

# **SUBMISSION ON VEXATIOUS LITIGANTS**

**Prepared by Women's Legal Service Victoria**

**For the Parliament of Victoria Law Reform Committee**

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## **Introduction**

Women's Legal Service Victoria (WLSV) has been providing free legal advice, information, representation and legal education to women for over 25 years. We specialise in issues arising from relationship breakdown and violence against women. Our principal areas of work are crimes compensation, family violence (principally intervention orders) and family law. A significant proportion of our clients have experienced family violence and their experiences of violence are often central to their cases, even outside the area of intervention orders.

WLSV has observed significant parallels between family violence and stalking conduct and the types of behaviour exhibited by vexatious litigants. Family violence is often characterized by one party attempting to control the other party and stalking by one party attempting to have contact with the other party against their wishes. Similarly a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact with him/her via persistent litigation. It appears that some vexatious litigants appear to be using the legal system as a vehicle for control and harassment of the other party. This is clearly very distressing for victims.

In this submission we have used the term "vexatious litigant" to refer to both individuals who have been declared a vexatious litigant by the Supreme Court of Victoria and also to individuals who have *not yet been so declared* but who in our view could or should be declared a vexatious litigant due to the frequency with which they have commenced litigation that has little merit.

*Please Note: Reference to any case studies has been omitted from this public submission to ensure the confidentiality and privacy of the parties involved.*

# Comments

## Why do people become vexatious litigants?

1. The WLSV does not wish to speculate on why people become vexatious litigants. There are undoubtedly a range of psychological, social and legal factors which contribute to someone repeatedly commencing litigation with little merit.
2. However, as noted in the introduction we have observed that some vexatious litigants appear to misuse the legal system to retain control over the other party or to continue to harass them in a way which mirrors stalking or family violence conduct. Family violence is characterized by one party attempting to control and exert power over the other party while in stalking cases one party attempts to contact or maintain contact with the other party against his/her wishes. Similarly a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact with him/her via persistent litigation.
3. In our experience vexatious litigation often commences or escalates when other avenues for the vexatious litigant to have contact with (or control over) the other party have been severely limited (quite properly in our view) in order to protect the victim, for example, when a court grants an intervention order under the *Crimes (Family Violence) Act 1987*.
4. This conduct is very stressful and upsetting for parties who are the focus of the excessive litigation, particularly those who have also been previously subjected to stalking or family violence by the vexatious litigant. In some cases the persistent litigation can continue for 12 years or more.
5. While we do not wish to see people's right to initiate legal proceedings unduly or unnecessarily restricted, the justice system must limit vexatious litigation for three important reasons:
  - a. To prevent significant harm and injustice to individuals who are subjected to repeated applications against them (particularly if they are already victims of violence or stalking);
  - b. To prevent the erosion of community confidence in the justice system which is likely to result if one party is permitted to continually commence litigation against another party which has no reasonable grounds; and
  - c. To prevent significant costs to individuals, the legal system and the state in responding to vexatious litigation and to prevent scarce legal resources from being wasted.

## Overview of our views about the current provision

6. The current provisions in relation to vexatious litigation are not effective in protecting people who are subjected to repeated vexatious applications against them for three main reasons:
  - a. It is difficult to have someone declared vexatious even when they persistently and habitually commence litigation with no legal merit.

- b. A declaration does not always prevent further applications and may even escalate litigious conduct by providing a new focus for further applications.
- c. There is confusion and lack of guidance for members of the judiciary and court staff about how to deal with vexatious litigants or the procedures to be followed to have someone declared vexatious. There is also little co-ordination and communication between agencies about potential or declared vexatious litigants which makes it harder to prevent and manage their vexatious conduct.

### **Applying for a declaration under Victoria's vexatious litigant laws**

- 7. In our view it is too difficult to have someone declared a vexatious litigant under the current system. A litigant can make repeated applications with little legal foundation against another person and they are unlikely to be subjected to an application by the Attorney-General to have a vexatious litigant declaration made against them. This means that the vexatious litigation can sometimes continue for many years at great financial and emotional cost to the other party/s.
- 8. The WLSV thinks it is important that the Attorney-General makes the application for a vexatious litigant for a number of reasons:
  - a. A declaration is a potentially serious limitation on someone's right to commence legal proceedings and should not be taken lightly without consideration of the broader justice issues that arise.
  - b. The hostility vexatious litigants often direct at the other party is likely to be exacerbated if an application to have someone declared a vexatious litigant was initiated by them.
  - c. The person who is the focus of the repeated applications often does not have the resources required to fund the legal costs involved in making an application. It is more properly handled by the Victorian Government Solicitor's Office on behalf of the Attorney-General.
  - d. Many of our clients would not want to be involved in such applications. They have previously experienced violence. They do not want the vexatious litigant to hold them responsible for the declaration. They just want the vexatious litigation to stop and for the vexatious litigant to leave them alone so they can get on with their lives safely. They have already been through enough.
- 9. However, the process by which vexatious litigants are brought to the attention of the Victorian Government Solicitor's Officer, and subsequently the Attorney-General, needs to be greatly improved. In addition, given the harm that vexatious litigants can cause, greater priority and resources may need to be devoted to investigating potential vexatious litigants and preparing applications in appropriate cases.
- 10. In properly addressing the issue of vexatious litigants, WLSV is of the view that improving the efficacy of the processes and procedures for monitoring and investigating potential vexatious litigants is just as important as the nature of the legal test that is to be applied.
- 11. There appears to be poor communication between various individuals and organizations affected by a vexatious litigant. Currently no agency seems to have overall responsibility

