18 July 2008

Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
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By email: vplrc@parliament.vic.gov.au

Dear Committee Members

Inquiry into Vexatious Litigants

Darebin Community Legal Centre Inc. (DCLC) provides a generalist legal information, advice and referral service to community members within the City of Darebin. We also conduct Indigenous access, family violence and prison outreach programs, the latter extending beyond our catchment area to all prisons in Victoria. Like other community legal centres, our clients are among the most disadvantaged in our community in terms of literacy, resources (including financial security), and understanding of and access to the law.

Our casework guidelines dictate that the majority of criminal matters and family law matters which come through our doors are referred out to Victoria Legal Aid, Victorian Aboriginal Legal Service or private practitioners. Therefore, the majority of matters we deal with are of a civil nature. Of these matters, issues range from neighbourhood disputes, family violence orders, victims of crime matters, wills, powers of attorney, and motor vehicle accidents, to fines (public transport, parking, police issued), disputes over bills and alleged debts, and complaints about the conduct or decisions made by businesses, corporations and government departments.

It is our experience that aggrieved persons wish for a speedy resolution to their problems, the vast majority hoping their legal issues will be resolved by a letter from a solicitor to the other party. Except perhaps in the case of family violence, where mediation and negotiation is favoured over launching actions via the Court. This option however, is generally outside the reach of our clients due to their financial means or unwillingness to engage in a process which is perceived as mystifying and time-consuming. Admittedly, some cases do go to Court, however this is usually only after all other avenues of resolution have been explored, attempted and proved fruitless. Generally, people are astute enough to weigh up the cost and time involved in litigation against their losses incurred. Where the latter is the lesser, they will (albeit in some cases begrudgingly), opt to let the matter lie.
Why People Seek the Intervention of the Court

As stated above, the majority of our clients who are unable to resolve their legal issues at first instance hope that they will be resolved by the intervention of a lawyer, whether that be communications entered into on the client’s behalf, or the mere threat of Court action. When the opposing parties hold equal footing in terms of resources, social status, and by association, balance of power, disputes may be more readily resolved without the need for commencing legal action through the Courts.

The situation is different where one party holds the balance of power over another, and this is inherent in disputes with insurance companies, telecommunications and utility providers, banks and finance organisations, large corporations, and government-run agencies and departments. Such entities are well aware of where they stand in comparison to a member of the general public on the power scale – their access to resources and funds are far superior to that of the complainant. The same may be true of individuals who occupy a higher position of privilege than their counterparts. It is because of this power imbalance that some individuals insist on having a higher power, that is, the Courts, adjudicate on the matter in issue. There is a belief that the authority of the Court will determine the matter “once and for all”, bringing finality to a problem that may have been dragging on for many, many months, thereby forcing the other party to remedy the dispute.

This access to the Courts, as well as justice being seen to be done, is one aspect of our democracy which is touted as an indicator of a ‘civilised nation’ and we should be mindful of any hypocrisy in the application or erosion of these justice principles. Rather than addressing the causes that lead people to litigate in the first place, there is a real danger in succumbing to the hysteria whipped up by those who have the most to gain in expanding the scope of vexatious litigious litigation, that is, big business and government, who are most often the targets of repeated litigation..

Understanding of and Access to the Law

Despite efforts to unpack the law and present it to the community in a more easily digestible state, it remains somewhat of an enigma to those not trained in the profession. Legal process and procedures may be confusing and in modern times attempts have been made to make the language and machinations of the legal system more accessible to the community.

The establishment of Legal Aid has, to some extent, addressed the issue of those without the means being denied access to legal information and assistance. In this respect, Community Legal Centres (CLCs) are the ‘rear-guard’, catching those who fall through the cracks and/or those denied the benefit of Legal Aid because they do not meet the tests of eligibility for aid. Both Legal Aid and CLCs have a law reform and community legal education component, delivering ‘live’ sessions, community forums and written information on various aspects of the law. While these programs are commendable, and indeed essential, when a person has an existing legal issue they are no substitute for a one-on-one advice session with a qualified legal practitioner. However, Legal Aid and CLCs are struggling to meet the demand for services; most CLCs have a waiting list of at least two weeks when it comes to securing an appointment; a quick ten minutes with the duty lawyer is all you can expect if you are attending Court unrepresented; and rejection of a claim for aid comes in the form of a letter, based on an application form that many in the community would struggle to complete. It is clear that both the expectations and the demand in the community are barely being met. This situation will only be resolved by increased funding and improved resourcing to the community legal sector. If community needs are not being
met by community legal services, the Courts will most likely need to manage these unrepresented individuals. This may cause undue stress for the Court, its staff and the sitting Magistrate, as well as for the individual who is unfamiliar with Court procedures and the law.

Linked to the issue of funding and resources is the provision of ethno-specific service delivery in the form of interpreters and culturally and linguistically appropriate education materials, information sessions and dispute resolution processes. This is a vital consideration in a multicultural community such as ours, where for some newly arrived Australians, a distrust of those in authority exists (including a distrust of lawyers). This may be due to past experiences in their home country where police and the justice system are considered corrupt, or where the legal profession is not as well regulated.

