

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 13 August 2008

Members

Mr C. Brooks

Mr R. Clark

Mr L. Donnellan

Mr M. Foley

Mrs J. Kronberg

Mr E. O'Donohue

Mr J. Scheffer

Chair: Mr J. Scheffer

Deputy Chair: Mr R. Clark

Staff

Executive Officer: Ms K. Riseley

Research Officer: Ms S. Brent

Witnesses

Ms P. Drysdale, law reform and policy lawyer, and

Ms S. Vessali, former principal lawyer, Women's Legal Service Victoria.

The CHAIR — First of all, Penny Drysdale and Sarah Vessali, thank you very much for coming this morning and for providing us with the submission that you sent. We have had a look at that and we much appreciate it. We will be recording these proceedings through Hansard. Anything you say here is protected under parliamentary privilege, because it comes under the parliamentary privileges legislation that deals with that. However, if you say something that is contentious outside the confines of this hearing, you will not be afforded that protection. We will run this fairly informally. I think we have got just a bit under 45 minutes with you. We will throw it open to you to set us up, talk to the terms of reference, talk to your submission.

Ms RISELEY — You might just want to talk about the in-camera hearing.

The CHAIR — That is right; we understand that we are going to do 30 minutes. There are not any people in the gallery actually, but if there were, they would be here for those 30 minutes and then the last part of it would be in camera. Hansard will remain to record it for our own confidential purposes and research purposes. If there are people in the gallery at that time we will ask them to leave. I forgot to mention that; thank you for reminding me.

Ms DRYSDALE — And if there are any questions that might be illuminated by us talking about some of the case studies, we might defer them to that in-camera part, if that is all right with you.

The CHAIR — Yes, that would be great. So it is over to you.

Ms DRYSDALE — Fantastic; we are from the Women's Legal Service Victoria, which is a community legal service. We have been providing free legal advice, information and representation to women for over 25 years and also legal education in that area. We specialise in issues arising from relationship breakdown and violence against women. That would include crimes, compensation, family violence, particularly applications for intervention orders and family law matters, predominantly. A significant proportion of our clients have experienced family violence, and often those experiences of violence are central to their cases, even in non intervention order cases. That is part of their lives and has to be managed by them and by people legally representing them.

I am the law reform and policy lawyer at the Women's Legal Service. I have only been at the service for three months, but I have a history of working on policy issues to do with violence against women prior to that. In particular I have worked for the state government and was involved in writing the Women's Safety Strategy between 2000 and 2003.

Ms VESSALI — I was the principal lawyer at Women's Legal Service until very recently. I was there for over seven years. I have worked as a lawyer for 12 years, predominantly in the areas of family violence and family law. I have actually just left and established my own practice at the moment but am still working in the same areas of law.

Ms DRYSDALE — I suppose the essence of our submission and why we have been motivated to put one forward to this inquiry is that we have acted for many women who have been involved in stalking and family violence matters. We have observed significant parallels between family violence and stalking conduct and the types of behaviour exhibited by vexatious litigants, and in particular we have observed that some vexatious or persistent litigants, even if they have not yet been declared vexatious, appear to be using the legal system in a way that really continues that family violence or stalking behaviour towards the other party. Obviously that is an abuse of process whether it is intended to have that effect or not and can be extremely distressing for the victim, basically leaving them in fear over a long period of time due to these repeated applications against them. We do not know what percentage of vexatious litigants would be of that kind, and perhaps your committee has uncovered further information about that, but in those cases that we see it is often quite different to repeated litigation against a corporation, a government agency, Corrections Victoria or something like that because the human impact on the women and often children involved in those cases is profound and it is part of a whole pattern of violence, so it is the other elements of that conduct too that cause the woman to live in fear and be quite significantly traumatised by it.

