

LAW REFORM COMMITTEE

INQUIRY INTO VEXATIOUS LITIGANTS

DECEMBER 2008



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OF VICTORIA



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Final report of the Victorian Parliament Law Reform Committee

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Functions of the Law Reform Committee

The functions of the Law Reform Committee are set out in section 12 of the *Parliamentary Committees Act 2003* (Vic). That section states:

- (1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—
 - (a) legal, constitutional or parliamentary reform
 - (b) the administration of justice
 - (c) law reform.

Terms of reference

The following reference was made by the Legislative Assembly on 1 March 2007:

To the Law Reform Committee — for inquiry, consideration and report no later than 30 September 2008 on the effect of vexatious litigants on the justice system and the individuals and agencies who are victims of vexatious litigants — and, the Committee should:

- (a) inquire into the effectiveness of current legislative provisions in dealing with vexatious litigants;
- (b) make recommendations which better enable the courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian courts.

The reporting date was extended to 4 December 2008 by resolution of the Legislative Assembly on 20 November 2007.

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Reform of the justice system

Recommendation 1: Case management 104

The courts and VCAT should develop, trial and evaluate agreed case management strategies for possible vexatious litigants. In particular, the courts and VCAT should consider docket systems, simpler litigation procedures, fast-tracking hearings and systems for information sharing between court and VCAT registries.

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The Judicial College of Victoria should provide training in and guidance for judicial officers and VCAT members on dealing with possible vexatious litigants. The training should be available through the College’s intranet service and the orientation course for new appointees, as well as through other programs.

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The Victorian Government should provide training in and guidance for all court and VCAT staff on dealing with possible vexatious litigants. The training and guidance should be provided in induction programs for new staff, as part of ongoing training for existing staff and in written manuals.

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- 4.1 The Law Institute of Victoria should provide training in and publish professional guidelines for solicitors about dealing with possible vexatious litigants.
- 4.2 The Victorian Bar should provide training, including as part of the Bar reader’s course, and publish professional guidelines for barristers about dealing with possible vexatious litigants.

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Recommendation 6: Security for costs..... 117

The courts should amend their rules to clarify that security for costs may be ordered when the proceedings are vexatious. The training and guidance for judicial officers in recommendation 2 should include information about the power to make a security for costs order where the proceedings are vexatious.

Recommendation 7: Registrars' powers to refuse to seal documents 124

- 7.1 The courts should amend their rules to make it clear that registrars must seek directions from a judge before refusing to seal or accept documents. The rules should also specify that a judge may make this determination in open court.
- 7.2 The courts should publish on an annual basis information about the number of times the power to refuse to seal or accept documents is exercised.

Recommendation 8: Interventions by the Victorian DPP 127

- 8.1 The Victorian DPP should publish the policy for taking over private criminal prosecutions under section 22(1)(b)(ii) of the *Public Prosecutions Act 1994* (Vic).
- 8.2 The Victorian DPP's policy for taking over private criminal prosecutions under section 22(1)(b)(ii) should include mechanisms for dealing with apparent conflicts of interest which arise when the DPP or an officer of the DPP is the subject of the prosecution.
- 8.3 The Victorian Government should examine possible mechanisms to enable a litigant to appeal decisions of the DPP under section 22(1)(b)(ii).
- 8.4 The Office of Public Prosecutions should publish in its annual report the number of private criminal prosecutions taken over and discontinued by the Victorian DPP under section 22(1)(b)(ii).

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The Victorian Government should introduce legislation codifying the courts' inherent power to stay criminal proceedings that are an abuse of process.

Recommendation 10: Registrars' powers to refuse to issue vexatious criminal proceedings..... 129

The Victorian Government should consider giving registrars a statutory power to refuse to issue vexatious criminal proceedings. Any such legislation should make it clear that registrars must seek directions from a judge before refusing to issue proceedings.

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The courts should develop and circulate plain-language materials about the principles of representation and appropriate persons to act as McKenzie friends.

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The courts should consider amending the court rules to extend the registrars' power to refuse to seal or accept documents where the proceeding would be an abuse of process to include the power to refuse to issue subpoenas. Any expanded power should require registrars to seek directions from a judge before refusing to issue subpoenas on this ground.

Reform of Victoria's vexatious litigant provision**Recommendation 13: Reform of Victoria's vexatious litigant provision 171**

The Victorian Government should introduce legislation to replace the vexatious litigant provision in section 21 of the *Supreme Court Act 1986* (Vic) with new legislation providing for a graduated system of 'litigation limitation orders'.

Recommendation 14: Limited litigation limitation orders 171

- 14.1 The new legislation should give all courts and VCAT the power to make a 'limited litigation limitation order'.
- 14.2 The Attorney-General and the Solicitor-General should be able to apply for this order. A person against whom the person has instituted or conducted proceedings that are without merit and a person who has a 'sufficient interest' in the matter should also be able to apply, subject to leave.
- 14.3 The threshold test for this order should be that the person has brought two or more applications in the existing litigation that are without merit.
- 14.4 The effect of the order should be to prohibit further applications in the existing litigation without leave.

Recommendation 15: Extended litigation limitation orders 172

- 15.1 The new legislation should give the Supreme Court, the Chief Judge of the County Court, the Chief Magistrate and the President of VCAT the power to make an 'extended litigation limitation order'.
- 15.2 The Attorney-General and the Solicitor-General should be able to apply for this order. A person against whom the person has instituted or conducted proceedings that are without merit and a person who has a 'sufficient interest' in the matter should also be able to apply, subject to leave.
- 15.3 The threshold test for this order should be that the person has frequently brought legal proceedings that are without merit.

- 15.4 The effect of the order should be to prohibit the person from continuing or bringing any applications or legal proceedings against the persons or organisations named in the order, or about the issues described in the order. Orders made by the Chief Judge, Chief Magistrate and President of VCAT should only prohibit legal proceedings in their respective jurisdictions.

Recommendation 16: General litigation limitation orders 172

- 16.1 The new legislation should give the Supreme Court the power to make a general litigation limitation order on the application of the Attorney-General and the Solicitor-General.
- 16.2 The Supreme Court should be able to make an order if it is satisfied that the person has persistently and without reasonable ground brought legal proceedings that are without merit in circumstances where an extended litigation limitation order would not be appropriate.
- 16.3 The effect of the order should be to prohibit the person from continuing or bringing any legal proceedings in any Victorian court or tribunal without leave.

Recommendation 17: Referral of cases to the Attorney-General 173

- 17.1 The Victorian Government should publish information about litigation limitation orders, including how to apply for an order and how to ask the Attorney-General to apply for an order.
- 17.2 The Victorian Government should work with the courts and VCAT to develop a protocol under which the courts and VCAT can refer persons for whom a litigation limitation order may be warranted to the Attorney-General for consideration.
- 17.3 The Victorian Government should establish or designate an agency responsible for publishing information about litigation limitation orders, receiving and investigating referrals and advising the Attorney-General about applications. The Government should develop and publish key performance criteria for the exercise of these functions.

Recommendation 18: Evaluation of reforms 173

The Victorian Government should commission an evaluation of the new legislation after it has been in operation for five years to determine whether it has been effective in meeting its objectives and its impact on access to justice.

Recommendation 19: Implications for the Family Violence Protection Act. 173

The Victorian Government should review the vexatious litigant provisions in the *Family Violence Protection Act 2008* (Vic) to ensure they are consistent with the new legislation proposed by the Committee.

Recommendation 20: When is a proceeding vexatious or without merit? 177

The new legislation should define ‘institute’, ‘proceedings’ and ‘proceedings that are without merit’ in a manner consistent with the definitions in the Standing Committee of Attorneys-General’s model vexatious proceedings bill.

Recommendation 21: ‘Forum shopping’ 178

The new legislation should allow the Supreme Court, and the courts and VCAT where relevant, to consider proceedings in any Australian court when determining whether to make a litigation limitation order.

Recommendation 22: The effect of litigation limitation orders 181

22.1 The new legislation should provide that the effect of a litigation limitation order is to stay any existing applications or proceedings covered by the order.

22.2 The new legislation should provide that any new applications or proceedings brought in contravention of the order are a nullity.

Recommendation 23: Vexatious litigant networks 182

The Victorian Government should commission research into the nature and extent of vexatious litigant networks in Victoria and develop a strategy to deal with any problems that may be identified. This should include consideration of a power to restrain litigation by persons ‘acting in concert’ with persons who are subject to a litigation limitation order.

Recommendation 24: Power to make additional orders 185

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to make any other order they consider appropriate when making a litigation limitation order, consistent with the Standing Committee of Attorneys-General’s model vexatious proceedings bill.

Recommendation 25: Granting leave to continue or bring proceedings 187

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to grant leave to continue or bring new applications or proceedings only if the application or proceeding is not ‘without merit’.

Recommendation 26: Notification of other persons about leave applications 189

The new legislation should require the Supreme Court, and other courts and VCAT where relevant, to notify designated persons and to provide them with an opportunity to be heard where it proposes to grant leave to a person to continue or bring an application or proceeding. The designated persons should include the Attorney-General, the person who applied for the litigation limitation order and the person/s named in the proposed application or proceedings.

Recommendation 27: Determining leave applications ‘on the papers’ 190

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to determine a leave application without an oral hearing if the court considers it appropriate.

Recommendation 28: Conditions on leave 191

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to impose conditions on leave to continue or bring applications or proceedings.

Recommendation 29: Controlling excessive leave applications 193

29.1 The new legislation should require a person seeking leave under a litigation limitation order to disclose all previous applications for leave.

29.2 The new legislation should also give the Supreme Court, and other courts and VCAT where relevant, the power to limit the number of occasions on which a person may seek leave if there is evidence that the person has frequently brought applications for leave that are without merit.

Recommendation 30: Review of orders 195

30.1 The new legislation should give persons who are subject to litigation limitation orders a right to appeal, subject to leave, and a right to apply for variation or revocation of the order.

30.2 The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to determine an application for variation or revocation of the order without an oral hearing if the court considers it appropriate.

30.3 The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to limit the number of occasions on which a person may apply for variation or revocation of the order if there is evidence that the person has frequently brought applications that are without merit.

30.4 The new legislation should provide that litigation limitation orders remain in effect for the period determined by the court or VCAT.

Recommendation 31: Public register of orders 196

31.1 The agency established or designated in accordance with recommendation 17.3 should establish a publicly searchable register of all litigation limitation orders, including on the internet.

31.2 The courts and VCAT should have the power to order non-publication of the name of a person mentioned in the order.

Recommendation 32: Coordination within the justice system..... 197

- 32.1 The agency established or designated in accordance with recommendation 17.3 should establish appropriate arrangements for ensuring that all courts and VCAT are aware of litigation limitation orders relevant to their jurisdiction.
- 32.2 The agency should monitor orders in Victoria and vexatious litigant orders in other jurisdictions to identify cases which may warrant a general litigation limitation order and should bring these cases to the attention of the Attorney-General.

Glossary

abuse of process	when a litigant engages in improper procedure or misuses the processes of the court. The categories of abuse of process are not closed
the Charter	the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)
civil restraint orders	a system of orders set out in the United Kingdom's Civil Procedure Rules. The Rules establish a series of graduated orders to deal with proceedings and applications that are totally without merit (see section 10.2.2 of this report)
complaint	the process by which a civil legal proceeding is commenced in the Magistrates' Court
costs order	a court or tribunal order that one party (usually the unsuccessful party) pay the legal costs of the other party or parties
counterclaim	a claim or cross-claim brought by a defendant against a plaintiff in a civil legal proceeding
declared vexatious litigant	a term used in this report to describe a person who has been declared a vexatious litigant by the Supreme Court of Victoria under section 21 of the <i>Supreme Court Act 1986</i> (Vic), or by another Australian court under an equivalent Commonwealth, state or territory law
defence	in civil legal proceedings, a defence is a type of pleading filed by the defendant in response to the plaintiff's statement of claim or complaint
defendant	the person against whom a legal proceeding is brought
DPP	the Director of Public Prosecutions. The DPP is the officer responsible for prosecuting criminal offences on behalf of the state

inherent jurisdiction	powers vested in courts by virtue of their being courts, rather than by legislation or the common law. Inherent jurisdiction includes the power of courts to prevent abuse of process
interlocutory application	an application for an order in the course of legal proceedings that will not determine the ultimate question in the proceedings
leave	authority or permission from a court or tribunal to take a particular action
litigation limitation orders	a proposed system of orders recommended by this report to deal with persons who institute repeated applications or proceedings that are without merit (see chapter 10)
McKenzie friend	a person who is not legally qualified who assists a plaintiff or defendant in legal proceedings
originating process	the process by which a civil legal proceeding is commenced in the Supreme Court and County Court
plaintiff	a person who seeks relief against another person (the defendant) in civil legal proceedings
pleadings	the formal written documents filed in court by parties in civil legal proceedings. They set out the facts in dispute and the issues to be determined by the court. They include the plaintiff's statement of claim and the defendant's defence
possible vexatious litigant	a term used in this report to describe a person who appears to meet the description of a vexatious litigant in section 21 of the <i>Supreme Court Act 1986</i> (Vic), or an equivalent Commonwealth, state or territory law, but has not been declared
private prosecution	a criminal prosecution that is brought by a private individual rather than the state
Prothonotary	a statutory officer of the Supreme Court of Victoria. The Prothonotary has a number of powers and responsibilities such as determining applications for waiver of court fees

registrar	an officer who is part of the court or tribunal administration. Registrars have a number of powers and responsibilities, including receiving and processing originating process in civil legal proceedings
SCAG	the Standing Committee of Attorneys-General. SCAG comprises the Attorneys-General of the Commonwealth, states and territories and New Zealand and is a forum for discussing matters of mutual interest about justice policy, justice services and programs
SCAG model bill	the model vexatious proceedings bill adopted by SCAG in 2004
section 21	section 21 of the <i>Supreme Court Act 1986</i> (Vic), which sets out Victoria's current vexatious litigant provision (see page 4 of this report)
security for costs order	a court order that a party to civil legal proceedings deposit money or some other form of security with the court in case the party's proceedings are unsuccessful and they are unable to satisfy any costs order
self-represented litigant (or litigant in person)	a person who acts or appears for themselves in legal proceedings rather than through a lawyer
standing	the right of a person to bring legal proceedings and be heard by a court
statement of claim	a type of pleading filed by the plaintiff in civil legal proceedings. It sets out the facts relied on by the plaintiff and the relief sought by the plaintiff
strike out	a court order that throws out a pleading filed by a party in civil legal proceedings
stay of proceedings	a court order that has the effect of suspending legal proceedings
summary judgment	a court order that determines civil legal proceedings in a summary way without a full trial. An order that dismisses the proceedings is sometimes referred to as 'summary dismissal'

VCAT	the Victorian Civil and Administrative Tribunal
vexatious legal proceedings	a term used in section 21 of the Supreme Court Act. The courts have interpreted the term to refer to proceedings that have either been brought for an improper purpose, or which have been revealed to be hopeless
VLRC	the Victorian Law Reform Commission

Chair's foreword

Throughout this Inquiry into Vexatious Litigants, the members of the Law Reform Committee have sought at all times to protect human rights and to promote equal access to the justice system.

From the evidence the Committee has received, it is clear that a number of individuals use the mechanisms of the law to bring repeatedly unmeritorious actions against other individuals and against organisations and that changes need to be made to better protect both those on the receiving end of these actions and the justice system as a whole.

Vexatious litigants have been described by some as 'serial pests'ⁱ, while others have characterised them as 'legal mavericks'.ⁱⁱ These opposing descriptions are indicative of the divergent views that the Committee encountered in conducting this Inquiry.

Declaring a person to be a vexatious litigant is significant as such a declaration deprives a person of the right to litigate without the permission of a court. The Committee recognises the gravity of such a declaration and this report and its recommendations seek to balance several competing interests: the right of access to justice; the rights of other parties; and the need to ensure an efficient and effective justice system.

The Committee has adopted a multifaceted approach that acknowledges both the human and the legal dimensions of the issue. The Committee's recommendations focus on preventing vexatious litigation through mechanisms such as better early dispute resolution. Where these litigants do appear in the court system, the Committee has recommended strategies for their better management, for example through improved case management and the education of judges and court staff. The Committee has also recommended restricting access to courts and tribunals only in the most serious cases, through a graduated system that provides for flexible orders that are appropriate to the individual circumstances.

This Inquiry generated considerable interest and I would like to thank the many individuals and organisations that made written submissions and appeared before the Committee at its public hearings. In particular, the Committee is grateful to the people who shared their own knowledge and experiences about their interactions with individuals who brought repeated and unmeritorious legal actions against them.

The Committee also conducted its own research in an endeavour to fill evidence gaps and acknowledges the contribution of all those who assisted in this process. I wish to thank Dr Ian Freckelton SC who the Committee engaged to consult with judicial officers and VCAT members as well as court and tribunal staff about their experiences with vexatious litigants. The Committee is also appreciative of the contribution made by participants in the interviews and focus groups conducted by

ⁱ Carly Crawford, 'Pests cost \$6.2 million', *Herald Sun*, 11 September 2007, 4.

ⁱⁱ Simon Smith, *Submission no. 21*, 10.

Dr Freckelton. All participants were enthusiastic and very generous with their time, experiences and ideas.

The Committee also conducted research into the extent that declared vexatious litigants in Australia are engaging in ‘forum shopping’. In this regard I would like to acknowledge the assistance of the registrars at the Supreme Court, County Court, Magistrates’ Court, VCAT, the High Court and the Family Court, and the cooperation of Attorneys-General in other Australian jurisdictions. I would also like to thank the library staff at the Australasian Institute of Judicial Administration who provided considerable research assistance.

This report is a cooperative effort and I would like to thank my Parliamentary colleagues, the members of the Law Reform Committee for their enthusiasm and their thoughtful attention to the many issues that we worked through. I especially thank the Deputy Chair, Mr Robert Clark MLA, for his measured deliberations and for his well-considered advice.

I would also like to acknowledge the splendid work undertaken by the Committee research and administrative team led by Ms Kerryn Riseley and comprising: Ms Susan Brent, Ms Deanna Foong and Ms Helen Ross-Soden. Special acknowledgement must be made to Ms Brent, our principal researcher for this Inquiry, whose legal expertise and analytical skills made a complex range of issues understandable and manageable.

Finally, I acknowledge the contribution of Ms Claire Barrance, a law student who completed a one month placement with the Committee as part of the Victorian Law Foundation’s Legal Policy Internship Program. Ms Barrance cheerfully and professionally undertook a variety of research tasks for the Committee and provided valuable assistance in the preparation of the case studies that appear throughout this report.

The approach recommended in this report is multifaceted and multidisciplinary. I am confident that the Committee’s recommendations achieve the appropriate balance of preserving rights of access to the courts, protecting other users of the justice system and increasing the efficiency of the justice system as a whole.

Johan Scheffer MLC
Chair

Executive summary

Vexatious litigants are defined in current Victorian law as people who habitually, persistently and without any reasonable ground institute vexatious legal proceedings. They sometimes sue the same people repeatedly. They sometimes sue a series of different people.

Victoria already has a range of laws to deal with vexatious litigants. They include section 21 of the *Supreme Court Act 1986* (Vic), which allows the Supreme Court to declare a person a vexatious litigant on the application of the Attorney-General. This prevents the person continuing or bringing further legal proceedings without leave from a court.

In recent years there has been a trend in Australia and overseas towards tightening laws dealing with vexatious litigants.

The Committee's aims in this Inquiry were to:

- balance rights of access to justice on the one hand with the need to promote efficient courts and tribunals and to protect other members of the community from harassment through the legal system on the other
- take a multidisciplinary approach to vexatious litigants which incorporates expertise about behavioural as well as legal issues
- develop evidence-based recommendations for reform.

The Committee received evidence from a cross-section of people with an interest in the problem including judges and court staff, psychiatrists, people who have been sued by vexatious litigants and the community legal sector. It also conducted its own research into vexatious litigants in Victoria.

The Committee's findings

Based on the evidence it received during the Inquiry, the Committee has made the following findings and conclusions.

Vexatious litigants in Victoria (chapters 3 and 4)

- There is no firm data about the number of vexatious litigants in Victoria's courts and tribunals, but some witnesses suggested that the number was relatively small. Only 15 people have been declared vexatious by the Supreme Court since 1928, although this may not reflect the true extent of the problem.
- There is conflicting evidence about whether the number of vexatious litigants in Victoria's courts and tribunals is increasing.

- There is no one ‘type’ of vexatious litigant. The nature of their disputes and the way they conduct their litigation varies from case to case.
- There are conflicting views about why some people become vexatious litigants. Some participants in the Inquiry blamed factors such as poor early complaint handling services, lack of legal advice and poor treatment by courts and tribunals. Others pointed to characteristics of the litigants themselves, such as motive and personality.
- Psychiatric literature suggests that some vexatious litigants have a mental or behavioural disorder, but research is limited and the Committee was not able to make a definitive finding.

The impact of vexatious litigants (chapters 5 and 6)

- It is not possible to quantify the effect of vexatious litigants on the justice system.
- There is anecdotal evidence that, although vexatious litigants are small in number, they consume disproportionate amounts of resources in courts and tribunals. There are also reports that some vexatious litigants cause stress and security issues for judicial officers, court staff and lawyers.
- The impact of vexatious litigants is felt more in the Supreme Court and County Court than in the Magistrates’ Court or Victorian Civil and Administrative Tribunal (VCAT).
- Vexatious litigants have a significant financial and emotional impact on the people they sue.
- There are particular problems in family violence proceedings in the Magistrates’ Court. The new *Family Violence Protection Act 2008* (Vic) aims to address these issues.

Effectiveness of current laws (chapter 9)

- The current provision in section 21 of the Supreme Court Act is not always effective. The Attorney-General’s monopoly on applying for orders has limited the use of the laws in practice. When orders are made, they are not always effective in stopping vexatious litigants.

The Committee’s recommendations

The Committee’s preferred approach is to prevent vexatious litigants wherever possible, and to manage one-off or infrequent vexatious proceedings more effectively without restricting general rights of access to justice. The Committee believes access to the courts should only be restricted when there is clear evidence of an established

pattern of vexatious litigation. The Committee has made 32 recommendations to give effect to this approach.

Alternative ways of dealing with vexatious litigants (chapters 7 and 8)

- There are steps the justice system can take to prevent and manage vexatious litigants better. They include better case management and more training and guidance for the judiciary and court and tribunal staff.
- Other measures and powers to deal with vexatious legal proceedings on a case by case basis can also be improved.

Reform of Victoria's vexatious litigant provision (chapter 10)

- The Committee recommends that Victoria move away from the traditional approach to vexatious litigants, where orders are made only as a last resort in the most extreme cases, to a system of 'graduated orders' like those used in civil cases in the United Kingdom.
- These orders should be called 'litigation limitation orders'.
- Under this system, there would be a series of orders available depending on the seriousness of the vexatious litigant's behaviour:
 - 'limited litigation limitation orders' would restrain a person from continuing or bringing further interlocutory applications in existing litigation without leave
 - 'extended litigation limitation orders' would restrain a person from continuing or bringing proceedings against particular people or organisations, or about particular issues, without leave
 - 'general litigation limitation orders' would restrain a person from continuing or bringing any proceedings without leave.
- The Attorney-General and the Solicitor-General should be the only people who can apply for general litigation limitation orders given their serious consequences for individual rights of access to justice. However, persons who are sued by vexatious litigants should be able to apply for other types of orders.
- There should be more information and clearer procedures for members of the public and courts and tribunals to refer possible cases to the Attorney-General. There should be one central, coordinating agency responsible for publishing this information, receiving and investigating referrals and providing advice to the Attorney-General.