There is perhaps also a tendency among some lawyers, as experts in their chosen field, to limit participation by clients to merely the provision of instructions. In some cases, insufficient attempts are made by the Practitioner to engage the client further by either explaining the process ahead of them, the reasons for a particular course of action taken, or arguments raised in their name. This is likely to be a consequence of resource limitations, although to some extent, it may reflect the arrogance of the legal profession. If a person were to take their car to a mechanic, they would expect to be apprised of the problem, what action the mechanic intends to take to fix it, and what the cost will be to the car owner. The same should be expected when one visits a lawyer. While keeping lay persons out of the loop may be beneficial in terms of expediency and non-interference with case management, it does nothing to contribute to that person’s understanding of the legal process, or the costs of such a process to themselves or the broader community. Fewer people may embark on a course of legal action if they had an opportunity to consider all of its implications.

Given the obstacles faced, it is a wonder more people have not found themselves victims of the vexatious litigant label. Over the last few years there has been agitation within academia, business and government around the issue of persistent complainants. Consequently we are witnessing a flood of articles in psychiatry and law journals, manuals, recommendations and legislative amendments, which serve to either psychoanalyse complainants or attempt to limit their right and/or ability to pursue their claims. Care must be taken to avoid getting blinded by the hysteria and over-exaggerating the extent of the problem. Otherwise, the process of enacting such changes, may create the effect of barring or restricting a person’s access to justice and the Courts.

**Faulty Complaint or Review Mechanisms**

An aggrieved party generally desires three things when they seek legal advice: to be heard, to be acknowledged, and to be satisfied with the outcome. Frequently, these three wishes cannot be met when a client attends a Legal Centre. Although a client is heard, they may not be provided with what they believe to be sufficient time with the legal practitioner. If the client has not done so already, the Centre attempts to assist them to resolve their issue informally. In some cases this may take weeks, or months of communications back and forth, as often as not without a satisfactory outcome for the client. While this may be tiresome for the legal practitioner, it can be frustrating or extremely distressing for the client who has a personal stake in the matter. It may also lead to a sense of resentment by the client. When the process becomes protracted to the extent that there seems no resolution in sight, the temptation is there to seek remedy through the Courts.
The Victorian Ombudsman in his 2006/07 Annual Report stated:

Over the period I received a total of 3,628 complaints from the public. This is 15 per cent more than last year. The majority involved allegations of unreasonable, unfair or wrong decisions, actions or enforcements of rules by government departments, local councils or statutory authorities. A number required in-depth investigation, but most were resolved through enquiries with the agencies concerned.
I note that there has been a consistent increase in overall complaint numbers for the past three years.¹

A significant number of similar complaints would have been dealt with by CLCs over the same period. The question to be considered is, how many more have ended up in Court?

The Case of Prisoners

We have chosen to highlight prisoners in this paper, because firstly, we have maintained an outreach program to prisons in Victoria over the last decade; and secondly, there appears to be an increasing trend towards disenfranchising that section of our community entirely².

In our eleven years of working with prisoners, we have seen many long, drawn out negotiations between clients and prison authorities over issues affecting the client’s everyday life. One would assume that disputes would be easily resolved with the assistance of legislation and Director’s instructions, clearly stating the rules the parties are expected to abide by. In reality, resolution is often a long time coming, with time having a particular resonance for prisoners. Client matters which have proceeded to Court (and these have been very few), have arrived there solely as a last resort. Of these, some have been withdrawn, having been resolved or settled just prior to the hearing. However, the majority of the remainder have resulted in decisions favouring the authorities’ discretion to manipulate policies and procedures in the name of ‘security, good order and management’ of the prison system. In at least half of the matters which progressed to Court, the client was self-represented, although they had received legal advice or assistance in relation to their matter. In one particular case, the client has been declared a vexatious litigant, and we understand that client is now making their own submission to the Inquiry.

Prisoners are in a unique position in society that every facet of their lives is controlled by prison administrators and government bodies. They are not in a position to make demands or to actively pursue complaints at the same level as those of us moving freely in the community. Issues that may seem trivial to those in the general community, may carry enormous weight for those in the prison system, particularly if it impacts on their visits or communications with friends, family members and support services, affects their ability to access meaningful work, education or medical services, or manifests in an abuse of due process, mandated policies and procedures, or enjoyment of human rights.

The Ombudsman’s Office is often the first point of call for prisoners who have been unsuccessful in having their grievances acknowledged or addressed by the agencies responsible for their care. This is because prisoners are, by and large, limited in their access to resources and means of otherwise resolving complaints. In these circumstances, it is hoped that the intervention of the

¹ Ombudsman Victoria Annual Report 2006-2007, GE Bruwer, p7
² Over the last year changes under The Electoral & Referendum Amendment (Electoral Integrity & Other Measures) Act 2006 (Cth), which had the effect of disenfranchising all persons serving a sentence of imprisonment, were overturned by the High Court; see Roach v Electoral Commissioner [2006] HCA 43, and the Victorian Government’s Freedom of Information Amendment Bill 2007, which, by their own admission, was intended to target prisoners and have them declared vexatious, and was defeated in the Upper House.
Ombudsman’s Office will, at the very least, lead to the agency involved attending to the complaint in a timely manner.

We recently met with the Ombudsman’s Office, regarding difficulties experienced by our clients in custody when communicating with their Office. This was prompted by our clients reporting a tendency of staff at the Ombudsman’s Office to insist that prisoners receive a response from the prison administration prior to The Ombudsman’s Office acknowledging any complaint. We have been led to understand that this was even in situations where this process had already been initiated and pursued by the complainant, with multiple written communications to the agency concerned.

