



Submission to the Victorian Attorney General,  
the Honourable Rob Hulls MP

A Draft Bill for an Act to Protect Public Participation

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Gregor Husper, Lucy McKernan and Catherine Symons

Public Interest Law Clearing House (PILCH) Inc

17/461 Bourke Street

Melbourne VIC 3000

T: (03) 8636 4400

E: [gregor.husper@pilch.org.au](mailto:gregor.husper@pilch.org.au) [lucy.mckernan@pilch.org.au](mailto:lucy.mckernan@pilch.org.au)

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## 1. Introduction

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### 1.1 Introduction

Community members engaging in legal activities, such as attending a meeting, participating in a protest or publishing an article may often be dissuaded from continuing these when civil proceedings are initiated or threatened in respect of them.

The Public Interest Law Clearing House (Victoria) (**PILCH**) proposes the introduction of legislation which safeguards public interest communications and activities by protecting against litigation which would have the effect of silencing it.

In its 2006 submission to the Victorian Law Reform Commission Civil Justice Review<sup>1</sup> PILCH recommended that the Victorian Government introduce legislation that would confer power upon Victorian courts to hear an application by parties whose right of public participation is threatened by litigation, and further powers where the litigation is brought for an improper purpose.

- Public participation is defined to include communications or activities which seek to influence public opinion or promote action on an issue of public interest.
- Improper purpose litigation is litigation, which objectively viewed, is commenced or threatened to discourage, diminish or punish a party's engagement in public participation.

PILCH's recommendation was made in light of an emerging practice in Australia of large corporations using litigation as a strategic means of suppressing adverse public debate, commentary and protest on issues of public importance. The increasing trend toward litigation of this kind led to introduction of the term 'strategic litigation against public participation' (**SLAPP**) and the SLAPP writ<sup>2</sup>.

PILCH, in conjunction with law firm Herbert Geer, has now prepared a draft Bill for an *Act to Protect and Encourage Public Participation* (the **Act**). The Act is directed at discouraging and, ultimately reducing, litigation which would constrain public participation. If enacted in its current form, it will:

- a) establish legislative recognition of a right to engage in public participation;
- b) confer on Victorian courts the power to award damages and costs against plaintiffs who issue proceedings for the improper purpose of discouraging public participation;
- c) provide for the dismissal of proceedings where the underlying alleged conduct constitutes public participation;

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<sup>1</sup> Public Interest Law Clearing House (Vic.) Inc.(December 2006) Submission to the Victorian Law Reform Commission Civil Justice Review, Victoria.

<sup>2</sup> The acronym was coined by American sociologists Pring and Canan.

- d) allow parties to apply for a declaration that their conduct constitutes public participation before legal proceedings are brought against them;
- e) protect and promote the human rights set out in sections 15, 16 and 18 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic); and
- f) promote and give practical effect to the Attorney General's commitment to reducing the cost of justice as outlined in Justice Statement 2 (published October 2008)

PILCH proposes that protection against SLAPP writs should be achieved by the introduction of uniform State, Territory and Commonwealth legislation.

By supporting the Act, the State of Victoria would be in a position to provide leadership on the issue of SLAPP writs and, through the Standing Committee of Attorneys General agenda, influence other jurisdictions to introduce similar legislative initiatives. This is particularly important with respect to the Federal jurisdiction which hears SLAPP writ proceedings concerning alleged contraventions of the *Trade Practices Act 1974* (Cth).

### 1.2 About PILCH

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through six schemes:

- (i) the Public Interest Law Scheme (PILS);
- (i) the Victorian Bar Legal Assistance Scheme (VBLAS);
- (ii) the Law Institute of Victoria Legal Assistance Scheme (LIVLAS);
- (iii) Pilch Connect (Connect);
- (iv) the Homeless Persons' Legal Clinic (HPLC); and
- (v) Seniors Rights Victoria (SRV).

PILCH's objectives are to:

- (i) improve access to justice and the legal system for those who are disadvantaged or marginalised;
- (ii) identify matters of public interest requiring legal assistance;
- (iii) seek redress in matters of public interest for those who are disadvantaged or marginalised;
- (iv) refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;

- (v) support community organisations to pursue the interests of the communities they seek to represent; and
- (i) encourage, foster and support the work and expertise of the legal profession in pro bono and public interest law.

## 2. Evidence of need

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### 2.1 Strategic Litigation Against Public Participation

SLAPP writs have been described as “a civil complaint or counterclaim for money damages filed against a private citizen or citizen groups who are targeted because of their communications to a government body or official or to voters ... on an issue of public interest or concern”<sup>3</sup>. They also include communications directed at corporate entities.

SLAPP writs are typically initiated by corporations or parties whose vested interests are threatened by the communications they seek to suppress. Well-resourced litigants applying SLAPP writs will in most instances enjoy a financial advantage over the private individuals and community groups they issue against. Not only is it costly to defend SLAPP writs, the personal exposure to costs and damages is prohibitive to most private defendants. Powerful interest groups are able to strategically leverage this comparative imbalance in access to the courts.