- The Supreme Court should be the only court with the power to make general orders given their serious consequences for individual rights of access to justice. All courts and VCAT should be able to make other orders.
- The courts and VCAT should be able to consider a broader range of factors than under the current law – the way the person conducts the proceedings and their motive, any interlocutory applications and proceedings in other Australian courts.
- The courts and VCAT should also have some additional powers to prevent some vexatious litigants using ‘loopholes’ to continue bringing vexatious litigation.
- There should also be a publicly searchable register of orders.
- The Government should evaluate the new system after a period of five years to assess whether it is effective and its impact on access to justice.

Chapter 1: Introduction

Victoria prides itself on being a strong and healthy democracy with a fair and open system of justice. We have courts and tribunals to settle disputes between members of the community and to maintain law and order. Our judges and magistrates are independent and act without fear or favour. We believe that everyone is equal before the law and that our courts should be open to everyone.

But what happens when a person repeatedly brings unjustified legal proceedings against other members of the community? What happens when the courts repeatedly find the proceedings have no merit? Do we need to protect the courts and the other members of the community from this behaviour? Is there a point at which a person's access to the courts should be restricted?

History shows that from time to time there are people – known in the justice system as ‘vexatious litigants’ – who do act this way. They may sue the same people over the same issues again and again. They may sue the lawyers in the legal proceedings, the judges who dismiss their cases and other people who become involved in their disputes. They may appeal every adverse decision almost as a matter of habit.

Victoria introduced specific laws to address this phenomenon in 1928. These laws, which are set out in section 21 of the *Supreme Court Act 1986* (Vic), prevent vexatious litigants continuing or bringing legal proceedings without leave from a court or tribunal. The current Attorney-General has described the laws as ‘an important tool for protecting the courts and court users from those individuals who are pursuing a collateral purpose or abusing the legal system for their own ends.’¹

On 1 March 2007 the Legislative Assembly gave the Law Reform Committee terms of reference to conduct an Inquiry into vexatious litigants. The terms of reference require the Committee to report on the effect of vexatious litigants on the justice system and the people and agencies they sue, and the effectiveness of current laws. They require the Committee to make recommendations that enable the courts to perform their role efficiently and effectively while preserving access to justice.

The Inquiry attracted almost diametrically opposed responses from people who participated in the Inquiry. Many people who have been sued by vexatious litigants believe the law does too little too late to protect them from this behaviour. Others were concerned by proposals to make it easier to shut people out of the courts, arguing they could affect legitimate legal claims as well.

These issues are not easy to resolve. They require the Committee to balance access to justice on the one hand, and the need to protect the justice system and members of the community from repeated vexatious litigation on the other. They require the Committee to find ways to manage complex human behaviours within a framework of legal rules and processes. These are the issues this report aims to address.

¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2003, 2190 (The Hon Rob Hulls MP, Attorney-General).

1.1 Vexatious litigant laws in Victoria

The Victorian legal system already has a range of measures to deal with vexatious litigants. These include the vexatious litigant provision in section 21 of the Supreme Court Act, as well as a range of other measures and powers.

1.1.1 Other measures and powers to deal with vexatious litigation

The justice system incorporates some financial disincentives to vexatious litigation. There are financial costs involved in litigating in the courts that have the potential to discourage litigants from bringing unmeritorious proceedings including:

- court fees and charges
- the cost of legal representation if the litigant decides to use a lawyer
- the risks of a costs order, requiring a litigant to pay some of the legal costs incurred by the other parties if the litigation is unsuccessful. The courts can sometimes make what are known as ‘security for costs orders’ which require a litigant to pay a nominated amount of security to the court at the beginning of the proceedings. The security is used to cover the other parties’ legal costs if the proceedings fail.

The justice system also has legal powers to dispose of vexatious legal proceedings on a case-by-case basis. These include:

- the power of court registrars to refuse to file proceedings that would be an ‘abuse of process’ without direction from the court
- the power of courts to strike out pleadings where the document does not disclose a cause of action, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the proceedings, or is otherwise an abuse of process
- the power of courts and the Victorian Civil and Administrative Tribunal (VCAT) to summarily dismiss vexatious legal proceedings
- the power of Directors of Public Prosecutions to take over and discontinue criminal prosecutions brought by private citizens
- the power of the courts to stay criminal prosecutions that are an abuse of process.

The courts can restrain litigation in some circumstances under their inherent jurisdiction. In Australia courts can make what are sometimes called *Grepe v Loam* orders, which restrain further applications in existing legal proceedings to prevent a party abusing the court’s process.² Some Australian courts have also restrained

² *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311. See generally Simon Smith, ‘Vexatious litigants and their judicial control – The Victorian experience’ (1989) 15(1) *Monash University Law Review* 48, 50-54.

people from bringing new legal proceedings, although the Supreme Court of Victoria recently held that its inherent jurisdiction does not extend this far.³

1.1.2 The vexatious litigant provision

In 1928 the Parliament of Victoria supplemented these measures and powers with new legislation. The provision, based on laws passed by the British Parliament in 1896, created a mechanism for restraining vexatious litigants without denying them access to the courts completely. In effect, it allowed the courts to ‘vet’ their litigation by requiring them to get leave before continuing or bringing legal proceedings.

The provision was reportedly prompted by the behaviour of the man who was to become Victoria’s first declared vexatious litigant (case study 1). It attracted the same controversy then as it does now. A bill containing the laws was first introduced into the Parliament in 1927 and was passed by the upper house. In the lower house, however, parliamentarian and lawyer Maurice Blackburn described the bill as ‘dangerous and unnecessary’. He argued:

It is public policy that every man who thinks he has a grievance for which the law offers redress, should have an opportunity of seeking that redress from the court ... That right must not be taken away simply because one or two cranks have instituted a few frivolous vexatious actions, or a dozen such actions.⁴

The debate on the bill was adjourned and it was later withdrawn. The provision was later included in the 1928 consolidation of the Supreme Court Act which was introduced into the Parliament the following year and passed with minimal debate.⁵

Section 21 of the Supreme Court Act contains the current version of the provision.

An order under section 21 is seen as a step of last resort when other measures and powers have failed. The Supreme Court has repeatedly emphasised that an order is serious and will only be made in clear and compelling cases.⁶

³ The Federal Court has made orders restraining proceedings which seek to relitigate the substance of matters already determined: *Hunter v Leahy* [1999] FCA 1075. The Queensland Court of Appeal has made orders restraining the institution of new proceedings arising out of or concerning the allegations in existing proceedings: *von Risefer v Permanent Trustee Co Pty Ltd* [2005] QCA 109, 13-27. In 2006, the Supreme Court of Victoria upheld earlier authority that the courts can only restrain applications in existing proceedings, not new legal proceedings: *Richards v Grant* [2006] VSC 387. There is evidence that wider orders have been made in Victoria on occasion: see, for example, *Richards v Gillies* [2001] VSC 176 and the discussion in Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 593 fn 194.

⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1927, 1360 (Mr Maurice Blackburn, Member for Clifton Hill) 1360-1361.

⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 1928, 3417-3420; Victoria, *Parliamentary Debates*, Legislative Council, 18 December 1928, 3452-3455. See generally Grant Lester and Simon Smith, ‘Inventor, entrepreneur, rascal, crank or querulent?: Australia’s vexatious litigant sanction 75 years on’ (2006) 13(1) *Psychiatry, Psychology and Law* 1; Smith, above n 2, 48 for discussion of the history of the provision.

⁶ See, for example, *Attorney-General (Vic) v Shaw* [2007] VSC 148, 58; *Attorney-General (Vic) v Knight* [2004] VSC 407, 36; *Attorney-General (Vic) v Weston* [2004] VSC 314, 7, 23; *Attorney-General (Vic) v Lindsey* (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998) 19; *Attorney-General (Vic) v Kay*

Victoria's vexatious litigant provision: section 21 of the *Supreme Court Act 1986* (Vic)

- (1) The Attorney-General may apply to the Court for an order declaring a person to be a vexatious litigant.
- (2) The Court may, after hearing or giving the person an opportunity to be heard, make an order declaring the person to be a vexatious litigant if it is satisfied that the person has—
 - (a) habitually; and
 - (b) persistently; and
 - (c) without any reasonable ground—
instituted vexatious legal proceedings (whether civil or criminal) in the Court, an inferior court or a tribunal against the same person or different persons.
- (3) An order under subsection (2) may provide that the vexatious litigant must not without leave of—
 - (a) the Court; or
 - (b) an inferior court; or
 - (c) a tribunal constituted or presided over by a person who is an Australian lawyer—
do the following—
 - (d) continue any legal proceedings (whether civil or criminal) in the Court, inferior court or tribunal; or
 - (e) commence any legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal; or
 - (f) commence any specified type of legal proceedings (whether civil or criminal) in the Court or any specified inferior court or tribunal.
- (4) Leave must not be given unless the Court, or if the order under subsection (2) so provides, the inferior court or tribunal is satisfied that the proceedings are not or will not be an abuse of the process of the Court, inferior court or tribunal.
- (5) The Court may at any time vary, set aside or revoke an order made under subsection (2) if it considers it proper to do so.
- (6) The Attorney-General must cause a copy of any order made under subsection (2) to be published in the Government Gazette.
- (7) The Court, when exercising a power under this section, must be constituted by a Judge.
- (8) The Court may, in determining whether to make an order under subsection (2), take into account vexatious legal proceedings (whether civil or criminal) instituted before or after the commencement of the *Supreme Court (Vexatious Litigants) Act 2003*.

(Unreported, Supreme Court of Victoria, Eames J, 23 February 1999) 50; *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 5; *Attorney-General (Vic) v Moran* [2008] VSC 159, 16.

There are a number of safeguards built into the provision. The Attorney-General is the only person who can apply for an order and the Supreme Court, the highest court in Victoria's judicial hierarchy, is the only court that can make an order.

The provision sets a high 'threshold test' for making an order. The Court must be satisfied that the person has 'habitually', 'persistently' and 'without any reasonable ground' brought vexatious legal proceedings. The term 'habitually' has been interpreted to mean that proceedings appear to be commenced as a matter of course, while 'persistently' has been interpreted to mean determination and an element of stubbornness.⁷ The Court has stated that, taken together, they imply that vexatious legal proceedings are brought 'more than frequently'.⁸ The Court will be satisfied that proceedings have been brought 'without any reasonable ground' where they have been revealed to be hopeless or have been instituted for an improper purpose.⁹

The term 'instituted vexatious legal proceedings' only allows the Court to consider some aspects of a person's litigation. The Court has interpreted the term to refer to circumstances where a person files an originating process, files a counterclaim or appeals from a final determination or applies to have it set aside. The Court will not consider interlocutory applications or proceedings brought in Commonwealth or other state or territory courts.¹⁰ The Court has stated that vexatious proceedings are proceedings which have either been brought for an improper purpose, or which have been revealed to be hopeless.¹¹ The question is not whether the manner in which the proceeding was conducted is vexatious, but whether the proceeding itself should be characterised as vexatious having regard to its nature and substance.¹²

The Supreme Court does not re-examine the merits of each individual proceeding. The 'critical evidence', according to the Court, is in the court files – the documents, judgments, orders and reasons. The Court will consider the 'overall impression' created by the number of proceedings, their general character and their results.¹³

⁷ *Attorney-General (Vic) v Weston* [2004] VSC 314, 23; *Attorney-General (Vic) v Knight* [2004] VSC 407, 6; *Attorney-General (Vic) v Shaw* [2007] VSC 148, 4; *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 6; *Attorney-General (Vic) v Moran* [2008] VSC 159, 26.

⁸ *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 6; *Attorney General (NSW) v Wentworth* (1988) 14 NSWLR 481, 492.

⁹ *Attorney-General (Vic) v Weston* [2004] VSC 314, 23; *Attorney-General (Vic) v Shaw* [2007] VSC 148, 5; *Attorney-General (Vic) v Moran* [2008] VSC 159, 26; *Attorney-General (Vic) v Knight* [2004] VSC 407, 6.

¹⁰ *Attorney-General (Vic) v Weston* [2004] VSC 314, 9, 23; *Attorney-General (Vic) v Knight* [2004] VSC 407, 3; *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 19; *Attorney-General (Vic) v Lindsey* (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998) 11; *Attorney-General (Vic) v Moran* [2008] VSC 159, 49. An interlocutory application is an application in which the order sought will not determine the ultimate question between the parties: see B C Cairns, *Australian civil procedure*, (5th edition, 2002) 417-419.

¹¹ *Attorney-General (Vic) v Weston* [2004] VSC 314, 23.

¹² *Attorney-General (Vic) v Shaw* [2007] VSC 148, 5; *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 28; *Attorney-General (Vic) v Weston* [2004] VSC 314, 14; *Attorney-General (Vic) v Moran* [2008] VSC 159, 27.

¹³ *Attorney-General (Vic) v Shaw* [2007] VSC 148, 5; *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 28; *Gallo v Attorney-General (Vic)* (Unreported, Full Court of the Supreme Court of Victoria, Starke, Crockett and Beach JJ, 4 September 1984) 7; *Attorney-General (Vic) v Knight* [2004] VSC 407, 5; *Attorney-General (Vic) v Moran* [2008] VSC 159, 27.

Even if the Court is satisfied that a person satisfies these criteria, it still has a discretion to make or not make an order under section 21. It will consider the person's conduct as a whole to determine whether an order ought to be made in all the circumstances.¹⁴ Some of the factors considered by the Court in the past include whether and to what extent the person is likely to engage in conduct of the same character in the future¹⁵, the impact on the time and resources of the courts and the loss to other parties and the fact that the proceedings were not only vexatious but contained 'scandalous material'.¹⁶ The Court can consider the fact that the person has also brought proceedings in Commonwealth or other state or territory courts at this stage.¹⁷

The ability of a declared vexatious litigant to seek leave to continue or bring proceedings ensures their access to the courts is not blocked completely. Section 21 allows the Supreme Court (or an inferior court or tribunal where permitted by the order) to grant leave if it is satisfied that the proceedings 'are not or will not be an abuse of process'.

The orders can also be reviewed. An order under section 21 can be appealed to the Court of Appeal if the Court grants leave to appeal¹⁸, and the Court can also vary, set aside or revoke an order under section 21 at any time.

1.2 The context for the Inquiry

The Committee conducted this Inquiry at a time of increased interest in vexatious litigants both in Australia and overseas. Much of the recent discussion suggests a growing hardline attitude to vexatious litigants. Recent media articles have carried headlines like 'Nuisances in court: judges get tough on serial pests'.¹⁹ An editorial in the *Australian Law Journal* referred to steps to address the problem as 'pest control'.²⁰ Victoria's Monash University Law School convened a 2006 conference on vexatious litigants called 'Access to justice: how much is too much?'

Governments and parliaments have also been moving to tighten controls on vexatious litigants. Like Victoria, other jurisdictions in Australia and around the world have had vexatious litigant laws in place for a number of years.²¹ Some have

¹⁴ *Attorney-General (Vic) v Weston* [2004] VSC 314, 8, 23; *Attorney-General (Vic) v Lindsey* (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998) 19-20; *Attorney-General (Vic) v Moran* [2008] VSC 159, 26.

¹⁵ *Attorney-General (Vic) v Knight* [2004] VSC 407, 43.

¹⁶ *Attorney-General (Vic) v Lindsey* (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998) 20.

¹⁷ *Attorney-General (Vic) v Moran* [2008] VSC 159, 53.

¹⁸ An order under section 21 is a 'judgment or order in an interlocutory application' and, as a result, section 17A(4) of the *Supreme Court Act 1986* (Vic) requires a person to obtain leave to appeal the order: see *Kay v Attorney-General (Vic)* [2000] VSCA 176.

¹⁹ Michael Pelly, 'Nuisances in court: Judges get tough on serial pests', *The Sydney Morning Herald*, 27 May 2004, 18. See also Carly Crawford, 'Pests cost \$6.2 million', *Herald Sun*, 11 September 2007, 4; Lisa Carty, 'New laws to stop pests in the courts', *The Sun-Herald*, 11 May 2008; Fergus Shiel, 'Court must act on pests: Judge', *The Sunday Age*, 14 July 2002, 4.

²⁰ 'Current issues – Litigant pests cost \$6.2m' (2007) 81 *Australian Law Journal* 907.

²¹ See for example, *Supreme Court Act 1981* (UK) c 54, s 42; *Judicature Act 1908* (NZ) s 88B. A list of laws in Australian, British, Canadian and US jurisdictions is set out in the bibliography to this report.

reformed their laws to make them easier to use, while some that never had the laws in the past are looking at introducing them.

1.2.1 Reform in Australia

Western Australia was the first Australian state to significantly reform its vexatious litigant laws in 2002. The Western Australian Attorney-General referred to ‘the difficulties of having persons declared to be vexatious under the existing [laws]’.²² Amongst other things, the new laws ended the Attorney-General’s monopoly on applying for vexatious litigant orders by allowing other parties to apply as well and lowered the threshold for making declarations. The Attorney-General told the Parliament it was ‘possible that, when enacted, the [new laws] will extend to about half a dozen vexatious litigants who are presently on the borderline.’²³

In 2004 the Standing Committee of Attorneys-General (SCAG), the ministerial council of Commonwealth, state and territory Attorneys-General in Australia, approved a ‘model’ bill to ‘deter and curtail the activities of vexatious litigants’.²⁴ The model bill incorporates some of the Western Australian reforms. It allows a range of people to apply for orders and has a lower threshold for making orders. It also attempts to address ‘forum shopping’ by vexatious litigants moving between different Commonwealth, state and territory courts in Australia.

Queensland, the Northern Territory and New South Wales (NSW) had passed legislation based on the model bill at the time this report was written.²⁵ The NSW Attorney-General stated that the new laws would:

make it easier to stop people abusing the court system as a way of victimizing others with unmeritorious law suits ... If people abuse the system we need to make it easier for judges to banish them from courtrooms, freeing up the justice system and protecting the good citizens of this State.²⁶

²² Western Australia, *Parliamentary Debates*, Legislative Council, 28 June 2000, 8354-8355 (The Hon Peter Foss, Attorney General).

²³ Ibid. See also Attorney General, Western Australia, ‘Vexatious litigants targeted by new bill’ (Media release, 28 June 2000); *Vexatious Proceedings Restriction Act 2002* (WA) and Law Reform Commission of Western Australia, *Review of the criminal and civil justice systems in Western Australia - Final report*, 1999.

²⁴ Standing Committee of Attorneys-General, *Annual report 2004-2005*, 2005.

²⁵ *Vexatious Proceedings Act 2005* (Qld); *Vexatious Proceedings Act* (NT); *Vexatious Proceedings Act 2008* (NSW).

²⁶ Attorney General, New South Wales, ‘New laws to stop legal harassment’ (Media release, 11 May 2008).

1.2.2 Reform overseas

The reforms in Australia are consistent with trends overseas.

The Committee's research found that jurisdictions as far apart as Nova Scotia, India and Hong Kong have held law reform inquiries into vexatious litigant laws in the past five years.²⁷

The most significant reforms have been in the United Kingdom (UK). These reforms were initiated by the courts themselves. In a 2003 decision, the UK Court of Appeal described the behaviour of several vexatious litigants as 'a very serious contemporary problem facing the dispatch of business in this court' and set out a new system of 'civil restraint orders' to restrain vexatious litigants.²⁸ The system, which is now set out in the UK's Civil Procedure Rules, provides for a series of graduated orders.²⁹ At the lower end, the courts can make an order stopping a litigant making further applications in existing proceedings without leave. At the higher end, the courts can make an order stopping a person from issuing any claim or making any application without leave. Parties to proceedings can apply for orders themselves. The courts are also required to consider making one of the orders whenever they strike out or dismiss a claim that is totally without merit.

The UK courts have taken even more drastic steps in some cases. In one case, a court made an order restricting a litigant's access to the Royal Courts of Justice, and restrained him from telephoning, faxing, emailing or in any other way communicating with judges and court staff.³⁰

1.2.3 Reform in Victoria

Proposals to reform vexatious litigant laws are not new in Victoria.

In 2006 the Victorian Law Reform Commission (VLRC) recommended specific vexatious litigant laws for family violence proceedings in the Magistrates' Court. The recommendations were based on concerns that some people were using intervention order applications to harass and intimidate family members.³¹

The *Family Violence Protection Act 2008* (Vic), which was recently passed by the Parliament of Victoria, implements this recommendation. It allows the most senior judicial officers in the Magistrates' and Children's Courts to make orders restraining family violence intervention order applications without leave. This gives courts other

²⁷ Law Reform Commission of Nova Scotia, *Vexatious litigants: Final report*, 2006; Law Commission of India, *192nd report on prevention of vexatious litigation*, 2005; Chief Justice's Working Group on Civil Justice Reform, Hong Kong, *Civil justice reform - Final report*, 2004.

²⁸ See *Bhamjee v Forsdick* [2003] EWCA Civ 799, 23-25 and *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113.

²⁹ *Civil Procedure Rules* (UK) r 3.11 and Practice Direction 3c— Civil Restraint Orders.

³⁰ *Her Majesty's Attorney-General v Ebert* [2001] EWHC Admin 695. See also *Her Majesty's Attorney-General v Ebert* [2005] EWHC 1254 (Admin).

³¹ Victorian Law Reform Commission, *Review of family violence laws: Report*, 2006, 284-289.

than the Supreme Court the power to make vexatious litigant orders in Victoria for the first time. It also allows applications for orders to be made by people who have made family violence applications and people who have been the subject of complaints, breaking the Attorney-General's monopoly on applications in Victoria.³²

The VLRC also considered vexatious litigant laws more generally in its 2008 report on Victoria's civil justice system. It made nine recommendations including:

- empirical research to ascertain the ambit of the problem
- allowing people other than the Attorney-General to apply for vexatious litigant orders
- liberalising the 'threshold test' for making orders
- allowing other Victorian courts and tribunals to make vexatious litigant orders of limited effect.

The VLRC noted some additional issues that required further consideration, including the relationship between mental health issues and vexatious or inappropriate litigation and laws dealing with vexatious criminal prosecutions.³³ It suggested this Committee might consider these issues as part of this Inquiry.

1.3 The scope of this Inquiry

As noted earlier, the terms of reference for this Inquiry require the Committee to inquire into, consider and report on the effect of vexatious litigants on the justice system and the individuals and agencies who are victims of vexatious litigants. They also require the Committee to look at the effectiveness of current legislative provisions in dealing with vexatious litigants, and to make recommendations which enable the courts to more efficiently and effectively perform their role while preserving the community's general right of access to the Victorian courts.

The terms of reference do not define 'vexatious litigant' or 'the justice system' and the Committee developed its own definitions for the purposes of its Inquiry.

1.3.1 What is a 'vexatious litigant'?

In strict legal terms, a vexatious litigant is a person who has been declared by the Supreme Court under section 21 because he or she has habitually, persistently and without any reasonable ground brought vexatious legal proceedings.

In the broader community, and sometimes the justice system itself, the term 'vexatious litigant' is not so clear-cut. Participants in this Inquiry expressed concern to the Committee that there was a tendency to apply the term to other categories of litigants including:

³² *Family Violence Protection Act 2008 (Vic)* Part 11.