Often, the ultimate complaint to the Ombudsman’s Office is the fact that no response has been received by the complainant... Even when a complainant has consistently raised their complaint with the prison itself, as well as the Commissioner’s Office, and had no response to this, they were being advised that the Ombudsman’s Office could take no action, nor intervene or investigate a complaint until a response has been received. This advice effectively means that complainants are forced to wait upon the agency’s convenience for a response which, whether forthcoming or not, erodes the timeframes existing for other means of resolving a complaint.

This is of concern for a number of reasons. Firstly, it takes no account of the fact that the prison administration’s failure to respond to a grievance in a timely manner, may aggravate the circumstances which gave rise to the initial grievance. Secondly, it does not recognise that inadequate internal grievance procedures are a legitimate source of complaint in itself. Thirdly, it takes no account of the enormous power imbalance between a prisoner and his or her gaolers and the fact that it may not be appropriate in all circumstances to insist that, regardless of a complainant’s vulnerability, he or she pursue resolution of a grievance with the agency against which that grievance is held.

Most alarming to us was the fact that one of our client’s received correspondence from the Ombudsman’s Office in response to their written complaint stating, “You may not be aware that pursuant to section 13(4) of the Ombudsman Act 1973 the Ombudsman does not ordinarily deal with complaints where the aggrieved person has a remedy by way of proceedings in a court.” The letter does not go on to detail the remaining qualifying provisions of section 13(4) of this Act, specifically:

...unless the Ombudsman considers that in the particular circumstances-
(c) it would not be reasonable to expect or to have expected the aggrieved person to resort to that right or remedy; or
(d) the matter merits investigation in order to avoid injustice.

When faced with such barriers, can we really be blaming prisoners for turning to the Courts?

Having visited the Ombudsman’s Office, it is undeniable that they have resourcing issues of their own. They deal with a large volume of complaints on a daily basis, and the number is growing year by year. Whether this may be put down to increasing problems within the respective agencies, more public confidence in the Ombudsman’s Office or simply greater awareness of individual’s rights, is unknown.

The experience of prisoners is but one example. However there are other examples whereby a person or class of persons is reliant on an entity or has dealings with them on a regular basis in order to manage their personal affairs. In these often involuntary situations, multiple disputes may arise between the parties over time, which may ultimately result in being taken to Court. The danger with this is that repeated actions against a particular entity, as a consequence of that entity’s obstructionist or unreasonable conduct, may result in a declaration being made against the aggrieved party, despite them bringing such actions
in good faith. Those unfamiliar with the intricacies of the justice system equate it with a sense of fair play. The reality is our Courts may only work within the constraints that the legislature has set for them. People may have been treated badly, suffered loss and acted in good faith, but that does not always mean that the Court will rule in their favour.

**Vexatious Litigants in Victoria**

Reportedly only fourteen people have been declared vexatious between 1930 and 2007. Six of these were declared in the last ten years. This is evidently an incredibly insignificant number.

It is acknowledged that there is a very small minority of people who, contrary to legal advice or sound judgement, insist on having matters aired in Court despite the lack of any attempt at prior resolution and/or without any likelihood of success. We are not, however, aware of it having become a significant issue. If we are mistaken in this belief, then we submit it would be prudent to examine the reasons for the increase in litigants before considering changes to the legislation.

We may only hypothesise as to the range of reasons why people may become vexatious litigants, although much has been written on that question. It is human nature to aspire to a satisfactory outcome in all our interactions, and to be treated fairly is a common desire. There may be many contributing factors, some of which have been canvassed above; others are more simplistic, such as having an emotional stake in the matter at issue.

There is also a plethora of articles on the subject of characterising vexatious litigants. Researchers believe one common characteristic is the tendency for vexatious litigants to pursue the same person, persons or cause, repeatedly. This is not a particularly helpful indicator, as, when using the example of prisoners, criminal appeals and civil actions against prison administrators and/or the Government, would figure highly among the types of matters litigated by prisoners. This is hardly surprising given their unique situation and that every element of their lives is controlled by these parties. A similar state of affairs exists for others in the community whose lives are solely governed by a particular entity or network of entities. It is likely that this entity will most often be named in any legal proceedings.

It is our submission that there is a risk in grouping all persons who tenaciously pursue legal matters into a generic class that does not recognise the individual’s motive or their circumstances, nor the external factors which impact on the decision to persevere with what may seem to others to be a hopeless cause.

In correspondence with the Ombudsman’s Office, we raised our apprehensions in regard to undue reliance on annexure D of the *Unreasonable Complainant Conduct: Interim Practice Manual*ª, “Complaint characteristics — warning signs to look out for”. This states:

> The content and/or the ‘look’ of the initial complaint can display characteristics that may, either individually or taken together, indicate that unreasonable conduct is or could be an issue.

