

Submission No. VL/40
Received 08/07/2008
Law Reform Committee

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By Email

Dear Law Reform Committee

Re: Inquiry into Vexatious Litigants

We thank you for the opportunity to comment on the Inquiry into Vexatious Litigants Issue Paper dated April 2008.

The Mental Health Legal Centre provides a free and confidential legal service to anyone who has experienced mental illness in Victoria where their legal problem relates to their mental illness. All centre activities aim to promote the rights of people who experience mental illness. The Legal Centre is a non-profit organisation run by an independent Committee of Management. We receive the majority of our funding from the Victorian Department of Human Services and Victoria Legal Aid. The Legal Centre provides telephone advice and referral, direct advocacy - in some cases, education and general inquiries about mental health and the law for consumers in Victoria.

For more than 20 years we have provided legal services to people with mental illness, and we have a keen sense of the extensive discrimination and prejudice to which they are subject. We also are aware of the many harms that they experience, however, their complaints about such harms are often disregarded and ignored. People with mental health issues experience discrimination everyday in all areas of life, they are vulnerable to abuse and neglect. Too often their experiences and complaints are dismissed or pathologised on the basis that they have a mental illness.

We hope that this current review will accept that people with mental illness have genuine and real complaints, that must be heard, and address some of the impediments to their access to legal redress.

Questions and Issues

Vexatious litigants in Victoria

Are there features from their previous attempts to solve disputes that contribute to them becoming vexatious litigants?

The Mental Health Legal Centre has a number of clients who seek assistance with legal issues which have been present in their lives for long periods of time. Although none of these clients has been declared vexatious, their tenacity in seeking redress may invite such labeling.

Typically, when clients have appeared before the Courts or VCAT we know anecdotally that they can leave feeling dissatisfied. This dissatisfaction may stem from being unable to access legal advice prior to attending a hearing (so they lack of knowledge of the role and powers of the Tribunal or Court) and lack of legal representation at Court. The matter may be dismissed if they are unable to attend or fail to comply with the filing of documents adequately and without legal representation it is difficult to get it relisted. They may be of the view that a party did not produce honest evidence before the Court or Tribunal, if they do not have access to all the documentation (and they often do not have access to medical reports and files). A hearing may be conducted during a period when they are unwell and unable to manage their legal affairs to the best of their ability. It is these feelings of dissatisfaction which drive clients to seek ongoing legal resolution: although the Court may regard the matter as resolved, it has not resolved to the satisfaction of clients and in many cases natural justice has not been applied.

The very experience of treatment for a mental health makes a person vulnerable to harm and abuse. Clients of the Mental Health Legal Centre have valid complaints that we urge them to pursue however, existing complaints mechanisms are far from adequate and clients are too often dismissed or discouraged from taking further action.

In our experience, clients will continue to attempt to bring matters before Courts when they have experienced an injustice which has not been properly heard and considered by the Court. There is a strong sense amongst clients that having their day in Court is imperative to knowing that justice has been being done. It is this imperative that the case is heard, failure in this regard may lead our clients to return to Court and be declared vexatious litigants, even when they in fact hold no intention to vex.

Injustice persists when the imperative to tell a story of injustice is stymied by inaccessibility to agents of the justice system, such as lawyers. To tell the whole story, in all its complexity, may take some time, particularly if a client has a psychiatric disability which can impact the ways in which they communicate a narrative. In our experience, many lawyers do not have the time, energy, experience or interest to allow clients to give full instructions. The limited resources of free legal services, where lawyers may offer their time in half hour appointments only, is too brief. People may be ill lead by services where lawyers advise them that their matter *may* have merits, but referring them on. Often people with mental illness are referred to the Mental Health Legal Centre from other legal services or private lawyers just because they are identified as having a mental illness. In these cases we find that there has been no effort to assist them with their complaint. Lawyers who simply refer clients on to other legal services which may be considered better equipped to 'manage' these clients, without providing legal advice, may not realize that the act of referral can be interpreted as an act of confirmation of legal merit by the client. Clients can shuttle between legal services and agencies for years, believing that the referral indicates their matter has merit and that the next agency will be able to assist them to present their case to the Court.

In summary, clients who attend the Mental Health Legal Centre, having resourcefully attempted to bring matters before the Courts on numerous occasions, are not potentially vexatious litigants. Rather, they have experienced the following factors:

- a) Having a matter dismissed by a Court for procedural reasons or during periods of ill health;
- b) Being denied the opportunity to explain in complete detail all the elements of their experience to lawyers within a time frame which enables their whole case to be explained;

- c) Receiving inappropriate referrals to other agencies which confirms their perception that the matter has legal merit, save for the provision of legal resources;
- d) Being ill informed or not informed at all about the progress of their matter.

A system that fails to assist people to have their matter heard adequately means that they will persist until it is heard to their satisfaction and may lead to a declaration that they are vexatious litigants.