³³ Victorian Law Reform Commission, above n 3, 600-603.

- litigants who appear to meet the description in section 21 but, for whatever reason, have not been declared by the Supreme Court
- litigants who bring vexatious legal proceedings once or rarely, but do not have a history of doing so repeatedly
- litigants with behaviours that are ‘challenging’ or ‘difficult’ for the justice system. This might range from overtly aggressive conduct to people who have trouble communicating in the manner expected by the justice system
- self-represented litigants (litigants not represented by a lawyer)
- litigants associated with ‘unpopular’ causes.³⁴

Some participants urged the Committee to use the term ‘vexatious litigant’ circumspectly and not confuse them with the types of litigants listed above.³⁵ One group of litigants which has reported particular problems are litigants with disabilities and mental illness. Reports suggest that they may repeatedly bring legal proceedings to deal with ongoing and systemic discrimination, but people in the justice system sometimes assume they are vexatious as a result and do not treat their claims as credible. Mr Martin Thomas from the Mental Health Legal Centre told the Committee ‘the threat of being labelled vexatious and the perception of being troublesome’ was a real concern for the Centre’s clients.³⁶ Other participants told the Committee that prisoners who bring legal proceedings are vulnerable to similar treatment.³⁷

Terminology is a difficult issue in this Inquiry. On the one hand, the Committee is keen to avoid language that unfairly labels genuine litigants as vexatious. On the other hand, there is a genuine policy debate about how ‘vexatious litigant’ should be defined in law and where the law should draw the line in terms of restraining access to the courts.

³⁴ See for example, Christine Atmore, Policy Officer, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 37, 40; Maartje Van-der-Vlies, *Submission no. 28*; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 24-25; Fitzroy Legal Service Incorporated, *Submission no. 43*; Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 3.

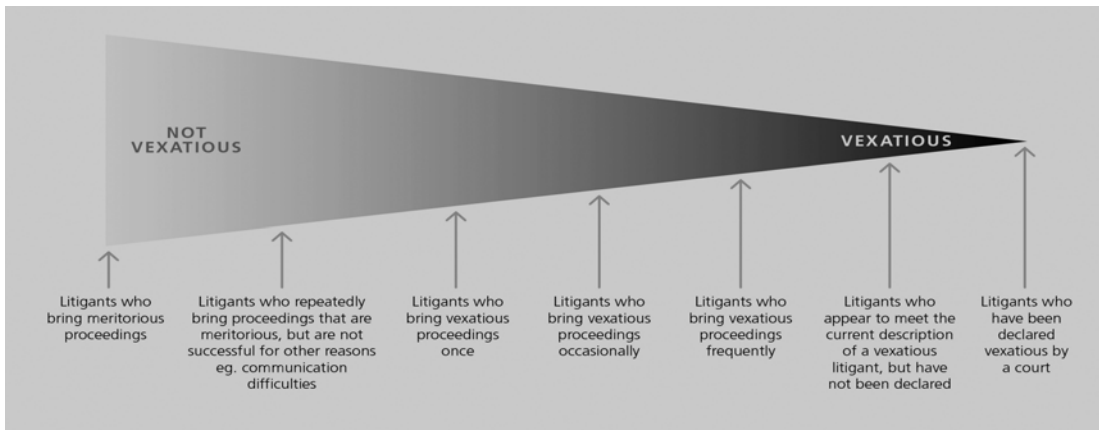
³⁵ See, for example, Simon Smith, *Submission no. 21*, 1; Christine Atmore, *Transcript of evidence*, above n 34, 37; Fitzroy Legal Service Incorporated, *Submission no. 43*; Justice Bell, *Transcript of evidence*, above n 34, 2. A number of judicial officers and tribunal members interviewed by Dr Freckelton for the Committee also expressed a need to distinguish between vexatious litigants and other litigants who were self-represented, experiencing mental illness or just distressed and angry: Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* (‘Judicial officers and VCAT members report’), Victorian Parliament Law Reform Committee, 2008, 5-6.

³⁶ Martin Thomas, Policy Officer, Mental Health Legal Centre, *Transcript of evidence*, Melbourne, 13 August 2008, 31. See also Mental Health Legal Centre Incorporated, *Submission no. 40*; Disability Council of New South Wales, *A question of justice: Access and participation for people with disabilities in contact with the justice system*, 2003, 63; Law and Justice Foundation of New South Wales, *On the edge of justice: The legal needs of people with a mental illness in NSW*, Maria Karras, Emily McCarron, Abigail Gray and Sam Ardasinski, 2006, 146-147; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 25; Christine Atmore, *Transcript of evidence*, above n 34, 40.

³⁷ Darebin Community Legal Centre Inc, *Submission no. 46*; Charandev Singh, Human Rights and Advocacy Worker, Brimbank Melton Community Legal Centre, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 39-40; Donna Williamson, Prison Outreach Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 55.

The Committee was assisted by suggestions that litigation or complaining behaviour should be seen in terms of a continuum or spectrum.³⁸ The Committee has attempted to illustrate this in Figure 1.

Figure 1 – Spectrum of litigation behaviour



The Inquiry is concerned with litigants who *repeatedly* bring proceedings that can be characterised as *vexatious*, that is people towards the far right-hand side of this spectrum. The Inquiry is not concerned with other litigants, such as litigants who are self-represented or who exhibit challenging behaviours, *unless* they behave in this way.

The evidence the Committee received during this Inquiry covered a range of litigants on this spectrum, from litigants who have been declared vexatious by the courts, to litigants who appear to meet the current description of a vexatious litigant but have not been declared, to litigants who bring one or more vexatious proceedings but would not meet the current legal description.

The Committee's recommendations in this report focus primarily on litigants who have an established pattern of bringing vexatious legal proceedings, that is, litigants towards the far right-hand side of this spectrum. These recommendations, and the Committee's recommendations about the type of terminology that should be used in future laws, are set out in chapter 10 of this report.

To avoid as much confusion about the term 'vexatious litigant' as possible, the Committee has adopted the following terminology in this report:

- 'declared vexatious litigant' – a person who has been declared by the Supreme Court under section 21, or by another Australian court under an equivalent Commonwealth, state or territory law

³⁸ Fitzroy Legal Service Incorporated, *Submission no. 43*; Grant Lester, 'The vexatious litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17, 17.

- ‘possible vexatious litigant’ – a person who appears to meet the existing description of a vexatious litigant but has not been declared
- litigants who bring vexatious proceedings – a person who brings one or more vexatious legal proceedings but does not meet the existing definition of a vexatious litigant.

1.3.2 What is the ‘justice system’?

The justice system potentially refers to a range of agencies involved in the administration of justice in Victoria and not just courts and tribunals.

Courts and tribunals are not the only organisations to report problems with people who repeatedly make vexatious claims.³⁹ Members of the community with a claim or grievance have a range of options available to them. They may seek help from local members of parliament. They may contact dedicated complaint-handling staff in government agencies and private institutions. They can complain to independent agencies such as public sector and industry ombudsmen. They may seek information from public sector agencies and local councils under freedom of information laws.

Some of these agencies have also been exploring ways to deal with ‘vexatious complainants’. Australia’s Commonwealth, state and territory parliamentary ombudsmen, for example, are currently conducting a joint national project to improve management of what they call ‘unreasonable complainant conduct’.⁴⁰

The Committee decided to confine this Inquiry to vexatious litigants in Victoria’s courts and tribunals, namely the Supreme Court, the County Court, the Magistrates’ Court and VCAT.

The Committee has taken the experience of other agencies with ‘vexatious complainants’ into account in two ways. Firstly, it is conscious that steps to restrict access to the courts and VCAT may just shift the problem to other agencies. Dr Matthew Groves from Monash University was one participant who argued a need to ‘ensure that [vexatious people] are not simply moved from one place to another but are instead “managed out of the system” so that they are no longer a problem’.⁴¹

³⁹ See, for example, Matthew Groves, *Submission no. 6*; Wellington Shire Council, *Submission no. 15*, 5; Victorian Privacy Commissioner, *Submission no. 11*; Health Services Commissioner, *Submission no. 41*; Ombudsman Victoria, *Submission no. 45*; Amanda Green, ‘Vexatious applications under FOI’ (2003) *AIAL Forum No.41*, 41; Chris Wheeler, ‘Dealing with repeat applications’ (2008) *AIAL Forum No.54* 64; John McMillan, ‘Persistent complainants to ombudsman offices’ (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006); Ian Freckelton, ‘Querulent paranoia and the vexatious complainant’ (1988) 11 *International Journal of Law and Psychiatry* 127; Chris Wheeler, ‘Dealing with unreasonable complainant conduct’ (Paper presented at the Society of Consumer Affairs Professionals Australia 2008 Symposium, Adelaide, 26-28 August 2008); Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen, ‘Unusually persistent complainants’ (2004) 184 *British Journal of Psychiatry* 352.

⁴⁰ See Ombudsman Victoria, *Submission no. 45*; Chris Wheeler, ‘Dealing with unreasonable complainant conduct’, above n 39; Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008. See also Freedom of Information Amendment Bill 2007 (Vic), an unsuccessful attempt to address ‘vexatious applicants’ under Victoria’s freedom of information laws.

⁴¹ Matthew Groves, *Submission no. 6*, 2.

Secondly, the Committee believes the experience of these agencies offers valuable lessons and strategies that could be adapted for the courts and VCAT. Chapter 7 of this report discusses some of these strategies.

1.3.3 Who are the 'victims' of vexatious litigants?

The Committee decided to interpret the word 'victims' in its terms of reference as a reference to the individuals or agencies against whom vexatious litigants have brought proceedings. The Committee uses the less emotive term 'other parties' to the legal proceedings in this report to describe these individuals and agencies.

1.4 The conduct of the Inquiry

1.4.1 Public consultation

The Committee began the consultation phase of the Inquiry in April 2008 by releasing an issues paper. The issues paper briefly described Victoria's vexatious litigant laws and the Inquiry's terms of reference. It set out questions designed to elicit information about the size and nature of the problem in Victoria, its effect on the justice system and other parties and the effectiveness of the current law. It also asked a series of questions based on reforms introduced in Australia and overseas to test community views about whether they should be introduced in Victoria.

The Committee sent copies of the issues paper to over 450 stakeholders including:

- all Victorian judges and magistrates
- the heads of the judiciary for the Commonwealth and other states and territories
- all Commonwealth, state and territory Attorneys-General
- peak bodies in the legal profession
- community legal organisations and human rights groups
- peak medical bodies and mental health advocacy groups (in light of literature suggesting a possible mental health link)
- organisations that, based on past experience, are liable to be sued by vexatious litigants. These included major banks, major Victorian Government departments and agencies and all local councils
- university law schools
- other complaint-handling agencies.

The Committee also advertised publicly for submissions in *The Age* and *The Herald Sun* on 28 April 2008. The Committee received 48 written submissions which are listed at Appendix A.

The Committee spoke to a cross-section of stakeholders in person at three public hearings on 6 August 2008, 13 August 2008 and 6 October 2008. A list of witnesses who appeared at those hearings is at Appendix B.

In addition, the Committee engaged barrister Dr Ian Freckelton SC to undertake a series of confidential interviews and focus groups with judicial officers, VCAT members and, following ethics approval from the Department of Justice, court and VCAT staff. The Committee was particularly interested in their views given they have the most contact with vexatious litigants. Dr Freckelton held discussions with 20 judicial officers and VCAT members and 18 court and VCAT staff between June and August 2008. In October 2008 he provided reports about these discussions to the Committee. Dr Freckelton notes that the comments in the reports reflect the views of individual participants and are not necessarily representative of all judicial officers, VCAT members and staff. However, they do provide valuable insight into the cross-section of views within the justice system itself.⁴²

1.4.2 Research and data collection

The Committee reviewed the legal and medical literature about vexatious litigants and examined laws and practices in other jurisdictions. The results of this research are set out in the bibliography to this report.

The Committee also undertook some of its own data collection and research. The Committee researched the cases of Victoria's declared vexatious litigants based on publicly available information in written court judgments, the Supreme Court's files, academic articles and the media. It sought statistical and other information from the Victorian Attorney-General about the operation of the existing vexatious litigant laws and related practices in the courts and VCAT. It sought information from other Australian jurisdictions about declared vexatious litigants in their courts. It wrote to Attorneys-General and law societies in some of the jurisdictions that have implemented recent reforms seeking information about their operation.

1.5 Outline of the report

This report is divided into four parts:

- Chapter 1 (this chapter) provides an overview of the Inquiry and vexatious litigant laws in Victoria
- Chapter 2 sets out some guiding principles for the Inquiry and future reform in this area
- Chapters 3 to 6 describe the evidence the Committee gathered during the Inquiry about the number and nature of vexatious litigants in Victoria, possible reasons why some people become vexatious litigants and their effect on the justice system and other parties
- Chapters 7 to 10 examine the effectiveness of current vexatious litigant laws in Victoria and set out the Committee's recommendations for reform.

⁴² See Ian Freckelton, Judicial Officers and VCAT members report, above n 35, 5; Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff*, Victorian Parliament Law Reform Committee, 2008, 4.

Chapter 2: Guiding principles

Vexatious litigants raise difficult and challenging issues. Their behaviour gives rise to a conflict between their rights of access to justice on the one hand, and the rights of other parties and the public interest in the justice system on the other. It raises issues of complex human behaviour in a justice system made up of formal legal rules and processes. This chapter sets out the key principles that have helped the Committee navigate these challenges during its Inquiry and when developing its recommendations for reform.

2.1 Striking a fair balance

The Committee believes the aim of vexatious litigant laws should be to strike a fair balance between the interests of possible vexatious litigants, the justice system and other parties to proceedings.

A number of participants in this Inquiry took this view. The Victorian Bar, for example, described the ‘key issue’ in the Inquiry in these terms:

to achieve an appropriate balance between the right of all persons in the community to have access to justice, and the needs to safeguard scarce judicial resources and protect the community from the inconvenience and very considerable expense of defending proceedings brought by persons without reasonable cause or merit.⁴³

The more difficult question is what that balance should be, and how it should be expressed in law, and chapters 7 to 10 address those issues. This section describes the different rights and interests at stake.

2.1.1 Access to justice

Although Australia does not have constitutional ‘open courts’ guarantees like those in some state constitutions in the United States⁴⁴, access to justice is an important value in Australia. In *Attorney-General (Cth); ex parte Skyring*, Justice Kirby of the High Court noted that ‘it is regarded as a serious thing in this country to keep a person out of the courts. The rule of law requires that, ordinarily, a person should have access to the courts in order to invoke their jurisdiction.’⁴⁵

Government and other attempts to articulate the values in our justice system invariably include access to justice as a key principle. The Victorian Government’s successive Justice Statements list accessibility and equality before the law as ‘core

⁴³ The Victorian Bar, *Submission no. 8*, 2. See also Australian Bankers’ Association, *Submission no. 20*; Commonwealth Bank of Australia, *Submission no. 18*, 2.

⁴⁴ See, for example, article 1, section 21 of the Florida Constitution which states that ‘[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.’ See also Deborah L Neveils, ‘Florida’s vexatious litigant law: An end to the *pro se* litigant’s courtroom capers?’ (2000) 25 *Nova Law Review* 343, 361-362.

⁴⁵ *Re Attorney-General (Cth); ex parte Skyring* [1996] HCA 4, 8.

values' of the justice system.⁴⁶ The Victorian Law Reform Commission's (VLRC's) recent report on Victoria's civil justice system also listed accessibility amongst the desirable goals of the civil justice system.⁴⁷

Access to justice is also recognised as a human right. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁴⁸

The United Nations Human Rights Committee has commented that Article 14 'encompasses the right of access to the courts ... Access to administration of justice must effectively be guaranteed in all such cases to ensure no individual is deprived, in procedural terms, of his/her right to claim justice.'⁴⁹

Vexatious litigant provisions, while not blocking access to courts completely, restrict access to courts by requiring declared vexatious litigants to obtain leave before continuing or bringing legal proceedings. The human rights implications of these provisions are particularly relevant in Victoria following the commencement of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). The legal implications of the Charter for vexatious litigant laws are discussed in more detail below.

2.1.2 Efficient and effective courts and tribunals

Public funding for courts and tribunals is not unlimited. Victoria's courts and tribunals are increasingly expected to ensure they use their available resources to administer justice as efficiently and effectively as possible.⁵⁰

These concepts are becoming part of the values of the justice system itself. The Government's Justice Statements list effectiveness as a 'core value' of the justice system along with equality before the law, fairness and accessibility.⁵¹ The VLRC listed proportionality – the idea that the costs incurred by the parties and by the

⁴⁶ Attorney-General, Victoria, *Attorney-General's Justice Statement: New directions for the Victorian justice system 2004-2014* ('Justice Statement'), 2004, 9; Attorney-General, Victoria, *Attorney-General's Justice Statement 2: The next chapter* ('Justice Statement 2'), 2008, 7.

⁴⁷ Victorian Law Reform Commission, *Civil justice review*, Report No. 14, 2008, 90.

⁴⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(1) (entered into force 23 March 1976).

⁴⁹ United Nations Human Rights Committee, *General comment no.32*, UN Doc CCPR/C/GC/32, 2007, 2. See also *Oló Bahamonde v Equatorial Guinea*, UNHRC, UN Doc CCPR/C/49/D/468/1991, 1993.

⁵⁰ See, for example, Chief Justice Marilyn Warren, 'State of the Victorian judiciary' (Speech delivered at the Banco Court, Supreme Court of Victoria, 22 May 2007); Supreme Court of Victoria, *Annual Report 2006-07*, 2008.

⁵¹ Attorney-General, Victoria, Justice Statement, above n 46, 9; Attorney-General, Victoria, Justice Statement 2, above n 46, 7.

public in the provision of court resources should be proportionate to the matter in dispute – as another desirable goal of the civil justice system.⁵²

Vexatious litigants challenge these values because they consume court and tribunal resources for proceedings that may be unmeritorious and, in doing so, reduce the resources available for other litigants. In a 2006 speech, the Master of the Rolls in the United Kingdom (UK) argued that:

If courts are required to utilise their scarce financial and temporal resources on vexatious claims and applications their ability to properly deal with claims and applications that have genuine merit will be diminished. Such claims may not be heard due to lack of time or resources. If heard, the hearing may be delayed for a lengthy period of time. Equally, if heard, a judgment may then be delayed because the judge has to spend precious time dealing with a vexatious litigant, or with matters that have been referred to him to hear as a consequence of vexatious litigation generally.⁵³

This analysis suggests that, by reducing the efficiency of the courts, vexatious litigants affect access to justice for the community as a whole. Chapter 5 sets out the evidence the Committee heard about the effect of vexatious litigants on the justice system in Victoria.

2.1.3 Fairness to other parties

Although discussions about rights in this context tend to focus on vexatious litigants, other members of the community also have interests that deserve consideration. The Committee heard that the vexatious litigants have a significant impact on other parties to their litigation in financial and sometimes emotional terms. This evidence is set out in chapter 6 of this report.

Mr Matthew Carroll from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) told the Committee:

In terms of identifying the human rights that are engaged, it is important to recognise that there is a dual engagement. It is consideration not simply of the right of a person who may or may not be vexatious; but the response to that scenario is also about protecting the rights of people who may be the subject of that litigation themselves.

... there can be issues arising in terms of the rights of individuals who are the subject of that litigation not to have their privacy and in particular their reputation unlawfully or inappropriately interfered with.⁵⁴

⁵² Victorian Law Reform Commission, above n 47, 91.

⁵³ Sir Anthony Clarke, 'Vexatious litigants and access to justice: past, present and future' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006).

⁵⁴ Matthew Carroll, Acting Chief Executive Officer, Victorian Equal Opportunity and Human Rights Commission, *Transcript of evidence*, Melbourne, 6 August 2008, 42. See also Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* ('Judicial officers and VCAT members report'), Victorian Parliament Law Reform Committee, 2008, 38.

Australian law rarely protects members of the community from being sued or prosecuted, but there are a range of laws that recognise the need to protect members of the community against frivolous and vexatious litigation and that, once a matter has been determined, there should be some finality for the parties.⁵⁵

Vexatious litigants challenge these principles by bringing unmeritorious legal proceedings and, in some cases, by repeatedly relitigating the same issues.

The Master of the Rolls in the United Kingdom pointed out in his 2006 speech that ‘if [the courts] were to permit such litigation to continue, which in very many cases is litigation which seeks to reopen or simply relitigate the same dispute time and time again, the courts would be denying to defendants in those proceedings their right to finality in litigation.’⁵⁶

2.2 Compatibility with the Charter of Human Rights and Responsibilities

Victoria’s new Charter has thrown the need to balance these rights and interests into even sharper relief.

A number of participants in the Inquiry drew the Committee’s attention to the Charter’s implications for reform of vexatious litigant laws.⁵⁷ The Charter sets out a number of human rights based largely on the ICCPR. Amongst other things, it:

- requires legislation introduced into the Parliament of Victoria to be accompanied by a statement about whether and how the legislation is consistent with human rights
- requires courts and tribunals to interpret legislation in a way that is compatible with human rights
- allows the Supreme Court of Victoria to make a declaration if it considers legislation cannot be interpreted in a way that is consistent with human rights
- requires public authorities to act compatibly with human rights and to give human rights proper consideration when making decisions.

This section looks at the Charter’s impact on vexatious litigant provisions and how the Committee has recognised and promoted a human rights approach in this Inquiry.

2.2.1 The impact of the Charter on vexatious litigant laws

Participants told the Committee that vexatious litigant laws affect two of the human rights in the Charter, namely the right to recognition and equality before the law in

⁵⁵ See, for example, the description of laws dealing with individual vexatious legal proceedings in chapter eight; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 609.

⁵⁶ Clarke, above n 53, para 33.

⁵⁷ The Victorian Bar, *Submission no. 8*, 5; Law Institute of Victoria, *Submission no. 1B*; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*; Matthew Groves, *Submission no. 6*; Victorian Director of Public Prosecutions, *Submission no. 22*, 4; City of Melbourne, *Submission no. 9*.

section 8 and the right to a fair hearing in section 24. Section 8(3) provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination. Section 24, which is modelled on article 14(1) of the ICCPR, provides that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.⁵⁸

These sections do not contain an express right of access to courts and tribunals. However, the United Nations Human Rights Committee, the European Commission of Human Rights and the European Court of Human Rights have interpreted similar provisions in other human rights instruments as encompassing a right of access to the courts.⁵⁹

This does not mean that other interests such as the public interest in efficient and effective courts and the need to protect other parties are irrelevant. Section 7 of the Charter contains a mechanism for balancing human rights against other interests in a free and democratic society. Section 7(2) provides that a human right may be subject under law to:

such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Vexatious litigant provisions can restrict vexatious litigants' access to the courts as long as they meet this test.

At the time this report was written the Supreme Court had not heard any cases about the compatibility of the current vexatious litigant provision in section 21 of the *Supreme Court Act 1986* (Vic) with the Charter. Most participants in the Inquiry who addressed the issue thought the current provision was compatible with the Charter. Mr Matthew Carroll from the VEOHRC, for example, told the Committee there was

⁵⁸ The Victorian Bar, *Submission no. 8*, 5; Law Institute of Victoria, *Submission no. 1B*; Law Institute of Victoria, *Submission no. 1C*; Mimi Marcus, Associate, Maddocks, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 16; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 13-19; Matthew Carroll, *Transcript of evidence*, above n 54, 42.