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³ Grant Lester and Simon Smith have been particularly prolific. See Grant Lester, FRANZCP, Beth Wilson, LLB, Lynn Griffin, MEd and Paul E. Mullen, DSc, ‘Unusually Persistent Complainants’ (2004) 184 *British Journal Of Psychiatry* 352 – 366. See also Simon Smith, ‘Vexatious Litigants and their Judicial Control – The Victorian Experience’ (1989) 15 *Monash U. L. Rev.* 48-68
⁴ Ibid.
⁵ Authored by by Helen Mueller, Project Manager and Chris Wheeler, Deputy Ombudsman, published by the NSW Ombudsman’s Office. August 2007

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TO EMPOWER AND SUPPORT OUR COMMUNITY · LEGAL ADVICE · ADVOCACY · INFORMATION
Examples of content include:

- is unclear or illogical
- makes illogical requests or demands (wants the department closed down, the clock to be turned back, retribution etc)
- there are expressions of a sense of victimisation or persecution
- there is a loss of focus: the complainant wants 'justice', 'punishment' satisfaction of the 'public good' rather than reasonable reparation of or compensation for a wrong.
- provides unnecessary detail
- provides unnecessary background information
- demands 'justice'
- invokes 'the public interest'
- uses rhetorical questions
- fails to provide necessary detail
- includes incorrect use of legal, technical or scientific terms
- uses third person for self
- consistently makes simple issues complex
- includes overt or covert threats of retribution or self harm if the complaint is not handled in accordance with expectations
- expresses a desire for public acknowledgement of the perceived wrong.

Examples of the 'look' include:

- overuse of the page (e.g. writing from edge to edge and top to bottom of page, handwritten annotations on official documents)
- idiosyncratic emphasis
- addressed to the agency with copies to many other addressees
- enclosures of large quantities of photocopies/press clippings (whilst this is not in itself indication of unreasonable conduct, together with other forms of unreasonable conduct can be indicative of impending difficulties)
- enclosures of testimonials or medical certificates where this is not relevant to the complaint
- use of highlights in single or multiple colours
- use of extensive underlining
- excessive use of capitalisation/bold/italic texts
- excessive use of punctuation (exclamation marks, inverted commas, question marks).

Undue emphasis placed on these factors would, in our submission, severely impact on the experience of people in the community labouring under disadvantage, in their contacts with public bodies. While persons suffering from an impairment of the mind may carry the majority of these characteristics, so too may those who are unqualified or unfamiliar with complaint processes, lack sufficient literacy or comprehension skills, are operating with limited resources or have been frustrated in their attempts to resolve their predicament, by inaction or ignorance on the part of the agency in question. In prison for example, where the majority are denied a voice, it is not uncommon for this to manifest itself in correspondence carbon-copied to a number of complaint bodies, or text capitalised or highlighted, in the hope that someone, anyone, will listen to them and assist them in resolving their issue. Further, overly pathologising complainants perceived to be 'troublesome' runs the risk of obscuring the fact that the existence of factors indicating 'unreasonable conduct' does not exclude the possibility of a legitimate grievance.

Characterising litigants in this manner to establish a proclivity to be vexatious would be, in our submission, a dangerous exercise.
Mental Health and Litigation

"It might be time for the legal profession, the judiciary and legislators to begin to reassess the concept of the vexatious litigant in medical terms. Hopefully, an awareness that vexatious litigants are not simply people who are a nuisance to the court system but individuals in need of psychiatric attention will both help with our understanding of them and enable the formulation of more appropriate responses to a psychiatric, rather than legal condition."  

Views such as that above are becoming increasingly common among academia; we however are not convinced of this link, as generalised as it is. As canvassed above, we believe that there is a tendency to classify ‘problem’ litigants as persons suffering from some mental infirmity, almost as a matter of convenience.

Smith and Lester, among others, believe there is a direct relationship between the two –

"... of difficult complainants who while usually presenting with a long history of conflictual relationships and chronic grumbling, actually display a heterogeneous aetiology ranging from the whistle-blower or social activist through to those with narcissistic or paranoid personalities. Many seem to overreact to and over-inflate their loss. They present with a stubborn and at times venal refusal to compromise in negotiations but inevitably settle to minimise the cost to them.

Further along the spectrum are individuals whose complaint arises from pre-existing major psychiatric illness. Aggrieved by loss and (often) persecution, their claims arise totally or in part from the delusions associated with a pre-existing psychotic illness. As a result, their claims are often bizarre, the nature of claim usually in constant flux and it is often impossible to define, let alone resolve, the claim until the underlying illness is treated.

Querulous Paranoia is characterised by a relentless, persistent and single minded pursuit of justice for real or imaginary wrongs through complaint, claims, petitioning of authorities, litigation and sometimes threats and actual violence to self or others. It takes place over years. At the core is an incorrigible belief by the person that they have been victimized."

If this is indeed an accurate assessment, then the appropriate assistance should be offered to such persons as soon as possible, rather than to allow things to run their course and see them fall foul of the legislation to be formally declared, or worse injure themselves or others.

It is granted that there will be some impact on the mental health of the parties involved, as any dispute, and litigation in particular brings enormous emotional stress. There may indeed be cases where a person feels they have suffered an enormous injustice which manifests itself as an obsession which eventually develops into a serious psychiatric condition, but similarily there are cases of individuals who have been driven to illness by the inadequacies of uncompromising complaint mechanisms, or the pressures of litigation itself. It is a question of which came first, the chicken or the egg. In any event, to surmise that all ‘vexatious’ complainants or litigants suffer an impairment of the mind is a fallacy.

The issue of access to the law for those who do have mental health issues or other complex needs is an important one, and should, we believe, be the subject of a separate inquiry. Persons affected by illness should enjoy the same rights as any other citizen, and every effort should be
made to ensure these rights are realised. The discussion should not be limited to a supposed link between vexatiousness and mental health.

**Support Services**

The continued presence of support services attached to the Court is essential to ensure people are not damaged by the experience of litigation, irrespective of their role in proceedings. As the majority of such services are volunteer-driven, and/or provided by charitable organisations, the Government should give some consideration to increasing material support, whether it be dedicated office space within the Court, capital equipment such as telephones and electronic databases, or funds with which to employ a referral and support services co-ordinator.

