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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 6 October 2008

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Justice Bell, President, Victorian Civil and Administrative Tribunal

The CHAIR — I would like to declare the meeting open. I would like to welcome Justice Kevin Bell, the President of VCAT, who is with us today to give us a presentation. I am sure you are aware that the proceedings of our hearing this afternoon are conducted under parliamentary privilege and you are familiar with that, and you will be provided with a copy of the Hansard transcript, which you can make whatever technical changes you might need to. We have got about 45 minutes, and the way we run these is fairly informally but we will give you some time to talk to us about the terms of reference, the inquiry and any other matters relating to it that you think the Committee needs to be made aware of. And we do have some questions that we will feed in as we go along, so I will hand over to you.

Justice BELL — Thanks very much and thank you for giving me the opportunity to give evidence to the Committee. I have prepared an opening statement, which is not very long, which summarises my views on the key questions in a plain speaking kind of way, not in a legal technical way, which I thought it might be useful for me simply to read.

The CHAIR — Yes, that would fine.

Justice BELL — It has been distributed and I am happy for that to be distributed. It is central to this inquiry — —

The CHAIR — If I could stop you right there. Right on five minutes, Mr Foley.

Mr FOLEY — My apologies.

Justice BELL — This is my associate Bruce Chen.

The CHAIR — We are just at the point where Justice Bell is going to step us through his prepared statement and we will open it up for questions.

Justice BELL — It is central to this inquiry into vexatious litigants that the committee distinguish between vexatious and other kinds of litigants. The two categories must not be confused or allowed to mix.

Vexatious litigants are those who have been declared so by the Supreme Court of Victoria, pursuant to a legislative procedure after a formal hearing. Vexatious litigants may or may not be challenging in their behaviour towards the staff and judicial officers of courts and tribunals.

Other kinds of litigants have been described by various names, including querulous litigants and high conflict people. Such people may be parties or witnesses in courts or tribunals. They may act out or present with challenging behaviours, but the vast majority are not vexatious litigants, actually or potentially.

Equal access to justice is a fundamental human right belonging to every Victorian, which is recognised and protected by the *Charter of Human Rights and Responsibilities Act 2006*. To qualify that right by declaring someone to be a vexatious litigant is a very serious step. It should only be taken in the most extreme of circumstances.

Nonetheless, it is a step that, when fully justified, must be taken. The main reason is the great cost and inconvenience to the justice system and the other parties that the actions of vexatious litigants can impose.

I think that the current legislation gets the balance between equal access to justice and protecting the justice system and the community about right. I do not think a case for change has been demonstrated. There is need for change, but it is not in that direction.

People may present at courts and tribunals with challenging behaviours for a variety of reasons. They may be emotionally upset or mentally ill. The case may be of singular importance to their lives. They may be reacting to the profound sense of disempowerment that many people feel in the justice system. It is very common for the courts and tribunals to see people present with challenging behaviours for these and for other reasons.

Courts and tribunals have a duty to assist everybody, including parties, witnesses and others who fall into this category. Dealing with such people can be very difficult, both for administrative staff and judicial officers. There is a need to enhance their capacity to do so effectively. This is a major and welcome new focus of the legal system.

Special attention must be paid to the position of self-represented parties. The typical self-represented party may present with challenging behaviours of various kinds. Even a person who is very calm in an ordinary environment is capable of acting very unreasonably in the high emotion of the court or tribunal environment. The number of self-represented parties is increasing. This is due to the unavailability of legal aid and the increasing regulation of human and business affairs under legislation administered by courts and tribunals. This trend is likely to continue.

We sometimes see an unfortunate tendency to treat self-represented parties with challenging behaviours as vexatious. This is not the correct paradigm. There have been several cases in recent times in which appeal courts have criticised the decisions of judges and tribunal members who have not given a fair hearing to self-represented parties who have behaved in challenging ways. The law in this area has been recently restated and clarified and is very clear.

Proper support and training of administrative staff and judicial officers is crucial if the challenges raised by the trend are to be met. At the courts and VCAT, it is recognised that there needs to be an increased focus on this area. For example, through the Judicial College of Victoria, various courses are being offered to help judges and tribunal members perform their function of giving a fair hearing and due assistance to self-represented parties, without compromising the impartiality they owe to other parties. It is also recognised that self-represented parties need more support within the court and tribunal environment. For example, the Supreme Court has a self-represented litigants program supported by a co-ordinator. More of this kind of educative and support work needs to be done. The Charter is providing a very positive impetus in this regard. This, in my view, is the best way to deal with the problem. Mr Chair, that is my brief.