Faced with such litigation, or the threat of litigation, community members have often been intimidated and withdrawn from public debate for fear of the enormous costs and uncertainty of litigation which can drag on for years.

By these means, SLAPP writs succeed in stifling and chilling criticism, and in so doing, impact negatively on public debate and participation. This in turn undermines fundamental principles of democracy, access to justice and the rule of law. Whilst corporations have legitimate interests to protect, PILCH submits the courts should have the power to determine whether a suit operates to stifle public participation, and in those instances to provide mechanisms to protect against it. Similarly, the courts should be vested with power to discourage SLAPP writs and to protect public interest communications. The Act balances the legitimate rights of corporations and other interest groups against those of public participation.

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<sup>3</sup> George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, Temple University Press, 1996, quoted in Brian Walters, *Slapping on the Writs: Defamations, Developers and Community Activism*, UNSW Press, Sydney 2003, p 8

Various avenues of litigation are available to resourced parties inclined to challenge and silence their dissenters. The torts of trespass to land, defamation and nuisance, and those torts protecting trade and business against intentional interference (including conspiracy and injurious falsehood), can, and have, all been applied. Whilst SLAPP writ actions have most frequently been framed within the laws of defamation, there has been a recent shift to these other torts and also the use of Trade Practices legislation as their basis.

In many instances, the threat of legal proceedings can have as chilling effect on public participation as actual prosecution in the courts. The case studies below illustrate how financial exposure to litigation exerts significant pressure on community groups and individuals to settle or abandon public interest activities. For this reason, it is also difficult to definitively quantify and document the occurrence of SLAPP writs in Australia. PILCH is aware, however, that a number of SLAPP writs have been commenced in Australian courts over the last five years<sup>4</sup>. Many of these actions run for years with some being settled in the process<sup>5</sup>. Others have been resolved prior to legal action being undertaken in the courts<sup>6</sup>.

### 2.2 Case Studies

Below are case studies where SLAPP writs, or the threat of legal action, have effectively suppressed public interest activities and communications. The examples illustrate the need to protect public participation. PILCH notes that observations on these cases are entirely its own and not of the parties mentioned or their legal representatives.

#### Case Study 1:

A well publicised example has been the defamation action brought by Frank De Stefano, chairperson of Barwon Water, against the Bannockburn Yellow Gum Action Group. Mr De Stefano sued the Action Group over their release of bumper stickers that read 'Barwon Water – Frankly Foul'. The Action Group were drawing attention to Barwon Water's proposal to turn local woodland into a sewerage farm. The defamation action had a major

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<sup>4</sup> Based on a limited survey, the US based Sourcewatch website lists over 60 cases in Australia and 40 examples of legal threats. See [http://www.sourcewatch.org/index.php?title=SLAPP%27s\\_in\\_Australia#The\\_Cases](http://www.sourcewatch.org/index.php?title=SLAPP%27s_in_Australia#The_Cases). Arguably the biggest in terms of scope and number of defendants was the so-called "Gunns 20 litigation". *Gunns Ltd v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No. 2)* [2006] VSC 329; *Gunns Ltd v Marr (No. 3)* [2006] VSC 386; *Gunns Ltd v Marr (No. 4)* [2007] VSC 91; *Gunns v Marr & Ors* [2008] VSC 464;

<sup>5</sup> For example: The Gunns 20 series of litigation: *Gunns Ltd v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No. 2)* [2006] VSC 329; *Gunns Ltd v Marr (No. 3)* [2006] VSC 386; *Gunns Ltd v Marr (No. 4)* [2007] VSC 91; *Gunns v Marr & Ors* [2008] VSC 464; *Schwabe Pharma v Auspharm.net.au*, Federal Court QUD 186/2006; *David Jones Ltd v The Australia Institute*, Federal Court, NSD2490/2006; *Australian Wool Innovation v Ingrid Newkirk & Ors*, Federal Court (2004) NSD 1630.

<sup>6</sup> For example: *NSW Minerals Council v Rising Tide*; *Yarra Trams v Public Transport Users Association*; *Toshiba v Environment Victoria*; *Reef Cove Resort v Steven Nowakowski*.

effect of intimidating the community and removing their voice. Those defendants who were unable to secure pro bono assistances incurred significant legal costs.<sup>7</sup>

### **Case Study 2:**

A similar case involved a defamation writ issued by a property developer against an architecture lecturer over comments in *The Age* relating to construction of a casino by the developer<sup>8</sup>. The lecturer found himself without legal support from the paper or his university, and eventually settled with an apology for an inference that may have been drawn from his comments, as they were reported. The threat of litigation in that case was said to have stifled public debate by a qualified commentator and the media about a matter of significant public interest and importance.