Case Study

Mr P made a number of complaints regarding his Office of Housing accommodation to the Department of Human Services and to his local Members of Parliament. He described living with the diagnosis of a serious mental illness, short term memory impairment and a very limited ability to read and write. Mr P received detailed responses to these complaints, including a description of steps which would be taken by the Department to address his concerns. When he assessed that these steps had not been taken, he made an application to VCAT complaining that he had been denied quiet enjoyment of his property. The matter was dismissed on the grounds that there was insufficient evidence. Mr P had video footage which he believed substantiated his claims, but reported that VCAT had been unable to provide the necessary equipment to play the footage. He was self-represented and believed that this lack of equipment led to the dismissal of the matter. Mr P still believes that, but for this equipment problem, he would have been able to explain his problem to VCAT. Four years later, Mr P attended the Mental Health Legal Centre. He did so, bringing with him two suitcases filled documents of correspondence and a description of his attempts to access legal advice and applications made to the Courts during that period. Mr P spent a considerable amount of time with a lawyer, who reviewed his documents, listened to his story and provided legal advice. The advice was that Mr P was unable to have this matter brought back before VCAT. Mr P was not distressed by this advice. Rather, he was satisfied that someone had taken the time to thoroughly review his situation. He described his frustration at trying to explain the situation to VCAT and to the free legal services he had accessed which due to their resource allocations, provided advice only in very limited time frames, which he found limiting given he had so much he needed to explain.

What is the relationship, if any, between mental health and vexatious litigation?

It is not the experience of the Mental Health Legal Centre that there is any relationship between mental health and vexatious litigation. Most of our clients do not bring their matters before the Courts despite ongoing experiences of injustice.

Interestingly, clients who have presented with difficult behaviours have been referred to the Mental Health Legal Centre by the Courts even when there is neither diagnosis of psychiatric disability nor history of past or present contact with mental health services. It seems that in particular issues with anger management, repeated contact with the Court, a perceived inability to grasp explanations given by the Court staff and/ or unusual personality traits can lead to judgments that an individual lives with a mental illness. It is our experience however, that our clients who do live with a label of psychiatric disability and who have past and/ or present contact with mental health services do not display these presentations.

It is important to note the role of the *Guardianship and Administration Act 1986* in this area. Many of our clients are subject to administration orders under the *Guardianship and Administration Act 1986*, whereby a third party has responsibility for managing an individual's financial and legal affairs. Should a client have the resources to fund legal action before the Courts, the organization or individual appointed as the administrator, may decide not to fund the legal action. Conversely, an individual who attempts to represent themselves before the Court and is subject to an Administration order, may have their matter dismissed on the grounds that they do not have the power to manage their own legal affairs and bring a matter before the Court. If a decision is made that an individual does not have the capacity to manage their financial and legal affairs as a result of their psychiatric disability, that individual does not have the power to bring matters to the Court without the approval of their administrator, and so is highly unlikely to be declared a vexatious litigant. Controls placed upon these people through legislation such as the *Guardianship and Administration Act* in fact limits their opportunity to litigate even when they have a legitimate matter.

Applying for a declaration under Victoria's vexatious litigant laws

Should the Attorney- General be the only person who can apply to have a person declared a vexatious litigant? Who else should be able to apply, e.g senior court staff or other parties to the litigation?

Only the Attorney-General should be able to apply to have a person declared a vexatious litigant. It is the experience of the Mental Health Legal Centre that there are already multiple structural barriers limiting people's ability to access justice. Further limitations, such as an application that an individual be declared a vexatious litigant, should only be exercised in very limited circumstances.

No Court or Tribunal other than the Supreme Court should have the power to declare a person a vexatious litigant for the same reasons. This power should be restricted as much as possible.

In relation to situations where the Supreme Court considers a declaration the only alternative, that consideration be given to exploring an option where the Court could declare a person to be 'partially vexated'.¹

Furthermore we do not support any further statutory restriction on potentially vexatious litigants, and therefore do not support the automatic application of a declaration from another jurisdiction.

What rights should an alleged vexatious litigant have?

A person who is the subject of an application to be declared a vexatious litigant should have the right to free legal representation without being subject to the merits test currently prescribed by Victoria Legal Aid. Only the Court should be able to make that decision: not Victoria Legal Aid who may determine person is likely to be declared a vexatious litigant, deny them the opportunity to obtain representation and further limit their ability to access justice.

A vexatious litigant should have the right of appeal against this decision.

The powers of the court to control vexatious litigation.

Other orders should not be able to be made to control vexatious litigants, for example, the power to order that the person cannot bring proceedings unless they are legally represented.

People living in poverty find it extremely difficult to access legal representation. It is our experience that with legal representation matters are resolved to the

¹ The phrase refers to the prohibition on people issuing proceedings against particular defendants, rather than banning them from issuing *any* future proceedings without prior leave:

satisfaction of clients, either by negotiation or mediation so that they do not need to persist at risk of being declared vexatious litigants.

