Mr Johan Scheffer MLC
Chair
Law Reform Committee
Parliament of Victoria
Parliament House
Spring Street
EAST MELBOURNE 3002

27 June 2008

Dear Mr Scheffer

Thank you for your invitation to make a submission to the Law Reform Committee’s inquiry into vexatious litigants, dated 24 April 2008. I understand the Parliamentary Committee is considering the effectiveness of current legislative provisions in dealing with vexatious litigants and will make recommendations which will better enable the courts to perform their role while nevertheless preserving the community’s general right of access to the Victorian courts.

While the committee’s terms of reference pertain to vexatious litigants in courts you have also expressed interest in our experience and approach to responding to vexatious complainants, and the extent to which vexatious litigants in the courts and tribunals are also interacting with organisations such as the Disability Services Commissioner.

Responding to vexatious complainants

The Office of Disability Services Commissioner (DSC) commenced operation on 1 July 2007 in accordance with provisions of the Disability Services Act 2006 (the Act), with the aim of improving services for people with a disability in Victoria. The primary role of the DSC is to resolve complaints about the provision of disability services. Complaints received by the DSC may be resolved informally during the assessment stage or, if I decide to consider the complaint, may be referred to either formal conciliation or investigation. While the DSC has been established for a relatively short period, complaints received in our first year of operation include a number of complex matters that had remained unacknowledged and unresolved for some time.

I would describe as ‘vexatious’ those individuals who are ultimately focussed on a achieving vindication and retribution, rather than any realistic outcome to their grievances. Such an approach is incompatible with the objectives and functions of the DSC, which are ultimately concerned with facilitating resolution between the parties. While some complaints brought to my Office may be described as vexatious, as provided in s 114 (1)(b)(ii) of the Act, I have not to date made a decision to not consider a complaint on this basis.

As with other independent statutory complaints authorities, many of the complainants who approach DSC are understandably upset by their experiences of service provision and frustrated at the way their complaints have been received and handled by disability service providers.

1 Investigation of the disability services involved with persistent complainants has not been required to date.
2 Lester, Wilson, Griffin and Mullen Unusually Persistent Complainants 2004
3 Lester, Wilson, Griffin and Mullen Unusually Persistent Complainants 2004
4 S 114(1)The Disability Services Commissioner may decline to consider a complaint if— (b)the Disability Services Commissioner considers that the complaint—(i)is frivolous; or (ii)is vexatious; or (iii) is misconceived; or (iv) is lacking in substance; or (v) does not warrant investigation.
Some have expressed anger in their dealings with front line service staff, which tends to induce avoidance and defensiveness. Other complainants manifest difficult behaviour for reasons that exceed the circumstances of their complaint.

Addressing these relatively few difficult complaints can, however, take an inordinate amount of time and resources. The challenging behaviours of some complainants can have adverse affects on complainants and staff alike. In this regard our experiences already parallel those of long-established statutory complaints authorities.

I share the view that has been put forward in the Joint Ombudsman Project — Unreasonable complainant conduct: interim practice manual (2007), that while the complainant owns the issues, the complaint handler owns the complaint. In a practical sense; this means that while the decisions that I reach may not represent a consensus by all parties, and issues may remain unresolved for unusually persistent complainants, it does present a conclusion to the complaints considered. In my view, this is a worthwhile outcome for those who have committed time, energy and resources to engage in the complaints handling process in good faith, and is well worth preserving.

As with courts and tribunals, the statutory provisions that enable my Office to decline to consider a matter which is manifestly vexatious offers an important recourse in the interests of equity and procedural fairness. There is no doubt that those provisions may be extended and strengthened, here as elsewhere. The developments pertaining to vexatious litigants in the United Kingdom, South Australia and Queensland, as well as recommendations of the Law Reform Commission are relevant in this regard. More distributed and strengthened measures to prevent vexatious litigation will remain a recourse of last resort and one that may be actively avoided in the continuing development and improvement of rigorous and robust, responsive and flexible case management processes and procedures in the courts.

Our developing approach to complaints handling is:

- consistent with relevant provisions of the Act;
- informed by Australian standards for complaints management;
- grounded in authoritative knowledge and skill formations that govern professional complaints handling, mediation and conciliation, alternative dispute resolution, and investigation, and;
- guided by the learnings and practices of statutory complaints authorities.\(^5\)

In seeking to preserve the community’s general right of access, the DSC has accessible complaints handling processes. This includes producing material in plain English and other accessible formats. We are also developing a person centred approach\(^6\), which is responsive to the varying specific needs, aspirations and capacities of people with a disability using registered disability services.

\(^5\) Of note, in this regard is the research conducted by Paul Mullen, Grant Lester and Lynn Griffin with the Health Services Commissioner\(^5\), Beth Wilson, and the training and guidance produced as a result of the Australian Parliamentary Ombudsman Joint project — Unreasonable Complaint Conduct: interim practice manual (OV 2007).

\(^6\) Adopting a Person centred approach is a requirement of the Disability Act. For further information see [http://www.helensandersonassociates.co.uk/](http://www.helensandersonassociates.co.uk/)
In my view, this developing area of expertise relevant to the rights of access for people with a disability, dual disability or multiple and complex needs has a contribution to offer courts and tribunals mindful that "unreasonable conduct does not preclude the existence of a valid issue" (OV 2007:1) in their case management of vexatious complainants.

**Interaction of vexatious litigants with organisations such as the Disability Services Commissioner**

In his article in the *Judicial Officers' Bulletin*, Dr Grant Lester observed that, with the establishment of formal complaint mechanisms throughout government agencies, businesses and professional organisations, it is increasingly common for persistent complainants to 'disrupt the work of complaints officers, ombudsmen, commissioners and, ultimately, tribunals and courts':

> "Recent research has found that the majority of these individuals (difficult complainants) will commence litigation, and when and if they become exhausted, either through a lack of financial capacity, emotional exhaustion or through being declared a vexatious litigant, the complainant will now rest and recuperate in complaints departments and ombudsmans' offices" (Lester 2005)

There is provision in the Act to decline to consider matters already determined by, or currently before a court, board or tribunal’. We have already had opportunity to closely consider matters raised by complainants that disability service providers argued are out of scope in this regard.

At this time, we look to the provisions of the Act, the professional formation of our staff and our developing complaints handling processes and procedures to provide sufficient resources in responding to difficult complainants making vexatious complaints. We will closely monitor developments more generally and look forward to your findings in particular.

Thank you for the opportunity to comment.

Yours sincerely

Laurie Harkin
Disability Services Commissioner

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7 s 114(1) The Disability Services Commissioner may decline to consider a complaint if — (c) the complaint has already been determined by a court, board or tribunal and does not raise any matter or issue that was not considered in that determination; or (d) the complaint is being considered by a court, board or tribunal;