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

LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 13 August 2008

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Ms K. Hilton, Executive Director, and

Ms M. Panayi, Manager, Law Institute Legal Assistance scheme, Public Interest Law Clearing House;

Mr B. Schokman, Human Rights Lawyer, Human Rights Law Resource Centre.

The CHAIR — The committee welcomes Ben Schokman, Kristen Hilton and Michelle Panayi from the Public Interest Law Clearing House and the Human Rights Law Resource Centre. Thank you very much for coming, and thank you for your submission and the material that you sent; they are very much appreciated. Before we begin I have a couple of preliminaries. Our discussion this morning operates under the Parliamentary Committees Act, which means that anything you say here that might be of a contentious nature is protected against litigation, but if you say the same thing outside the confines of the hearing, you will not be afforded the same protection. Hansard staff are recording our discussion this morning, and you will be sent a copy of the transcript subsequently. You can make clarifications, but you cannot change the substance of the evidence. We have about 45 minutes, so we will leave it to you to speak to the terms of reference and elaborate on or restate any of the points in your submission, then we will have some questions or throw open the discussion. We can be as informal as we wish. It is over to you.

Ms HILTON — I might start off on behalf of both of the organisations. My name is Kristen Hilton. I am the Executive Director of PILCH. Obviously PILCH and the Human Rights Resource Centre made a joint submission for this inquiry. I thought I would go through some of the major points of our submission, and then there are probably areas that you would like to pick up on, and we can talk in more detail about those.

Essentially our joint submission contends that the current provisions, under section 21 of the Supreme Court Act, for vexatious litigant orders in many respects strike the correct balance between the right to access to the courts and the need to protect other parties in the justice system from vexatious litigation. We submit that with any reform of this kind or any reform that is being proposed careful consideration must be given to what are the very serious consequences of a litigant being denied access to the court system and being restrained from bringing future legal proceedings. We contend that any of these reforms or any proposals should be viewed and looked at through the human rights framework and the current Victorian Charter of Human Rights and Responsibilities.

Part of the human rights framework in relation to law reform says that if less restrictive measures can be adopted to pursue the legitimate aim of reform, then these avenues must be approached first. Our submission looks at why litigants become vexatious in the first place and looks at ways in which the current system and the response from registries and from judicial officers can be made better so as to perhaps prevent perceived need to change current laws. To understand what those changes might be we need to understand the reasons why litigants become vexatious in the first place.

We also suggest that inquiries into areas for potential law reform usually stem from identified failures of the system. We do not see that there has been such failure under the Victorian vexatious litigants model. Since 1928 we note that only 14 people have been declared vexatious litigants. From that point of view and from the empirical evidence that has brought forward to suggest the need for these sorts of changes, we are not sure that that need currently exists.

What we do see a need for and what we do see the vexatious litigant debate stemming from, is the increase in self-represented litigants. We contend that that increase is due in part to the restrictive legal aid guidelines, which provide insufficient funding in key areas for assistance, particularly in relation to civil and administrative legal aid funding. We submit that the provision of government-funded legal advice, particularly at the early stages of proceedings or even before proceedings have commenced, can enable a potentially difficult litigant to be more fully informed about the court process, to gain a better insight into their matter and why it may or may not succeed in court and to be given realistic expectations about the merit of their matter. This is the part of the process, as opposed to necessarily broadening laws in relation to vexatious litigants, that we submit is in most need of reform.

We suggest that the provision of direct guidelines and continued training for judges and court staff in dealing with self-represented litigants, and in particular in dealing with people who have mental health issues, is essential. Many of our suggestions and concerns are in keeping with and derive from an examination and an understanding of the right to a fair hearing, which is recognised in the international human rights framework and under the charter in section 24.

We talk in our submission about what the concept of a fair hearing means — what the elements and standards which make up this right are. This is informed through international jurisprudence and case law on what some of the minimum basic elements of the right to a fair hearing are and ones that are relevant to this inquiry. We suggest that they are: equal access to and equality before the courts; the right to legal advice and representation; the right to procedural fairness; and the right to a trial without undue delay.