**The Costs**

All legal action has a cost, financially, in the consumption of time and resources, and in many cases, emotionally and physically for some of those involved. The diversion of valuable resources to matters which are truly vexatious can lead to delays in the hearing of other, more legitimate matters, and contribute to backlogs in the Court list. Such delays can be a great source of frustration for other court users and this frustration often spills over into the broader community. Court staff may find that a large proportion of their time is consumed by matters related to the problem litigator, who will demand their constant attention, and in extreme cases may exhibit behaviour which resembles harassment. Then there is the innocent party who is the subject of the litigation and who must endure the process knowing they are unable to recover time lost, or for that matter, money spent in defending the action, that is, providing they are able to afford to present their defence in the first place.

A vexatious litigation may be the cause of such stress to other parties, witnesses, judges, lawyers and so on, that there are medical or psychological implications. These variously impact on our health system, workers’ compensation funds and by osmosis the community and economy. If we were to painstakingly dissect the problem, the hidden costs may be surprising, but it must be conceded that similar issues may arise and bring with them the same effects in the case of legitimate litigation. The question is whether the issue of vexatious litigants is more than just a blip on the radar.

**Community Awareness**

Although people in the community may be aware of the term and its implications from newspaper reports where a high profile case has been in the public eye, individuals may not be aware of how the provisions operate or the implication stemming from a declaration. In New South Wales, fact sheets about vexatious litigant declarations are available both at the Courts and on the New South Wales Supreme Court website.\(^6\) A similar fact sheet for Victoria would be a valuable tool for the legal profession in informing at-risk clients of the effects of vexatious litigation, and discharging their obligations in advising clients of the possible implications in pursuing legal action. It would also be a useful document to provide to litigants as they engage with court staff, or at the very least, at the time of presenting documents for filing.

Due to lack of funds, access to legal advice or other resource restrictions, some people choose to represent themselves in Court. This is despite a lack of legal expertise and simply because they do not have any other option. For all of the afore-mentioned reasons, these people are at a higher risk of being declared vexatious, particularly where their arguments are misconceived or deemed to be an abuse of court process. This is a risk which has been recognised by both the County and Supreme Courts, and consequently resources have been made available to inform court users of

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their rights and responsibilities should they be self-represented. In the Supreme Court, the Self-represented Litigants Coordinator has been responsible for the development of materials to assist court users. In the County Court of Victoria, a kit has been produced entitled, 'Guide for Self Represented Litigants', which is aimed at improving self-represented litigants' knowledge of court processes and procedures\(^9\).

The appointment of a Coordinator to manage these matters makes perfect sense in terms of efficiency and customer service. Having one dedicated section in charge of filing both unrepresented and potentially vexatious matters (and the distinction must be drawn between the two - one does not necessarily lead to or link in with the other), isolates them from other matters dealt with by the Court, enabling identification of the matters at an early stage and the provision of the required information or assistance to avert risk. Through this process, court users may also be referred to interpreters and other services to assist them in presenting and managing their case.

**Applications**

Although most orders are made on the application of the Attorney-General, there is provision in the Family Court for application by aggrieved parties\(^10\), and in the Federal Court for application by aggrieved parties, Court Registrars, the Court itself or Attorney and Solicitor Generals of the Commonwealth, State or Territories\(^11\).

In New South Wales, any person aggrieved by the conduct of a vexatious litigant can apply to the Court for an order.\(^12\) This mirrors the situation in other states and territories where a person with sufficient interest in Court proceedings can, either with or without the leave of the Court, make an application. It seems that there is a move towards a national approach to dealing with vexatious litigants, which may foreshadow the recognition of such an order across all jurisdictions. If this is indeed the case, then Victoria is clearly out of step and will need to amend its provisions accordingly.

There are arguments in favour of, as well as against the proposition that the Attorney-General should be the only person capable of making such an application. Vesting exclusive power in the Attorney-General gives rise to allegations of collusion between executive government and the judiciary and may increase the scope for political interference, or applications based on political considerations. On the other hand, limiting standing to the Attorney-General may ensure that the power is exercised in a non-partisan way and prevents private entities from using the application in a vengeful, vindictive or oppressive manner.

One expects that the Courts are the personification of impartiality, and best placed to make a determination as to whether such an order is warranted. However, whether this is appropriate given that it will be the Court that adjudicates on whether an order is in fact made, is open to debate.

Also open to debate is the inherent power of the Court to control litigants. The Australian High Court has ruled that this power is restricted to current proceedings\(^13\), however the English Court of Appeal\(^14\), in recent years, has asserted an inherent power to control future proceedings, although this view is not without its critics.

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\(^10\) Family Law Act 1975 (Cth) s 118(1)(C).

\(^11\) Federal Court Rules 1979 (Cth) r 21(1) (2).

\(^12\) Supreme Court Act 1970 (NSW) s84(2).

\(^13\) Commonwealth Trading Bank v Inglis (1974) 131 CLR 311

\(^14\) See Bhamjee v Forsdick [2003] EWCA Civ 1113 for a summary of the relevant cases and law.
While there is something to be said for widening the scope of the provisions to allow others, such as aggrieved persons, to make application, removing the sole power from the hands of the Attorney-General, would need to be very carefully managed. This is to avoid a situation where such applications are used as a weapon against unwelcome litigation, which is neither frivolous nor vexatious. Such a move may create a quite separate class of vexatious litigants attempting to seek orders against any who may have cause to bring proceedings against them. Accessibility of the process and legal support and representation are other issues which would need to be canvassed to ensure that the application process does not become a white elephant creating further division within the community between those who have the means and those who do not.