### **Case Study 3:**

In 1999 BCR Asset Management threatened Ruth Hawley with legal action following the publication of her letter to the editor in *The Sunday Age* in relation to her opposition to the redevelopment of Erskine House in Lorne<sup>9</sup>. Ruth complied with BCR's request that she publish an advertisement apologising for her letter in order to avoid potential litigation. Ruth's experience is a good example of a company using the threat of legal action to severely limit the individual's ability to comment upon actions impacting upon their community.

### **Case Study 4:**

Gunns Limited a Tasmanian sawmiller and hardware retailer is Australia's biggest woodchip exporter. On 13 December 2004 Gunns lodged a writ in the Supreme Court of Victoria seeking injunctions and damages of \$6.36 million against twenty Tasmanian environmentalists and groups. The 216 page writ was unusually long and complex claiming that the defendants engaged in a campaign against Gunns that amounted to a conspiracy to injure Gunns by unlawful means, and interference with Gunns' trade and business by unlawful means. In response to a strike out application (which took over three days to hear) a second draft of 360 pages was served. On 19 July 2005 the first and second versions of the writ were struck out because they failed to set out with sufficient clarity the case which the defendants must meet. On 15 August 2005 a third version of the statement of claim at 221 pages was served. This was again struck out. On 17 November 2006 Guns proposed three different Statements of Claim and dropped almost half or the original claims and six

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<sup>7</sup> See Brian Walters, *op cit*, pp 14-18 and Donald, B, "Defamation Action Against Public Interest Debate" (Paper delivered to the Free Speech Committee of Victoria, 22<sup>nd</sup> April 1999).

<sup>8</sup> See Brian Walters, *op cit*, pp 28-31

<sup>9</sup> See Brian Walters, *op cit*, pp 22-27

defendants from the case. On 3 April 2007 the court allowed Gunns to proceed with the claim against 14 defendants, with a separate claim against another party<sup>10</sup>. Through 2007 and 2008 interlocutories dragged on with two hearings and an appeal in relation to discovery,<sup>11</sup> and settlements were reached with 3 defendants – two involving no damages and both sides bearing their own costs, one with a paying a “small fraction” of what was originally sought but settling because the defendant wanted to “stop haemorrhaging money” to his lawyers.<sup>12</sup> In April 2009 a further 5 defendants exited the case with Gunns paying their costs. Proceedings are still on foot regarding seven defendants<sup>13</sup>. At the time the case was brought, *The Age* predicted that Gunns would have cause to regret its action: “For their contempt of public debate, they deserve to lose.”<sup>14</sup> The case has cost defendants many millions to defend and has placed a significant burden on court resources.<sup>15</sup>

PILCH was approached by 13 defendants for pro bono assistance and referred eight of them.

### **Further Case Studies:**

Further recent examples include:

- A case in Victoria where a dairy company took action against an organic food activist and the media, after the food activist had questioned the company's claims that its products were organic;
- the threat of legal action used by Toshiba in 2005 to silence Environment Victoria when it issued an environmental report card which Toshiba alleged did not do justice to its product; and
- the threat of legal action directed by Yarra Trams in 2003 against the Public Transport Users' Association, which related to a leaflet criticising the removal of seats from tram services<sup>16</sup>.

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<sup>10</sup> *Gunns Ltd v Frank Nicklason*, Supreme Court of Victoria No. 5526 or 2007.

<sup>11</sup> *Gunns v Marr & Ors* [2008] VSC 464.

<sup>12</sup> The statement from the second defendant is at: <http://www.wilderness.org.au/articles/law-discharged-from-gunns-case>

<sup>13</sup> *Gunns Ltd v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No. 2)* [2006] VSC 329; *Gunns Ltd v Marr (No. 3)* [2006] VSC 386; *Gunns Ltd v Marr (No. 4)* [2007] VSC 91

<sup>14</sup> From *The Age*, 18 March 2009

<sup>15</sup> From Dr Greg Ogle *Gunning for Change: The Need for Public Interest Law Reform* The Wilderness society Dec 2005

<sup>16</sup> See Brian Walters, “Suing into Submission: Using Litigation to Quell Dissent”, (Speech to Castan Centre for Human Rights Law, 9 August, 2005).



### 3. Legislative Responses

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#### 3.1 International jurisdictions

Legislation providing protection to public participation has been introduced in various jurisdictions, including in the United States of America and in Canada. Legislation in Californian, USA, provides for the dismissal of actions which arise from conduct that falls within the right of petition or free speech<sup>17</sup>. The Rhode Island, Massachusetts and Minnesota statutes provide for cases to be dismissed if they offend reasonable public participation<sup>18</sup>.

#### 3.2 ACT legislation

The Australian Capital Territory recently passed the *Protection of Public Participation Act 2008 (ACT)* (**the Capital Territory Act**). The Capital Territory Act is the first in Australia to specifically protect public participation against improper purpose litigation. It discourages certain civil proceedings that interfere with public participation, and allows the court to impose a civil penalty and indemnity costs in certain circumstances.