Those declared vexatious have a right to pursue matters in other jurisdictions, for example being declared vexatious must not prevent the person from exercising tenancy rights, discrimination protections, mental health review or review of an administration order.

Other ways to respond to vexatious litigants

Is there any other action that courts and tribunals could take to manage vexatious litigants, eg should there be more guidelines or training for judges, tribunal members and court staff on how to deal with difficult litigants?

It is the experience of the Mental Health Legal Centre that people may continue to attempt to bring actions before the Courts whilst they feel they have experienced injustice, they may have had matters dismissed from the Court for procedural reasons or for reasons they do not understand, they are unable to access free legal advice which can consider their entire narrative in all its depth and complexity and provide legal opinion accordingly, they may have received inappropriate referrals to other services which has confirmed in their minds that their matter must have some legal merit and they therefore believe they deserve their day in Court.

The following steps may therefore be of assistance:

- a) Judges and tribunal members to clearly explain to applicants why matters are being dismissed or have resolved before the Court, and to provide written decisions;
- b) An increase in the opportunity for people to tell their story to free legal services, which are resourced adequately so that the necessary time can be spent reviewing all elements of the narrative and providing detailed legal advice to individuals who may need lengthy consultations due to disabilities such as psychiatric disability;
- c) Should an individual wish to persist in pursuing a matter before the Court, that individual should be subject to the usual rules of the Court rather than being declared a vexatious litigant and having the focus shift to an assessment of their personality rather than the merits of their action.

- d) A 'hub point' – including a centralised referral system that tracks and refers complaints: to assist a complainant to find the right complaints process and to regularly update them in terms of the progress of their action. We suggest that the Victorian HR and EOC assume this role.

Should courts and tribunals be able to refer vexatious litigants to support services? What kinds of support services would be required?

It is not the experience of the Mental Health Legal Centre that people living with mental illness, particularly serious mental illness, are any more likely to act in ways which render them likely to be labeled vexatious litigants. The Mental Health Legal Centre therefore does not anticipate the need to refer people likely to be labeled vexatious litigants to mental health services.

Whilst being amongst the most disenfranchised and disempowered in our community, clients of the Mental Health Legal Centre report that they value highly the opportunity to access thorough, thoughtful legal advice and firmly believe that they too are entitled to be heard in our Courts and Tribunals. This is a great strength of our justice system: that even our community members considered the most marginalized believe that they too are entitled to their day in Court. It is a strength which should not be diminished by increasing the ease with which people are declared vexatious litigants.

The most appropriate service for people at risk of being declared vexatious litigants is a free, legal advice service. Referral to medical or mental health services results in the Courts pathologising behavior which may have emerged as a result of people's inability to have their injustices heard, or to receive adequate legal assistance in the first instance. Failures in the justice system should not rest with the person.

Should the Court form the view that a person may be exhibiting a psychiatric disability which is affecting their ability to represent before the Court, existing court processes and legislation such as appointing a next friend, a litigation guardian or applying the *Guardianship and Administration Act 1986* are appropriate.

How should the law, and courts and tribunals, respond to any mental health issues arising from vexatious litigation?

In the first instance the law should recognize that it is not equipped to make assessments or judgments as to the mental health of individuals. Expert evidence

must be obtained regarding ill mental health. It is the responsibility of the justice system to ensure individuals who may appear to be vexatious litigants have access to thorough, appropriate legal advice, without being deemed mentally unwell. The Courts must recognise that people have the right to make what others may consider to be poor decisions - such as embarking upon legal actions against legal advice. The impact on others should be addressed through mechanisms applied to all litigants such as costs orders. If psychiatric disability is alleged, capacity assessments can be ordered and the Office of the Public Advocate invited to investigate. It is the experience of the Mental Health Legal Centre however, that our clients who are labeled as having psychiatric disability, have not embarked upon behaviours of vexatious litigation, once they have received thorough, considered legal advice. It is therefore suggested that the role of the law, courts and tribunals, should not be focused upon responding to mental health issues arising from vexatious litigation, but rather, should be focused upon ensuring that those at risk of being declared a vexatious litigant have appropriate legal advice rather than deeming them to have mental health issues.

We endorse the views of the Federation of Community Centres in their submission to the inquiry in particular the concern that any legislation and procedures concerning vexatious litigants does not become a mechanism to silence unpopular causes and 'difficult' people.

We thank you again for the opportunity to comment on the issues paper. Current systems are frequently inaccessible, lack transparency and accountability, or are ineffective and we hope that the review will address existing impediments to people seeking justice.

Please do not hesitate to contact Vivienne Topp at the Mental Health Legal Centre with any queries.

Yours faithfully

Vivienne Topp

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