The CHAIR — Thank you very much. I apologise, I omitted in my opening welcome to thank you for the fantastic co-operation that you have given the Committee in its work on this inquiry.

Justice BELL — I hope that has been useful.

The CHAIR — It has been very useful and we are meeting with Dr Freckelton later on so thank you very much on behalf of the Committee for that work.

Justice BELL — I should have perhaps put on the record that I determined to give Dr Freckelton free and unfettered access to VCAT and to such members and staff as he wished to interview for the purposes of obtaining whatever evidence he felt he needed, and I took the opportunity he extended me to meet with him as one of the interviewees.

The CHAIR — Good. A number of witnesses here have talked about the relationship between self-represented litigants in court and the area — in inverted commas — around vexatiousness. What is the overlap there, could you just tell us about that?

Justice BELL — There may be a paradigm way to describe vexatious litigants as personality types — there may be — but I am not familiar with it. There is not a paradigm personality type that covers every kind of litigant in person. They are very, very various in their background, their education, their competence, their class, their wealth, their education, their ethnicity. So with respect to litigants in person we are dealing with a very, very broad range of people and they may be litigants in person by choice or by necessity. Mostly, I expect, by necessity, by reason of lack of income or other means to participate in the process. All of those people are liable to exhibit challenging behaviours at one time or another, simply because they are alone in a hostile environment.

I am not sure whether any of you have appeared in court in such an environment; it is very difficult. I have been a party in court as an individual, it is a completely different experience to being there as an advocate. The pressures that act on you are felt very personally and bring out personal — not considered or professional — responses, they bring out emotional, subjective personal responses. Everybody who is a litigant in person is subject to such pressures.

Within the general class of litigants in person, there are people who are more likely than others to present challenging behaviours, not being vexatious litigants but people who the courts have come to know as individuals presenting challenging behaviours. I know that you have received evidence from Dr Lester and from Professor Mullen, so you will be familiar with terminology like querulous litigants, and I think you have received evidence from Professor Sourdin, and she has told you about Mr Eddy's book — I cannot remember the name, I think it is High Conflict People, if I remember correctly.

There is more known about this particular subset of the general class. They tend to be men of a certain age; they tend to have had successful backgrounds, so they have an enhanced degree of competence to negotiate with systems; they almost always have suffered what comes later to be identified as an injustice of a kind; they carry a deep sense of grievance with respect to that injustice; they almost always are struggling to maintain their life in general so they are experiencing a sense of breakdown, almost total breakdown, in their life in general; and they seem to project this complex feeling of disengagement and despair onto a legal case, which they pursue to the nth degree.

Those people, I would expect some of them, at least, tip over into the vexatious litigant category so they are a group of people who are, I would say, at risk of becoming vexatious litigants. It is very wrong to call them vexatious litigants because they do not satisfy what I would describe as the satisfactory and traditional indicia, that is frequently pursuing in an unjustified way hopeless or cases that have unreasonably low prospects of success. That is not what they do. They tend to pursue a case that has a gravamen of truth or justice about it, to the point of very often regrettably their own self-destruction, so there is the overlap.

But can I remake this point, that if you look at the class of vexatious litigants not all of them are like that, by no means. And they do not all exhibit the kind of behaviours which querulous people exhibit either. Some of them are cool, calculating, deliberate, more in control than even the average person, and in some cases more in control than even the average lawyer. Some vexatious litigants are very impressive in terms of their capacity to negotiate the system.

The CHAIR — Can I welcome Mr Clark, Deputy Chair. Are there any other questions from other members at this point?

Mr FOLEY — I was going to ask Justice Bell, given your — I take it — view that you do not think there is a need for the change to the legislative definition of vexatious litigant?

Justice BELL — Yes.

Mr FOLEY — What your view on the model clause that is running around — —

Justice BELL — I have not seen the model clause.

Mr FOLEY — It has arisen out of the Attorney General's SCAG, which I understand the Queensland jurisdiction — —

Justice BELL — Is it here? Have you got a copy of it? I can probably get on top of it straightaway.