PILCH believes the Capital Territory Act provides important legislative recognition in this field, but that it falls short in a number of areas. PILCH is aware that draft legislation similar to the Act was watered down prior to the Capital Territory Act being promulgated.

In particular, a positive right to engage in public participation and the ability to have proceedings dismissed are absent from the final version of the Capital Territory Act. PILCH believes these provisions are fundamental to protecting public participation, and further, it is appropriate that they are purposefully framed within SLAPP writ legislation rather than relying on less focussed court dismissal rules or human rights legislation.

Another important distinction to be made between the Act and the Capital Territory Act is an *objective* test for determining improper purpose litigation in the former, as compared to the *reasonable person* test in the latter. PILCH submits an objective test is more appropriate, for the reasons that it is less cumbersome and recognises societal change as to what is reasonable (see explanation at 4.6).

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<sup>17</sup> Californian Code of Civil Procedures, sections 425.16, 425.17 & 425.18

<sup>18</sup> For a more comprehensive discussion of legislative responses in North America see Travis Bover and Mark Parnell, *A Protection of Public Participation Act for South Australia*, Environment Defenders Office (SA) Inc at <http://www.edo.org.au/edosa/research/publicparticipation.htm>

Further, the Capital Territory Act has wider provisions that remove public participation protection in the case of property damage or injury. For example, the Capital Territory Act does not contain provisions found in the proposed legislation, whereby protection will only be lost in the case of *intentional or reckless* activity that causes *appreciable* damage or injury. PILCH submits the Capital Territory Act model will operate to remove protection to valid public participation activities where unintended minor property damage has occurred, and particularly where the damage is disproportionate to the public interest to be protected.

### 3.3 Commonwealth legislation -Trade Practices Act

The secondary boycott provisions contained within s 45 of the *Trade Practices Act 1974 (Cth)* establish a right of action against persons acting in concert with others to cause substantial loss or damage to the business of a corporation. A limited exemption to this provision can be raised under s45DD of the TPA where the conduct has a dominant purpose substantially related to environment or consumer protection. This exemption has very limited application<sup>19</sup>, and PILCH notes it will be inapplicable to the great majority public interest activities in which SLAPP writs have been used to silence public debate; that is, every instance save for limited environment or consumer protection secondary boycott activities.

Nonetheless, the exemption under s45DD does at least recognise the potential threat of litigation to public participation and the need to provide legislative protection.

### 3.4 Victoria

It is PILCH's submission that the existing law in Victoria fails to adequately protect community members who speak out about matters of public interest, and that a legislative response is necessary and appropriate. Existing legislation and Court Rules that deal with abuse of process and striking out of claims are insufficient.

#### (a) Existing mechanisms – summary dismissal and abuse of process

The civil procedure rules of each Victorian court contain mechanisms for dealing with claims that are brought for inappropriate purposes.<sup>20</sup> Whilst an application by a defendant for summary dismissal of a proceeding may be entertained by any of the State courts, the bases upon which such applications may proceed are concerned solely with the character of the claim. That is, in order to be successful, the defendant must demonstrate to the

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<sup>19</sup> Rural Export and Trading (WA) Pty Ltd v Hahnheuser [2008] FCAFC156

<sup>20</sup> For example, Order 23 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* provides that where a proceeding does not disclose a cause of action; is scandalous, frivolous or vexatious; or is an abuse of the process of the Court; the Court may stay the proceeding, give judgment, or strike out the whole or any part of the claim.

Court's satisfaction, that the claim being pursued is bad in law, scandalous, frivolous or vexatious, or is an abuse of the process of the Court. These grounds are, however, not framed or intended to defeat SLAPP writs, and in that service are, at best, a blunt instrument.

Furthermore, invocation of inappropriate purpose provisions will invariably occasion enormous resource and time costs to a defendant, and it is precisely the exposure to these costs that will incline a defendant to settle or cease the 'offending' activities. Even where a party runs a defence and succeeds in a strike out application, more often than not it will simply lead to an order that a plaintiff recast its pleadings.

For example, in the Gunns 20 litigation<sup>21</sup>, it took over two years and the expense of successful applications to strike out three statements of claim (as well as dealing with numerous other interlocutory steps) before the plaintiff withdrew its proceedings against five (of an original twenty) defendants. Over the next two years the plaintiffs settled against other defendants for nominal or no damages, and most recently against a principal defendant, The Wilderness Society, with a substantial net payment to The Wilderness Society – which it had originally sued for \$3.5 million.<sup>22</sup>.

### (b) Operation of the Act

This Gunns case is illustrative of the shortcomings of summary dismissal rules to protect public interest activities against SLAPP writs. If however, the emphasis in the strike-out application had been on enforcing a *positive right* in the defendants to public participation, the same end may have been achieved a great deal earlier and without the cost that attends a protracted litigation process.