A particular issue in relation to vexatious litigant laws and whether they require reform is article 14 of the International Covenant on Civil and Political Rights which has been interpreted to signify that all people must be granted, without discrimination, the right of equal access to the justice system and that the administration of justice must effectively be guaranteed in all cases to ensure that no individual is deprived in procedural terms of his or her claim to justice.

The courts have determined in various cases that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process, and we say and recognise that while there may be some limitations to that right, and those limitations might be reasonable, they are only permitted under the human rights framework where there is no less restrictive means of balancing an individual's right to access to justice and the court system with the desirability of preventing litigation that is vexatious or unmeritorious.

That is in a sense our rights framework which guides our discussion and guides our responses to the inquiry. We then also look at why people become vexatious litigants in the first place, and our submission is formed both by research that we have done but also our experience as organisations on the ground which are receiving calls from individuals who have a very deep sense of grievance and injustice and have experienced some sort of difficulty in navigating the legal system.

We have identified a number of key factors as to why we think that self-represented litigants might go on to display some form of vexatious behaviour. Those key criteria or those key experiences are an experience by the individual of unfair treatment or injustice in the legal system or a lack of appropriate legal advice and representation at the initial stage, and this is a particularly important issue. We see people who have been given very quick advice or no advice at all, and what has happened is that they have developed perhaps an inflated sense of the merits of their claim. Where the merit in their eyes has not been substantiated, that has led to a real perception of injustice and unfairness. In particular individuals, that only spurs or fuels the desire to be avenged or to be vindicated in some way, in terms of their matter having particular merit. Having a legal system and having access to quality and low-cost legal advice, particularly for people who cannot afford private legal representation, is key to being able to manage the expectations of people at an early stage in the legal proceedings, and what we see is that that simply is not happening.

We also have people who have reported very difficult experiences with the court process, and what we have seen is that the complexity of the court processes can aggravate a litigant who may have some vulnerabilities in the first place. It can aggravate their sense of injustice and trigger certain behaviours.

We have looked at some of the research around this and we have seen that there are particular patterns of behaviour among self-represented litigants in the way that they present to the court system and the way in which they use the court system. That has included the incorrect use of forms, simply filling out a form that should have been filled out in one way and has not been; the misdirection of correspondence containing formal submissions or requests; wrongly framed requests for relief particularly around judicial review; bringing applications that are misguided; and also we know that many self-represented litigants have a great deal of difficulty in articulating exactly what their legal claim is. All of those experiences can lead to a very deep sense of frustration that the justice system, and in particular the court system, is not responding to their particular matter.

People have recorded a great deal of difficulty and frustration in dealing with public complaint bodies, the various ombudsmen, the failure of internal grievance procedures, even matters that have gone from, for example, the Equal Opportunity Commission to VCAT and then the Supreme Court. Through those stages of different forms of dispute resolution in some sense people still have not been given the proper advice and have ended up alone in the Supreme Court trying to deal with the various forms and procedures that need to be dealt with there.

We look in the submission, as the terms of reference call for, at the question of the relationship between mental health and vexatious litigation. This is an area that is quite vexed, and I am sure you have heard a lot of different views on this. At the bottom of our submission, or at the heart of our submission, is a cautionary note that not all vexatious litigants are people with mental health issues and not all the self-represented litigants are people with mental health issues, and to conflate the two or to think that the two necessarily go hand in hand is of real concern for us. Often the process of litigation may trigger mental health issues, but that is not to say that the person had a mental health issue before the matter was actually initiated. We have had many clients who have had complaints of

post-traumatic stress disorder as a result of being involved in the legal system, but that is also not to say that the matter that they present with does not have legal merit and that they should not be afforded a fair hearing.