⁵⁹ United Nations Human Rights Committee, above n 49, 2; *Oló Bahamonde v Equatorial Guinea*, UNHRC, UN Doc CCPR/C/49/D/468/1991, 1993; *Golder v United Kingdom* (1973) Eur Comm HR Application No.4451/70; *Ashingdane v United Kingdom* (1985) 93 Eur Court HR (ser A); *Case of Golder v The United Kingdom* (1975) 18 Eur Court HR (ser A).

‘a high level of comfort’ with the existing framework although consideration might be given to additional features.⁶⁰

This is supported by human rights decisions from other jurisdictions, which have upheld similar vexatious litigant provisions under other human rights instruments. In *H v United Kingdom*, for example, the European Commission of Human Rights dismissed an application by a vexatious litigant who had been denied leave to bring civil proceedings against a police officer. The Commission said that the vexatious litigant order:

did not limit the applicant’s access to court completely, but provided for a review by a senior judge ... of any case the applicant wished to bring. The Commission considers that such a review is not such as to deny the essence of the right of access to court; indeed some form of regulation of access to court is necessary in the interests of the proper administration of justice and must therefore be regarded as a legitimate aim.

... Further, the Commission finds that in the present case the means employed in regulating access to the court by the applicant were not disproportionate to the aim of ensuring the proper administration of justice.⁶¹

Similarly, in *Golder v United Kingdom* the Commission observed that:

having been declared a vexatious litigant, it is open to a person to prove to the court that he has a sustainable cause of action and he will then be allowed to proceed. The control of vexatious litigants is entirely in the hands of the courts and contains no element of executive discretion. Such control must be considered as an acceptable form of judicial proceedings.⁶²

The Charter, and the limitation provision in section 7 in particular, does need to be considered when recommending or making any changes to vexatious litigant laws or practices in Victoria.⁶³ Participants in this Inquiry stressed that any new laws should be proportionate to their aims and not so extreme that they totally extinguish rights. They also encouraged the Committee to consider less restrictive means of balancing

⁶⁰ Matthew Carroll, *Transcript of evidence*, above n 54, 43. See also The Victorian Bar, *Submission no. 8*, 5-6; Kristen Hilton, Executive Director, Public Interest Law Clearing House, *Transcript of evidence*, Melbourne, 13 August 2008, 24; Fitzroy Legal Service Incorporated, *Submission no. 43*; Darebin Community Legal Centre Inc, *Submission no. 46*.

⁶¹ *Application No. 11559/85, H v the United Kingdom* (1985) 45 D&R 281, 285.

⁶² *Golder v United Kingdom* (1973) Eur Comm HR Application No.4451/70. See also *M v the United Kingdom* (1987) 52 D&R 269; *Ebert v Official Receiver* [2001] EWCA Civ 340, 9-11; *Her Majesty's Attorney-General v Covey and Matthews* [2001] EWCA Civ 254, 59-61; John Sorabji, 'Protection from litigants who abuse court process' (2005) 24 *Civil Justice Quarterly* 31, 32-33; Scott Trueman, 'Vexatious litigants' (2000) 144(28) *Solicitors Journal* 676, 677; *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, 16-19. Challenges based on constitutional and human rights have also been unsuccessful in other jurisdictions: see, for example, *Mishra v Canada (Attorney-General)* 2000 CanLII 16361 (FCA); Law Reform Commission of Nova Scotia, *Vexatious litigants: Final report*, 2006, 16; Deborah L Neveils, above n 44, 361-364; Lee W Rawles, 'The California vexatious litigant statute: A viable judicial tool to deny the clever obstructionists access?' (1998) 72 *Southern California Law Review* 275, 294-298; *Brogden v Attorney-General* [2001] NZAR 809, 815; Michael Taggart and Jenny Klosser, 'Controlling persistently vexatious litigants', in Matthew Groves (ed), *Law and Government in Australia*, 2005, 272, 297-298.

⁶³ For a discussion about the extent to which the Charter applies to courts and tribunals, see Carolyn Evans and Simon Evans, *Australian bills of rights: The law of the Victorian Charter and ACT Human Rights Act* (2008) 12-14, 20-21.

the various rights and interests, and the need for laws and practices to be flexible enough to take into account the circumstances of individual cases.⁶⁴

2.2.2 The Committee's approach

In light of the evidence it received about the Charter, the Committee's approach in this Inquiry was to examine alternative measures to deal with vexatious litigants, without restricting their access to the courts, wherever possible. This approach is also consistent with the Committee's terms of reference, which require it to make recommendations that enable the courts to perform their role more efficiently and effectively while preserving general rights of access to justice.

Some participants urged the Committee to address systemic problems in the justice system that can contribute to vexatious behaviour. The Disability Discrimination Legal Service, for example, stressed the need to 'focus on root causes of the problem rather than just its symptoms'.⁶⁵ Mr Charandev Singh from the Brimbank Melton Community Legal Centre told the Committee 'much earlier support and intervention ... is a much more practical, workable and human solution than strong legal responses at the highest level'.⁶⁶

Some participants also encouraged the Committee to examine other measures and powers to deal with vexatious legal proceedings. The Federation of Community Legal Centres suggested the Committee should explore remedies like summary dismissal.⁶⁷ Mr Greg Garde QC from the Victorian Bar argued that 'courts need an array of remedies to tackle the problem. No one remedy in its own right is going to be sufficient'.⁶⁸

Consistent with these views, the Committee's preferred approach to dealing with vexatious litigants is as follows:

- efforts should be made to *prevent* vexatious litigants where possible by addressing factors that cause or contribute to the behaviour
- efforts should be made to *manage* one-off or infrequent vexatious proceedings using existing powers
- the law should only *restrict* access to courts and tribunals where there is sufficient evidence of a repeated pattern of vexatious litigation.

⁶⁴ Matthew Carroll, *Transcript of evidence*, above n 54, 42; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 2; Kristen Hilton, *Transcript of evidence*, above n 60, 22; Mimi Marcus, *Transcript of evidence*, above n 58, 16; Law Institute of Victoria, *Submission no. 1C*; Ben Schokman, Human Rights Lawyer, Human Rights Law Resource Centre, *Transcript of evidence*, Melbourne, 13 August 2008, 24-25.

⁶⁵ Disability Discrimination Legal Service Incorporated, *Submission no. 24*, 4. See also Christine Atmore, Policy Officer, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 38.

⁶⁶ Charandev Singh, Human Rights and Advocacy Worker, Brimbank Melton Community Legal Centre, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 43.

⁶⁷ Christine Atmore, *Transcript of evidence*, above n 65, 38.

⁶⁸ Greg Garde, Chair, Victorian Bar Law Reform Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 6 August 2008, 25.

The Committee's recommendations for reform under this approach are set out in chapters 7, 8 and 10 of this report. Where those reforms raise particular issues under the Charter, they are addressed in those chapters.

2.3 A multidisciplinary approach

One of the other threshold issues facing the Committee in this Inquiry was the extent to which it should consider behavioural as well as legal aspects of vexatious litigants.

The legal profession is not alone in its interest in vexatious litigants. In the 19th century psychiatrists, particularly in continental Europe, began to discuss what has variously been described as 'querulous paranoia', 'querulent paranoia', 'litigious paranoia' or 'de Clèrambault syndrome' in patients who seemed to almost obsessively make complaints or bring legal proceedings in the courts. After a period of disfavour, there has been a revival of interest in the topic in recent decades.⁶⁹

Some commentators and participants in this Inquiry suggested that it may be time for the law to recognise psychiatry's potential to contribute to the response to vexatious litigants. The VLRC, for example, listed mental health as one of the issues requiring further consideration in its recent report on the civil justice system.⁷⁰

This proved one of the most contentious issues in the Inquiry. This section describes the different views before setting out the Committee's proposed approach.

2.3.1 Is a multidisciplinary approach appropriate?

The 'no' case

Some participants in the Inquiry warned the Committee there were risks involved in approaches that 'medicalise' or 'pathologise' legal processes.

A major concern for these participants is the risk that applying medical explanations to litigation behaviour could lead to suppression or neglect of legitimate legal claims. Mr Martin Thomas from the Mental Health Legal Centre told the Committee:

In terms of diagnosis, I think [querulous paranoia] is quite a dangerous one. It takes what is a legal issue and it applies a medical model to it. I think it is highly

⁶⁹ M W D Rowlands, 'Psychiatric and legal aspects of persistent litigation' (1988) 153 *British Journal of Psychiatry* 317; G S Ungvari, A H T Pang and Helen F K Chiu, 'Querulous behaviour' (1997) 37(3) *Medicine Science and the Law* 265; Ian Freckelton, 'Querulent paranoia and the vexatious complainant' (1988) 11 *International Journal of Law and Psychiatry* 127; Paul E Mullen and Grant Lester, 'Vexatious litigants and unusually persistent complainants and petitioners: From querulous paranoia to querulous behaviour' (2006) 24 *Behavioural Sciences and the Law* 333; P J McKenna, 'Disorders with overvalued ideas' (1984) 145 *British Journal of Psychiatry* 579; Paul E Mullen, 'Disorders of passion', in Alistair Munro and Dinesh Bhugra (eds), *Troublesome disguises: Underdiagnosed psychiatric syndromes*, 1997, 127; Robert L Goldstein, 'Litigious paranoids and the legal system: The role of the forensic psychiatrist' (1987) 32(4) *Journal of Forensic Sciences* 1009; Alan Murdie, 'Vexatious litigants and de Clerambault syndrome' (2002) 152 *New Law Journal* 61. A broader list of publications is set out in the bibliography to this report.

⁷⁰ Victorian Law Reform Commission, above n 47, 601-602. See also Simon Smith, *Submission no. 21*, 5; Taggart and Klosser, above n 62, 300; Murdie, above n 69, 62.

inappropriate to say that this person no longer has a legal matter; they have a medical matter. This is an incredibly dismissive approach to the legal system and to a person's legal concerns.⁷¹

Commentators have raised similar concerns in the past. A correspondent to the *British Journal of Psychiatry* suggested '[q]uerulous paranoia is a diagnosis best left within the darkened past of psychiatry – perhaps pre-war Russia where Stalin often used “madness” to silence his critics’.⁷²

Participants were particularly concerned about whether the justice system is equipped to use multidisciplinary approaches appropriately. As noted in chapter 1, some participants complained that the justice system is already too ready to assume litigants with mental illness are vexatious. The Mental Health Legal Centre told the Committee:

People with mental health issues experience discrimination everyday in all areas of life, they are vulnerable to abuse and neglect. Too often their experiences and complaints are dismissed or pathologised on the basis that they have a mental illness.⁷³

The Centre also expressed doubt about whether the justice system was capable of making mental health assessments. It told the Committee that courts had referred people with difficult behaviours to the Centre in the past even where there was no diagnosis or previous contact with mental health services.⁷⁴

Others did not see this as the proper role of the justice system. Dr Christine Atmore from the Federation of Community Legal Centres told the Committee, 'it is not for the legal system to decide who might be mentally ill, in the same way as we would not expect psychologists to be able to assess whether a case has legal merit.'⁷⁵

Some psychiatrists acknowledge these risks themselves. Dr Robert L Goldstein from Columbia University, for example, has written that:

while psychiatrists can identify and diagnose paranoid illness and attempt to clarify the impact of an individual's psychopathology on his use of the legal system, it is not so clear that they can reliably determine (except perhaps in the most extreme cases) if his grievances are imaginary or actual or if his accusations are grounded in fact or delusional ideation. The dividing line between paranoid ideation (and its role

⁷¹ Martin Thomas, Policy Officer, Mental Health Legal Centre, *Transcript of evidence*, Melbourne, 13 August 2008, 33. See also Darebin Community Legal Centre Inc, *Submission no. 46*; Christine Atmore, *Transcript of evidence*, above n 65, 40; Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁷² R Pal, 'In defence of complainants' (2005) 185 *The British Journal of Psychiatry* 175, 176. See also Olli W Stålsröm, 'Querulous paranoia: Diagnosis and dissent' (1980) 14 *Australian and New Zealand Journal of Psychiatry* 145.

⁷³ Mental Health Legal Centre Incorporated, *Submission no. 40*. See also Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 25. One study in the United Kingdom for example noted a tendency amongst judges and court staff to ascribe mental illness to 'difficult' litigants: see Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings*, Department of Constitutional Affairs Research Series 2/05, 2005, 79, 89.

⁷⁴ Mental Health Legal Centre Incorporated, *Submission no. 40*.

⁷⁵ Christine Atmore, *Transcript of evidence*, above n 65, 45. See also Victorian Director of Public Prosecutions, *Submission no. 22*, 4.

in the legal process) and so-called “normal” thinking (and its objective to use the legal process to obtain certain ends) is not always a bright line. The danger exists that use of a psychiatric label (such as “paranoid”) might deprive an individual of legitimate rights and prerogatives.⁷⁶

The ‘yes’ case

The converse view presented to the Committee was that, unless the law takes account of the behavioural aspects of this problem, its effectiveness will be limited and it risks making the problem even worse.

Former solicitor and Monash University PhD candidate Mr Simon Smith described recent vexatious litigant reforms as ‘lawyers’ solutions to a more complicated problem’.⁷⁷ In his submission he wrote that in the cases he had studied, earlier recognition of possible conditions ‘may have enabled earlier resolution/diversion’.⁷⁸ American lawyer, therapist and mediator Bill Eddy argues that lawyers, judges and others can in fact ‘enable’ inappropriate behaviour and make it worse if they fail to deal with ‘high conflict people’ appropriately.⁷⁹

Other commentators have suggested that a multidisciplinary approach may be able to provide a more humane response to the problem than a strictly legal one. In a 2004 paper on ‘unusually persistent complainants’ in ombudsmen’s offices, Dr Grant Lester, Ms Beth Wilson, Ms Lynn Griffin and Professor Paul Mullen noted that:

There are good reasons for caution in introducing concepts of personal pathology into social processes such as complaining, but equally it is cavalier to ignore the possibility that knowledge and approaches developed in the mental health field might offer help to organisations and individuals in avoiding the damaging and distressing effects of unusually persistent complaining.⁸⁰

These types of arguments are not unprecedented. The concept of ‘therapeutic jurisprudence’, originally developed in the United States, promotes a more integrated approach between the law and behavioural and social issues and has attracted growing interest in Australia. Professors Bruce Winick and David Wexler describe therapeutic jurisprudence in these terms:

Therapeutic jurisprudence focuses our attention on the traditionally under-appreciated area of the law’s considerable impact on emotional life and psychological well-being. Its essential premise is a simple one: that the law is a social force that can produce therapeutic or antitherapeutic consequences. The law consists of legal rules, legal procedures, and the roles and behaviors of legal actors,

⁷⁶ Goldstein, above n 69, 1014. See also Rowlands, above n 69, 322; Ungvari, Pang and Chiu, above n 69, 266, 268; Mullen and Lester, above n 69; Freckelton, ‘Querulent paranoia and the vexatious complainant’, above n 69, 129.

⁷⁷ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 4.

⁷⁸ Simon Smith, *Submission no. 21*, 5.

⁷⁹ Bill Eddy, *High conflict people in legal disputes* (2006) 157-175.

⁸⁰ Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen, ‘Unusually persistent complainants’ (2004) 184 *British Journal of Psychiatry* 352, 356. See also Murdie, above n 69, 62; Taggart and Klosser, above n 62, 300.

like lawyers and judges. Therapeutic jurisprudence proposes that we use the tools of behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law.⁸¹

In Australia therapeutic jurisprudence is most closely associated with ‘problem solving courts’ such as drug courts and family violence courts, but it does have a potentially far wider application to the way courts and tribunals operate generally.⁸²

2.3.2 The Committee’s approach

The Committee is mindful of the dangers of ‘pathologising’ legal processes and the need to take a cautious approach to the role of psychiatry and other professions in this area.

The psychiatric literature on vexatious litigants does, however, highlight the human element of this phenomenon. It is a reminder that vexatious litigants raise issues that are much broader than legal problems and that the law needs to acknowledge these, not only to succeed in its own aims, but to avoid doing further damage.

It is also a reminder that the justice system itself is made up of individuals who react to pressures in human ways. The Committee heard evidence that judicial officers and court staff find the behaviour of some vexatious litigants challenging and stressful, an issue which is discussed in chapter 5 of this report. Supreme Court judge and President of VCAT, Justice Kevin Bell, told the Committee:

I am sure if I went to speak to any member of the tribunal or any staff member of the tribunal and asked them, ‘Have you had a bad day today with somebody who has been abusive, swearing at you, not cooperating or whatever?’ probably five times out of 10 I would get the answer ‘yes’ and be given the details.

... This is the kind of reaction to pressure which is very human, which can be alleviated if you have systems in place that acknowledge the pressure as a genuine human response to a pressurised situation, and which tries to enhance the capacity of that person to deal with it in that environment.⁸³

Measures to deal with vexatious litigants are unlikely to be effective unless people in the justice system are given proper support and resources to protect themselves and do their jobs properly.

⁸¹ Bruce J Winick and David B Wexler, ‘Introduction’, in Bruce J Winick and David Wexler (eds), *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*, 2003, 3, 7.

⁸² See, for example, Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, ‘The “helping court” comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia’ (2007) 11 *Journal of Judicial Administration* 93; Jelena Popovic, ‘Contemplating conventional law and changing the culture of the judiciary’ (2002) 20(2) *Law in Context* 121; Marilyn McMahon and David Wexler, ‘Therapeutic jurisprudence: Developments and applications in Australia and New Zealand’ (2002) 20(2) *Law in Context* 1; Warren Brookbanks, ‘Therapeutic jurisprudence: Implications for judging’ (2003) *New Zealand Law Journal* 463-467; Arie Freiberg, ‘Therapeutic jurisprudence in Australia: Paradigm shift or pragmatic incrementalism’ (2002) 20(2) *Law in Context* 6.

⁸³ Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 5.

The Committee was impressed by the Australian parliamentary ombudsmen's approach in their project on unreasonable complainant conduct. The NSW Deputy Ombudsmen, Mr Chris Wheeler, told the Committee that the project does not attempt to apply medical solutions to unreasonable complainant conduct:

from our perspective we are complaints handling bodies ... We are not psychiatrists; we are not social workers. Even if we were psychiatrists, we do not have enough face-to-face contact and enough knowledge of the background to be able to psychoanalyse a complainant.⁸⁴

Forensic psychiatrist Dr Grant Lester was a consultant to the project, however, and the interim manual developed to assist complaint-handling staff recognises the human dimensions of the problem. It notes that many complainants are justifiably upset and angry and have come to the end of their tether, while others are difficult for reasons that go beyond the circumstances of their case. It recognises the challenges facing complaint-handling staff, noting that '[m]ost people would prefer not to deal with difficult people. In fact, most people will actively try to avoid or minimise the circumstances where they have to deal with such people. This reflects normal human nature.'⁸⁵ The manual provides strategies to deal with these behavioural issues, including remaining calm, setting limits and making a plan to manage the complainant.

The Committee believes that a similar approach should be possible in courts and tribunals without undermining legal rights and values, and has therefore considered multidisciplinary research where relevant in this report. The Committee's views about whether vexatious litigants suffer from querulous paranoia or some other type of disorder is discussed in chapter 4 of this report. The Committee's views about particular policy responses discussed by participants in the Inquiry – training and guidance, appointment of litigant guardians and referrals to mental health services – are set out in chapters 7 and 8.

2.4 Evidence-based law reform

The impact of vexatious litigant laws on human rights and access to justice suggests that clear evidence should be required to justify the restrictions they impose.

However, despite the increased interest in the issues in recent years, the Committee found a paucity of evidence about vexatious litigants. There is little publicly available and reliable data about the size, nature or effect of the problem either in Victoria or overseas.⁸⁶ Some recent reforms appear to have involved limited

⁸⁴ Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008, 49.

⁸⁵ *Unreasonable complainant conduct: Interim practice manual: A joint project of the Australian Parliamentary Ombudsman*, 2007.

⁸⁶ Simon Smith, *Submission no. 21*, 3; Matthew Groves, *Submission no. 6*; Rawles, above n 62, 278; Clare Thompson, 'Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)' (2004) 14 *Journal of Judicial Administration* 64, 65 fn 62; Victorian Law Reform Commission, above n 47, 591; Simon Smith, 'Goldsmith Collins: Footballer, fencer, maverick litigator' (2008) 34(1) *Monash University Law Review* 190, 191.

community consultation. Commentators have noted that it is an area of law where law reform has been driven very much by anecdotal evidence, perception and attempts to deal with individual vexatious litigants.⁸⁷

This creates challenges for an evidence-based approach to law reform. The VLRC recommended empirical research into the ambit of the problem in its report on the civil justice system, as well as research into the impact on the courts and the effectiveness of orders.⁸⁸ Some of the judicial officers and tribunal members who talked to Dr Ian Freckelton SC during the Inquiry noted that so little was known about the phenomenon and what leads to this type of conduct that it is hard to develop responsive strategies.⁸⁹ Some participants suggested the Committee should be cautious about recommending any reforms in the absence of empirical research and data.⁹⁰

As chapter 1 noted, the Committee consulted widely in this Inquiry and conducted some of its own research and data collection. This has addressed some of the gaps in evidence about vexatious litigants. In some cases, the evidence supported further reform and in some cases it did not. The Committee has based its recommendations in this report on this information.

The Committee is mindful that there are still gaps in evidence about vexatious litigants. It has identified these gaps where relevant throughout this report. It also became evident during the Inquiry that there are a number of barriers to empirical research in this area. Apart from the time and cost involved in accessing court files, some files could not be located or were missing relevant documents. The Committee was told the justice system does not routinely collect data about some issues relevant to this Inquiry.⁹¹ The Committee has made some recommendations about the need for proper evaluation of any changes to the law to promote a more evidence-based approach to reform in the future.

⁸⁷ Grant Lester and Simon Smith, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 8-9; Simon Smith, 'Vexatious litigants and their judicial control – The Victorian experience' (1989) 15(1) *Monash University Law Review* 48, 54-55; Michael Taggart, 'Alexander Chaffers and the genesis of the Vexatious Actions Act 1896' (2004) 63(3) *Cambridge Law Journal* 656.

⁸⁸ Victorian Law Reform Commission, above n 47, 599.

⁸⁹ Freckelton, Judicial officers and VCAT members report, above n 54, 40.

⁹⁰ Federation of Community Legal Centres (Victoria), *Submission no. 39*, 3. See also Christine Atmore, *Transcript of evidence*, above n 65, 41; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 2.

⁹¹ Letter from The Hon Rob Hulls MP, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 22 August 2008, Att A.

Chapter 3: Vexatious litigants in Victoria

One of the significant gaps in evidence about vexatious litigants in Victoria is the extent and nature of the problem. A number of ‘myths’ or assumptions about vexatious litigants appear to have developed in the absence of such information. This chapter examines the available evidence about the number of vexatious litigants in Victoria, who they are and how they behave in courts and tribunals.

3.1 How many vexatious litigants are there in Victoria?

The Committee was not able to quantify the number of vexatious litigants in Victoria’s courts and tribunals, but it does appear to be relatively small.

At the time this report was written, the Supreme Court of Victoria had only declared 15 people to be vexatious litigants even though vexatious litigant laws have existed in Victoria for almost 80 years.⁹²

The number of actual declarations is unlikely to be a true indication of the extent of the problem. The Committee received evidence that there are possible vexatious litigants in Victoria’s courts and tribunals who appear to meet the criteria in section 21 of the *Supreme Court Act 1986* (Vic), but have never been declared.

