

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY**

STANDING COMMITTEE ON LEGAL AFFAIRS

**INQUIRY INTO COURT PROCEDURES (PROTECTION OF
PUBLIC PARTICIPATION) AMENDMENT BILL 2005**

**SUBMISSION BY TUGGERANONG COMMUNITY
COUNCIL INC**

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Contact: Michael Sassella, Treasurer

Address: PO Box 436, Erindale Centre, ACT 2903

Email: tccorg@optusnet.com.au

Telephone: (02) 6291 6917

Introduction

On 14 March 2006 the Secretary to the Standing Committee on Legal Affairs of the Legislative Assembly for the Australian Capital Territory ('the Standing Committee') wrote to the President of the Tuggeranong Community Council Inc ('the TCC') inviting a submission for consideration by the Standing Committee in its Inquiry into the Courts Administration (Public Participation) Amendment Bill 2005 ('the Bill').

2 The TCC is an apolitical organisation established to represent and progress the interests of the community in the Tuggeranong Valley. It is unusual for us to make a submission on pending legislation because of our apolitical nature. However, the subject-matter of the Bill goes to basic rights of a community to engage freely in public participation and we regard that as a topic of great relevance to us.

3 We note that there are no specific terms of reference for this Inquiry.

4 We are pleased to offer our support for the Bill and for its purposes as we understand them.

Purposes of the Bill

5 We note that the proposed s 37A of the *Courts Procedures Act 2004* ('the Act'), dealing with the Objects of the new Part 4A of the Act, are:

- encouraging public participation, and dissuading people from bringing or maintaining proceedings for improper purposes, by providing –
 - an opportunity, at or before the trial of a proceeding, for a defendant to claim that, and for the court to consider whether, the proceeding is brought or maintained for an improper purpose; and
 - a way in which a proceeding that is brought or maintained for an improper purpose can be summarily dismissed; and
 - a way in which people who are subject to a proceeding that is brought or maintained for an improper purpose can obtain reimbursement for all reasonable costs and expenses incurred as a result; and
 - a way in which punitive or exemplary damages can be imposed in relation to a proceeding that is brought or maintained for an improper purpose; and
- preserving the right of access to the courts for all proceedings that are not brought or maintained for an improper purpose; and

- consistently with the *Human Rights Act 2004*, ss 15, 16 and 17(a), better protecting the rights of:
 - peaceful assembly;
 - freedom of association;
 - freedom of expression; and
 - to take part directly in the conduct of public affairs.

5 The TCC applauds and supports these objects.

Basic concepts

6 The Bill proceeds on the basis of several definitions of concepts basic to the Bill's objects. These, and any comment on them are:

Concept	Definition	Comment
Costs	[new s 37B] Include all of defendant's reasonable costs and expenses incurred in relation to the proceeding including costs of action under this new Part (Part 4A).	Appears to provide a generous measure of costs – close to indemnity costs and far more generous than party-party costs. The TCC approves of this measure of costs.
Improper purpose	[new s 37C] Proceeding is brought for improper purpose if: (i) publication or conduct by defendant is public participation; and (ii) plaintiff could have no reasonable expectation of success in the proceeding; and (iii) a purpose for bringing the proceeding is to discourage the defendant or another from engaging in public participation, or to divert defendant's resources from public participation to the	These requirements are cumulative rather than alternative. This means that the defendant cannot be certain of succeeding in having the proceeding dismissed unless all of these requirements are met. The Council believes it would have been preferable to provide for dismissal if only ground (iii) or (ii) or both of them is present. We believe that this position should be considered in meeting the purposes of the Bill.

	proceeding, or to penalise defendant for engaging in public participation.	The listed factors are appropriate. We see this Bill as sending a clear message about protecting the fundamental principle of free speech and debate over community issues.
Public participation	[new s 37D] Public participation is a publication or conduct aimed at influencing public opinion , or furthering lawful action by the public or any government entity in relation to an issue of public interest . There are exceptions for publications or conduct that are subject to prosecution, or appear to breach the law in a variety of ways.	The definition of public participation is broad but justifiable. The exceptions, based on publications or conduct that appear to involve a breach of the law, are justifiable in our view.

Time limit [new s 37E]

7 The defendant must apply to the court within 60 days of service of process if the defendant considers that the process is for an improper purpose. The court must deal with the application as soon as practicable. The proceeding appealed against cannot proceed further until the defendant's application has been heard and decided.

8 The TCC considers a 60-day period within which the defendant must act to be reasonable. The stay of the proceeding appealed against pending the outcome of the defendant's action is quite a powerful restriction on the plaintiff but the TCC regards this as necessary to preserve the rights of the defendant in case the defendant's application is finally successful.

Possible orders

9 The court can respond to the defendant's application in any of the following ways [new s 37F]:

1. **Dismissal of the proceeding appealed against** where the defendant satisfies the court, on the balance of probabilities, that, when viewed

objectively, the proceeding was brought or was maintained for an improper purpose. The court may order payment of costs.

2. **Order that the plaintiff provide as security an amount to cover costs and damages** to which the defendant may become entitled under these provisions where the court has not decided to dismiss the proceeding appealed against but the defendant has satisfied the court that there is a realistic possibility that, when viewed objectively, the proceeding was brought or maintained for an improper purpose.
3. **Order that the proceeding appealed against, while not being dismissed**, but the defendant has satisfied the court that there is a realistic possibility that, when viewed objectively, the proceeding was brought or maintained for an improper purpose, **is not to be settled or discontinued without the approval of the court** and on conditions imposed by the court.

10 The TCC notes that new s 37G deals with the court's ability to order that the plaintiff pay the defendant's costs in cases where the proceeding appealed against has been settled or discontinued.

11 The TCC considers that this range of possible orders provides the court with sufficient discretion to react appropriately in any particular case.

Conclusion

12 The TCC considers that this Bill is a well balanced and justifiable initiative designed to protect the rights of the community to engage in public participation with a reduced risk that those on the other side of an argument will be able to silence the community by threatening to use the law in an inappropriate way against the community. We commend this Bill to the Legislative Assembly.