We are particularly concerned that there be more education within the court system about how to deal with people who have mental health issues, but within that there should be a recognition that not all people who cannot articulate their matter properly, or have difficulty using the court processes, or have a desire to pursue a certain course through the justice system, necessarily have mental health issues. We try to make that point throughout the submission.

In relation to questions around broadening various provisions of the current laws — the test for vexatious litigant and standing — again we take a very cautious position about broadening those tests. We think the current system strikes the right balance. In particular we do not think the current test for a vexatious litigant around a persistent behaviour or a persistent pursuit of the matter should be changed to a frequent pursuit of the matter, which I think is something that is picked up under the model vexatious litigation proposal.

In summary, what we would say is that, I guess particularly where our organisations are coming from, we have noticed over last five years, particularly with cuts around legal aid funding, there is a preponderance, a much higher number of self-represented litigants trying to take their matters through the courts, and there simply is not the support there for those self-represented litigants. We see the emergence of querulous or vexatious behaviour where self-represented litigants simply have not been able to get the assistance they need, where the court system, particularly in the beginning stages, has failed to respond to their questions or their expectations in a meaningful or straightforward way. Often even judges can perhaps give a litigant an unfair, or not so much unfair but an overexaggerated sense that their matter might have merit. They are often told to go and procure a particular form of evidence and they then should come back to the court, and they believe that on the procurement of that evidence they will suddenly have a matter that is meritorious. In some cases it can be seen that a matter simply does not have merit, and they should be guided by the court in terms of what they might be able to expect from the legal process. That is a summary of our submission.

We then propose a number of practical ways, including continued training and education of court staff and judicial officers, the appointment of special masters, the introduction of management plans, more legal assistance to help determine the initial stages of a matter and improved resources for self-represented litigants. We have looked at a number of services in the UK. There is also a pilot service in Queensland that is run by QPILCH which is a clinic for self-represented litigants in the courts, where they are provided with advice and assistance, particularly with how to fill out forms, and more procedural advice rather than going to the merit of the matter. That program already has yielded very practical and helpful results.

Mr SCHOKMAN — I am a lawyer with the Human Rights Law Resource Centre. The centre has particular expertise around the charter and in particular the human rights framework. I guess I do not really need to say too much, but I am obviously more than happy to answer any particular questions that you might have about the human rights framework or indeed the charter itself.

The CHAIR — Maybe we will just start there. Kristen, you talked about access to justice and the human rights framework. Can we just come back to the existing legislation at the moment. I know you have also said it probably should be left more or less as it is because it strikes the right balance. But do you think the present legislation is consistent with the charter of human rights?

Ms HILTON — In our view it is, and I suppose in these submissions we have looked more carefully at the proposed reforms to see whether or not they would be compatible.

The CHAIR — You are talking about the model bill?

Ms HILTON — Yes, I am talking about the model bill.

Mr SCHOKMAN — The only point I might add to that is that certainly the human rights framework advocates a much more holistic approach, so it is not just looking at the legislation itself to see whether or not it is compatible with the charter, but other alternatives that might exist that Kristen has already talked about. So we are looking at the training of judicial staff, adequate funding for community legal centres and legal aid and those types of measures. You really have to look at whether or not the system can take into account the individual circumstances of particular cases and whether or not there is sufficient flexibility, not just within the legislation, but

with the way the criminal justice system or the civil justice system actually responds to those individuals. I mean, there are plenty of things we could talk about in terms of ways to ensure there is sufficient flexibility and individualisation in that sense.

The CHAIR — Kristen, I might have cut you off when you were talking about the Attorney-General's draft model bill. Did you want to say any more about that?

Ms HILTON — We have looked at the model bill. There are a couple of things that we can talk about, but you might have particular questions around it.

The CHAIR — Just give us a quick sense of what your view is.

Ms HILTON — Under the model litigants bill, obviously the test for vexatious litigants is different from what we currently have. We would say that extending it to include 'frequently', as the current model litigants bill does, is far too broad. We would have charter concerns, human rights concerns, around that.