The Act seeks to redress the current deficit by confirming a right to 'public participation'. This enables defendants in legal proceedings to seek an order that the proceedings be dismissed on the basis that the conduct that the plaintiff seeks to constrain, constitutes public participation. In a successful application, punitive or exemplary costs can follow where the plaintiff brought the litigation for an improper purpose.

The Act also allows parties threatened with SLAPP writs to seek a court declaration that their conduct constitutes public participation before a writ is prosecuted in the courts. This provision is intended to provide applicants with a judicial assessment of whether their activity may attract protection under public participation principles. Parties might have significant regard to such a finding, notwithstanding it may not be binding on a future or

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<sup>21</sup> *Gunns Ltd v Marr* [2005] VSC 251; *Gunns Ltd v Marr (No. 2)* [2006] VSC 329; *Gunns Ltd v Marr (No. 3)* [2006] VSC 386; *Gunns Ltd v Marr (No. 4)* [2007] VSC 91

<sup>22</sup> "Little damage, as Gunns shoots itself in the foot", *The Age* 18 March 2009

higher court. PILCH commends this process as providing some certainty and for its potential to protect public participation and reduce potential litigation.

Further details of the Act are articulated in Section 4 below.

### 3.5 Human rights, the Charter and the Act

The issue of SLAPP writs engages a number of rights provided for in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**): the right to freedom of expression (section 15), the right to peaceful assembly and freedom of association (section 16) and the right to take part in public life (section 18). In addition, courts and tribunals will be obliged to interpret and apply the Act consistently with human rights. Accordingly, the Act has been designed to reinforce and promote the rights set out in the Charter and in particular sections 15, 16 and 18.

In line with the objects of the Charter, the Act also seeks to enhance democracy in Victoria by formalising a concomitant ‘public participation’ right which operates to prevent intentional or indirect barriers to public debate, commentary, dialogue and protest on issues of public importance.

Notwithstanding the above, we recognise that nothing in the Charter gives a person a right to limit or destroy the rights of any other person.<sup>23</sup> The definition of public participation in the Act balances the rights of Victorians to, for example, liberty, privacy and protection of property, with the rights to public participation, freedom of speech, association and assembly.

### 3.6 Relevant Charter Rights

Freedom of expression includes the freedom to receive and impart information and ideas of all kinds, whether orally, in writing, print, media or any other medium. The right to freedom of opinion and expression is particularly important in the areas of political communication, journalism and the media, demonstrations, industrial activity and ‘whistle blowing’.

Commenting on the right to freedom of expression under s 14 of the *New Zealand Bill of Rights Act* (NZ), the New Zealand Ministry of Justice has stated that:

Speech or an expression that is considered important to the ability of individuals to participate in core democratic processes, for example in elections, and political and social speech, is likely to enjoy a very high degree of protection.<sup>24</sup>

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<sup>23</sup> Charter, section 7(3).

<sup>24</sup> <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/section12-15.html#section14>. See also *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin) [35]; *Lombardo & Ors v Malta*, Application No 7333/06 (24 April 2007); *Baczkowski v Poland*, Application No 1543/06 (3 May 2007).

The provisions of both the Charter and the *International Covenant on Civil and Political Rights* (1966) (**ICCPR**) are mirrored in the Act.

Section 4(1) of the Act ensures every person's right to engage in public participation is upheld and protected from arbitrary interference. The mechanism by which the right is protected is found in section 5 of the Act, which disallows the initiation of an improper proceeding for the primary purpose of stifling public participation.

Section 16 of the Charter establishes a right to peaceful assembly and freedom of association with others, including the right to join trade unions.<sup>25</sup> This protects the rights of individuals and groups to meet together to receive or impart information or ideas, to express their views or to hold a protest. Freedom of assembly is not an absolute right<sup>26</sup> and is confined to peaceful, non-violent assemblies (for example, riots would not be protected). The right may impose a positive obligation on government to facilitate peaceful assemblies<sup>27</sup> and to take action to protect peaceful demonstrators from counter-demonstrators<sup>28</sup>.

In our view, the Act seeks to reflect the scope of this right and fulfils the Victorian Government's obligations to take steps to meaningfully protect the enjoyment by Victorians of the right to peaceful assembly and freedom of association. The positive obligation on the State of Victoria to secure genuine and effective respect for freedom of association and assembly is of particular importance to those people who hold unpopular views or who belong to minorities because those people are more vulnerable to victimisation.<sup>29</sup>

The Act also seeks to protect and enhance enjoyment of the right to take part in public life (section 18 of the Charter). Victorians enjoy the right to participate in public affairs and decision-making processes that affect them<sup>30</sup>. In regards to the comparable provision in the ICCPR, the UN Human Rights Committee notes that methods of participation in public life

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<sup>25</sup> For further HRC jurisprudence on the right to freedom of assembly, see <http://www.bayefsky.com/bytheme.php/id/651>. For further HRC jurisprudence on the right to freedom of association, see <http://www.bayefsky.com/bytheme.php/id/658>.