To briefly talk about what we mean by family violence, the definition that we think is one of the best definitions around is in section 5 of the Family Violence Protection Bill, which is currently before the Victorian Parliament. That has a very broad definition, which includes any behaviour that is physically or sexually abusive, emotionally or psychologically abusive, economic abuse, threatening or coercive conduct, or behaviour which controls or dominates and causes people to feel fear for their own or someone else's safety, and also causing a child to hear or witness that type of conduct or be exposed to that behaviour.

The bill specifically provides that family violence is not just criminal conduct, it is other conduct that has that effect of controlling or dominating someone, so you can see how that would link with some of these repeated applications where people seem to want to just keep in contact with that person. They might want to personally cross-examine that person and continually engage them in this litigious conduct. Similarly in stalking conduct that is a course of conduct with the intention of causing physical or mental harm to the victim or arousing apprehension or fear in them. Often stalkers do want to maintain contact with their victims against their wishes, and they will go to great lengths to do that, including commencing a lot of legal proceedings.

Also in our experience often the behaviour that we have observed escalates at a time where for some reason or another the party's access to the other party is limited in some way by, for example, an intervention order being put in place or in some cases by family law proceedings which have closed off some avenues for this person to continually harass, dominate and control the woman or the woman or child. At that time you see the attitude, 'Okay, if I can't do it this way, I'm going to do it this way, and I am going to start application after application after application'.

They are some of the things that we have observed, and I guess that is quite relevant in the vexatious legislation context because often if someone is declared a vexatious litigant, in our experience they will then use every avenue open to a declared vexatious litigant to continue that. They will be making applications in the Supreme Court and they will be seeking leave for further applications, so they will still find a way to continue in that way. Of course that conduct is very stressful and upsetting for parties who are the focus of it, particularly because they have often been subjected to sexual offending, stalking or family violence in the past, so they can be kept in a state of fear and locked in litigation for quite a number of years.

Essentially our position is that we would not want to unnecessarily restrict people's rights to initiate legal proceedings, and we value that right of our client to do so. But we do think it is important to limit that vexatious litigation to prevent harm and injustice to those individuals, particularly where they have already been the victims of violence, and to prevent the erosion of community confidence in the justice system if one party is allowed to commence groundless applications against another and because of the significant costs which I am sure you are only too aware of.

We do feel, and the essence of our submission is, that it is very difficult to have someone declared vexatious even when they persistently and habitually commence litigation with little or no legal merit and that even when declared, that declaration does not always prevent further applications and in some cases significantly escalates that. Many vexatious litigants in our experience are unrepresented and choose to represent themselves in court, and often judges, we feel, in their efforts to be fair, to properly assist the unrepresented litigant and to prevent any further appeals, often tip the balance too far in favour of the persistent litigant, which leaves the other person exposed to that litigation over and over again, and certainly that is the view of some of the clients that we have had.

We also feel there is a bit of confusion and perhaps lack of guidance for members of the judiciary and court staff and indeed probably for lawyers more generally about how to deal with vexatious litigants, the procedures to be followed to have someone declared vexatious and the whole way in which that process works. There is often little coordination and communication between agencies about potential and declared vexatious litigants, and obviously we need to protect people's legitimate legal rights, but it makes it incredibly hard to prevent and manage that kind of conduct, which in our experience in some cases has gone on for 19 years. We had a client who has had, for example, 60 court appearances in a one-year period as part of that whole pattern of behaviour, and that person was a resident of country Victoria; it was a 2-hour drive to and from court for the ones that occurred in Melbourne across all courts and jurisdictions, so the effect on that person's life is obviously profound, and she is trying to be a good mum and bring up three kids, so it is very difficult.

Ms VESSALI — Together with the inherent safety issues of constantly being brought back to be face to face with this person, which is the other added factor for the client.