In relation to standing laws we would favour a cautious approach in extending those standing laws. If there was to be a broadening of standing laws, we think it would have to be accompanied by some fairly stringent guidelines as to how they would work. Looking at the additional powers of the courts, my understanding is that the model bill also allows for the court, when making a vexatious litigant order, to make any order that it considers appropriate to that person. It might be providing for security of costs; it might be an order that a person try to seek particular assistance. We think the way in which it is framed in the current bill is far too broad. We would worry about the imposition of those orders. We think there is probably something that might be inherently discriminatory against the court having the power to make particular orders to one class of people and not to others. They are some of our main concerns about the bill.

Mr CLARK — You have mentioned a couple of points in your submissions on the issue of evidence which is obviously crucial to our inquiry. Does PILCH keep statistical evidence, or can you give us anecdotal evidence about the types of requests for assistance that you receive, and to what extent they would come from people who might be described as persistent litigants, whether or not vexatious? And do you have an overview as to what are the triggers for persistent litigation amongst the people that come to you with applications for assistance?

Ms HILTON — In PILCH's history, and it has been going for 15 years, we have had dealings with two people who have been declared vexatious under the current system. Their behaviour is radically different, I would say, to many of the self-represented litigants who approach us. I do not have the statistics, unfortunately, but we have referral points with, in particular, the Supreme Court, which has recently appointed a self-represented litigants coordinator. They will often refer people to us who have presented at the court without representation.

In terms of vexatious litigants coming to PILCH, we have had two experiences of that, and they have been very difficult clients to assist.

Mr CLARK — When you say 'vexatious', you mean people who have already been declared vexatious.

Ms HILTON — They have been declared vexatious, that is right. They have been seeking to have that 'vexatious' label overturned or to try to bring a fresh proceeding. We have provided advice as to whether or not we will assist with those sorts of matters.

PILCH sees clients from many, many different backgrounds and across really the whole legal spectrum. Apart from doing a small amount of criminal work and family work, we see people who are about to be evicted or are defaulting on their mortgage, a whole range of civil and administrative claims. The people who tend to be self-represented litigants have generally been people who have been relatively resourceful, particularly if they are coming from the Supreme Court and have already approached a number of centres or organisations for assistance. Our scheme is a scheme of last resort. You only get pro bono assistance when you have exhausted all other avenues, and so we tend to see people who have exhausted the other options that are available to them.

Our experience has been that, even if we see a client where we can see on the face of the matter there is no legal merit to the matter, we will, more times than not, refer them to a barrister or a solicitor for an advice session so that person has the benefit of having explained to them, clearly and firmly — because expectations are really important

to manage in these situations — why their matter does not have legal merit, how much it might cost them if they continue with these proceedings and the difficulty in litigating anything. We have often found that after clients have received that sort of very clear advice about the scope of their matter, then they are less likely to pursue their legal matter in a way that is going to be unmeritorious.

I cannot give you statistics on how many times that has happened, but anecdotally we know that that works. We know that if people are given very clear advice and their expectations are managed, then they will be less inclined to display the sorts of behaviours that might be linked to vexatious litigants.

Ms PANAYI — Could I also add a point in there? In relation to one of the litigants who had been declared vexatious, that individual brought a case to us seeking advice and assistance which did have merit. I cannot go into any detail for confidentiality reasons as to why in the end we were not able to assist, but that is just to ensure that where a person does have a vexatious litigant order made against them, it does not mean that there will not be future matters that are deserving of legal representation and advice.

In terms of applicants who come to us for assistance who display behaviours that could be seen as vexatious or heading down that track, it comes across in a lot of other different areas in law, in particular in family law related matters. We have identified that as being an area of concern.