<sup>26</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Material and Commentary* (2<sup>nd</sup> ed, 2004), 426.

<sup>27</sup> See, eg, *R (Laporte) v Chief Constable of Gloucester Constabulary* [2004] EWCA Civ 1639 in which the House of Lords held that the police had acted unlawfully, both in preventing coach passengers from reaching the site of a demonstration (because a breach of the peace was not imminent at the time the coaches were stopped) and in escorting the coaches back to London.

<sup>28</sup> See, eg, *Baczowski v Poland* [2007] ECHR 1543/06 (3 May 2007) in which the European Court of Human Rights found a violation of the right to peaceful assembly where a municipal authority refused permission for a march through the city regarding discrimination against homosexuals on the grounds of traffic regulations and the risk of clashes with counter-demonstrators. See also *Plattform 'Ärtze für das Leben' v Austria* (1991) 13 EHRR 204.

<sup>29</sup> See, eg, *Baczowski v Poland* [2007] ECHR 1543/06 (3 May 2007).

<sup>30</sup> CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights, Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 3, [12].

include taking part in popular assemblies and engaging in public debate and dialogue with elected representatives<sup>31</sup>. Further, this right can only be fully supported by concomitant freedoms of expression, assembly and association, including (but not limited to), a free press and the freedom to organise politically.<sup>32</sup>

It is noted, however, that the Charter, was not intended to be a litigious instrument and does not contain a free-standing cause of action. Section 39(1) of the Charter provides that if, otherwise than because of the Charter, a person may seek any relief or remedy with respect to an act or decision of a public authority, that person may also seek relief or remedy for unlawfulness under the Charter. Owing to that limitation, the recipient of a SLAPP writ would be prevented from bringing a claim for breach of its Charter rights unless the plaintiff to the SLAPP writ is public authority, and even then only where there is an existing cause of action open to the defendant to which a Charter claim could be attached. The Act operates as an extension to Charter objectives and powers in establishing a broadly applicable public participation right of action.

Finally, the 'dialogue model' of human rights protection, on which the Charter is based, aims to encourage discussion of human rights between the Parliament, the Executive, the Judiciary and the public. It is designed to ensure that human rights principles inform the development of laws and policies. In enshrining the right of public participation through specific procedural protections, the Act would complement the underlying principles of the Charter and promote the protection of human rights.

## 4. Discussion of the Act

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### 4.1 Summary of the Act

A proposed Bill for an *Act to Protect Public Participation* is attached at Annexure A. The Act would:

- a) establish legislative recognition of a right to engage in public participation;
- b) confer on Victorian courts the power to award damages and costs against plaintiffs who issue proceedings for the improper purpose of discouraging public participation;

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<sup>31</sup> HRC, *General Comment No 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (1996) [6]–[8] available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>. For further HRC jurisprudence on the right to participate in public life, see <http://www.bayefsky.com/bytheme.php/id/1187>.

<sup>32</sup> *Ibid.*, [8], [12], [25].

- c) provide for the dismissal of proceedings where the underlying alleged conduct constitutes public participation;
- d) allow parties to apply for a declaration that their conduct constitutes public participation before legal proceedings are taken against them;
- e) protect and promote the human rights set out in sections 15, 16 and 18 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic); and
- a) promote and give practical effect to the Attorney General's commitment to reducing the cost of justice as outlined in his Justice Statement 2 (published October 2008)

Following is a discussion of specific sections within the Act

### 4.2 The Act s 2 – The Purposes of the Act

The broad purpose of the Act, as articulated in s 2(1), is to provide a foundation for free public debate, which is the cornerstone of a democratic society. The Act also seeks to reinforce and protect the human rights set out in sections 15, 16 and 18 of the Charter (s 2(2)).

The purposes of the Act, as set out in section 2, acknowledge that the Act is intended to operate as a shield, rather than a sword.

### 4.3 The Act s 3 – Definitions

#### (a) Improper purpose

Section 6(4) of the Act provides that a court may make an order for punitive or exemplary damages if, when viewed on an objective basis, the proceedings were commenced or maintained for an 'improper purpose'. The definition provides guidance as to what constitutes an improper purpose.

The purpose for which the plaintiff brings or maintains proceedings is only relevant to the determination of whether damages should be awarded against them, which reinforces the point that the intention of the Act is to protect rather than punish.

#### (b) Public Participation

'Public participation' has been drafted in a narrow and unambiguous way so as to guard against misuse. Two key mechanisms are used to limit the phrase.

First, the definition requires the communication or conduct that is the subject of the threat or claim to have been aimed at influencing public opinion or promoting action (by, for example, a government body) in relation to an issue of public interest. This requirement (in particular, the reference to public interest) will enable a court to consider the facts of a particular case in light of the scope and purpose of the Act. The controlled discretion vested in the court may be particularly useful in circumstances where the communication or conduct under consideration does

not fall within any of the automatic exclusions set out in paragraphs (i) to (ix) (discussed below) but does not otherwise warrant protection.