for co-ordination of matters related to potential and declared vexatious litigants. This makes it very difficult to manage them effectively.

12. WLSV recommends that a co-ordination office for vexatious litigants be established (possibly within the Victorian Government Solicitor's Office) which has the following functions:

- a. Receives notifications of potential vexatious litigants for investigation from the judicial officers, lawyers and parties subjected to persistent litigation;
- b. Keeps a register and central file of people being investigated as vexatious litigants;
- c. Investigates vexatious litigants and prepares applications and briefings to the Attorney-General in relation to potential applications for someone who has been declared vexatious;
- d. Keeps a register of all persons declared vexatious litigants in Victoria and answers inquiries from appropriately authorized court personnel about them;
- e. Provides advice, information and education to court personnel, members of the judiciary and members of the public about the general issue of vexatious litigants and how they should be handled.

13. Such a co-ordination office would also be effective in providing a central co-ordination point for inquiries from other states and jurisdictions in relation to vexatious litigants. In our view a person's status as a vexatious litigant in the Family Court or in another jurisdiction or under a specific piece of Victorian legislation (eg the Family Violence Protection Bill, once it becomes legislation) should be a relevant consideration for the Supreme Court in determining whether someone is a vexatious litigant under s 21 of the *Supreme Court Act 1986 (Vic)*.

14. The test of "habitual" and "persistent" litigation "without any reasonable ground" seems an appropriate one to us in determining whether someone is a vexatious litigant. Similarly it is appropriate for the court to interpret vexatious litigation as litigation brought for an "improper purpose" or which is revealed to be hopeless.

15. However, in our view the Court should be able to take into account the surrounding circumstances and history of the litigation and the person's motive in bringing fresh applications in deciding whether to declare someone a vexatious litigant. In our experience it is particularly important that this includes recognition of circumstances in which the litigation may be linked to, or a further manifestation of, family violence, sexual violence or stalking by the litigant which predates or co-occurs with the litigation. WLSV has seen at least three examples of this occurring. In considering this issue, it is important that the Supreme Court understand and define "family violence" broadly in accordance with current research and best practice. The definition in the *Family Violence Protection Bill 2008* recently introduced to the Victorian Parliament is the most appropriate legal definition to use.

16. It is particularly important for interlocutory and interim proceedings to be considered by the Supreme Court in whether to declare someone vexatious or not as this is a major way in which some litigants persist with their legal proceedings. This has been a feature of most of the cases we are aware of.

17. WLSV acknowledges that many vexatious litigants are self-represented and can create significant challenges for the courts and opposing counsel. However, we are not in favour of them being granted free legal representation. This would deplete scarce legal resources and potentially give legitimacy and impetus to further groundless litigation. However, vexatious litigants should *not* be entitled to personally cross-examine the opposing party where that party has been subjected to family violence, sexual offences, stalking or threatening conduct by the litigant.

### **The effect of a vexatious litigant declaration**

18. In some cases a declaration by the Supreme Court that someone is a vexatious litigant appears to have no real impact on their capacity to bring fresh applications to court. In some cases the litigious conduct escalates or gains new impetus as a result of the declaration.

19. In our experience declared vexatious litigants seem to turn their focus towards:

- a. making applications to have their vexatious litigation declaration itself removed;
- b. seeking leave to initiate fresh applications notwithstanding the declaration;
- c. seeking to commence proceedings in other jurisdictions, such as the Family Court; or
- d. all of the above.

20. There seems to be little effective communication about when a vexatious litigant declaration has been made and many members of the judiciary and court staff are unsure of how to deal with some of the challenging behaviours exhibited by vexatious litigants. This can lead to the vexatious litigant being granted leave by the court to bring a fresh application notwithstanding the vexatious litigant declaration. In some cases the court may over-compensate for the fact that the litigant is self-represented.