Currently the Supreme Court is the only Victorian Court which may make an order restraining a person from bringing further actions without leave and we believe that this should remain so. To bestow such a power on the inferior Courts will only contribute to further difficulties with their own list management and generate more proceedings further on, involving multiple appeals against the order. As the Supreme Court is the highest judicial authority in the State, it is appropriate that it is the venue for determination of such a drastic sanction. To allow inferior Courts to make such orders, turns the Court hierarchy on its head and removes from the Supreme Court, the mantle of being the 'superior Court' within the jurisdiction.

Though there may be a temptation to 'liberalise' the application of the provisions to perhaps improve utility, one can only imagine the chaos that would follow should, for example, the Victorian Civil and Administrative Tribunal, have the power to make such orders. Local Councils and property developers would be tempted to appeal to such powers to silence opposition to proposed schemes and unpopular projects. There is a real danger that community action groups, residential and environmental lobby groups, may be restrained by the threat of such a declaration in the face of the power and resources held by their opponents. The declaration should not be made, nor taken lightly, therefore the appropriate forum is the Supreme Court.

The Test

The current test demands that the litigant must have acted habitually, persistently and without reasonable grounds\(^{15}\), but defining and interpreting these terms has been left to the Courts. It is our submission that the problem lies not with the test itself but in its application. Case law suggests that proceedings must be commenced as a matter of course, as if it is an automatic response to a grievance, with determination approaching stubbornness, and it must be brought in bad faith, for an improper purpose, or be utterly hopeless\(^{18}\).

To determine whether someone has acted habitually, persistently and without reasonable grounds seems to suggest that an examination of each of the matters being relied on to support an application is warranted, however this is not the approach favoured by the Courts.

Ashley J in *The Attorney General for the State of Victoria v Horvath, Senior*\(^{17}\) stated:

"[T]he following matters are, according to the authorities, relevant: first, where an order has been made dismissing an action as frivolous or vexatious, or striking a pleading out, it is not for a court considering a s 21 application to go behind the order and go into the merits of the argument as a court of appeal would do."\(^{16}\) Second, findings which are required do not depend on viva voce evidence or credibility of witnesses. The critical

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\(^{15}\) Supreme Court Act (Vic) 1986 s 21(2)
\(^{16}\) See Attorney-General v Wentworth (1888) 14 NSWR 481; Attorney-General v Weston [2004] VSC 314
\(^{17}\) [2001] VSC 299
\(^{18}\) His Honour referred to *Kay v Attorney-General* (2000) 2 VR 435 in support of this principle. In Kay Ormiston JA made observations (at 437) to the effect that it was not necessary to re-examine the circumstances of each proceeding upon which the Attorney-General may seek to rely to support an order under s 21

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evidence is to be found in court files – documents, judgments, orders and reasons. For that reason, any hearsay material contained in an affidavit in support of an application, even though objectionable, should be treated simply as distraction, and ignored. Third, the question is not whether the manner in which a proceeding is conducted is vexatious; it is whether, having regard to its nature and substance, it should be so characterised. Fourth, and this is a more general proposition with respect to s 21, in determining whether the Attorney-General has made out a case, the court is not concerned with a minute individual examination of each proceeding. It must consider the overall impression created by the number of proceedings, their general character and their results.\(^{19}\)

We would support a more strict definition of what constitutes vexatious proceedings which properly determines what is vexatious, while having regard to the motives behind the litigation. The Schedule Dictionary to the Vexatious Proceedings Act 2005 (Qld), defines vexatious proceedings as:

\(\text{(a) a proceeding that is an abuse of the process of a court or tribunal; and} \)

\(\text{(b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and} \)

\(\text{(c) a proceeding instituted or pursued without reasonable ground; and} \)

\(\text{(d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.} \)

This definition is further illuminated having regard to the explanatory notes to the original Bill\(^{20}\). It is our view that the need to satisfy all four of the criteria described therein would better determine what is vexatious.\(^{\text{19}}\), It would protect those at risk of such a label simply because they have been unrepresented and/or have been forced to initiate proceedings because of the unreasonable conduct of the other party. The current test weighs heavily against plaintiffs who may have legitimate causes of action yet lack the knowledge or experience to frame them in a manner which exposes a statement of claim. Undue reliance on numerical values, that is, the number of actions brought by a party, and the noting of outcomes without consideration of the circumstances behind this, has the potential to create a false impression of an individual being vexatious. This is particularly the case where actions are commenced yet later withdrawn because the opposing party has finally come to the negotiation table, or, as is common in disputes under family law, frequent changes in circumstances lead to numerous applications to the Court.\(^{\text{21}}\).

Rights

It is essential that the subject of a vexatious litigant application be represented in defending that application. This is due to the restrictions such an order places on their access to the Courts. In many cases it may be the lack of legal representation that has brought them to the stage of facing an application in the first place. In this respect, there is an impression of having 'shut the stable door after the horse has bolted'. However, the Attorney General is guaranteed representation by the Victoria Government Solicitor; therefore, in the interests of equality, justice and fairness under the law, so too should there be some guarantee of representation for the subject of the application.

