briefly that we have looked at the law society guidelines. They are commendable, but frankly they do not take existing ethical rules any further than they are at the moment. At the moment we have ethical rules in place. They are effective across the board.

They deal with all matters that professionals such as barristers are handling. Barristers are very used to seeing litigants in person, as I mentioned a moment ago. The rules are beneficial. They essentially come down to you treating a litigant in person exactly the same way as you would treat any other situation.

I think it is fair to say that where you do have a litigant in person, professionals are typically more cautious than they would be in a situation where you have an opponent who perhaps you know and therefore you do not have to think about ethical rules and requirements — everybody automatically works on that basis. I think with a litigant in person most barristers and professionals would be, if anything, more careful about adherence to professional requirements than ever. There is no complaints history. You should be aware that as far as I know there is no complaints history about relationships between practitioners and litigants in person being mismanaged or any abuse occurring in that field.

Finally, in terms of the comment that we heard when we came in, we are talking here about the liberty of the subject — the capacity of a person to take legal proceedings in a court or elsewhere. To us as barristers that is a serious topic that relates to the freedom of the individual. We would support the concept that it ought to be a court that makes such a ruling to reduce the right of a person to access the court system rather than VCAT, which, as we were discussing informally earlier, has a wide range of important things to do.

We from the point of view of the Bar Association would leave it for the Supreme Court to undertake that task. It is significant, it does have an impact on the liberty of the person, so it ought to be done in that way. We do not think the cost is actually going to be very significant, because, as I mentioned earlier, vexatious litigants are typically impermeable to cost considerations anyway, otherwise they would not be on the track they are on.

There are a few brief comments, Chairman. I probably trespassed too long already but there it is. We would certainly invite your questions.

The CHAIR — Thank you very much, Greg. Franz or Tony, would you like to add anything at this point?

Mr HOLZER — Just one thing from me if I may: ADR for vexatious litigants is another issue that Kerryn raised with Greg. We do not think that that is really an appropriate forum for this particular group of people. They tend not to be those who would be susceptible to being assisted by ADR procedures generally speaking. It is a point you did raise and we should just touch on that, but otherwise I have nothing further to add to the general position set out by Greg.

Mr GARDE — Just to further expand on that, because one might initially be attracted to ADR: mediation occurs now in virtually all court proceedings. It is court ordered, it is standard procedure. To give you one experience of a vexatious litigant, having had a mediator successfully achieve an outcome in a mediation, because of the issues associated with a vexatious litigant a day or two later, the mediation result was disowned by the vexatious litigant. It then necessarily went to the court.

The court said the mediation agreement ought to be specifically performed and enforced. Some time later the vexatious litigant issued fresh proceedings in the court in any event. They were subsequently dismissed by a

Master. They were taken on appeal to the court, they were dismissed again. They were taken to the Court of Appeal. ADR, whilst it is to be encouraged, is no particular solution to this issue.

The CHAIR — You have necessarily in your presentation compressed a complex and wide-ranging issue. In that compression it gives the impression of great urgency and that it is a huge problem. What we are hearing on the one hand is that it is not a big problem but where it happens it can be very intense. That is one picture.

The bit that overlays that is we have had it put to us that the problem is not so much in the litigant but a lot of the problem is in the courts and their incapacity to hear. I know that is not the case that you have put, and that would be expected for people from your background, but could you just reflect on that for a moment to start off?

Mr GARDE — There are two issues: I would immediately agree. As I mentioned, vexatious litigants are a small minority of litigants in person — it is not the greatest problem by any stretch of the imagination confronting our administration of justice in Victoria. Having said that, it is an issue. The reality is that people who through no fault of their own happen to be on the wrong end of a vexatious litigant do suffer injustice and are impacted on and occasion unwarranted cost in trying to sort out the problem. It is a form of harassment, if you like: one person harasses another through repeated litigious steps. It ought to be viewed in that light. People do need protection from it.