Just to reiterate and confirm what Kristen has been discussing with you, in cases where we have looked at them and found them to be unmeritorious and particularly where people might have mental health issues or have a deep sense of grievance about the issue — and I am not putting them together but just trying to cover as much as I can quickly — where they have received detailed advice at the early stage, they have expressed that they have been very grateful, they wished they had received that advice earlier and would not have continued with the litigation.

Mr O'DONOHUE — Just to follow that point through further, we have heard from other witnesses about the impact from the other side, particularly the family law matters. You mentioned before, Kristen, the right to a fair trial without undue delay. I suppose there is also the flipside for people who are involved in family law litigation for years and years and years as a respondent. I just make that comment and observation.

Ms HILTON — Did you want to respond to that?

Ms PANAYI — Family law is an area where, it is my understanding, there is not as much of a public display about the amount of vexatiousness going on in the Family Court. We do not have access to the data on it. As far as I know, there are probably a lot of vexatious orders being made in that jurisdiction. Here I am relying on the research by Simon Smith in that area. In terms of any more detail about what is going on with the proceedings where there is vexatiousness, I cannot go into much detail, only because I do not have access to that research. We certainly understand the difficulties in the family law area where that is occurring and particularly where there are issues of family violence also involved; it is problematic.

Ms HILTON — It is the jurisdiction that triggers the deepest emotional response from people as well, when you have got couples that are going through separation, child custody issues, where they feel like an unfair determination has been made in terms of the splitting up of the assets and then they do not feel like their legal representation has been adequate. It seems that in losing the family structure — and a lot of the people who we see in relation to family law matters have perhaps lost custody of the children or perhaps have been the ones who have not come out as well in the property settlement — they fixate on the court system and the determination of a particular judge or the behaviour of their legal representation. I think that, because of the highly emotive nature of that jurisdiction, it probably breeds an even deeper sense of grievance than you might get in other jurisdictions.

Again, I think it is partly an expectation management issue for clients who are embarking on the Family Court proceedings. We find it very difficult to refer those matters — to get pro bono advice, for example. Often what we have found happening is that people will receive representation under legal aid for a certain period time, then they will reach their cap and the lawyer withdraws, so suddenly they have found themselves in very complex proceedings without representation or without the representation they thought they were going to have, and that is an unacceptable situation. That is a legal aid funding issue, but that can also, combined with the sort of combustive emotional stuff, really trigger some quite difficult behaviours.

Mr O'DONOHUE — That is a problem, and I suppose for a respondent to that, who is just responding to ongoing litigation and interlocutory applications and the like, that obviously can be very distressing and very difficult to deal with.

Ms HILTON — Absolutely, but I think prior to declaring that person vexatious, we would need to look at how the court system was managing, what the court management system was within the Family Court, what restrictions needed to be placed rather than just a vexatious litigant order, and perhaps this is where the UK model might be useful. It limits or provides a gradated system of orders, and that might be something worthwhile looking at, particularly in this jurisdiction. But I think in those situations, to declare someone a vexatious litigant could have really dangerous implications, particularly if we are talking about a family situation where there might even be a history of abuse. To suddenly prevent someone from access to the court system might aggravate other histories or other behaviours. That would be something to be very cautious of.

Mr FOLEY — We have heard, to follow up Edward's contribution, evidence from other community-based legal services that specialise in the family law area and women's law areas that they have considered all of the submissions, the training, the support, all the in-principle points that you have made, but given their experience, the weight of evidence that they have seen makes them come to the conclusion that on balance there is, in some terrible, really awful cases, the need to weight the system in favour of essentially the victim who is having the court system used to pursue them, to harass them, to humiliate them, to threaten them — all sorts of really horrible things. How do you balance your in-principle support and all the valid points you make about education, support, funding et cetera against the fact that we have heard evidence — which will be available on our website in the very near future — about the rights of those people who are essentially having the court system used to harass them and worse — —

The CHAIR — And also, because I was going to ask this as an addendum to that, not only in the family issues, but also against institutions and organisations at the top end where costs are running over $1 million in some instances, where the law and the courts are being used as a tool for an attack, so they are the kinds of things we are hearing as well, but we certainly have a lot of sympathy with where you are coming from.