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\(^{19}\) [2001] VSC 269 at [28].

\(^{20}\) "...taking legal action without any reasonable grounds, a repetition of arguments which have already been rejected, disregard for the court’s practices and rulings, and persistent attempts to abuse the court’s process...": Explanatory Notes, Vexatious Proceedings Bill 2005 (Qld) 1.

\(^{21}\) This latter example was identified in Canadian reforms to vexatious litigant laws, in particular see Law Reform Commission of Nova Scotia, Vexatious Litigants Final Report (2008), 19, <http://www.lawreform.ns.ca/Downloads/VL_Final_Report.pdf>, at 23 June 2008
While this is the ideal situation, the logistics of making this a reality are less than straight-forward. Legal Aid is already overstretched and it is unlikely the Commission would be agreeable to demands being made of them similar to that brought about by *Dietrich v R*\(^{22}\), that is, an order from the Court to provide representation\(^{23}\). It remains to be seen how often declarations will be made in the future (and that may be dependant on the outcome of this inquiry), however if the provision continues to be invoked only rarely, then there is the possibility of some negotiation with the Law Institute and Bar Association to provide a specific pro bono scheme to assist those who find themselves the subject of a vexatious litigant application.

In respect of rights of appeal, we defer to the Canadian position in that orders should be open to appeal. This enables the subject of an order to challenge it, if he or she thinks the order was made unfairly or on improper grounds. This is in contrast to the situation when an order has been imposed and a litigant seeks leave to commence proceedings. In that case leave is either granted, with or without conditions attached, or it is not, and to introduce a process of appeal would seem to defeat the purpose of a finalised declaration. There should be no bar however, to a person returning to seek the leave of the Court should the circumstances relevant to their particular matter change.

As the law currently stands, a person who has been declared a vexatious litigant is required, in seeking leave, to demonstrate that there is an identifiable cause of action which has reasonable prospects of success. This is a determination to be made by the judicial member presiding over the leave application and we believe that it is perfectly acceptable for a litigant to apply ex parte. We believe that the involvement of other parties at this stage would only serve to protract the event and increase the possibility of the leave application turning into a quasi hearing of the matters in issue. We would be surprised if the Attorney-General is not already on notice as regards leave applications of this nature, therefore consider that question put by the Committee to be a moot point. Further, we understand that the other parties currently have the capacity to attend and be represented in these leave proceedings, therefore we submit that the law as it stands is adequate.

As to the ability of the Court to decide leave applications ‘on the papers’, we see no reason why this should not be allowed to occur, providing this is the will of the parties involved. If a party prefers the option of appearing in person then the Court should facilitate that request, particularly where a party is unrepresented.

When granting leave to a litigant, if the Court chooses to exercise its discretion and impose conditions, it should be mindful of the position of the litigant and the resources at their disposal. Conditions should not be so onerous as to be crushing or to seriously compromise the litigant’s ability to proceed with the case for which leave has been granted. This is particularly relevant in respect of security for likely legal costs; access to the legal system should not be predicated on one’s wealth.

**The Charter**

At present, we perceive no conflict between the Charter of Human Rights and Responsibilities\(^{24}\) (‘the Charter’) and the vexatious litigant provisions.

Care must be taken to ensure that this remains the case, and that the rights of persons seeking redress via the Courts are not undermined by a lack of legal representation. The right to a fair hearing, recognition and equality before the law, and the entitlement to participate in public life,

\(^{22}\) (1992) 177 CLR 292.

\(^{23}\) The relevant legislative provision in respect of criminal matters being *Crimes Act 1958* (Vic) s 360A

\(^{24}\) *Charter of Human Rights and Responsibilities Act 2006* (Vic)
are all relevant in the context of access to the law. An excellent summation of this notion is provided by Simon Rice in his working paper, ‘A Human Right to Legal Aid’:

“We cannot be human with dignity if, through ignorance of the state’s rules, we face censure and sanction; if, through inability to use rules, we face loss and damage; if, through confusion about rules, we lose opportunity. [...] It is no less fundamental that people be entitled to participate, and participate effectively, in the system of rules – let’s call it a legal system – of which they are a part.

As a fundamental human right, the right of access to law is held by everyone. It is a right that all people have at all times. It does not have to be searched for and inferred from a constitution or a legal system. It is not peculiar to criminal matters or unavailable in non-criminal matters. There is no room for a state to argue away the fundamental right, and there is a presumptive position that the right will be effectively available. Unlike rights created within and by the state, the state does not have the power to create, or to deny, a human right.

[...] Access to law means a right to be told the law, to be given the opportunity to know and understand the law, to use it, to gain its benefit and protection.”

Ensuring these fundamental rights are protected and upheld is a continuing challenge in light of the demands placed on Legal Aid Commissions and Community Legal Centres. There are many in the legal profession however, who are to be commended for their generosity and sustained efforts to confirm these tenets as the cornerstone of the justice system by providing pro bono assistance to those in need. The Government must not become complacent and allow these practitioners to bear the increasing load of legal need, nor must Court Registrars be expected to fill the gaps in service provision. Government has a responsibility to ensure that every one of its constituents, those at liberty or without, whether affluent or impecunious, knowledgeable or uninformed, have equal access to the law. This is a duty which cannot be delegated.