Ms DRYSDALE — Particularly when threats to kill and things like that have been involved. I will just summarise our position, and then the committee can ask us some questions. We believe that strategies are needed to improve the handling of vexatious litigants, and that needs to recognise, I suppose, that some of that obsessive conduct is a manifestation of family violence and stalking; that the traumatic impact on those victims certainly needs to be better acknowledged and taken into account in any responses; and that further research on the relationship between family violence and stalking and vexatious litigation would probably be warranted in order to

determine how that should be appropriately managed. Certainly we think the Supreme Court should take into account the person's motive and the surrounding circumstances, and the history of the litigation in deciding whether to declare someone a vexatious litigant, and that should include whether the litigation arises from stalking, sexual assault or family violence, and whether it represents a further manifestation of the litigant's desire to control the other party and to have continued contact with her. We feel those surrounding circumstances are a very important part of the picture and need to be taken into account, as do all of the interim applications, interlocutory procedures and all the other things that make up this conduct.

We feel that perhaps a central agency, possibly within the Victorian government solicitor's office — but possibly somewhere else — needs to coordinate information about vexatious litigants in order to properly manage that, including keeping central records, managing the whole process of briefing and bringing matters to the Attorney-General's attention, and trying to limit the harm and costs that arise when that behaviour is left unchecked. There need to be procedures for investigating or monitoring that, and perhaps a lot greater priority needs to be given to the way in which we handle those matters. Information, education and guidelines in some form need to be given to members of the judiciary and court staff about how to manage vexatious litigants and potential vexatious litigants.

The CHAIR — Okay. Thank you very much, Penny. Did you want to add something at this stage, Sarah?

Ms VESSALI — Not at this stage. I am here more to help answer questions.

The CHAIR — All right. To start off, just focusing on the issue of an aggrieved partner using the legal system in the way you have described, as a tool of abuse to intimidate and to do various things you have described, to assist the committee — and I am not disputing the intensity of it; I think you have made that really clear in your submission as well — how widespread do you think that particular action is used by aggrieved parties?

Ms DRYSDALE — We do not have any clear statistics or research on that question so we cannot answer what percentage of vexatious litigants or even what percentage of people — —

The CHAIR — But your sense from your practice and your involvement in this issue.

Ms VESSALI — I do not think we are trying to say it is common; it is not a common situation, but equally it is not uncommon. In the years that I have been working at WLS there have been multiple cases where that is the situation, where the partner will take the matter through several courts, and every avenue, and will revisit each avenue. It is not uncommon behaviour because of the nature often of the family violence and stalking that goes hand in hand with the obsessive behaviour and the refusal to let someone leave. This is just another way they find to do it.

The CHAIR — Right. Also, just something that was playing on my mind as well as you were talking, is the women's legal service itself a target of this kind of activity?

Ms VESSALI — We can talk a bit more later when we talk in camera, but certainly in relation to one of our clients, and I think it has been said in our submission that we have had to take steps to protect the service and to protect the lawyers. It is not extensive, but once we have come into contact with some of the very specific people that we have come into contact with, it has been focused on the service, yes.

The CHAIR — Right, and have you had to change the way you work as an organisation as a consequence of that to protect yourselves and your staff?

Ms VESSALI — Practical changes?

The CHAIR — Yes.

Ms VESSALI — Practical changes for the organisation and for the staff, and also changes such as debriefing the staff as well to help them to cope with some of the pressures that come along with it, yes; and I guess just being more alert to security issues.

The CHAIR — Do you have a protocol that we could look at?

Ms VESSALI — I believe we would have a policy about our debriefing. It is something we can look at and provide to you if we do.

Ms DRYSDALE — Across a number of policies that we have there is no single policy on vexatious litigants.

The CHAIR — Okay.

Mr CLARK — You mentioned in your submission the lack of knowledge within the court system of the fact that vexatious orders have been made against particular individuals. Do you know what is supposed to happen when an order is made to notify all the other courts? Do you think there is a breakdown in that, or there needs to be improvements in the system. Secondly, what happens when you say to the court that so and so has been declared a vexatious litigant? How does the court react to that to resolve the fact that it appears that someone has brought proceedings who has been declared a vexatious litigant?

