

TWS Comments on Submission of ACT Law Society

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The submission of the ACT Law Society is a comprehensive analysis of the *Court Procedures (Protection of Public Participation) Amendment Bill 2005*. While we believe that the ACT Law Society may underestimate the extent of the existing problems of litigation against public participation, The Wilderness Society agrees with much of the Law Society's submission on the bill. We have taken the liberty of responding point by point to their submission because it provides a good base from which to consider and clarify key issues in relation to the proposed bill. The following table presents a summary of the points made in each paragraph of the Law Society submission with our comments in the right column.

Note:

G4C = The *Gunning for Change* report by The Wilderness Society

B-P model are the principles or "drafting instructions" put forward by Bover and Parnell in G4C).

ACT Law Society Submission Paragraph	TWS Response
1. Some goals admirable, but bill is over-reaction to Gunns case	<i>Agree goals are admirable, but G4C shows that there is an increasing problem not limited to Gunns case</i>
2. Not support the bill	<i>See recommendations in TWS submission, and comments below</i>
4. Provisions unnecessary as courts already have power to stay proceedings	<i>The legal threshold for a stay is high and rarely used as courts often err on side of the Plaintiff's right to a day in court – the current system does not protect public participation and the bill at least attempts to give legislative guidance to courts dealing with strike outs</i>
5 & 6. Courts can already reject cases which are abuses of processes	<i>Agree, but power seldom useful due to issues of proof of abuse. Consideration not relevant to B-P model.</i>
7 & 8. Lawyers obliged to follow rules and not abuse process	<i>These sanctions clearly not working due to number of cases in G4C, and lawyers will always simply retreat behind a "Nuremberg defence" that they were just acting on instruction. Flower & Hart v White Industries had exceptional circumstance and is a rarity.</i>
9. Bill ineffective in costs orders	<i>Agree, except where costs are recoverable through punitive order under proposed s37(2)(b)</i>
11. Provisions unnecessary as successful defendants will be awarded costs	<i>Unfortunately defendants never recover all costs, including the non-legal costs of wages, travel to court etc</i>
13. Unclear as no criteria for punitive damages	<i>Agree, but welcome the intention to provide legislative encouragement as to appropriateness of punitive cost orders for abuses of process</i>
14. Unclear how bill furthers Human Rights Act	<i>Agree</i>

15. Costs definition adds nothing to existing law	<i>Agree, but welcome what we take to be intention to capture all costs, not just lawyer costs</i>
16. Different cost remedies are iniquitous and contra Human Rights Act	<i>Disagree. Law already provides different remedies for different wrongs, even for same wrong (eg. civil v criminal trespass, defamation law distinguish corporations & non-corps)</i>
17 & 18. Definition of improper purpose is unclear and narrows existing definition, and is unnecessary in light of existing law	<i>Agree, but current definition unhelpful & seldom useful due to difficulty in proving abuse. Consideration not relevant to B-P model.</i>
19. Sanctions cast too widely and include cases where the predominant purpose is not improper	<i>Agree, but G4C argues existing “dominant purpose” definition not useful. Consideration generally not relevant to B-P model which provides more targeted protection.</i>
20. Definition of improper purpose may be discriminatory and contra Human Rights Act	<i>Repeat comment above re law already provides different remedies, and B-P model provides a rights based solution.</i>
21. Definition of improper purpose is unnecessary and unhelpful	<i>Agree that current law needs to evolve, and say the B-P model would avoid the issues raised here.</i>
22. No definition of “penalise”	<i>Redraft if required.</i>
23 May be contra new Defamation Laws	<i>G4C shows that the uniform defamation laws are themselves inadequate to protect public participation</i>
24–26. Definition of public participation is nugatory, unhelpful or circular	<i>Agree, but problem not relevant to B-P model.</i>
27. Summary dismissal application provision limited and unnecessary	<i>Again, current provisions not protecting public participation, but problem identified not relevant to B-P model.</i>
28. Timing issues	<i>Drafting issue for fixing.</i>
29-31. Summary dismissal orders add nothing to existing law.	<i>Again, current system is not protecting public participation, but problem identified not relevant to B-P model.</i>
32-38. Problem with burden of proof of “realistic possibility”, and with contradiction of Evidence Acts and other Acts	<i>Agree, but mostly either drafting issues or not relevant to B-P model because test is not about purpose.</i>
39. Evidence Act issues.	<i>Agree, and this issue would need to be sorted in drafting a bill along the lines of the B-P model.</i>
40. Duplication of existing proceedings	<i>Agree.</i>

It is noted that most of the arguments which we have said are not relevant to the Bover-Parnell model are because that model uses a different framework and (with the exception of the statutory tort provisions) does not rely on the notion of improper purpose. This avoids many of the problems identified in this bill and better protects public participation.

Again, the ACT Law Society’s comprehensive submission is most useful in clarifying the issues with the proposed bill and highlighting areas where the principles in the Bover-Parnell model may be legislatively less problematic while providing greater protection for public participation.