Some of this evidence was given by organisations who reported dealing with possible vexatious litigants. The Victorian WorkCover Authority, for example, told the Committee about one claimant who was the subject of 40 published decisions over the last four years.⁹³ The Commonwealth Bank of Australia advised the Committee that ‘[a]t any one time the Bank’s legal department in Victoria, or its external lawyers, would be dealing with, on average between four and seven such litigants’.⁹⁴ Other individuals, corporations, government agencies and, in one case, a community legal centre reported similar experiences.⁹⁵

The existence of possible vexatious litigants was confirmed by judicial officers, tribunal members and court and tribunal staff during their discussions with Dr Ian Freckelton SC.⁹⁶

⁹² Letter from The Hon Rob Hulls MP, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 22 August 2008, Att A 2-3.

⁹³ Victorian WorkCover Authority, *Submission no. 48*, 1.

⁹⁴ Commonwealth Bank of Australia, *Submission no. 18*, 2.

⁹⁵ John Arnott, *Submission no. 3*, 2; State Revenue Office, *Submission no. 16*, 1; Foster’s Group Limited, *Submission no. 23*, 1; Telstra Corporation Limited, *Submission no. 29*, 3; Victoria Police, *Submission no. 47*, 1; Sarah Vessali, former Principal Lawyer, Women’s Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 10; Wellington Shire Council, *Submission no. 15*, 4. The Victorian Law Reform Commission noted similar evidence in its report on Victoria’s civil justice system: Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 591.

⁹⁶ Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* (‘Judicial officers and VCAT members report’), Victorian Parliament Law Reform Committee, 2008, 11-12; Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* (‘Court and VCAT staff report’), Victorian Parliament Law Reform Committee, 2008, 8-9. See also Judge Misso, *Submission*

The Committee is not able to quantify the number of possible vexatious litigants in Victoria's courts and tribunals. There does not appear to be any definitive research into their incidence either in Victoria or elsewhere.⁹⁷ There was not sufficient detail in the evidence provided by participants in this Inquiry to judge whether any or all of the litigants named would conceivably meet the criteria in Victoria's current vexatious litigant provision.

Most participants in the Inquiry did suggest that the number of possible vexatious litigants is small compared with the thousands of people who bring legal proceedings in Victoria's courts and tribunals every year.

This was the view of most organisations who reported dealing with possible vexatious litigants. Wellington Shire Council told the Committee that it dealt with around 50 000 phone calls a year and it was talking about 'less than a handful of people a year'.⁹⁸ Other councils reported that vexatious litigants were not a substantial problem at all.⁹⁹ The State Revenue Office's submission stated that it had dealt with four people who could fall into the category in the past 10 years.¹⁰⁰ The Victorian WorkCover Authority's submission noted that it managed 'many thousands of litigated workers compensation matters every year, less than 1% of whom could be considered vexatious'.¹⁰¹

It was also the view of participants from within the justice system. Supreme Court judge and President of the Victorian Civil and Administrative Tribunal (VCAT), Justice Kevin Bell, told the Committee '[i]t is a low order problem and a low number of people ... There would not be 10 or 20 people, in my experience, in this state.'¹⁰² The judicial officers and court staff who spoke to Dr Freckelton agreed.¹⁰³ Supreme Court staff estimated that there were currently about two dozen possible vexatious litigants and 'a handful' in the Court of Appeal. VCAT staff reported two to three over the last six years, noting that this was not many when they deal with 90 000

no. 10, 4-5, although he notes that the litigants he refers to in his submission might attract the description 'vexatious litigant' but may be better described as 'querulous litigants'.

⁹⁷ Other researchers have also noted the lack of data: Law Reform Commission of Nova Scotia, *Vexatious litigants: Final report*, 2006, 4; Clare Thompson, 'Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)' (2004) 14 *Journal of Judicial Administration* 64, fn 2; Lee W Rawles, 'The California vexatious litigant statute: A viable judicial tool to deny the clever obstructionists access?' (1998) 72 *Southern California Law Review* 275, 278.

⁹⁸ Jim Wilson, Director, Corporate Services, Wellington Shire Council, *Transcript of evidence*, Melbourne, 13 August 2008, 5. See also City of Melbourne, *Submission no. 9* and correspondence from Letter from Chief Executive Officer, Cardinia Shire Council, to Chair, Victorian Parliament Law Reform Committee, 1 May 2008; Letter from Chief Executive, Manningham City Council, to Executive Officer, Victorian Parliament Law Reform Committee, 16 May 2008; Letter from Chief Executive Officer, Moreland City Council, to Executive Officer, Victorian Parliament Law Reform Committee, 28 May 2008, who reported that they dealt with such people not often, if at all.

⁹⁹ City of Melbourne, *Submission no. 9*, 1.

¹⁰⁰ State Revenue Office, *Submission no. 16*, 1.

¹⁰¹ Victorian WorkCover Authority, *Submission no. 48*, 1. See also Corrections Victoria, *Submission no. 32*, 1; Matthew Groves, *Submission no. 6*, 1. cf The Institute of Legal Executives (Victoria), *Submission no. 42*, 1 whose submission stated that vexatious litigants appear to be 'reasonably common'.

¹⁰² Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 7.

¹⁰³ Freckelton, Judicial officers and VCAT members report, above n 96, 11-12. See also Magistrates' Court of Victoria, *Submission no. 37*, 1.

cases each year.¹⁰⁴ Mr Greg Garde QC from the Victorian Bar also told the Committee that vexatious litigants were ‘only a very small proportion’ of self-represented litigants.¹⁰⁵

This finding is consistent with research that has been conducted by other complaints organisations. The NSW Deputy Ombudsman, who has been involved in the Australian parliamentary ombudsmen’s project on ‘unreasonable complainant conduct’, told the Committee that such complainants form between 2% and 6% of complainants to ombudsmen’s offices.¹⁰⁶ The Office of Police Integrity told the Committee that only 2.75% of its complainants had been deemed ‘unusually persistent’ since 1 January 2008.¹⁰⁷ The Health Services Commissioner reported that her office dealt with no more than four vexatious complainants per year.¹⁰⁸

3.2 Is the number of vexatious litigants increasing?

There is limited evidence about whether the number of vexatious litigants in Victoria’s courts and tribunals is increasing.

Statements from the United Kingdom, and from some complaints organisations, suggest that the problem as a whole is growing in size and intensity.¹⁰⁹

The Committee received mixed evidence from participants in this Inquiry about whether Victoria’s courts and tribunals are experiencing a similar increase. The Commonwealth Bank of Australia’s submission stated that:

Vexatious litigants are becoming more and more prevalent ... Economic conditions, access to no-cost jurisdiction such as VCAT, waiving of filing fees and access to the

¹⁰⁴ Freckelton, Court and VCAT staff report, above n 96, 8-9.

¹⁰⁵ Greg Garde, Chair, Victorian Bar Law Reform Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 6 August 2008, 23, 25.

¹⁰⁶ Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008, 47. See also Chris Wheeler, 'Dealing with unreasonable complainant conduct' (Paper presented at the Society of Consumer Affairs Professionals Australia 2008 Symposium, Adelaide, 26-28 August 2008), 5 for more detailed statistics.

¹⁰⁷ Office of Police Integrity, *Submission no. 17*, 2. See also Matthew Carroll, Acting Chief Executive Officer, Victorian Equal Opportunity and Human Rights Commission, *Transcript of evidence*, Melbourne, 6 August 2008, 46; Public Transport Ombudsman Victoria, *Submission no. 27*, 2; Health Services Commissioner, *Submission no. 41*.

¹⁰⁸ Health Services Commissioner, *Submission no. 41*, 1.

¹⁰⁹ Sir Anthony Clarke, 'Vexatious litigants and access to justice: past, present and future' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006); Joanna Lobo, 'Unreasonable behaviour' (2003) 153 *New Law Journal* 1387; John Sorabji, 'Protection from litigants who abuse court process' (2005) 24 *Civil Justice Quarterly* 31, 32; Chris Wheeler, 'Dealing with unreasonable complainant conduct', above n 106; *Unreasonable complainant conduct: Interim practice manual: A joint project of the Australian Parliamentary Ombudsman*, 2007, 1; Ian Freckelton, 'Querulent paranoia and the vexatious complainant' (1988) 11 *International Journal of Law and Psychiatry* 127, 127. cf Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings*, Department of Constitutional Affairs Research Series 2/05, 2005, 79. See also Chief Justice Diana Bryant, 'Self-represented and vexatious litigants in the Family Court of Australia' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006) 59 about the Family Court’s experience.

Internet are all making it easier for such litigants to conduct their own cases, master civil procedure, and on occasion to collaborate with each other.¹¹⁰

However, former solicitor and Monash University PhD candidate Mr Simon Smith told the Committee that ‘vexatious litigants are no more a problem for Australian courts than they have ever been.’¹¹¹ Some of the County Court staff who spoke to Dr Freckelton reported that numbers vary from year to year.¹¹²

The number of vexatious litigant declarations made by the Supreme Court of Victoria has clearly increased in recent years, as shown in Figure 2. Seven of Victoria’s 15 vexatious litigant declarations, almost half the total number, have been made since 1998 and there is a similar trend in other Australian jurisdictions.

Figure 2 - Vexatious litigant orders in Victoria and other jurisdictions by decade¹¹³

Jurisdiction	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s	Total
Victoria	1	1	1	2	1	2	2	5	15
High Court	N/A	0	1	0	1	0	2	0	4
Federal Court	N/A	N/A	N/A	N/A	0	0	3	6	9
Family Court	N/A	N/A	N/A	N/A	0	2	75	147	224
NSW	N/A	N/A	N/A	N/A	0	0	2	11	13
Queensland	N/A	0	0	0	0	3	3	11	17
South Australia	0	0	0	0	0	0	1	5	6
WA	1	0	0	0	0	1	0	15	17
Tasmania	N/A	N/A	N/A	N/A	N/A	N/A	0	0	0
ACT	N/A	N/A	N/A	N/A	N/A	N/A	0	0	0
NT	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0	0
Total	2	1	2	2	2	8	88	200	305

¹¹⁰ Commonwealth Bank of Australia, *Submission no. 18*, 2. See also Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 16; Matthew Groves, *Submission no. 6*, 1.

¹¹¹ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 2.

¹¹² Freckelton, Court and VCAT staff report, above n 96, 8-9.

¹¹³ The number of orders in this table is based on information provided by state and territory Attorneys-General and Commonwealth courts. The table does not include orders made by the Federal Magistrates Court, which was unable to provide a list of orders. The figures for the Family Court refer to the number of individual litigants subject to orders rather than the number of orders. Where a jurisdiction did not have a vexatious litigant provision in place in a particular decade, this is marked N/A in the table. This information is based on unpublished research by former solicitor and Monash University PhD candidate Simon Smith.

However, for the reasons explained earlier in this chapter, the number of declarations is not a reliable indicator of the total number of vexatious litigants. There may be other reasons for the increase in the number of declarations. The problem may be becoming more visible, for example. Professor Tania Sourdin, Professor of Conflict Resolution at the University of Queensland, noted:

You might not necessarily have that many more in terms of numbers of litigants, but what you might have is more time being consumed within the system by the ones that you actually have. Maybe there needs to be a better analysis of the problem.¹¹⁴

It is also possible that there has been a greater willingness by recent Attorneys-General to make applications, or that recent reforms in some jurisdictions are encouraging wider use of the laws.

3.3 Who are Victoria's vexatious litigants?

The Committee encountered radically different descriptions of vexatious litigants during its Inquiry. Recent newspaper articles describe them as 'pests' and 'nuisances'.¹¹⁵ Mr Simon Smith, who has written extensively on the issue, told the Committee they were 'people of ideas and talent. They are reformers, activists and performers seeking to advance their ideas and talents through the legal system and beyond.'¹¹⁶ Forensic psychiatrist Professor Paul Mullen told the Committee '[t]hese are damaged people, these are people at risk, and it is important to try to at least not add to the damage that they have suffered'.¹¹⁷

One of the Committee's aims was to find out more about who Victoria's vexatious litigants are and where they come from, and this section describes its findings.

3.3.1 Research methodology

The Committee's primary research strategy involved examination of Supreme Court files, law reports and media reports, where available, about the 15 declared vexatious litigants in Victoria. The Committee was able to gather basic information about the litigants and their proceedings from these sources.

The Committee tested the results from this research against other sources:

- the views of stakeholders, who were asked about the common characteristics of vexatious litigants in the Committee's issues paper

¹¹⁴ Tania Sourdin, Professor of Conflict Resolution, University of Queensland, *Transcript of evidence*, Melbourne, 13 August 2008, 59. See also Moorhead and Sefton, above n 109, 79; Simon Smith, *Submission no. 21*, 9; Matthew Carroll, *Transcript of evidence*, above n 107, 46.

¹¹⁵ Michael Pelly, 'Nuisances in court: Judges get tough on serial pests', *The Sydney Morning Herald*, 27 May 2004, 18; Carly Crawford, 'Pests cost \$6.2 million', *Herald Sun*, 11 September 2007, 4; Lisa Carty, 'New laws to stop pests in the courts', *The Sun-Herald*, 11 May 2008.

¹¹⁶ Simon Smith, *Submission no. 21*, 4. See also Simon Smith, *Transcript of evidence*, above n 111, 3.

¹¹⁷ Paul Mullen, Professor of Forensic Psychiatry, Department of Psychological Medicine, Monash University, and Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 40.

- Professor Steve Hedley's study of 105 vexatious litigants in England and Wales from 1990 to 2006¹¹⁸
- information about vexatious litigants in other jurisdictions in law reports and academic journals
- research conducted by complaints agencies.

The research methodology has its flaws. Fifteen people is a small number and it is not possible to draw broad conclusions from such a sample. The research focused only on declared vexatious litigants who, for reasons already outlined in this chapter, are unlikely to reflect the total number of vexatious litigants in Victoria. The publicly available information about the 15 declared vexatious litigants was also limited in some cases, particularly where court files for the litigants could not be located.

This research does make it clear that there is no one 'type' of vexatious litigant and their backgrounds, legal proceedings and behaviour vary from case to case. The Committee has included de-identified case studies of Victoria's 15 declared vexatious litigants throughout this report. This section sets out the Committee's general findings.

3.3.2 Demographic and social characteristics

Only a few participants in the Inquiry mentioned social characteristics in their response to the Committee's questions about common characteristics of vexatious litigants. Wellington Shire Council included a list in its submission which included 'male', 'middle aged' and 'socially marginalized'.¹¹⁹

The information available to the Committee suggests this behaviour more commonly arises in the middle years. Information about age was only available for nine of Victoria's 15 declared vexatious litigants. All but one started litigating after they turned 30 years of age. Three were declared vexatious while in their 30s, three in their 40s, two in their 50s and one in his 70s. This is consistent with research into unreasonable complainant conduct in Australian ombudsmen's offices. It found that 95% of 'complainants whose conduct was found to be unreasonable' were over 30

¹¹⁸ Steve Hedley, 'Vexatious litigants in England and Wales 1990-present' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006). Most academic studies take the form of historical case studies of individual vexatious litigants. See, for example, Grant Lester and Simon Smith, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1; Simon Smith, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant' (2007) 11 *Legal History* 31; Simon Smith, 'Ellen Cecilia Barlow (1869-1951): Western Australia's pioneering vexatious litigant' (2007) 14(2) *Murdoch University E Law Journal* 69; Michael Taggart, 'Alexander Chaffers and the genesis of the Vexatious Actions Act 1896' (2004) 63(3) *Cambridge Law Journal* 656; Michael Taggart, 'Vexing the establishment: Jack Wiseman of Murrays Bay' (2007) *New Zealand Law Review* 271; Simon Smith, 'The vexatious litigant sanction: An overview of the first 110 years' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006); Simon Smith, 'Goldsmith Collins, Footballer, fencer, maverick litigator' (2008) 34(1) *Monash University Law Review* 190.

¹¹⁹ Wellington Shire Council, *Submission no. 15*, 2.

and two-thirds were over 45.¹²⁰ Professor Hedley's study in England and Wales found that the majority of declared vexatious litigants were between 50-70 years.¹²¹

There is also a trend in terms of gender. Twelve of Victoria's 15 declared vexatious litigants are male and three are female. Research into 'unusually persistent complainants' and 'complainants whose conduct was perceived to be unreasonable' in ombudsmen's offices found that men were overrepresented in both categories.¹²² Eighty-one per cent of Professor Hedley's group of declared vexatious litigants were male.¹²³

Some participants in the Inquiry reported that vexatious litigants were usually unemployed and therefore had considerable time to devote to litigation.¹²⁴ There is little information in the legal documents about the socio-economic status of declared vexatious litigants in Victoria. Of the 13 Victorian declared vexatious litigants for whom information was available, three were described by themselves or others as engineers, three as having family or small businesses, two as farmers and two as unemployed (one due to workplace injury). Of the remaining three, one was a builder, one a composer and musician and one a prisoner. Of those whose occupations were described, it is not always clear whether they remained in work while they were litigating. Information about other characteristics, such as family status, are similarly sketchy.

A number of participants in the Inquiry referred to mental health issues as a common characteristic of vexatious litigants. This issue is discussed in chapter 4.

3.3.3 Litigation behaviour

Do vexatious litigants try to resolve their disputes in other ways?

As chapter 1 noted, members of the community with a claim or grievance now have a range of dispute resolution options including members of parliament, ombudsmen and other complaint-handling agencies. The Committee's issues paper asked whether vexatious litigants try to resolve their disputes in these ways before resorting to the courts.

The people and organisations who responded to this question reported that vexatious litigants do try to resolve their disputes before going to court. Mr Julian Knight, the only declared vexatious litigant who made a submission to the Inquiry, told the Committee he 'utilized every appropriate and available avenue of dispute resolution:

¹²⁰ Wheeler, 'Dealing with unreasonable complainant conduct', above n 106, 5.

¹²¹ Hedley, above n 118.

¹²² Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen, 'Unusually persistent complainants' (2004) 184 *British Journal of Psychiatry* 352, 352; Chris Wheeler, 'Dealing with unreasonable complainant conduct', above n 106, 5.

¹²³ Hedley, above n 118.

¹²⁴ Commonwealth Bank of Australia, *Submission no. 18*, 2; Sarah Vessali, *Transcript of evidence*, above n 95, 13; Freckelton, *Judicial officers and VCAT members report*, above n 96, 10. See also Belinda Paxton, 'Domestic violence and abuse of process' (2003) 17(1) *Australian Family Lawyer* 7, 7.

local prison management, official prison visitor, Corrections Victoria Head Office, and the Victorian Ombudsman'.¹²⁵ The Health Services Commissioner wrote that in her experience 'these people will have tried to get their issue resolved at the point of service and that has failed so they proceed to agencies of accountability like mine and/or the courts'.¹²⁶

The Committee's own research into Victoria's declared vexatious litigants yielded limited results. Not surprisingly, the court files focus on their legal proceedings rather than the broader history of their disputes. It can be assumed that some declared vexatious litigants did try other avenues of assistance, based on the fact that they later sued the people and agencies involved. Mr G, for example, brought legal proceedings against the Ombudsman and a member of his staff (case study 7).¹²⁷ Mr J brought legal proceedings against two members of parliament he had contacted about his concerns (case study 10).¹²⁸

The movement of vexatious litigants between other dispute resolution options and the courts may not always follow a neat sequence. They may move back and forth between different options or use several at the one time. Mr Jim Wilson from the Wellington Shire Council told the Committee that in the Council's experience:

They use free tribunals, which is good - things like VCAT ..., the Ombudsman and any other sorts of tribunals like that that are around ... They cruise around outside the legal system ... They write a lot of letters ... They bombard us with emails ... They seek interviews with us ...¹²⁹

The NSW Deputy Ombudsman, Mr Chris Wheeler, told the Committee that when he ran the names of 13 declared vexatious litigants in NSW through his office's database, he found seven had complained to the Ombudsman as well. He told the Committee he had 'not been able to work out precisely the sequence – whether it is sequential or concurrent. I think there is a bit of overlap, but primarily I think probably people would come to the Ombudsman first in most cases.'¹³⁰ Mr Simon Smith noted this is 'a fertile area for research'.¹³¹

¹²⁵ Julian Knight, *Submission no. 14*, 5.

¹²⁶ Health Services Commissioner, *Submission no. 41*, 2. See also Donna Williamson, Prison Outreach Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 50.

¹²⁷ *Attorney-General (Vic) v Ben Hemic* (Unreported, Supreme Court of Victoria, Starke J, 10 March 1981) 2.

¹²⁸ *Attorney-General (Vic) v Kay* (Unreported, Supreme Court of Victoria, Eames J, 23 February 1999) 142.

¹²⁹ Jim Wilson, *Transcript of evidence*, above n 98, 2.

¹³⁰ Chris Wheeler, *Transcript of evidence*, above n 106, 49.

¹³¹ Simon Smith, *Transcript of evidence*, above n 111, 7.

Case Study 1: Mr A

The Supreme Court declared Mr A a vexatious litigant on 5 December 1930.

Mr A was born in 1887 and has been described by former solicitor and PhD candidate Mr Simon Smith as an ‘inventor, entrepreneur, land developer, transport pioneer and self-taught litigator’. By the time he brought his first proceedings in 1925, he had worked as a gasoline importer, lodged a patent for improvements to internal combustion engines, petitioned the Premier to buy petrol-powered railroad cars for public transport, drafted plans for a shipyard in Geelong and published a journal on transport issues.

According to Simon Smith, in 1925 Mr A became involved in a dispute with authorities over new bus licensing laws. He and other bus companies started applying for licences under earlier laws they claimed had not been properly repealed. When the Melbourne City Council began to prosecute, he issued summons against its inspectors for exceeding their powers. Mr A also became involved in a dispute with the Shire of Heidelberg after it demolished his prototype for a ‘fireproof house’ made of empty kerosene tins and reinforced concrete. He was bankrupted by the Shire for non-payment of costs in 1927, but became involved in further litigation with the City of Melbourne in 1928 over its plan to introduce parking fees.

In 1928 the Parliament passed Victoria’s vexatious litigant provision and in 1930 the Attorney-General brought the first application under the laws against Mr A.

According to the Full Court’s judgment, between 1926 and 1929 Mr A had brought 120 proceedings against the Shire of Heidelberg, its councillors and staff, the City of Melbourne, the proprietors of daily newspapers, the Commissioner of Public Works, the Melbourne Tramways Board and others. Most were private criminal prosecutions in the Court of Petty Sessions and none were successful. The Court held that ‘a clear case has been made’ and ordered that he not commence legal proceedings in any court without leave. The High Court refused special leave to appeal.

According to Simon Smith, Mr A’s litigation was ‘slowed but not stopped’. He continued to bring proceedings in the Supreme Court and High Court, some relating to his earlier disputes but others concerning issues as diverse as his defeat as a Senate candidate and proceedings brought in his brother’s name over an option to purchase a property in Brighton. In 1933 he was sentenced to four years imprisonment for non-payment of fines but was released after six months. Simon Smith estimates that between 1930 and 1955 he brought 81 separate filings in the Supreme Court alone.