Second, the definition specifically excludes from protection, communications or conduct to the extent that it falls within one of the categories described in paragraphs (i) to (ix). These categories can be summarised as follows:

- Communication or conduct that constitutes discrimination, racial or religious vilification, a deprivation of liberty or a trespass to a private residence (paragraphs (i) to (iv)).
- Communication or conduct by a party to an industrial dispute (paragraph (v)). This category has been included to ensure that the Act does not disrupt the functioning of existing workplace relations legislation.
- Communication or conduct that causes appreciable (as opposed to insignificant) injury to tangible property or causes physical or mental injury to natural persons or incites others to cause such injury (paragraphs (vi) to (viii)).
- Communication or conduct that is made in trade or commerce. This category has been included to help ensure that acts inspired by commercial motives are not afforded protection under the Act (paragraph (ix)).

The inclusion of the above categories in the definition significantly restricts the scope of activities that can be considered acts of 'public participation'. However, the Act anticipates that there may be situations where only part of a person's conduct falls within one of the categories and that in such circumstances it would be unreasonable to wholly deny them the protection offered by the Act.

#### 4.4 **The Act s 4 – The Right to Public Participation**

The Act crystallises into specific legislative recognition the rights set out in the Charter which relate to public participation. Framing the right within the Act is a positive approach that seeks to provide community members with the confidence to speak freely about issues of public interest.

The Act does not promote criminal actions or behaviour and does not protect a person from criminal liability.

#### 4.5 **The Act s 5 - Application for a Declaration as to Public Participation**

Section 5(1) reinforces the right to public participation by enabling a person to obtain a declaration from the Magistrates' Court that their conduct amounts to public participation.



Section 5(2) makes it clear that the evidentiary onus rests on the applicant to demonstrate to the Magistrates' Court, on the balance of probabilities, that his or her communication or conduct constitutes public participation as defined by the Act.

Section 5(3) sets out the power of the Magistrates' Court to issue a declaration. The words, 'having regard to the purposes of this Act', are intended to require the Magistrates' Court to be mindful of the purposes of the Act in making a determination as to whether or not to issue a declaration as to public participation.

It is anticipated that the effect of a declaration will be to deter the accuser from making good a threat to institute proceedings. A declaration may also provide some reassurance to the threatened person that, should the accuser issue proceedings, the threatened person has the option available to apply for a declaration seeking to have the proceedings dismissed. Similarly, a Magistrate's decision not to issue a declaration will serve to put the applicant on notice that his or her communication or conduct may not be protected under the Act. Again, the introduction of declaratory relief is a measure directed at preventing a claim from being instituted rather than merely providing a defence after a claim has been issued.

In addition, once a proceeding is on foot in any Victorian court, a defendant to the proceeding may bring an application for dismissal pursuant to section 6 of the Act (discussed below).

#### 4.6 **The Act s 6 – Application for Dismissal**

To ensure that the right to public participation is meaningful, it is necessary that a person have the ability to have a claim or proceeding dismissed if it constrains that right. However, the Act also recognises that in giving effect to this right, a court must balance the rights of all parties to a dispute, including a person's right to access to justice, while also seeking to avoid undue process and minimise the expense of litigation. This balance is in part achieved by enabling a claim or proceeding to be dismissed at any stage.

Pursuant to section 6(3), a court will have the power to dismiss a matter before parties are forced to engage in time consuming and costly litigation. In circumstances where the determination of whether particular conduct constitutes public participation is a complex one, the Act provides the court with flexibility to defer that determination to a later stage in the proceeding.

Unlike the ACT Act, the Act does not require a person engaging in public participation to demonstrate that the opinion being expressed by them is "genuinely" or "reasonably" held. This is in part because it is likely to be cumbersome and costly for a person to demonstrate that their opinion is genuinely held. In addition (and, perhaps more importantly), many

concepts that are now commonly accepted as just and reasonable were widely considered unreasonable when first espoused.

Pursuant to section 6(4), where litigation has been found to have been brought for an 'improper purpose' a court may make an order for punitive or exemplary damages. The purpose of such an award of damages is to discourage proceedings which are expressly brought for the purpose of silencing public debate.

The provision contained in section 6 is less onerous than existing abuse of process provisions which require the defendant to demonstrate that a proceeding was brought without proper motive, thereby requiring a defendant to establish the intentions of another party. It also avoids the necessity of commencing separate litigation in order to put an end to litigation which was unfounded in the first place. The purpose of the Act is to remove or minimise the need for costly and time consuming litigation while protecting the rights of citizens to engage in public participation.