21. In general, there appears to be no guidance to the judiciary or court staff regarding how to deal with vexatious litigants. In some cases they can exhibit very challenging and hostile behaviour. They can be very demanding. In other cases they can appear charming and evoke sympathy and a disproportionate level of assistance from court staff and it can be hard for staff to identify them as vexatious.

22. Better co-ordination and guidance as recommended above would assist in managing these litigants more effectively.

23. In our view declared vexatious litigants should not be able to obtain leave from the court to commence litigation unless they can demonstrate that they have reasonable grounds. However, care has to be taken to ensure that the application for leave does not then become a mini-contest in its own right. The other party should be given notice of the application seeking leave to commence fresh proceedings but he/she should not be compelled to attend. The applicant should be required to show new circumstances or merits in order for leave to be granted.

24. There appear to be few consequences for vexatious litigants who continue to attempt to make fresh applications. In our view, as a very minimum, declared vexatious litigants

should not be granted leave to commence fresh proceedings while they still have outstanding costs orders from previous proceedings.

25. We consider that the provision of information, education and guidance for the judiciary about vexatious litigants is critical to assist them in determining whether to grant leave for fresh applications and generally how to manage these difficult litigants.

26. There should be some right to appeal vexatious litigation orders but not an unlimited right. As indicated above some litigants will continue to use any available avenue, however unlikely, to continue their litigious conduct whether it has any merit or not.

27. We do consider that careful co-ordination and case-management of vexatious litigants and potential vexatious litigants is required to prevent further harm and costs caused by their persistent conduct.

### **Impact of vexatious litigation**

28. Clients who have been subjected to persistent or vexatious litigation face significant emotional and financial costs. This is often combined with fear for their own safety and the safety of their children (due to the family violence, sexual assault or stalking conduct that preceded or accompanied the litigation). They felt great frustration with the legal system itself and struggled to understand why the litigation was allowed to continue.

29. As a community legal service representing clients against vexatious litigants WLSV has also been affected. Dealing with vexatious litigants takes valuable time away from other legal proceedings and has a disproportionate impact on a small organization with limited resources. The costs and time involved in responding to proceedings initiated by vexatious litigants is enormous notwithstanding that their cases have little merit. Vexatious litigants are usually unrepresented. They may be demanding and exhibit a wide range of hostile, irrational or challenging behaviours which legal professionals have to contend with.

30. Vexatious litigants clearly take a disproportionate amount of time and energy and are very stressful for the lawyers to deal with.

### **Family Violence Protection Bill 2008 – Part 11 Vexatious Litigants**

31. We note that there are provisions in the Family Violence Protection Bill 2008 which has recently been introduced to State Parliament on vexatious litigants (see Part 11). Given the concerns we have for our clients who have been subjected to vexatious litigation after years of family violence we welcome this additional protection and look forward to seeing how it operates in practice.

32. The court may make the order that someone is a vexatious litigant after hearing or giving the person an opportunity to be heard if it is satisfied that “the person has habitually, persistently and without any reasonable ground instituted proceedings under this Act against the same person.” (s193 (1)).

33.If the person is so declared they cannot make an application for a family violence intervention order or the variation, revocation or extension of a family violence intervention order against that person stated in the order or their children (s193(2)).

34.We also note that the Family Court has vexatious litigation provisions.

## **Summary of Recommendations**

In summary WLSV Victoria recommends that:

1. Strategies to improve the handling of vexatious litigants recognize that some vexatious litigation is obsessive conduct which arises from (or is a further manifestation of) family violence or stalking.
2. The particularly traumatic impact that vexatious litigation has on victims of family violence, sexual assault and stalking be acknowledged and addressed in responses to vexatious litigation.
3. Further research occur on the relationship between family violence/stalking and vexatious litigation to determine how it should be appropriately managed.
4. The Supreme Court should take into account the person's motive, the surrounding circumstances and the history of the litigation in deciding whether to declare someone a vexatious litigant, including whether the litigation arises from stalking, sexual assault or family violence and represents a further manifestation of the litigant's desire to control the other party or have continuing contact with her.
5. A central agency (possibly within the Victorian Government Solicitor's Office) co-ordinate information about vexatious litigants, including keeping central records and ensuring communication across agencies to effectively manage the vexatious litigant and limit the harm and costs arising from their conduct.
6. Procedures for investigating or monitoring potential vexatious litigants (including the preparation of applications on behalf of the Attorney-General to have individuals declared vexatious) be greatly improved and given greater priority and that they be co-ordinated by the central office described in recommendation 5 above.
7. Information, education and guidelines be provided to members of the judiciary and court staff about how to manage vexatious litigants and potential vexatious litigants.

## Contact details

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