At the age of 67, Mr A swore in an affidavit in one of his appeals that ‘I am not worth £25 pound sterling in the world excepting my wearing apparel and my interest in the subject matter of this intended Appeal.’ According to Simon Smith, by the 1960s he was dependent on family and friends for accommodation, moving ‘from stables to a warehouse to a garage taking with him a suitcase of papers and other paraphernalia’. He died in 1969 at the age of 82.

Who initiates the legal proceedings?

It might be expected that vexatious litigants would invariably be the ones initiating their legal proceedings, but the evidence suggests this is not always the case.

Around half of Victoria's declared vexatious litigants were defendants, not plaintiffs, in their *first* legal proceedings. Mr C (case study 3) is one example. His litigation grew from Northcote Council's prosecution of him for erecting a fence on his property without a permit.¹³² Mr K (case study 11) is another example. His litigation arose out of the Commonwealth Bank's action against him, his wife and son for possession of land after they defaulted on their mortgage.¹³³ Professor Hedley's study of declared vexatious litigants in England and Wales found that the vexatious litigant was initially the defendant in *most* cases.¹³⁴

The declared vexatious litigants were plaintiffs in most of their *subsequent* vexatious legal proceedings, although there are exceptions. Mrs H (case study 8) was originally the defendant in nine of the 22 proceedings raised by the Attorney-General in his original application under section 21.¹³⁵ Mr L (case study 12) is another example. He started as the defendant in at least five of the 28 proceedings raised by the Attorney-General in his application.¹³⁶

What is the subject matter of their disputes?

Professor Hedley's study of declared vexatious litigants in England and Wales found their disputes were nearly always 'pretty domestic'. They were disputes with neighbours, tenants or landlords over property, with family over divorce, children or a will, or with banks, lawyers and creditors over business failures.¹³⁷

The Committee's research on Victoria's declared vexatious litigants supports the conclusion that most of the disputes arise from simple daily life. They are disputes most people can relate to, even if they have not experienced them directly. The more common types of disputes in Victoria were:

- disputes with public authorities, either government or local councils
- disputes arising from family breakdown. Although only two declared vexatious litigants were involved in family disputes, evidence suggests that family disputes produce the greatest number of vexatious litigants in Australia. As Figure 2 shows, the Family Court of Australia has made more vexatious litigant orders than all other Australian courts combined.

¹³² C Francis, 'Valete Goldie' (1982) *Victorian Bar News* 20.

¹³³ *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 50-52.

¹³⁴ Hedley, above n 118, 2. See also comments by one Supreme Court judge that some begin as defendants in Freckelton, *Judicial officers and VCAT members report*, above n 96, 11.

¹³⁵ See also Taggart, 'Vexing the establishment: Jack Wiseman of Murrays Bay', above n 118, which describes a declared vexatious litigant who initiated only 2-3 of the legal proceedings he became involved in.

¹³⁶ See *Attorney-General (Vic) v Weston* [2004] VSC 314.

¹³⁷ Hedley, above n 118.

In Victorian courts, participants in this Inquiry and other commentators advised that the problem was greatest in family violence intervention order proceedings¹³⁸

- disputes about livelihood. One case arose from a workplace injury while another involved disputes with business suppliers and bankers
- disputes about property. In Victoria, these disputes arise from property transactions, mortgages or planning issues rather than tenancy disputes.

Vexatious litigants involved in ‘public interest’ litigation are rare in Victoria, consistent with Professor Hedley’s findings about vexatious litigants in England and Wales.¹³⁹ Mrs E (case study 5), an animal welfare activist whose litigation arose from her attempts to reform the Royal Society for the Prevention of Cruelty to Animals (RSPCA), is one clear example.¹⁴⁰

Although frivolous disputes between prisoners and prison authorities have had a high profile in the past, particularly in the United States, this does not appear to have been a significant issue in Australia.¹⁴¹ Only one of Victoria’s declared vexatious litigants is a prisoner. Mr Simon Smith told the Committee that he is one of only two prisoners who have been declared vexatious in Australia.¹⁴²

Other disputes in Victoria involved issues as diverse as a faulty bath heater and leaking gas pipe, termination of a college enrolment and disputed traffic offences.

A number of vexatious litigants in Victoria were involved in more than one type of dispute, which is also consistent with Professor Hedley’s study.¹⁴³ Some became involved in disputes about the way authorities were handling their claims, alleging conspiracy, fraud and misconduct on the part of people in the justice system. This phenomenon is discussed later in this chapter.

The Committee did not examine the types of laws used by declared vexatious litigants in Victoria in detail. In several cases the legal basis for their claims was simply unclear. At least five, or one-third of the total number, brought private criminal prosecutions as well as civil proceedings against members of the community. Dr Freckelton has previously reported a tendency to rely on documents such as the Magna Carta, the International Covenant on Civil and Political Rights

¹³⁸ Victorian Law Reform Commission, *Review of family violence laws: Report*, 2006, 284-289; *Family Violence Protection Act 2008* (Vic) Part 11; Women’s Legal Service Victoria, *Submission no. 38*, 1; Magistrates’ Court of Victoria, *Submission no. 37*, 2; Freckelton, *Judicial officers and VCAT members report*, above n 96, 34.

¹³⁹ Hedley, above n 118.

¹⁴⁰ See Smith, ‘Constance May Bienvenu: Animal welfare activist to vexatious litigant’, above n 118.

¹⁴¹ *Prison Litigation Reform Act of 1995* 28 USC §1915 (US); Erin Schiller and Jeffrey A Wertkin, ‘Frivolous filings and vexatious litigation’ (2001) 14 *Georgetown Journal of Legal Ethics* 909, 917-919. Corrections Victoria told the Committee that there is a large volume of litigation conducted by prisoners in Victoria which imposes significant demands, but the proportion which can be said to be entirely without grounds or vexatious is relatively small: Corrections Victoria, *Submission no. 32*, 1. See also Charandev Singh, Human Rights and Advocacy Worker, Brimbank Melton Community Legal Centre, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 39.

¹⁴² Simon Smith, *Transcript of evidence*, above n 111, 6.

¹⁴³ Hedley, above n 118.

and the Constitution.¹⁴⁴ Some participants in the Inquiry suggested that Victoria's new *Charter of Human Rights and Responsibilities Act 2006* (Vic) might prove a popular source of argument for vexatious litigants in the future.¹⁴⁵

Who do vexatious litigants bring proceedings against?

All 15 of Victoria's declared vexatious litigants brought legal proceedings against more than one person or organisation.

Given the subject matter of their disputes, it is not surprising that the most common targets were public agencies or officials (10 litigants), government ministers or politicians (six litigants), banks, finance companies and other corporations (six litigants), local councils (four litigants) or public institutions (a charity in the case of one litigant and educational institutions in another).

The vexatious litigants who started to bring legal proceedings about the way their cases were handled also sued people working in the justice system. At least seven of Victoria's 15 declared vexatious litigants sued their own lawyers and 11 sued the lawyers representing the other parties. Six sued judges, court officials or court staff.

It is clear that at least eight of Victoria's declared vexatious litigants brought legal proceedings against individuals or small businesses. Those vexatious litigants who sued institutions such as local councils or banks often sued individual staff members as well. Other vexatious litigants sued people who were inadvertently involved in events around the dispute. Mrs B, for example, sued the removalists who moved furniture from her marital home on the instructions of her ex-brother-in-law (case study 2).¹⁴⁶ Mr L sued the estate agent who conducted the mortgagee sale of his farm and the person who bought the farm (case study 12).¹⁴⁷

However, conclusions based on persons sued by declared vexatious litigants may not provide an accurate picture of the phenomenon. Some commentators claim that vexatious litigant laws are only applied when public figures and powerful institutions are involved.¹⁴⁸ As the previous section noted, participants in the Inquiry suggested the problem in Victoria is in fact greatest in family violence intervention order proceedings. For these reasons, the proportion of individual members of the community affected by vexatious litigants may be higher than the cases of declared vexatious litigants suggest, but the Committee is unable to make definitive findings in the absence of more detailed evidence.

¹⁴⁴ Freckelton, 'Querulent paranoia and the vexatious complainant', above n 109, 131. See also Lester and Smith, above n 118, 16; Grant Lester, 'The vexatious litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17, 18.

¹⁴⁵ Grant Lester, Forensic Psychiatrist, Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 32; Simon Smith, *Transcript of evidence*, above n 111, 6; Freckelton, *Judicial officers and VCAT members report*, above n 96, 38.

¹⁴⁶ Supreme Court proceeding No.327 of 1940. See also Affidavit of Thomas Augustine Keely, Prothonotary, Supreme Court of Victoria, 10 July 1941, Supreme Court File No. M501.

¹⁴⁷ *Attorney-General (Vic) v Weston* [2004] VSC 314, 143.

¹⁴⁸ Simon Smith, 'Vexatious litigants and their judicial control – The Victorian experience' (1989) 15(1) *Monash University Law Review* 48, 57-58; Michael Taggart and Jenny Klosser, 'Controlling persistently vexatious litigants', in Matthew Groves (ed), *Law and Government in Australia*, 2005, 296.

Where do vexatious litigants bring proceedings?

Participants in the Inquiry had different views about which courts and tribunals were most affected by vexatious litigants. Some claimed they were more common in more accessible, low cost jurisdictions like the Magistrates' Court or VCAT. The Law Institute of Victoria, for example, told the Committee that anecdotal evidence suggests they are most commonly present in VCAT.¹⁴⁹

However, the evidence from Dr Freckelton's discussions with judicial officers, tribunal members and court and tribunal staff suggest the opposite. Supreme Court and County Court judges identified a number of individuals who they believed met the criteria for an order. One Supreme Court judge told Dr Freckelton that although individual judges do not see vexatious litigants often, the Court as a whole does. The judge said that in the Practice Court 'I sometimes feel as though we're running a psychological counselling service.'¹⁵⁰ Magistrates and VCAT members, on the other hand, reported relatively few possible vexatious litigants, other than in family violence proceedings in the Magistrates' Court.¹⁵¹

The Committee's own research showed that, between them, Victoria's 15 declared vexatious litigants had brought proceedings in every court and tribunal in Victoria. The Supreme Court (including the Court of Appeal) was the court used most often. Of the 14 litigants for which information was available, all 14 had brought legal proceedings in the Supreme Court at first instance or on appeal. The County Court and Magistrates' Court were used by six declared vexatious litigants each. VCAT (or its predecessors) had been used by only two declared vexatious litigants. Administrative tribunals like VCAT were created relatively recently, however, and the legal proceedings brought by some early vexatious litigants, such as Mr D's dispute about a faulty bath heater (case study 4), would most likely be dealt with at VCAT today.

Once again, however, it may be misleading to draw conclusions based just on the cases of declared vexatious litigants. As noted earlier, there is other evidence that the problem is greatest in the Magistrates' Court in family violence proceedings.

The Committee heard different explanations about why the Supreme Court might be more popular with vexatious litigants. Mr Simon Smith told the Committee the Magistrates' Court has 'a strong culture that allows people to have their day in court', while 'in the superior courts the emphasis is on paperwork, form and professional representation. It is here where ... frustrated litigants are found.'¹⁵² Some magistrates and VCAT members who spoke to Dr Freckelton agreed that they had more of a track record of accommodating 'difficult' litigants, with one VCAT

¹⁴⁹ Law Institute of Victoria, *Submission no. 1B*, 1; Irene Chrisafis, Lawyer, Litigation Lawyers Section, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 20. See also State Revenue Office, *Submission no. 16*, 1; Jim Wilson, *Transcript of evidence*, above n 98, 4.

¹⁵⁰ Freckelton, Judicial officers and VCAT members report, above n 96, 12.

¹⁵¹ *Ibid*; Freckelton, Court and VCAT staff report, above n 96, 9-11.

¹⁵² Simon Smith, *Transcript of evidence*, above n 111, 3.

member noting, ‘We have a high tolerance level in this place’.¹⁵³ One magistrate told Dr Freckelton that vexatious litigants were more attracted to the higher courts because they perceive their claims as too important for other forums. The magistrate reported that when the limits of the Magistrates’ Court jurisdiction were pointed out to one litigant he said, ‘Oh no! My case is worth millions!’.¹⁵⁴

The Committee’s research does show that most declared vexatious litigants rarely confine their litigation to one court or tribunal. Thirteen of the 14 Victorian declared vexatious litigants for which reliable information was available brought legal proceedings in more than one Victorian court or tribunal.

In some cases, the declared vexatious litigants had brought legal proceedings in non-Victorian courts and tribunals as well. The Supreme Court’s decision in Mr J’s case refers to proceedings in the Family Court of Australia (case study 10).¹⁵⁵ The Court’s decision in Mr K’s case refers to proceedings in the Federal Court and the Federal Magistrates Court (case study 11).¹⁵⁶ However, the Victorian court files and judgments do not always refer to proceedings in other jurisdictions in detail, and the Committee has been unable to estimate how often this occurs.

Patterns of litigation

Previous research shows that not all vexatious litigants follow the same pattern in their litigation. Professor Steve Hedley classifies vexatious litigants into three types.¹⁵⁷ The NSW Deputy Ombudsman, Mr Chris Wheeler, also categorised complainants who show ‘unreasonable persistence’ in ombudsmen’s offices into three categories.¹⁵⁸

The first type, which Professor Hedley calls the ‘rubber ball strategy’ and Mr Wheeler calls ‘the obsessional’, react to lack of success in their initial dispute by bringing the same legal proceeding or making the same complaint against the same parties again and again. Mr Wheeler told the Committee ‘[t]hey will just keep going on and on about the same issue. They might reframe it and they might change the details slightly, but they will just keep coming back on the same issue.’¹⁵⁹ Figure 3, based on Mr Wheeler’s presentation to the Committee, illustrates this pattern.

¹⁵³ Freckelton, Judicial officers and VCAT members report, above n 96, 15.

¹⁵⁴ Ibid 12.

¹⁵⁵ *Attorney-General (Vic) v Kay* (Unreported, Supreme Court of Victoria, Eames J, 23 February 1999) 44-47.

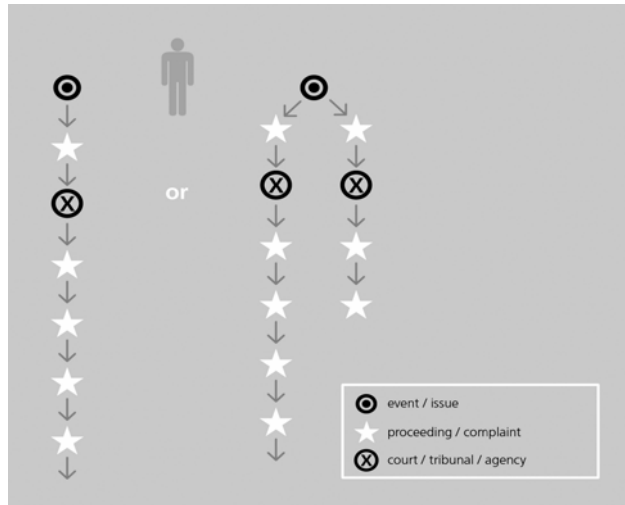
¹⁵⁶ *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 94, 155.

¹⁵⁷ Hedley, above n 118.

¹⁵⁸ Chris Wheeler, *Transcript of evidence*, above n 106, 48.

¹⁵⁹ Ibid.

Figure 3 - Patterns of litigation - ‘Rubber ball strategy’

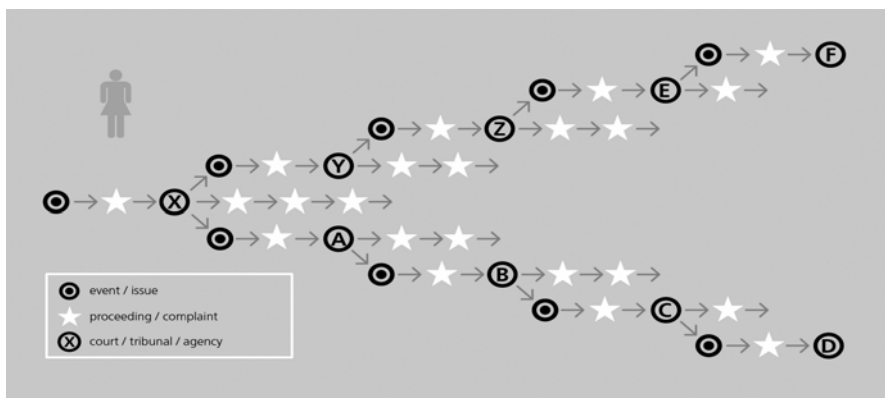


The second type, which Professor Hedley calls the ‘conspiracy strategy’ and Mr Wheeler calls ‘rolling thunder’, react to lack of success in their initial dispute by widening the scope of the dispute and suing or complaining about the people involved in handling it. According to Professor Hedley:

Here the litigant loses their initial action, and responds by broadening the range of people involved in the dispute. The failure of the first litigation is seen as evidence of misbehaviour by some of those involved in it – perhaps witnesses, lawyers or the judge – and bringing that misbehaviour to light is seen by the litigant as their next task. In many cases this develops rapidly into paranoia, as each failed application becomes further evidence of the conspiracy against them.¹⁶⁰

Figure 4 illustrates this pattern of behaviour.

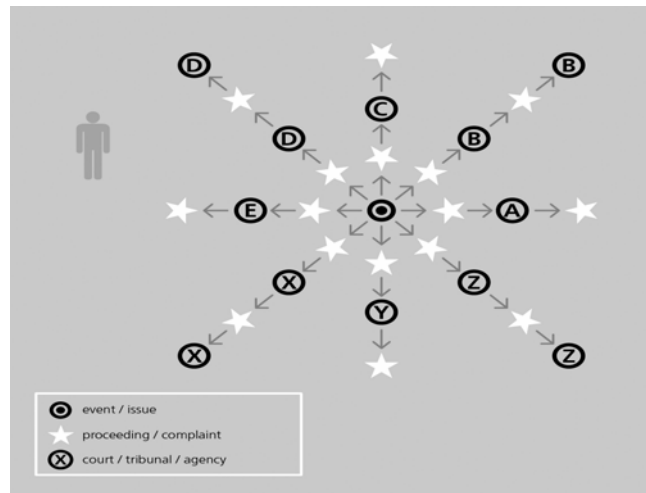
Figure 4 - Patterns of litigation - ‘Rolling thunder’



¹⁶⁰ Hedley, above n 118.

The third type, described by Professor Hedley as ‘litigation as a lifestyle choice’ and Mr Wheeler as ‘the scattergun’, bring a series of legal proceedings or complaints against different people over different issues, with no apparent connection between them. Figure 5 illustrates this pattern of behaviour.

Figure 5 - Patterns of litigation - ‘The scattergun’



Professor Hedley found that 5% of declared vexatious litigants in England and Wales fell into the first type, 49% into the second type and 46% into the third type.¹⁶¹

In Victoria, most declared vexatious litigants appear to fall into the second category, although Mrs H might be seen as an example of the third type (case study 8). Some of the cases in Victoria are so complex that they defy even this categorisation. Mr L (case study 12) repeatedly attempted to re-litigate his original dispute with his local council about the impact of drainage works in his land (first type), but he also sued the lawyers and a witness involved in earlier proceedings (second type) and brought other legal proceedings regarding mortgages and cancellation of his firearms licence (third type). This evidence reinforces the point that there is no single type of vexatious litigant.

¹⁶¹ See, for example, Lester and Smith, above n 118, 16; Lester, Wilson, Griffin and Mullen, above n 122, 354; Chris Wheeler, *Transcript of evidence*, above n 106, 47; Sorabji, above n 109, 31; Justice Ruth McColl, 'The obsessed litigant - the Australian perspective' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006) 3.

Case Study 2: Mrs B

The Supreme Court declared Mrs B a vexatious litigant on 21 July 1941.

According to Mr Simon Smith's research, Mrs B was born in 1907. A musician and composer, by the time she was 23 she had performed in London, Cairo and Paris. In 1938 she married the brother of a former High Court judge, but they separated the following year.

Between January 1940 and July 1941, Mrs B brought nine legal proceedings arising from the breakdown of the marriage. In an affidavit filed in the Supreme Court, she claimed her ex-brother-in-law used undue influence to take her share of the marital home and forced her out of the house by turning off utilities and having the furniture removed. She claimed this led to her hospitalisation and forced her to sell jewellery to pay her medical bills. She sued her ex-brother-in-law, one of her husband's servants, a pawnbroking company, the furniture removals company and some of their officers and employees. None of the proceedings were successful but she claimed she was 'justified in applying to the Court of Justice as a British Citizen'.

There is no written decision explaining the Supreme Court's decision to declare Mrs B vexatious on the Court files. Comments made by judges in earlier decisions may be illustrative. In one decision, the judge reportedly said:

never in the long history of our Courts has there been a gross abuse of the privileges of the Court as has taken place in this litigation Protected by her privilege of summoning under the King's Command, witnesses; relying on the leniency usually conceded to an unassisted litigant, and upon her sex; she has deliberately, in spite of all my efforts, my repeated warnings and requests, ignored and abused the Court's rules and procedure; utilised the opportunities her own cunning had devised to defame and denounce her own witnesses, and those of the Defendant, and even others unconnected in any way with the litigation. Nothing could stop her not even threats of imprisonment.

The Court's order in the vexatious litigant application, of which there is a record, was that Mrs B not institute any legal proceedings without leave.

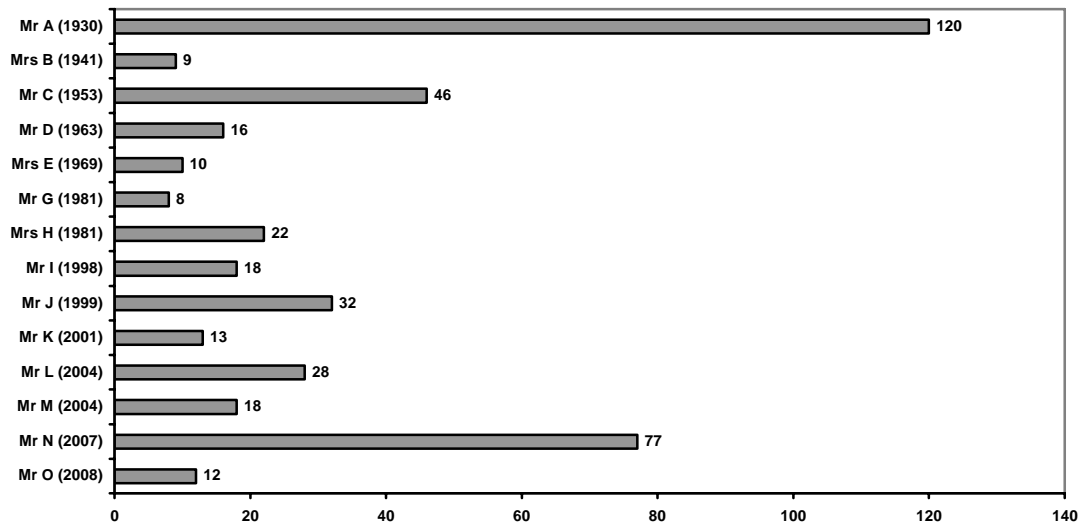
Mrs B continued to have occasional contact with the courts. She was declared bankrupt in 1941 after failing to pay a costs order from one of her unsuccessful cases. Mr Smith reports she brought a maintenance action against her husband and, after he died, made a claim on his estate. He also claims she was the 'driving force' behind litigation brought by her second husband in the 1960s before he too was declared vexatious (see case study 4). In 1977 she appealed a prosecution by her local council for allowing her dog to 'wander at large'. In 1984 she obtained leave to sue a Melbourne newspaper for defamation over reviews of her performances, one of which referred to her as an 'eccentric', but was unsuccessful.