The CHAIR — I think there is, actually. There is one right here.

Justice BELL — I am certainly pro Australian uniformity, and I would not stand on fine points of difference if it meant that uniformity would not be achieved, so I am quite happy for there to be a national standard that might require some departure from our own state standard, if uniformity could reasonably be achieved by that means. But the critical thing is the definition. Yes, these are well-known and well-accepted methods of giving effect to a vexatious litigant principle, and I do not feel the need to contribute about the precise words, and I do not see this as a radical departure.

Mr FOLEY — I did not wish to ambush you.

Justice BELL — No, not at all, but that is my general response. There will be a spectrum of words within which minds I think could reasonably differ about precisely what the definition should be, and I think that is a democratic choice, and that is one I am happy to leave to the legislature. Once that spectrum is exceeded, I think you intrude into another area and you really are doing damage to a principle which I see as being fundamental to democracy itself, which is equal access to justice. So the selection of the definition needs to be circumscribed by recognition of that principle, and I know that this parliament accepts that principle across all sides so there is no issue about that, but real care needs to be chosen to make sure that the definition fits within that.

The CHAIR — Thank you. That is the first time we have ever done that, just flick something over and got an instant response, so very good. We should use that as a strategy for witnesses in future.

Mr O'DONOHUE — Thank you for your evidence this afternoon, Justice Bell. You mentioned in your commentary the Supreme Court self-represented litigants program. Does VCAT run anything similar?

Justice BELL — This is a really good question, if I might say so. The answer is no, we do not, but the challenges of doing so are quite profound. The reason is whereas legal representation in a court is the rule, in VCAT it is self-representation that is the rule. Even though VCAT is a tribunal and not a court, parties nonetheless experience the emotional and operational pressure of having to function within a hearing environment which is really quite unusual for most people. The consequences of that pressure are that people often feel a profound sense of disempowerment just by being there, of which I am extremely conscious. This profound sense of disempowerment is most experienced when a party goes into an environment which they sense is operating as a club and that induces in them a sense that there are people there who are members of the club, who know how the club operates, who have been there before, who are welcomed there, who may even be referred to in familiar terms — a very unsatisfactory occurrence in my view — and that is not for them.

I want to enhance so far as I can, a sense in VCAT that VCAT is for everybody, for the people who are frequently there and for the people who are not frequently there, and for every Victorian, whatever be their class, ethnicity, background, education or competence, linguistic skills or whatever. I do not think we can do that with a self-represented litigant program of the kind that you are referring to because even if we had a duty lawyer there, or a duty advocate — it probably would be a lawyer — we would not be able to extend that help to everybody who needs it. Therefore, we need to do it by other ways, and those other ways will involve — and of course I am trespassing here into areas that will be the subject of the review which the Attorney has asked me to carry out — the need to pick up new technology in a major way; the website needs to be significantly enhanced; our education and preparatory materials need to be very much improved.

Can I bring that point home to the current context, though. I am sure if I went to speak to any member of the tribunal or any staff member of the tribunal and asked them, 'Have you had a bad day today with somebody who has been abusive, swearing at you, not cooperating or whatever?' Probably five times out of 10 I would get the answer 'yes', and be given the details. Just, if I might say, if I went to a public hospital and asked the person on the counter at the public hospital, 'Have you had a bad day today?' You would be given the same answer. Mr Chair, you told me about being a teacher. If I said to you that I went to see half the teachers in the school and asked, 'Have you had a kid act out in class today?' The answer would, of course, be 'yes'. I could perhaps ask your electoral officials, 'Have you had anybody come in today who has been abusing you for this, that or the other thing?'

This is the kind of reaction to pressure which is very human, which can be alleviated if you have systems in place that acknowledge the pressure as a genuine human response to a pressurised situation, and which tries to enhance the capacity of the person to deal with it in that environment. Coming to VCAT, I believe that we can reduce the emotional load that is transferred or projected onto staff and members by having effective preparatory programs and initiatives, which enable people better to deal with the VCAT environment. We might need funding to do it, however.

The CHAIR — Not our department. Any further questions?