Ms VESSALI — I have to say that I do not know the answer to how it is supposed to work; we have just seen it from the point of view that it clearly has not worked. With the particular matter in question we became involved a few years down the track, and it just became very obvious to us in looking back through the history of the court proceedings that the vexatious litigant had been able to commence proceedings in different courts that clearly had no knowledge whatsoever that he was a declared vexatious litigant. When we became involved it had been brought to the notice of the court at that point, so it was aware of it, but the experience that we have is that it has made pretty much made no difference, very little.

Mr CLARK — In what respect were they able to continue even though they had been declared a vexatious litigant?

Ms VESSALI — Very little restriction on his ability to continue doing what he was doing.

Ms DRYSDALE — One of our clients has described that the declaration was like a speed hump in the road. It slowed it down slightly — marginally — but in fact it kept going.

Mr FOLEY — Can I follow that up? Although you inherited the case, essentially, the court was aware that the person was a vexatious litigant?

Ms VESSALI — Yes.

Mr FOLEY — We are not in camera at the moment, but I think it might be the case you were referring to elsewhere. Or was the court aware and then had to apply and seek leave to put it in; do you know which it was?

Ms VESSALI — At the point at which we picked up the case we were at court as part of — we do duty lawyer service at the court, and the woman was just there having been brought there again for this matter. At the point at which we picked it up the court was aware that he was declared vexatious — —

Mr FOLEY — In another jurisdiction?

Ms VESSALI — By the Supreme Court, yes, and he had at that point already made his application to the Supreme Court to be given leave to do what he was doing in the court where we picked up the case. However, subsequent to that, after that part had been resolved he made a further application which he did not have leave for, and what became apparent was that even though the court already knew he was declared vexatious, nobody was going to stop him making that further application that he did not already have leave for. So I think as well as the lack of communication in that at some points the other courts do not know that this person is declared vexatious, also as we said, I think people do not quite know how to handle it when they are declared vexatious in that they knew he had to seek leave but because he had already had leave for a previous application it was just sort of assumed, or it seemed to be assumed, that he could go ahead and do the next one as well, whereas technically he could not.

Mr FOLEY — It is a separate matter.

Ms VESSALI — So it is all quite confusing from that point of view for everyone within the system, I think is what is going on. The other thing that I have just noted down that I wanted to say as well is that another

concern we have had is that when in this particular case this person, who is declared vexatious, makes his applications to the Supreme Court to seek leave to bring further applications against our client, there is no notification to our client or to ourselves acting for her that he is making further leave applications, which we have seen as another breakdown in the system too, that we are not actually given the ability, if the client or we chose to go along and try to object to his further applications for leave. So it is a further breakdown in the system there as well.

Mr FOLEY — If I could again, in that subsequent application that you are not advised, does he nominate your client as the person that he — —

Ms VESSALI — Yes. It is — —

Mr FOLEY — Very specific.

Ms VESSALI — The same focus, same issues, same everything. The only reason that in recent years we have been kept in the loop is that the person at the Victorian Government Solicitor's Office has known that we are involved and out of courtesy has rung me to let me know that things are happening. There have been other occasions where barristers who have been involved in a case have just happened to be at the Supreme Court on the day and have rung me to say, 'Do you know this person is making another application for something?'. So there is no notification to the victim or the victim's lawyers that the person is trying to start something else as well.

The CHAIR — Going back, courts have powers to deal with vexatious litigation issues prior to an order being made — to summarily dismiss a case, for example. Do you find that courts are taking that up? Is that an effective way of dealing with the issue?

Ms VESSALI — I am not entirely sure what you — —

The CHAIR — If a person who is heading down the track of being declared a vexatious litigant appears to a court, a court at the moment can say, 'We are not going to proceed with this case because it is not properly founded and obviously its motives are not right and there are various impediments to it proceeding in the courts view'. So courts have got that tool at their disposal. One, are they taking it up; and two, when they take it up, is it effective?