Mrs B died on 7 October 1989, aged 82.

How often do vexatious litigants bring legal proceedings?

There are also significant differences in the number of proceedings brought by Victoria’s 15 declared vexatious litigants prior to their declaration. The chart at Figure 6 records the number of legal proceedings referred to affidavits filed with the Supreme Court, or the Court’s decision.¹⁶²

Figure 6 - Number of legal proceedings instituted by Victoria's declared vexatious litigants



Professor Hedley has noted that it is not just the number of proceedings but also the time and expense involved that influences the courts when making declarations.¹⁶³

In Victoria there also appear to be significant differences in the length of time that elapses between the first legal proceeding and the Supreme Court’s declaration. Mrs B was declared by the Supreme Court just 18 months after she instituted the first of her nine legal proceedings (case study 2). Mrs H, on the other hand, was not declared until 16 years after instituting the first of the 22 proceedings mentioned by the Attorney-General in his original application (case study 8).

Some participants in the Inquiry also complained of the high number of interlocutory applications and appeals brought by vexatious litigants. Mr Ross Thomson, a legal officer with the Commonwealth Bank of Australia, told the Committee ‘abuse of all those interlocutory processes – and appeal processes; I include that – [is] where our

¹⁶² These numbers may not include every legal proceedings brought by the declared vexatious litigant. In some cases it appears from the court documents that the Attorney-General’s application is based on only some of the litigant’s legal proceedings. In some cases, the Supreme Court will rely on an even more limited number in reaching its decision. See, for example, *Gallo v Attorney-General (Vic)* (Unreported, Full Court of the Supreme Court of Victoria, Starke, Crockett and Beach JJ, 4 September 1984) in which the Attorney-General’s original application raised 22 legal proceedings, but only nine proceedings were considered by the Full Court of the Supreme Court when determining the appeal. The figure does not include the number of proceedings brought by Mr F, for whom this information could not be located.

¹⁶³ Hedley, above n 118

biggest problem is'.¹⁶⁴ His colleague Mr Grant Dewar advised that '[m]ultiple applications for adjournment are a big problem'¹⁶⁵ and described one current possible vexatious litigant:

He tends to abuse the interlocutory procedures and process and also the appellate structure ... He will take every conceivable technical point and appeal every case management or interlocutory order, no matter how insignificant. He will appeal that to the High Court if he wants to simply as a matter of course.¹⁶⁶

Some of the court and tribunal staff who spoke to Dr Freckelton also suggested that such litigants characteristically 'appeal every tiny little decision which stretches it out forever'.¹⁶⁷ The Committee's own research into declared vexatious litigants was inconclusive. The Supreme Court's written judgments sometimes refer to various interlocutory applications and appeals¹⁶⁸, but the Court could not be expected to mention them because, as chapter 1 noted, they are not considered relevant under the current law.

Do vexatious litigants use legal representation?

Chapter 1 noted the tendency to conflate vexatious litigants and self-represented litigants. The Committee's research into Victoria's declared vexatious litigants found they are mostly, but not always, self-represented. The Committee was able to find information for only 12 of the 15 declared vexatious litigants and that information was not comprehensive. However, it was clear that all 12 had been represented by lawyers at some point.

The declared vexatious litigants were more likely to become self-represented over time. This could be due to the costs of legal representation, but the Committee also heard evidence to suggest that vexatious litigants become disenchanted with the legal profession.¹⁶⁹ Seven of the declared vexatious litigants sued one or more of their former lawyers. At the hearing of the vexatious litigant application itself, only three were legally represented.

The Committee heard conflicting evidence about the legal skills of vexatious litigants. Ms Sarah Vessali, the former principal lawyer with the Women's Legal

¹⁶⁴ Ross Thomson, *Transcript of evidence*, above n 110, 18. See also Commonwealth Bank of Australia, *Submission no. 18*, 3.

¹⁶⁵ Grant Dewar, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 18.

¹⁶⁶ Ibid 17. See also Law Reform Commission of Western Australia, *Review of the criminal and civil justice systems in Western Australia - Final report*, 1999, 161; Taggart and Klosser, above n 148.

¹⁶⁷ Freckelton, Court and VCAT staff report, above n 96, 6.

¹⁶⁸ See, for example, the decisions in *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269; *Attorney-General (Vic) v Weston* [2004] VSC 314; *Attorney-General (Vic) v Kay* (Unreported, Supreme Court of Victoria, Eames J, 23 February 1999); *Attorney-General (Vic) v Moran* [2008] VSC 159.

¹⁶⁹ Paul Mullen, *Transcript of evidence*, above n 117, 39; *Gallo v Attorney-General (Vic)* (Unreported, Full Court of the Supreme Court of Victoria, Starke, Crockett and Beach JJ, 4 September 1984) 11; Smith, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant', above n 118, 52; Smith, 'Ellen Cecilia Barlow (1869-1951): Western Australia's pioneering vexatious litigant', above n 118, 80; Freckelton, 'Querulent paranoia and the vexatious complainant', above n 109, 131.

Service Victoria, told the Committee ‘they are actually quite good on their feet in terms of arguing their rights to the court’.¹⁷⁰ There have also been cases in other jurisdictions where declared vexatious litigants were former lawyers.¹⁷¹

Others participants reported different experiences. Judge Misso from the County Court told the Committee there is ‘an inability to comprehend the general conventions which govern litigation let alone the law.’¹⁷² Other commentators warn that vexatious litigants’ apparent competency can be deceptive. Dr Ian Freckelton has previously written that ‘[a]ll too often the litigant will focus on documents such as the Magna Carta, the International Covenant on Civil and Political Rights, or the Constitution, without any real understanding of how they fit into the overall legal framework’.¹⁷³ This view was confirmed by a number of judicial officers and tribunal members who spoke to Dr Freckelton for this Inquiry, who observed that a characteristic of such litigants was ‘absorption with detail and technical rules, as well as an inability to have any overall perspective of their situation’.¹⁷⁴

Are all the legal proceedings unsuccessful or vexatious?

It cannot be assumed that every legal proceeding brought by a declared vexatious litigant is unsuccessful or vexatious.¹⁷⁵

Roughly half of Victoria’s declared vexatious litigants were successful or partly successful in some of their legal proceedings. However, when viewed in the context of the overall amount of litigation conducted, these successes were rare. Mr I won two of the legal proceedings he instituted over a workplace injury, in one case obtaining \$120 000 in damages (case study 9).¹⁷⁶ Mr L won \$65 400 in damages for wrongful arrest (case study 12).¹⁷⁷ Others achieved their aims even though their legal proceedings were dismissed. The Supreme Court agreed with Mrs E’s claim that the

¹⁷⁰ Sarah Vessali, *Transcript of evidence*, above n 95, 13. See also Justice Bell, *Transcript of evidence*, above n 102, 4; Commonwealth Bank of Australia, *Submission no. 18*, 6; Thompson, above n 97, 69; Alan Murdie, ‘Vexatious litigants and de Clerambault syndrome’ (2002) 152 *New Law Journal* 61, 62, who describes vexatious litigants as displaying ‘high intelligence’.

¹⁷¹ See Taggart, ‘Alexander Chaffers and the genesis of the Vexatious Actions Act 1896’, above n 118; *Witt v Cox* [2006] NSWSC 1427; Taggart, ‘Vexing the establishment: Jack Wiseman of Murrays Bay’, above n 118; Taggart and Klosser, above n 148, 273.

¹⁷² Judge Misso, *Submission no. 10*, 3. Research on ‘unusually persistent complainants’ in ombudsmen’s offices also reported that they were less able to express their complaints in a coherent and rational manner: see Lester, Wilson, Griffin and Mullen, above n 122, 353-355.

¹⁷³ Freckelton, ‘Querulent paranoia and the vexatious complainant’, above n 109, 131. See also Lester and Smith, above n 118, 16; Lester, ‘The vexatious litigant’, above n 144, 18.

¹⁷⁴ Freckelton, Judicial officers and VCAT members report, above n 96, 9-10.

¹⁷⁵ The Committee uses the term ‘unsuccessful’ in this context to mean that the litigant did not win in the proceedings. In some cases, the proceedings were dismissed at an early stage. In others they were unsuccessful at trial, or the litigant withdrew the proceedings or did not proceed with them.

¹⁷⁶ See *Attorney-General (Vic) v Lindsey* (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998) 2-3.

¹⁷⁷ Jeremy Kelly, ‘Farmer wins 16-year epic court battle’, *Herald Sun*, 31 January 2002, 13. Mr L appealed this decision: see *Attorney-General (Vic) v Weston* [2004] VSC 314, 158-165.

by-laws of the RSPCA were invalid. However, it held that her action was not entitled to succeed because she had no ‘standing’ to bring the proceedings (case study 4).¹⁷⁸

The Supreme Court will not necessarily find that a proceeding is ‘vexatious’ where it is unsuccessful. Chapter 1 noted that ‘vexatious’ in this context means that the proceedings must be ‘hopeless’ or brought for an improper purpose. In Mr L’s case, the Court held that only 13 of his 28 proceedings could be considered vexatious (case study 12).¹⁷⁹ In Mr M’s case, the Court held that a substantial number, although not all, of the 18 proceedings relied on by the Attorney-General were vexatious (case study 13).¹⁸⁰

3.3.4 Other characteristics

Communication and presentation

A number of the participants in this Inquiry, along with other commentators, report that vexatious litigants and other persistent complainants communicate in distinctive ways. The State Revenue Office wrote in its submission that vexatious litigants ‘usually send voluminous volumes of correspondence, often containing threatening or inflammatory language’.¹⁸¹ The Health Services Commissioner’s submission advised the Committee:

They write many, many pages in their complaint, often using asterisks and other punctuation marks to emphasise their point. Coloured highlighters or coloured pens tend to feature a lot. They send frequent messages to the agency that is dealing with their complaint and they turn up without appointments. They are very demanding and often want to engage in long argumentative conversations.¹⁸²

The court and tribunal staff who spoke to Dr Freckelton also noted ‘unusual formatting’ in paperwork, with use of bold type and heavy capitalisation for emphasis.¹⁸³

These reports are consistent with research published in 2004 about ‘unusually persistent complainants’ in ombudsman’s offices in Australia based on surveys of staff in those offices. It reported that ‘unusually persistent complainants’ supplied greater volumes of material, used dramatic or offensive expressions and had unusual methods of emphasising words such as coloured highlighting, repeated underlining and margin notes.¹⁸⁴ The interim manual on ‘unreasonable complainant conduct’

¹⁷⁸ *Bienvenu v Royal Society for the Protection of Animals* [1967] VLR 656. See also Simon Smith, ‘Constance May Bienvenu: Animal welfare activist to vexatious litigant’ (2007) 11 *Legal History* 31, 45-49.

¹⁷⁹ *Attorney-General (Vic) v Weston* [2004] VSC 314, 172-176, 187.

¹⁸⁰ *Attorney-General (Vic) v Knight* [2004] VSC 407, 8-35.

¹⁸¹ State Revenue Office, *Submission no. 16*, 1.

¹⁸² Health Services Commissioner, *Submission no. 41*, 3. See also Taggart, ‘Vexing the establishment: Jack Wiseman of Murrays Bay’, above n 118, 283; Simon Smith, *Transcript of evidence*, above n 111, 6.

¹⁸³ Freckelton, Court and VCAT staff report, above n 96, 6.

¹⁸⁴ Lester, Wilson, Griffin and Mullen, above n 122, 353-355.

used by ombudsmen's offices now lists such examples of this characteristic content and 'look' as 'warning signs'.¹⁸⁵

Other participants in this Inquiry criticised the use of these criteria to identify possible vexatious litigants or complainants. Darebin Community Legal Centre's submission noted that while some people suffering from an impairment may display the 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.¹⁸⁶

Do vexatious litigants display other types of destructive behaviour?

Research and data from ombudsmen's offices and other complaint-handling agencies suggest 'unusually persistent complainants' sometimes demonstrate other destructive behaviours. The 2004 research into 'unusually persistent complainants' in ombudsmen's offices reported that over half had made some threat of violence to complaints officers.¹⁸⁷ The Office of Police Integrity also told the Committee that its staff received a higher level of threatening phone calls from these complainants than from other callers.¹⁸⁸

The Committee also heard evidence suggesting a self-destructive aspect to vexatious litigants' behaviour. The 2004 research in ombudsmen's offices found persistent complainants were also more likely to have damaged close relationships and their social lives and to have seriously impaired their financial position.¹⁸⁹ Some of the judicial officers, VCAT members and court and tribunal staff who spoke to Dr Freckelton also expressed concern about the welfare of the litigants themselves. A Supreme Court Master told Dr Freckelton that it could be 'a kindness to stop grossly unmeritorious litigation – "because they can lose their houses. They lose so much"'.¹⁹⁰

The public documents about Victoria's 15 declared vexatious litigants do not always discuss these types of behaviour. Three of the 15 declared vexatious litigants appear to have been imprisoned for offences connected with their litigation, such as non-payment of fines, contempt of court and, in one case, a threat to kill the other party's solicitor. At least five were bankrupted after they failed to pay the legal costs arising from their litigation. The case studies in this report and other research suggest some

¹⁸⁵ *Unreasonable complainant conduct*, above n 109, 22.

¹⁸⁶ Darebin Community Legal Centre Inc, *Submission no. 46*, 7.

¹⁸⁷ Lester, Wilson, Griffin and Mullen, above n 122, 354.

¹⁸⁸ Office of Police Integrity, *Submission no. 17*, 3-4.

¹⁸⁹ Lester, Wilson, Griffin and Mullen, above n 122, 354.

¹⁹⁰ Freckelton, Judicial officers and VCAT members report, above n 96, 19.

declared vexatious litigants suffer in other ways because of their litigation¹⁹¹, but the Committee did not have access to sufficient information to make findings.

3.4 Links between vexatious litigants

The Committee's Inquiry yielded other interesting evidence about the extent to which some vexatious litigants work with one another, or with other litigants in the justice system.

There are isolated cases both in Victoria and elsewhere of vexatious litigants from the same families. Two of Victoria's vexatious litigants – Mrs B and Mr D – were married.¹⁹² Mrs B had already been declared at the time of the marriage and Mr Simon Smith has suggested that she was the driving force behind the legal proceedings that led to Mr D's declaration nine years later (case studies 2 and 4).¹⁹³ Other Australian courts have declared multiple members of the one family, and Professor Hedley reported a married couple and two brothers amongst declared vexatious litigants in England and Wales.¹⁹⁴

There are also instances of vexatious litigants offering support to one another. Victoria's first and third declared vexatious litigants, Mr A and Mr C (case studies 1 and 3), were reportedly friends for a period. According to an obituary for Mr C in the *Victorian Bar News*, they 'frequently exchanged notes of useful cases and pleading precedents'.¹⁹⁵ Mr Simon Smith reports that Mrs E (case study 5) was assisted in some of her litigation by two advisers. She referred to the first as 'Mr X' in her diaries, while she met the second (who Mr Smith claims was Mr C) in the State Library.¹⁹⁶

The Committee heard other evidence that vexatious litigants were assisting other litigants to raise unmeritorious legal arguments. Mr Ross Thomson from the Commonwealth Bank of Australia told the Committee that Victoria's most recent vexatious litigant had appeared for other people.¹⁹⁷ Mr N (case study 14), who was declared in Victoria in 2007 and Western Australia in 2004, reportedly provided

¹⁹¹ See, for example, Smith, 'Ellen Cecilia Barlow (1869-1951): Western Australia's pioneering vexatious litigant', above n 118; Taggart, 'Alexander Chaffers and the genesis of the Vexatious Actions Act 1896', above n 118, both of whom ended their lives financially destitute and without family.

¹⁹² 'Mrs Isaacs weds', *The Herald*, 20 February 1954, 2.

¹⁹³ Smith, 'The vexatious litigant sanction: An overview of the first 110 years', above n 118, 7.

¹⁹⁴ See, for example, *Hunters Hill Municipal Council v Pedler* [1976] 1 NSWLR 478 (a mother and son); *Commonwealth Bank of Australia v Ridout* [2004] WASC 136 (a mother and two sons); *Commonwealth Bank of Australia v Bride* [2004] WASC 177 (husband and wife); Hedley, above n 118.

¹⁹⁵ Francis, above n 132, 20. See also Smith, 'Goldsmith Collins: Footballer, fencer, maverick litigator', above n 118, 200.

¹⁹⁶ Smith, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant', above n 118, 50-57; Smith, 'Goldsmith Collins: Footballer, fencer, maverick litigator', above n 118, 222-223; Taggart, 'Alexander Chaffers and the genesis of the Vexatious Actions Act 1896', above n 118, for an English example.

¹⁹⁷ Ross Thomson, *Transcript of evidence*, above n 110, 16. See also Hedley, above n 118, fn 33 for an English example.

assistance to several family members who were subsequently declared in Western Australia.¹⁹⁸

There are also examples of organisations that have promoted unmeritorious legal arguments. In a 2006 speech to a Monash University conference on vexatious litigants, former Commonwealth Solicitor-General David Bennett QC gave examples of groups which had promoted failed constitutional arguments in Australia. One, a company called the Institute of Taxation Research, offered research, advice and consultancy services to litigants seeking to avoid tax or other obligations. Its principal arguments were presented and rejected in a series of cases around the country. In one case the High Court joined the Institute to the proceedings as a party and ordered that it pay the Deputy Commissioner of Taxation's legal costs. Mr Bennett reported that the Australian Competition and Consumer Commission later took action¹⁹⁹ against the Institute under misleading and deceptive conduct legislation.¹⁹⁹

Some participants in the Inquiry suggested that the internet had given such groups and their arguments a wider circulation. Wellington Shire Council's submission stated that there were a number of websites that offer tips to would-be litigants.²⁰⁰ Mr Jim Wilson, the Council's Director of Corporate Services, told the Committee:

There seems to be a bit of a tendency for litigants to claim that we have no authority. This happens to us quite a bit. Over the years it has been alleged that the Local Government Act has no foundation, the council is not properly constituted, the state is illegal and the federal government is illegal; ditto with the Constitution, all the way back to the Magna Carta ... We seem to be increasingly receiving purported legal documents ... some of them seem to be coming as form documents off the net where people have access to these sites ...²⁰¹

The Committee was unable to obtain information about whether any of the people involved in these groups were possible vexatious litigants or declared vexatious litigants.

¹⁹⁸ *Commonwealth Bank of Australia v Ridout* [2004] WASC 136, 16, 22. See also Freckelton, Court and VCAT staff report, above n 96, 17, where County Court staff reported that some declared vexatious litigants inspect court files for other litigants they know, and Smith, 'Goldsmith Collins: Footballer, fencer, maverick litigator', above n 118, which describes assistance provided by one Victorian vexatious litigant.

¹⁹⁹ See *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* [2001] HCA 26; David Bennett, 'Vexatious constitutional litigation' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006). Professor Steve Hedley has reported a similar case in the United Kingdom: see Hedley, above n 118.

²⁰⁰ Wellington Shire Council, *Submission no. 15*, 5.

²⁰¹ Jim Wilson, *Transcript of evidence*, above n 98, 3. See also Hedley, above n 118; Paul Mullen, *Transcript of evidence*, above n 117, 39.

Chapter 4: Why do some people become vexatious litigants?

Thousands of people are involved in legal proceedings in courts and tribunals every year but only a few ever become vexatious litigants. To deal with their behaviour effectively, it would help to understand why this happens. The Committee found very little consensus about this issue during its Inquiry. Some participants pointed to frustrations caused by the justice system itself. Others emphasised characteristics of the litigants themselves – their motivations, expectations, personalities, even possible mental or behavioural disorders. This chapter looks at the competing explanations.

4.1 Characteristics of the justice system

Some participants in the Inquiry, particularly those in the community legal sector, told the Committee that the justice system itself provokes frustration in litigants. They did not suggest that all of these litigants were or would become vexatious. However, they did argue that parts of the justice system – complaints handling and dispute resolution services, access to legal assistance and courts and tribunals themselves – can contribute to what appears to be inappropriate behaviour.

4.1.1 Problems with initial dispute resolution

As chapter 3 noted, the Committee’s issues paper asked whether vexatious litigants try to resolve their disputes in other ways before resorting to the courts. The issues paper also asked whether features of this experience contribute to them becoming vexatious.

A number of community legal centres told the Committee that poor complaint handling and dispute resolution schemes was a problem generally. Community legal services who assist people with disabilities and prisoners raised particular concerns. They told the Committee that some public agencies lacked proper internal grievance procedures or failed to resolve disputes in a timely way. They also told the Committee that independent agencies such as the Disability Services Commissioner, the Ombudsman and the Auditor-General lacked meaningful powers, failed to address underlying causes of common complaint or were too ready to refer complainants back to the original agency that was the source of the dispute.²⁰²

The centres told the Committee their clients saw the courts and tribunals as the only real option in these circumstances. The Fitzroy Legal Service’s submission said ‘for many people tribunals and courts are the only avenue where an objective and unbiased assessment of their rights and any infringements thereof is likely to

²⁰² Disability Discrimination Legal Service Incorporated, *Submission no. 24*, 3-4; Charandev Singh, Human Rights and Advocacy Worker, Brimbank Melton Community Legal Centre, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 39, 40; Donna Williamson, Prison Outreach Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 50; Darebin Community Legal Centre Inc, *Submission no. 46*, 3-4; Fitzroy Legal Service Incorporated, *Submission no. 43*, 4-5.

occur'.²⁰³ Mr Cameron Shilton from the Darebin Community Legal Centre also drew a link with vexatious conduct in the courts in his evidence to the Committee, noting that:

in our experience usually when people are engaging in conduct in the courts which might be characterised as vexatious it is ... because of a failure of internal grievance procedures or a lack of access to merits review or other means of resolving a dispute short of going to court.²⁰⁴

The views expressed by the legal services were supported by some other participants as well. Former solicitor and Monash University PhD student Mr Simon Smith told the Committee that industry ombudsmen schemes were too paper-based and do not give people their 'day in court', while important sectors such as local government failed to use alternative dispute resolution enough to deal with disputes.²⁰⁵ Professor Tania Sourdin, Professor of Conflict Resolution at the University of Queensland, also agreed that poor complaints-handling practices probably at least worsened the behaviour of vexatious litigants.²⁰⁶

4.1.2 Problems with access to legal advice

Community legal services also listed lack of access to quality legal advice as a factor contributing to vexatious litigation.

The disadvantages of self-represented litigants have been described not just in terms of lack of legal skills and experience, but also as a lack of the objectivity and emotional distance needed to properly assess the merits of their case.²⁰⁷ Socio-legal research suggests that good lawyers play a role in helping clients overcome both of these problems. They help litigants understand the legal process and 'come to terms with the apparent capriciousness and unpredictability of the administration of justice'.²⁰⁸ They also help to manage their expectations about their case and their chances of success in litigation.²⁰⁹

²⁰³ Fitzroy Legal Service Incorporated, *Submission no. 43*, 10. See also Disability Discrimination Legal Service Incorporated, *Submission no. 24*, 1; Charandev Singh, *Transcript of evidence*, above n 202, 42.