Mr CLARK — In the course of your presentation notes you refer to there being a need for change but not in the direction or expanded definition of vexatious litigant. I am wondering what your thoughts would be about

how this system should best respond to people who misuse it or abuse it, either maliciously or through just being having a totally different mindset to most other people about how the system should work. I suppose abuse, perhaps family violence is the most graphic context of where it is alleged that people use intervention order proceedings or applications for review in a very malicious way. But in any other jurisdiction you can have people who just persist in issuing process where most of us would say that is totally inappropriate. How would you propose the system?

Justice BELL — I think you have got to build the capacity of the judges and the staff of the courts and tribunals to do so; that is really the critical point. Given the acknowledged constraints imposed by the need to recognise that everyone has an equal right to access the justice system, that is an absolute given, I know that it is agreed with across the board, that imposes a constraint upon action and so what are the other levers that can be brought to bear on the problem? The one to which I refer in my opening statement is the capacity of the staff and the members of the court or the tribunal to deal with the issue. The courts have an armoury of procedural weapons, including strike out, dismissal, direction, case management powers, powers to direct that evidence be given in writing, and all manner of other procedural weapons which can be brought to bear to deal with that problem.

The courts are not so good at dealing — at least not so far — with the emotional or the behavioural consequences of people of the kind you are talking about and it is there, I think, that we have most to learn and that process has started. Enhancing the capacity of a judge to understand the impact that they have by their own behaviour in court, by their physical presence and by the manner of the conduct of a proceeding, is part of a solution. The Judicial College, therefore, has a program called the 360 Degree Program, which is aimed at the judge to enhance their own capacity to deal with problem cases in court.

One thought also is that there seem to be some judges who are better at dealing with these kinds of problems than others. It may be experience-based, but it is also just a question of their inherent capacity or talent for it, and it may be that having particular judges who can deal with the more difficult cases is part of the solution. You could not task a judge, though, with that job alone because it would burn them out and more likely lead to other downstream problems, so that is my general answer to you, Mr Clark, is to build capacity within the court and the staff themselves.

Mr CLARK — Can I just follow-up on that. Let us take an example. If you have got the fifth application in six months by a person seeking a variation to an intervention order, do you say, 'Well, we deal with the fifth application in the same way as we dealt with the second or the first application'? When you are talking about mechanisms are you talking about rules of court that would say in that instance, it is stopped by the Registrar, it is dealt with on the paper and the respondent is not forced to make another trip to the Frankston Magistrate Court to respond to it?

Justice BELL — Is that happening, is that sort of thing happening?

Mr CLARK — That is the flavour of the evidence we have been given.

Justice BELL — In intervention order cases in particular, yes. No, you do not deal with the fifth application in the same way. Whether you actually need a rule of court in order to bring out a sense of resolve by the judicial officer, in this case it is a Magistrate, I would perhaps doubt. It is the sense of resolve — 'Can I go about this another way?' You sometimes get a judge or a tribunal member saying, 'We need stronger rules, or we need stronger legislation to deal with a problem'. When you look at the problem, you realise that it is actually not a question of legislation or rule power, it is a question of a real resolve to act judicially — in this case that includes a tribunal, you understand — in order to address the problem. Now if there is a Magistrate who has got the fifth application unjustified in nature to amend a restraining order, then what is needed is a strength of judicial resolve, not a new rule. If judges are confident about the rules of natural justice, the principles of human rights, the governing legislation, the rules of evidence as they may bear upon the problem, the subject matter of their jurisdiction, you do not get this problem, and you do not need increased rules or powers in order to deal with it.

The CHAIR — Could I just take you back. You talked in your initial contribution around a whole range of stresses that litigants are under when they come to one of the tribunals of VCAT, and then you talked about a

pocket of people inside that where the system really does need to act to restrain them from doing things that are costly and time consuming.

Justice BELL — Yes.

The CHAIR — Can you put any kind of quantification around that group for us?

Justice BELL — It is a low order problem and a low number of people, but they are very noisy and attract a lot of attention and they are very time consuming. There would not be 10 or 20, in my experience, in this state. I have done a lot of Practice Court work in my time as a judge for various reasons, some months you understand, so I have seen a lot of this. I have also taken a real interest in this problem of self-representation, as you may know, and of course at VCAT it is part of the wallpaper, this question, literally. I think there would not be 10 or 20 people who, in my view, really fall into this category. And they are known to virtually every judicial officer, certainly in Melbourne.