Ms VESSALI — The simple answer would be no, they are not, or it may well be that there might be a few preliminary hearings before it gets to that point. So again the victim is already brought into the court system at that point, because I suppose they do not — I guess the courts are loath to make that call that this person should not be allowed to proceed with this application without hearing evidence from both sides, which means that the victim is drawn into it to at least put in the defence or put in the response or whatever needs to be put in. So they are still brought into the process in some way before that decision could even be made.

Ms DRYSDALE — That often depends too on the individual member of the judiciary, but they are often concerned to be absolutely fair and above board to both parties at all times, and in doing so, looking at that matter in isolation from the whole pattern of conduct, they might make a particular decision, which is why some form of coordination is needed, because when you look at the whole history of the matter and behaviour outside court and inside court you can clearly see a pattern emerging which might lead to a different outcome.

Mr FOLEY — The bill that is currently before the Parliament that you referred to, do you think that is an avenue to deal with this particular problem or is it simply just going to create another road hump or even another opportunity for vexatious litigants in this area?

Ms DRYSDALE — Yes, the bill does have a vexatious litigant clause or part to it.

Mr FOLEY — Provision.

Ms DRYSDALE — That would enable that to be made at the Magistrates Court level, and that would only obviously apply to applications under that act. But certainly that may well assist, because again I suppose the Magistrates Court itself can have better coordination within itself, if you like, but then you might find people having applications in other jurisdictions. That might be relevant as well, for example, in family law matters. I do not know if that is — —

Mr FOLEY — If it should become law, what is your view on that provision dealing with some of the problems that you have identified?

Ms DRYSDALE — That it would be helpful but not sufficient in terms of the coordination and the procedures for alerting people to it, and training people about this issue and things like that that are still required in addition, but I think that does provide another additional important legislative protection.

Mr CLARK — If I could follow on from that, I have had a quick look at the provisions, particularly about this notice point, that you mentioned earlier, to the other party. Do you know offhand whether the bill provides for notice of applications seeking leave for fresh proceedings to be served on the protected person?

Ms DRYSDALE — I think it does from memory, yes.

Ms VESSALI — I believe so. I would have to read it again, but — —

Ms DRYSDALE — I would have to check that, but yes.

Mr CLARK — Also in terms of your reference to turning it into a mini contest over these particular procedures, what is in the bill is quite extensive. Are you satisfied it has got the right balance between appeal rights versus stopping vexatious litigants?

Ms DRYSDALE — I think we will have to see how it operates in practice. I am not sure how that will play out.

Ms VESSALI — I think, interestingly, the avenues of appeal that are available are what often allow the vexatious litigation to really be prolonged, because again from the cases that we have talked about, it is the appeal avenues that give the people the further steps that they are seeking to bring the matter back to court. Also, by the very nature of the vexatious litigants that we have dealt with, they are extremely ingenious. They just do not follow your normal appeal routes, either; they will find different appeal routes. They are self-representing, as a general rule they are probably not working and they have got a lot of time, and they are actually quite good on their feet in terms of arguing their rights to the court. So even within the restrictions that are in the bill that is coming and things like that, they find ways around it.

Mr FOLEY — You have seen that in the vexatious arrangements that apply in the Family Court already?

Ms VESSALI — This is through the Supreme Court.

Mr FOLEY — My understanding is that there are vexatious arrangements in the Family Court.

Ms VESSALI — In the Family Court as well, yes.

Mr FOLEY — How do you see those applying in this area?

Ms VESSALI — They do not commonly make that declaration in the Family Court; it is not done very often. What we have seen — in the one particular case where we know that it was made there, and also in the Supreme Court — is the Family Court one seems to have been more effective in some ways, but maybe that is because that is such a discrete system in that once they go over into the family violence system they then have access to the whole state court process, whereas with the Family Court, once you have stopped at the Family Court you might be able to appeal but there is not really anywhere else to go from there. What we have seen in the one particular case where it did happen was that the Family Court declaration just shifted the focus sideways into a different court system.

The CHAIR — We are at 11 o'clock and will now move into our in-camera session.

Proceedings in camera follow.