Ms HILTON — The sorts of situations that you are describing I would say are fairly clearly vexatious and I am not sure why the current laws have not been used in the way that they could currently be to declare that person vexatious. I am not sure if it is an issue around awareness of the current laws that exist and whether advocates in legal organisations are presenting that as an option to their clients. I guess obviously it is the AG's decision about whether or not to make someone vexatious, but it would seem that there currently is a framework or there currently is legislation to address those sorts of quite extreme situations.

Ms PANAYI — It is both legislation and inherent jurisdiction of the courts to deal with an abuse of process, so how these matters keep getting back into, for example, the Family Court, I am not sure how that is working given that they have the power to make vexatious litigant orders.

Mr FOLEY — And they do.

Ms PANAYI — And in addition, if the individual is getting that clear legal advice early on, and support, that is really crucial because the added problems in the area of family law are those — they call them support groups — that are there giving what they think is important legal advice to these individuals and it is adding fuel to the fire. There is only so much you can do with the legal mechanism when you have these groups that are also operating to inflate the individual's sense of grievance and give them a sense that they have merit when they do not, and you are also competing with those groups as well.

The CHAIR — Could I take you back? You mentioned as you were going through before about a gradated system of restraint orders which the UK has been experimenting with or is looking at.

Ms HILTON — Yes.

The CHAIR — Could you perhaps give us a comment on that?

Ms HILTON — Sure. Did you want to make a comment on that?

Mr SCHOKMAN — Yes, I am happy to. I might add to the discussion. Quite often there is all sorts of evidence to say that a human rights framework has really beneficial therapeutic advantages as well, so to be able to say to someone quite early in the court process and take them through a human rights analysis of, for example, why they might be declared vexatious, can have very beneficial therapeutic advantages from that point of view as well.

In terms of the discussion about how adequate the current laws are, if there were options that were available to courts to look at how you might be able to tailor or individualise particular orders or circumstances — so it might be an order that relates purely to that factual scenario or to that proceeding — I think that that would certainly add to the flexibility that the charter requires, because whenever you are going to have a blanket policy, you are always going to have people on the margins who are going to be affected. It might suit 90 per cent or 98 per cent of all the people, but there will always be people at the fringes who will be affected. From that point of view any powers that a court may have to consider different graded responses to a particular circumstance or the ability of someone to bring any sort of proceedings would certainly add to that. Looking at whether or not a limitation on the right to a fair trial or a limitation on equality before the law is actually proportionate, it is necessary and it is adapted to suit the ends of having an efficient justice system. If the committee is interested, we would be happy to provide a bit more detail about the actual UK system itself. To be frank, we have not had the time to have a look into it. Certainly the concept of having graded orders available to the court is a much better approach.

Mr CLARK — Just one other aspect of the family violence issue. You probably know, or may know, that there is a family violence protection bill before the Parliament at the moment which contains vexatious litigant provisions, broadens the scope for application and contains quite elaborate mechanisms. Do you have any view on those provisions in that bill?

Ms HILTON — I am happy to take that on notice, but we are not across the detail of those particular provisions. But I am happy to get back to you if you would like to hear our views on those particular provisions.

Mr CLARK — In particular, as I said, there is scope for a wider range of parties to apply for vexatious litigant orders, and I am interested in your views on that.

Ms HILTON — Yes, sure.

The CHAIR — We are right on time so we will leave it at that. Thank you to the three of you for coming along. As I said earlier you will be provided with a copy of the transcript, and I am sure that either Susan or Kerryn will be in touch to follow up on some of the issues. If you have any further information you would like to contribute we would be happy to receive it. Thank you so much.

Ms HILTON — Great. Thank you very much.

Witnesses withdrew.