The CHAIR — Could that number, do you think, be reduced by setting in place the various programs or strategies that you have described in your discussion?

Justice BELL — No. It cannot be reduced because it is a phenomena that is not caused by the legal system, it is phenomena that is caused by the social system, by the personality type of the individual, by their experiences within general society and so on. But what can be done is drastically to reduce the negative impact upon the legal system and upon the third party participants, say the other parties, government agencies, all manner of people who are drag-netted into the crisis that this person is generating. So, no, you cannot reduce the number of vexatious litigants. You can increase the number of vexatious litigants by making unsatisfactory compromises to the definition. You cannot reduce the number of people who are in the 'at risk' group because they are at risk for reasons beyond our own control, but we can act in a way that is more protective of the legal system, that will ultimately be better for them and for the third party who might be impacted or affected by their conduct.

The CHAIR — So do you think the applications made to the Supreme Court should still be restricted to the Attorney-General?

Justice BELL — I am agnostic about that.

The CHAIR — Can I ask you why?

Justice BELL — There are other options which can be considered, for example a Solicitor-General or some other official — and perhaps I am not agnostic about the need for it to be an official because I think it is a public interest power that is being exercised on application, but to arm other parties who are not officials or representing the public interest with that capacity I think would be very dangerous. And the reason is that the application for the exercise of this jurisdiction is special, it is an act that is regulatory in nature, it is an act that results in a right being highly qualified — you cannot issue without leave — it is an act that is protective in its objective; in other words, it is an act that is inherently governmental in its characterisation. It is not an act that is inter partes, that is arising in the context of a dispute between person A and person B. To bring the question of the so-called vexatious litigant status into inter partes litigation, I think, would be unsatisfactory and have all sorts of unsatisfactory consequences.

The CHAIR — Does that mean you are no longer agnostic, having just set that out?

Justice BELL — Yes.

The CHAIR — Because that to me sets out a clear principle.

Justice BELL — If that was your question, I have misunderstood it. I thought you were asking me whether the official should be the Solicitor-General or the Attorney-General. I have a principal stance in relation to the question, who should be the applicant authorised by legislation to bring the application, and the answer is: because it is a public act then it should be somebody representing the public interest.

The CHAIR — But you are agnostic to whom the Attorney-General should make the application.

Justice BELL — Oh, what level of court?

The CHAIR — Yes. Since you opened that up. What would you say to that?

Justice BELL — I am of the view it should be the Supreme Court, and that is because of the significance of making somebody a vexatious litigant; it means that in all courts they cannot sue without the leave of the court. You could not give the Magistrates' Court the power, I would submit, to prevent a person from being able to sue in all courts without the leave of who — the Magistrates' Court, the other courts? You would not create legislation, I would submit, authorising a Magistrate to prevent somebody from being able to sue without the leave of, say, a Supreme Court judge; there is a lack of proper hierarchy involved in that kind of arrangement. So if you accept the principle that you cannot have, say, VCAT or a Magistrate doing it then you have to search for the appropriate institution to do it, and the appropriate institution is the highest court in the hierarchy, for the reasons that I have given.

The CHAIR — Any other questions?

Mr FOLEY — I might just ask quickly, on that same level of graduated response, I suppose, the UK has introduced some reforms around civil restraint procedures, which are a graduated series of response with vexatious litigants and a whole series of steps going through procedures and things. Are you familiar with those?

Justice BELL — No, I am not. Are they recent?

Mr FOLEY — Relatively recent; over the last five years.

Justice BELL — We are fortunate in this state to have a Charter of Human Rights and Responsibilities.

Mr FOLEY — As indeed they do.

Justice BELL — As indeed they do. That was the reason for my question. We know, of course, that a vexatious litigant system is Charter compatible, depending on the width of the indicia, and it has been so held in both in Europe and in the United Kingdom. As long as the graduated response was, to use this phrase, proportionate to the evil then it could be a useful thing to examine.

The CHAIR — I think we have covered all the things we want to cover with you, so if I could thank you again for your general contribution to the inquiry and also for coming along today.

Justice BELL — Thank you for the opportunity; I appreciate it. I wish you good luck with your deliberations.

Witness Withdrew.