In terms of the inability of the court system to handle it, I would suggest that that is not the case in that litigants in person, generally speaking, get a much longer and more patient hearing than anyone else. I think you have to go back to the question what is motivating a vexatious litigant? The two factors that tend to motivate vexatious litigants are persecution — this idea that I am being persecuted, that a terrible injustice has been done to me, a very great grievance on the part of the individuals who are strongly motivated to try to procure remedy for what others may view as a non-existent grievance or offset by other more significant considerations — and the second is, if you like, the malicious nature, which we do see too, where people say, 'If I can't beat you in the court system, if you have established the justice of your case against me, I don't accept that so I am going to gain retribution against you by doing these things'. That is the way I would see it.

Mr CLARK — Could I raise the issue of the use of cost requirements as a potential for restraining vexatious litigation? We have had slightly conflicting evidence so far: on the one hand the proposition that people could be required to post bonds or other security for costs or to clear previous cost orders unmet before they could bring proceedings, and on the other hand the argument that we already require security for costs and it is not having much effect. Do you think there is any potential to modify rules as to costs or for security for costs to give greater powers to the courts or to the registrars as a mechanism for restraining the repeated issuing of proceedings?

Mr GARDE — What I think is that courts need an array of remedies to tackle the problem. No one remedy in its own right is going to sufficient. If we look at applications for security for costs, first of all they are constrained to plaintiffs. If, for example, you are a defendant for whatever reason, or you have been joined in proceedings, then the security for costs rules do not apply to you. In addition what you can find taking place is this: even if security for costs is ordered, it can be appealed. You can have multiple appeals taking place as to whether a security for costs order should be made. You have some people who regardless of a security for costs order will proceed anyway, or issue fresh proceedings. It has its place, but it is not the total solution.

Mr O'DONOHUE — Could I just explore a bit further the concept that the Attorney-General is reactive to applications and often applications are not made because of the complexity and time required? How could that system be made efficient? Do you suggest perhaps that the department should keep a watching brief and have an idea of those who may be becoming vexatious?

Mr GARDE — The department does maintain an oversight of this topic. However, the factual reasons why people may be vexatious litigants will often be outside the knowledge of the department. Let us assume in the course of some extraneous litigation which the state is not involved in that there is a series of problems cropping up. The department will not know that unless it is involved and chances are that it will not be involved. It requires input from those who are involved and it sets out to investigate what is occurring, and the particular litigious situation may pass and another may arise.

I do not think it is really a very practical solution for the attorney to be the only party with standing to apply for an order. If it is widened so there can be third-party applications, then I think the problem is likely to be better tackled. We remember that when this happened in — what was it? — 1922, it had not existed before then, so this was then

a brave step to give the attorney that capacity. Now I think we have reached the situation where we need to move on.

Mr FOLEY — Does the bar have a view on one of the proposals that seems to have emanated from the Victorian Law Reform Commission's *Civil Justice Report*, where essentially a master or an associate judge would be given a role in engaging, hearing and dealing almost exclusively with these people?

Mr GARDE — I do not know that the volume of vexatious litigants is such as to really require the full-time dedication of a master or a judge. There is, of course, within the court a system to support litigants in person, so there are already advisers who do an outstanding good job, I might say, in helping people find their way around the courts both physically and in terms of procedures. So that exists now. Certainly you need a situation where the court gives oversight to vexatious litigants, but I know that the exclusive dedication of a master or a judge to that function is called for. You could give that as a duty to a particular master or judge amongst other duties.

Mr FOLEY — If you did not like them!

Mr GARDE — Well — —

The CHAIR — Don't feel obliged to comment!

Mr GARDE — I was just going to say they are your words, not mine!

The CHAIR — Do you wish your press your case, Martin? Any comment? No. I am very conscious of the time — we have about 5 minutes to go — but you did refer before to the UK civil restraint orders. Could I just bring you to the model bill that came out of the Standing Committee of Attorneys-General and perhaps ask you to comment on how the Victorian Bar sees that?