## **5. Conclusion**

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The use or threatened use of litigation will often dissuade a community member from engaging in an otherwise legal activity, such as attending a meeting, participating in a protest or publishing an article. This chilling of public debate can be discouraged by the introduction of tailor-made legislation designed to protect and encourage public participation, while dissuading persons from threatening, bringing or maintaining proceedings or claims that constrain public participation. To this end, PILCH commends the draft Bill to the Victorian Attorney-General and recommends that it be given legislative force.

## **6. Draft Bill**

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### **A Bill for an Act to protect and encourage public participation**

Section 1 - Short Title

Section 2 - The Purposes of the Act

Section 3 - Definitions

Section 4 - The Right to Public Participation

Section 5 - Application for Declaration as to Public Participation

Section 6 - Application for Dismissal

### **Section 0 - Short Title**

This Act may be cited as the “Protection of Public Participation Act of 2008”.

### **Section 0 - The Purposes of the Act**

The purposes of this Act are to:

- (0) protect and encourage public participation and to dissuade persons from threatening, bringing or maintaining proceedings or claims that constrain public participation; and
- (0) protect and promote the following human rights as set out in sections 15, 16 and 18 of the Charter of Human Rights and Responsibilities Act 2006:
  - ( ) the right to freedom of expression;
  - ( ) the right to peaceful assembly and freedom of association; and
  - ( ) the right to take part in public life.

### **Section 0 - Definitions**

In this Act:

“**applicant**” means a person who brings an application pursuant to Section 5 of this Act ;

**“defendant”** means a person against whom a proceeding is brought or maintained;

**“government body”** includes a federal, state or a local government body or instrumentality, and any branch, department, agency, official, employee, agent, or other person with authority to act on behalf of the federal, state or a local government and includes any body appointed or established by, or from which advice is requested by, a federal, state or a local government;

**“improper purpose”** for the purposes of this Act proceedings will be taken to have been commenced or maintained for an improper purpose if, when viewed on an objective basis, a purpose for commencing or maintaining the proceedings is:

- (a) to discourage the defendant (or any other person) from engaging in public participation;
- (b) to divert the defendant’s resources away from the defendant’s engagement in public participation; or
- (c) to otherwise punish the defendant for engaging in public participation.

**“proceeding”** means any action, suit, matter, cause, counterclaim, appeal or originating application that is brought in any court or tribunal, but does not include a prosecution for an offence or a crime;

**“public participation”** means communication or conduct aimed, in whole or in part, at:

- (a) influencing public opinion; or
- (b) promoting or furthering action by the public, a corporation or by any government body,

in relation to an issue of public interest.

Public participation does not include communication or conduct to the extent that such communication or conduct:

- (i) constitutes unlawful discrimination under the Equal Opportunity Act 1995;
- (ii) constitutes vilification under the Racial and Religious Tolerance Act 2001;
- (iii) constitutes a deprivation of liberty;
- (iv) constitutes a trespass to premises used primarily as a private residence;
- (v) is by a party to an industrial dispute between an employer and employee, former employee, contractor or agent and relates to the subject matter of the dispute;

- (vi) intentionally or recklessly causes appreciable injury to tangible property that lowers its value;
- (vii) intentionally or recklessly causes physical or mental injury to natural persons;
- (i) incites others or attempts to incite others to commit an act referred to in sub-section a(vi) or a(vii); or
- (ix) is made in trade or commerce.

#### **Section 4 - The Right to Public Participation**

- (1) Every person has the right to engage in public participation.
- (2) The right contained in section 4(1) does not provide a defence to criminal liability.

#### **Section 5 - Application for Declaration as to Public Participation**

- (2) Where threats of proceedings are made in respect of a person's communication or conduct, that person may bring an application before the Magistrates' Court for a declaration that the conduct complained of is public participation.
- (3) At the hearing of the application the applicant must, on the balance of probabilities, demonstrate to the Magistrates' Court that the communication or conduct of the applicant constitutes public participation.
- (4) Where the applicant satisfies subsection (2), the Magistrates' Court may, having regard to the purposes of this Act, issue a declaration that the communication or conduct complained of is public participation.

#### **Section 6 - Application for Dismissal**

- (4) A defendant against whom a proceeding is brought or maintained may bring an application under this section for an order to dismiss the proceeding or a claim within the proceeding.
- (5) When an application is brought under subsection (1) all further applications, procedures or other steps in the proceeding are, unless the court otherwise orders, stayed until the application has been heard and decided.
- (6) Where a court is satisfied that conduct alleged against the defendant constitutes public participation, the court may, having regard to the purposes of this Act, make an order

dismissing the proceeding or any claim within the proceeding, which is founded on that alleged conduct.

- (7) The court may, on application by the defendant or on its own motion, make an order for punitive or exemplary damages if satisfied that the proceedings or part of the proceedings were, when viewed on an objective basis, commenced or maintained for an improper purpose.
- (8) For the purposes of this section 6, a reference to a court is a reference to the court or tribunal in which the proceeding is brought.