We would also like to raise the issue of protection of privacy and reputation, as we have some concerns that Victoria may consider adopting the course taken in New South Wales26, that is to publish the names of litigants and the orders made against them on a website. We submit this is an unjustified intrusion into people’s privacy, and this mode of naming and shaming - because that is the impression created - serves only to further punish the litigant, and by extension their family members. It is true that this information can be uncovered by a concerted search of Court records, academic and newspaper articles, but that requires some effort. We are opposed to a list which holds people up to be vilified by the broader community, and submit that this would be contrary to the intention of the Charter.

Conditions and Methods of Control

It is our submission that there are already a number of adequate ‘safeguards’ in place to prevent abuse of Court processes and/or to prevent a truly vexatious litigant continuing to engage in unreasonable conduct. Among these is a range of screening provisions which give Court Registrars the power to refuse acceptance of litigant documents that do not comply with, or represent an abuse of, the process of the Court, for example, the ability of the Prothonotary to refuse to accept or seal a document lodged for filing with the Court27. After the issue of proceedings there are further controls available such as the ability to order security for costs28.

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26 Simon Rice, ‘A Human Right To Legal Aid’ (Working Paper No 14, Macquarie University – Division of Law, 2007) 6-7
27 Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 27.06
28 Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 62.02
strike out motions\textsuperscript{20} and summary dismissal of matters determined to be an abuse of process. Laws of contempt are also available to prevent conduct which constitutes interference with the administration of justice.

For those persons who have already been declared, the Court possesses the power to impose conditions on their access to the Court, among them the requirement to seek leave, proving to the Court that their proposed argument has legal merit, and the condition that they be legally represented in any matter which they intend to pursue. Indeed, one of our clients who has had a declaration made against them, recently obtained leave on the condition that they obtain representation in the matter before proceeding. The unfortunate side-effect of this of course, is that due to the shortfall in Legal Aid, the client is reliant on the goodwill of members of the legal profession who offer their services pro bono. This of course does not resolve the issue of costs associated with filing documents or subpoenaing witnesses, etcetera.

It is apparent that those most at risk of such sanctions are those litigants who may be self-represented and we believe that some further pre-emptive action is warranted to assist those litigants rather than to discriminate against them simply because they are unable to afford or access legal assistance. The appointment of a Self-Represented Litigants Co-ordinator, similar to that trialed in the Supreme Court Registry, for each Court and Tribunal, would be a step in the right direction. In addition, dedicated sittings resembling the operation of the Practice Court to hear interlocutory matters and make initial assessments of matters identified by Registrars as being potentially problematic, would not only expedite matters, but also limit the potential for actions which lack substance to make their way into the Court lists.

The proposition that a person should be banned from entering Court buildings is not something that we can easily entertain. Even in the most extreme cases where a person may be prone to use threatening behaviour or acts of violence, court security is available to remove the person from the premises and/or seek the intervention of authorities such as the police. There may be instances that individual Court staff may choose to seek intervention orders, or conditions may be attached to penalties arising from criminal proceedings brought about as a result of a person’s conduct. However, we vehemently oppose the ‘banning’ of a person from Court premises simply because they have been declared vexatious.

**Effect and Impact**

Given that a declaration prevents a person from commencing proceedings without the leave of the Court, one would anticipate that this significantly hampers the ability of a litigant to continue on with their claims, via the Courts at least. Some may attempt to continue litigating using others as a ‘front’, however, the law relating to standing and the general requirement that a party must demonstrate a sufficient connection to harm suffered, or the issue which is the subject of the litigation, will in many cases, preclude a person from conducting a case on another’s behalf.

We are aware of only three litigants who have been declared in more than one Court, only one of those having occurred in the last thirty years.

The suggestion that a declaration in other jurisdictions should automatically apply in Victoria or should be taken into account, is in our submission, both unnecessary and unwieldy. Firstly, we fail to see the demonstrated need for such an approach. Secondly, the consideration of one’s matters in another state or territory would surely require the transfer and perusal of court files from that state or territory. Thirdly, we perceive some difficulty where the provisions or test for determining what constitutes vexatiousness in a different state or territory, differs from that in Victoria. We

\textsuperscript{20} Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 23.02
suspect it is this final point that has triggered the move toward a national approach to the issue of vexatious litigants.

**Conclusion**

In light of the apparatus currently available to the Courts to deal with problematic litigants, we wonder whether a change to the current provisions is justified. What is certainly clear however, is that more needs to be done to assist people to navigate the legal system.

As a first step we would like to see the expansion of the highly successful program which was piloted in the Supreme Court Registry, to become a standard fixture in all Courts and Tribunals. The Self-Represented Co-ordinator, although not providing legal advice, improved litigants understanding of the legal system and was on hand to assist litigants to meet procedural requirements of the Court, as well as providing referrals to other agencies. The Victorian Law Reform Commission, while praising the program highly, acknowledged that "...often what is needed is substantive legal advice and assistance."30 This is the challenge which needs to be addressed. The Commission has suggested the appointment of a judicial officer to case manage proceedings where parties are unrepresented31, along with a raft of other recommendations designed to assist litigants and shield them from declarations or orders which limit their ability to access the Courts. We believe this to be a much more effective use of resources than the amendment of provisions which may only serve to suppress the real issues behind the problem.

Darebin Community Legal Centre Inc. thanks the members of the Victoria Law Reform Committee and its officers for this opportunity to make a submission to the Inquiry. If you have any questions regarding this submission, please contact Gayathri Paramasivam, Principal Solicitor, on (03) 9484 9442.

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31 Ibid 573