Mr GARDE — Very briefly — very much we support that as moving in the right direction. I guess the issue with the UK topic is whether you want to seek to go a step further than the model bill. Essentially what the UK is saying is that there are additional remedies, additional ways you can tackle the problem that can potentially be added to the armoury of courts in looking at this subject generally. Having had a specific look at those remedies — I mean they are beneficial — it is really then taking the model bill just a small step further in one respect in terms of adoption of the UK remedies, which is what they are. Doubtless from the UK point of view, they experience very similar challenges to the ones we confront on this topic and our experience all around Australia and elsewhere, I might say, in the world. So we would support the model bill. We think it is very definitely moving in the right direction, but we would also just pick up on the UK options as being of benefit also.

Mr CLARK — I just wanted to follow up on your suggestion about voluntary referrals of some litigants to mental health professionals. I think as a broad concept that that has a number of attractions but also some challenges. You mentioned there is already a litigation support facility in the court. You suggested this reference to mental health professional could also be styled in a similar way. I am wondering whether it would be a better approach to have someone — a clinical psychologist or a person with similar skills — in the existing office. How would you handle that delicate transition from advising on court and litigation procedures to saying maybe you have got a broader range of issues that you ought to speak to this person about.

Mr GARDE — I think it has to be done under the rubric of the court support network. I mean there still is, whether we like it or not, in our community a barrier in relation to mental health issues, despite beyondblue and all the other considerations.

If you say to someone who is a litigant with a, if you like, persecution complex, 'Look, you need mental health support', rejection will almost certainly follow. People still have resistance to that sort of support, and of course vexatious litigants do not view themselves necessarily, or indeed in all probability, as having a mental health problem, or as others do in that their perception may be fanciful or they have no concept really of what may be a fair or just outcome in a particular situation. It has to be done under the umbrella of the wider support that the court network offers so that gently a vexatious litigant can be transitioned into support by a clinical psychologist, and that has to be a carefully managed process if it is to be effective.

The CHAIR — Does the Victorian Bar provide training to its members around the issues that you have raised?

Mr GARDE — The bar provides extensive training in terms of the readers' course in ethics generally. Perhaps contrary to the thesis that may be in part there, we take the view that the needs of professional conduct in the context of litigants in person, which are frequent — and vexatious litigants, as I mentioned, is a subset of litigants in person — that the professional ethics of the bar apply there and elsewhere. Our view is that there is not really any difference between the ethics you owe to the court and to your opponent and to the opponent's client, whether or not the person is represented. So we do not specifically train barristers, as far as I am aware, in vexatious litigants as such. The ethical duties are the same regardless of whether the person is represented or not.

The CHAIR — I appreciate that the general duties are the same, but nonetheless, particularly from your presentation, there are very particular and complex issues in relation to a particular case. The mere fact that you have put a submission together and we have had a conversation for 30 minutes about it would indicate that there might be valuable lessons that your membership has that could be shared.

Mr GARDE — Yes, there are lessons in terms of vexatious litigants and the problems that they may encounter individually and the problems that they can generate for others. From the bar's point of view, I guess our efforts are really in relation to the management of that situation. It is not so much an ethical issue for us in that the same ethics prevail; the full-scale ethics of professional practice are applicable, and obviously litigants come in many different shapes and sizes. Every day you experience — and they might be your clients — litigants who are of varying dispositions in terms of who they are. So the same ethical rules apply to everybody, really, whether they are clients, whether they are witnesses, whether they are your opponent's clients, or whether they are a litigant in person or a vexatious litigant. We do not specifically target vexatious litigants as a topic in its own right, but rather it is part of the overall obligations owed to people who are experiencing the legal process.

The CHAIR — Greg, Franz and Tony, thank you very much for both your submission and for giving us some of your time this morning. As I said, the Hansard transcript will be forwarded to you. I am sure you will not mind Susan and/or Kerryn contacting you for any follow-up information.

Mr GARDE — Thank you very much, Chair, for the hearing and the opportunity. We wish you all the best with your endeavours.

Witnesses withdrew.