²⁰⁴ Cameron Shilton, Community Legal Education Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 50. See also Darebin Community Legal Centre Inc, *Submission no. 46*, 4-6; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 22-23; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 4; Mental Health Legal Centre Incorporated, *Submission no. 40*, 1-3.

²⁰⁵ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 4.

²⁰⁶ Tania Sourdin, Professor of Conflict Resolution, University of Queensland, *Transcript of evidence*, Melbourne, 13 August 2008, 61.

²⁰⁷ Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 564. See also Australian Institute of Judicial Administration, *Litigant in person management plans: Issues for courts and tribunals*, 2001, 4-5; *Tomasevic v Travaglini* [2007] VSC 337, 79-83.

²⁰⁸ Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings*, Department of Constitutional Affairs Research Series 2/05, 2005, 89.

²⁰⁹ See, for example, Rosemary Hunter, 'Through the looking glass: Clients' perceptions and experiences of family law litigation' (2002) 16 *Australian Journal of Family Law* 7, 20-21; Bruce J Winick, 'Therapeutic jurisprudence and the role of counsel in litigation', in Dennis P Stolle, David B Wexler and Bruce J Winick

The joint submission from the Human Rights Law Resource Centre (HRLRC) and the Public Interest Law Clearing House (PILCH) was one of several submissions that suggested a lack of such advice and guidance explained the behaviour of some vexatious litigants. They wrote that ‘in many instances vexatious litigants have not had access to legal advice and representation in the initial stages of legal proceedings. This has led to erroneous or inflated perceptions of the merit of their matter and a lack of understanding about the court process.’²¹⁰

Others suggested that the problem was a lack of access to responsive and inclusive legal services. The Darebin Community Legal Centre’s submission criticised the approach of some lawyers to their clients:

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.²¹¹

The Mental Health Legal Centre also pointed to the problems caused when lawyers do not give clients, particularly clients with a psychiatric disability, enough time to explain their legal problems or refer them on to other legal services.²¹² The Centre’s submission noted ‘the act of referral can be interpreted as an act of confirmation of legal merit by the client. Clients can shuttle between legal services and agencies for years, believing that the referral indicates their matter has merit and the next agency will be able to assist them to present their case to the Court.’²¹³

Not all participants in the Inquiry thought the behaviour of vexatious litigants could be attributed to lack of legal advice, however. A number suggested that vexatious litigants were not willing to accept advice about the lack of merits of their proceedings. Victoria Legal Aid, for example, told the Committee that in its experience access to legal advice was not a determinant of future litigation behaviour.²¹⁴ Some of the Supreme Court staff who spoke to Dr Freckelton also reported that vexatious litigants do not listen to legal advice or want legal

(eds), *Practising therapeutic jurisprudence: Law as a helping profession*, 2000, 309, 312-316, 321; Moorhead and Sefton, above n 208, 89.

²¹⁰ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 21-22. See also Kristen Hilton, Executive Director, Public Interest Law Clearing House, *Transcript of evidence*, Melbourne, 13 August 2008, 23; Charandev Singh, *Transcript of evidence*, above n 202, 39, 42; Mental Health Legal Centre Incorporated, *Submission no. 40*, 2; Fitzroy Legal Service Incorporated, *Submission no. 43*, 5.

²¹¹ Darebin Community Legal Centre Inc, *Submission no. 46*, 3.

²¹² Martin Thomas, Policy Officer, Mental Health Legal Centre, *Transcript of evidence*, Melbourne, 13 August 2008, 33. See also Mental Health Legal Centre Incorporated, *Submission no. 40*, 3; Darebin Community Legal Centre Inc, *Submission no. 46*, 2-3.

²¹³ Mental Health Legal Centre Incorporated, *Submission no. 40*, 3. See also Donna Williamson, *Transcript of evidence*, above n 202, 54.

²¹⁴ Victoria Legal Aid, *Submission no. 33B*, 2-3. See also Commonwealth Bank of Australia, *Submission no. 18*, 2.

representation: ‘They say things like, “I’ve been to ten solicitors. They’ve all said I have no case but they’re all wrong.”’²¹⁵

4.1.3 Problems with courts and tribunals

Participants in this Inquiry and other commentators have also argued that negative experiences in courts and tribunals can trigger vexatious litigation.

Dr Christine Atmore from the Federation of Community Legal Centres warned the Committee against assuming that the justice system always produces fair and just outcomes for litigants:

in our experience – and historically this has also been shown to be true, with people like Nelson Mandela, for example – there have been many occasions when people have not been able to receive justice through the legal system and yet they are seen to be vindicated subsequently ... it may well be that for some people the experience of that tips them over the edge ...²¹⁶

Other commentators have suggested that the litigation process is as problematic as its results. Despite efforts to improve their accessibility, courts and tribunals can still be a confusing and frustrating environment for litigants. In 1988, barrister Dr Ian Freckelton wrote:

What environment could be devised more ideal to feed the persecution complexes of a person newly stumbling into it than that of the litigation processes? It can all too easily seem Kafkaesque, an autocratic world, run by authoritarian rules, scarcely comprehensible at times, yet determinative of one’s fate and peopled by strange individuals conscious from the lowest levels that their word is law.²¹⁷

Participants in the Inquiry also saw this as a problem. In their joint submission, the HRLRC and PILCH argued ‘[t]he complexity of court processes can also aggravate a vulnerable litigant’s sense of injustice and trigger vexatious behaviours’.²¹⁸ The Mental Health Legal Centre told the Committee that, while none of its clients had been declared vexatious, they often left courts and the Victorian Civil and Administrative Tribunal (VCAT) feeling dissatisfied with their treatment and determined to persist with their claim:

although the Court may regard the matter as resolved, it has not [been] resolved to the satisfaction of clients ... In our experience, clients will continue to attempt to

²¹⁵ Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* (‘Court and VCAT staff report’), Victorian Parliament Law Reform Committee, 2008, 7.

²¹⁶ Christine Atmore, Policy Officer, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 45.

²¹⁷ Ian Freckelton, ‘Querulent paranoia and the vexatious complainant’ (1988) 11 *International Journal of Law and Psychiatry* 127, 132. See also Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 3; Duncan Webb, ‘Self represented litigants: Who’s the problem?’ (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006).

²¹⁸ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 22. See also Kristen Hilton, *Transcript of evidence*, above n 210, 23.

bring matters before Courts when they have experienced an injustice which has not been properly heard and considered by the Court. There is a strong sense amongst clients that having their day in Court is imperative to knowing that justice has been ... done.²¹⁹

The need to be heard was a common theme in evidence to the Committee. The HRLRC and PILCH noted '[o]ften, an individual's *perception* of fairness is far more important than any result they are seeking to achieve'.²²⁰

These observations are supported by surveys of litigants in both the United States and Australia. These studies show litigants value procedural justice – for example, being treated with dignity and respect, being able to tell their story, and being listened to and treated with care – as highly and sometimes more highly than the outcome of the legal proceedings.²²¹ There have been relatively few published studies in Australia on the extent to which courts and tribunals meet these needs. A 1997 study of personal injury litigants in New South Wales and a 2006 survey of litigants in South Australia both found that around two-thirds of litigants left the courts feeling that their proceedings were handled fairly.²²²

The Committee heard that some attempts by courts and tribunals to assist litigants, particularly self-represented litigants, sometimes actually add to the problem. Ms Kristen Hilton, the Executive Director of PILCH, told the Committee that:

Often even judges can perhaps give a litigant an unfair, or not so much an unfair but an overexaggerated sense that their matter might have merit. They are often told to go and procure a particular form of evidence and they then should come back to the court, and they believe that on the procurement of that evidence they will suddenly have a matter that is meritorious. In some cases it can be seen that a matter simply does not have merit, and they should be guided by the court in terms of what they might be able to expect from the legal process.²²³

However, not all participants thought that poor treatment by the justice system actually led to people becoming vexatious litigants. Supreme Court judge and

²¹⁹ Mental Health Legal Centre Incorporated, *Submission no. 40*, 2-3. See also Martin Thomas, *Transcript of evidence*, above n 212, 30, 32; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 21; Charandev Singh, *Transcript of evidence*, above n 202, 42.

²²⁰ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 23.

²²¹ Some of the US studies suggest that procedural fairness is rated more highly than the actual outcome: see, for example, Winick, above n 209, 320-321; Roger K Warren, 'Public trust and procedural justice' (2000) *Fall Court Review* 12, 13; National Centre for State Courts, *Trust and confidence in the California Courts 2005: A survey of the public and attorneys*, David Rottman, 2005, 24-25. Professor Rosemary Hunter's study of family law clients in Australia suggests that satisfaction with outcome influences perceptions of procedural fairness, and there is a tendency to project dissatisfaction with outcomes back onto processes: Hunter, above n 209, 14-15. See also Justice Research Centre, *Plaintiffs' satisfaction with dispute resolution processes: trial, arbitration, pre-trial conference and mediation*, Marie Delaney and Ted Wright, 1997, 79-103, 122.

²²² Justice Research Centre, above n 221, 45-48; Courts Administration Authority, South Australia, *Courts consulting the community 2006 survey results*, 2006, 26. The Justice Research Centre's study found that litigants whose claims had been settled at trial were less satisfied than those who had used the other dispute resolution procedures in the study such as mediation.

²²³ Kristen Hilton, *Transcript of evidence*, above n 210, 24. See also Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 26.

President of VCAT, Justice Kevin Bell told the Committee ‘it is a phenomena that is not caused by the legal system, it is a phenomena that is caused by the social system, by the personality type of the individual, by their experiences within general society and so on.’²²⁴ Professor Mullen told the Committee he and Dr Lester had looked at this issue in their earlier research on persistent complaints, but found no evidence that querulent complainants were treated differently to other complainants.²²⁵

4.2 Characteristics of individual vexatious litigants

Other participants told the Committee the cause of vexatious litigants’ behaviour could be found in the litigants themselves – in their motives for litigating, their expectations of the process, their personalities and attitudes and, more controversially, possible mental disorders.

4.2.1 Motive

A desire for justice

One view of vexatious litigants is that they are people motivated by an unusually strong sense of loss and desire for justice. Previous research and commentary on vexatious litigants often describes them as people with a ‘justifiable grievance that has somehow mushroomed’.²²⁶

The Fitzroy Legal Service suggested that one of the factors where people were engaged with legal processes on an ongoing basis was an ‘unwillingness to accept infringement of rights or to let go of [their] sense of injustice’.²²⁷

The Victorian WorkCover Authority’s submission to the Inquiry suggested that this sense of loss or injustice was more extreme in cases of vexatious litigants. It noted that it manages many claims from people who have a sense of being wronged unfairly because of workplace injury but ‘[i]n vexatious litigants this perception extends to an extreme sense of persecution and failure of justice.’²²⁸

²²⁴ Justice Bell, *Transcript of evidence*, above n 217, 7.

²²⁵ Paul Mullen, Professor of Forensic Psychiatry, Department of Psychological Medicine, Monash University, and Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 35.

²²⁶ Michael Taggart, ‘Vexing the establishment: Jack Wiseman of Murrays Bay’ (2007) *New Zealand Law Review* 271, 321. See also Graham L Fricke, ‘The injustice collectors’ (1978) *52 Australian Law Journal* 316, 316; John Sorabji, ‘Protection from litigants who abuse court process’ (2005) *24 Civil Justice Quarterly* 31, 31; Grant Lester, ‘The vexatious litigant’ (2005) *17(3) Judicial Officers’ Bulletin* 17, 18; Moorhead and Sefton, above n 208, 88; Chris Wheeler, ‘Dealing with unreasonable complainant conduct’ (Paper presented at the Society of Consumer Affairs Professionals Australia 2008 Symposium, Adelaide, 26-28 August 2008) 2.

²²⁷ Fitzroy Legal Service Incorporated, *Submission no. 43*, 6.

²²⁸ Victorian WorkCover Authority, *Submission no. 48*, 1. See also Wellington Shire Council, *Submission no. 15*, 2.

Malice

Some participants in the Inquiry reported that not all vexatious litigants were genuine and some used courts and tribunals as part of a wider campaign of harassment. A Supreme Court Master who spoke to Dr Freckelton saw this as an issue in some cases reporting that:

even if their litigation is struck out, they come back, all the while, sometimes maliciously, generating costs for the other side. This can be very damaging and even ... oppressive, sometimes deliberately so from the point of view of the vexatious litigant who can regard the conflict as a battle “to the end”.²²⁹

Mr Greg Garde QC from the Victorian Bar also named malice as one of the factors he thought was motivating vexatious litigants. He told the Committee there are ‘people who can see that use of the justice system is an effective means of causing havoc, cost and distress to somebody else’.²³⁰

The Women’s Legal Service Victoria suggested this is a particular problem with vexatious litigants in family violence proceedings. The Service’s submission drew the Committee’s attention to the ‘significant parallels’ between vexatious litigation and family violence. It stated that:

Family violence is often characterized by one party attempting to control the other party and stalking by one party attempting to have contact with the other party against their wishes. Similarly a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact with him/her via persistent litigation. It appears that some vexatious litigants appear to be using the legal system as a vehicle for control and harassment of the other party.²³¹

Ms Penny Drysdale, who gave evidence on behalf of the Service, told the Committee:

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’m going to start application after application after application.’²³²

The Service recommended further research on the relationship between vexatious litigation and family violence and stalking.

²²⁹ Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* (‘Judicial officers and VCAT members report’), Victorian Parliament Law Reform Committee, 2008, 19.

²³⁰ Greg Garde, Chair, Victorian Bar Law Reform Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 6 August 2008, 23, 25.

²³¹ Women’s Legal Service Victoria, *Submission no. 38*, 1. See also Freckelton, *Judicial officers and VCAT members report*, above n 229, 34.

²³² Penny Drysdale, Law Reform and Policy Officer, Women’s Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 9.

Case Study 3: Mr C

The Supreme Court declared Mr C a vexatious litigant on 27 March 1953.

Mr C was born in 1901. From 1922 to 1928 he played 64 games for the Fitzroy Football Club, winning the Club's Best and Fairest award in 1923.

By the late 1940s Mr C was living in Northcote with his wife. In 1947 he built a fence on their property without a permit from the local council and was fined by the Court of Petty Sessions in 1948. Mr C's application to the Supreme Court to review the decision failed. The *Victorian Bar News* described the events as 'the immediate stimulus for a celebrated legal career'.

Mr C had already been declared vexatious in the High Court by the time the Supreme Court heard the Victorian Attorney-General's application. The Supreme Court's file could not be located but, according to media reports, Mr C had brought 46 criminal and civil proceedings in the Court of Petty Sessions and the Supreme Court. The defendants included judges, the Supreme Court Library Committee, the Attorney-General, the Crown Solicitor, the Principal Registrar of the High Court, the Northcote City Council, lawyers, newspapers and public officials. The proceedings included actions for trespass, conspiracy, assault and defamation.

The Supreme Court adjourned the hearing for Mr C to seek legal advice, but he did not reappear and Acting Justice Hudson made the order.

Mr C's contact with the law continued, however. On 30 March 1953, he filed a writ in the Supreme Court seeking damages from Acting Justice Hudson, the Crown Solicitor, the Attorney-General's barrister and the media. In July 1953, the Court sentenced him to one month's imprisonment for contempt of court over statements he made in the vexatious litigant hearing. Justice Sholl said that:

having observed him over a long period in the Courts, I regard him as a man with some sort of persecution complex ... He has in the past been treated with very great indulgence, because he has obviously been a litigant endeavouring to conduct his own cases under what I believe to be a genuine sense of injustice inflicted upon him in the case of the original convictions of 1948 and 1949. It is apparent that he is a self-indulgent type of individual who seeks to justify his own failures by attributing them not to his own faults, but to the alleged wicked conspiracies and malice of other persons ... In my opinion he will continue the behaviour of which the Crown complains in relation to this Court unless he is on this occasion given a sharp lesson.

He was imprisoned for contempt of court again in 1958 after breaking an undertaking not to enter the Supreme Court building without the Chief Justice's consent.

According to an obituary published in the *Victorian Bar News*, Mr C spent his final years in a caravan at Panton Hill, where he died in a fire at the age of 80.

Other motives

Professor Steve Hedley has also listed a number of other possible motives based on his study of vexatious litigants in England and Wales:

- ‘lifestyle’ – in some cases ‘[l]itigation has become their life; so much so that they do not know what they would do with their time if they were not litigating’.²³³ The NSW Deputy Ombudsman, Mr Chris Wheeler, cites ‘recreation’ as one of the motivations for people engaging in unreasonable conduct in Ombudsman’s offices as well²³⁴
- delay – Professor Hedley notes some may not expect to win their legal proceedings, but use them as a strategy or tactic to delay an inevitable outcome
- pride – Professor Hedley argues that this is a particular issue where litigants see themselves as victims of a conspiracy because ‘the alternative, namely to give in, and let the conspirators have what they want without a fight, is undignified, not to say humiliating.’²³⁵

4.2.2 Expectations

Another common observation during the Committee’s Inquiry was that vexatious litigants have high, sometimes unrealistic, expectations of the justice system. They can interpret failure to meet their expectations as an injustice or a mistake and return to the courts to try again.

Some participants in the Inquiry noted that litigants can be disappointed when courts and tribunals deliver an outcome based on legal rules and procedure rather than what they see as the moral outcome. Professor Tania Sourdin told the Committee:

there is also sometimes a real lack of understanding from their perspective about what the outcomes are going to be, and they seriously do think that there will be a light cast over the other person, that the bottom will drop out of the court and that the judge will say, ‘You are evil; you are bad’. Sometimes there is a very weird understanding about what the reality of a court process is like and what the real remedies might be.²³⁶

Academic Duncan Webb, speaking in the context of self-represented rather than vexatious litigants, has noted that people who do not separate legal and moral issues can have ‘difficulty accepting that conduct which to them is a clear wrong causing harm is not recognised by the law’.²³⁷ Forensic psychiatrist Dr Grant Lester told the

²³³ Steve Hedley, ‘Vexatious litigants in England and Wales 1990-present’ (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006). See also Commonwealth Bank of Australia, *Submission no. 18*, 2.

²³⁴ Wheeler, ‘Dealing with unreasonable complainant conduct’, above n 226, 2.

²³⁵ Hedley, above n 233.

²³⁶ Tania Sourdin, *Transcript of evidence*, above n 206, 58. See also Grant Lester, Forensic Psychiatrist, Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 30.

²³⁷ Webb, above n 217. See also Maartje Van-der-Vlies, *Submission no. 28*, 1.

Committee this was a particular issue for vexatious litigants for whom ‘[the legal proceeding] is a moral issue ... Everything is about rights and about morality.’²³⁸

Others told the Committee that vexatious litigants overestimate their chances of success in legal proceedings. Judge Misso from the County Court told the Committee that:

These litigants only see the result which they want and then interpret any perceived adverse reaction to the litigation, as they have formulated it, to be unjust and “the system” working against them. It is the perception of what these litigants believe the litigation will provide which is at the heart of the problem ... it is often impossible to have these litigants behave and think rationally and accept that the result may go against them.²³⁹

The HRLRC and PILCH noted that some vexatious litigants ‘have unrealistic expectations of the legal system and at times seek redress that is grossly disproportionate to their grievance’.²⁴⁰ The case of Mr K might be one example. In some of his applications, he sought \$30 million compensation (case study 11).²⁴¹

Complaint-handling agencies suggest that some of their persistent or vexatious complainants expect vindication and retribution, not just compensation.²⁴² A 2004 study of unusually persistent complainants in Australian ombudsmen’s offices found these complainants more often sought to have individuals dismissed or prosecuted and organisations closed down or made to pay punitive damages.²⁴³ The Committee did not receive evidence about the extent to which this is a problem in courts and tribunals.

4.2.3 Attitude and personality

Participants in the Inquiry also pointed to common characteristics that might be loosely described as attitudes or personality traits.

Some reported that vexatious litigants were distinguished by their absolute conviction about the veracity of their claim. Mr Mark Yorston, a consultant with Wisewoulds Lawyers who gave evidence on behalf of the Law Institute of Victoria, described vexatious litigants as ‘fixated’.²⁴⁴ Forensic psychiatrists Professor Paul Mullen and Dr Grant Lester also reported similar characteristics in a paper published in 2006:

²³⁸ Grant Lester, *Transcript of evidence*, above n 236, 32.

²³⁹ Judge Misso, *Submission no. 10*, 3.

²⁴⁰ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 24.

²⁴¹ *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 91, 105.

²⁴² Wheeler, ‘Dealing with unreasonable complainant conduct’, above n 226, 1-2; Disability Services Commissioner, *Submission no. 25*, 1.

²⁴³ Paul E Mullen and Grant Lester, ‘Vexatious litigants and unusually persistent complainants and petitioners: From querulous paranoia to querulous behaviour’ (2006) 24 *Behavioural Sciences and the Law* 333, 336.

²⁴⁴ Mark Yorston, Consultant, Wisewoulds Lawyers, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 17.

The mental state of these individuals by the time we see them is dominated by apparently unshakeable beliefs around the justice of their grievances, the wide social import of their pursuit of justice, and the organized and malevolent opposition that they face. They usually retain a certainty of total victory.²⁴⁵

Other participants reported that vexatious litigants were quarrelsome individuals. The NSW Deputy Ombudsman, Mr Chris Wheeler, referred to a general attitude of dissatisfaction with a person, agency or life in some cases.²⁴⁶ Mr Jim Wilson from Wellington Shire Council told the Committee that vexatious litigants were sometimes engaged in a continual series of disputes: ‘When you think you have just about solved an issue for them, all of a sudden they will find another one that they need to become involved with.’²⁴⁷

Another characteristic mentioned by some witnesses and other commentators is a tendency to view injuries not just in terms of a loss, but as evidence of persecution or conspiracy. The joint submission from the HRLRC and PILCH noted that ‘[v]exatious litigants are also prone to creating an illusory web of conspiracy against them’²⁴⁸, while Mr Garde from the Victorian Bar suggested that paranoia, particularly perceptions of persecution, was a factor.²⁴⁹ One of the Supreme Court judges and some of the court staff who spoke to Dr Freckelton noted that many persons described as vexatious have a paranoid aspect to their thinking, as well as obsessive traits. A Supreme Court Master observed ‘[s]ome of these people won’t trust anyone’.²⁵⁰

4.2.4 Mental, personality or behavioural disorders

As chapter 2 noted, there is also a substantial body of psychiatric literature on the phenomenon of vexatious litigants, persistent complaints and ‘querulous paranoia’. This section looks at the evidence about whether vexatious litigants do or do not have a form of disorder that explains their behaviour.

The psychiatric perspective

Forensic psychiatrists Professor Mullen and Dr Lester from the Victorian Institute of Forensic Mental Health have both published in this area and gave evidence to the Committee at one of its public hearings. In their 2006 paper, they described querulousness as:

a pattern of behaviour involving the unusually persistent pursuit of a personal grievance in a manner seriously damaging to the individual’s economic, social, and

²⁴⁵ Mullen and Lester, above n 243, 338.

²⁴⁶ Wheeler, ‘Dealing with unreasonable complainant conduct’, above n 226, 2.

²⁴⁷ Jim Wilson, Director, Corporate Services, Wellington Shire Council, *Transcript of evidence*, Melbourne, 13 August 2008, 2.

²⁴⁸ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 24.

²⁴⁹ Greg Garde, *Transcript of evidence*, above n 230, 23. See also Fricke, above n 226, 326.

²⁵⁰ Freckelton, Judicial officers and VCAT members report, above n 229, 10. See also Freckelton, Court and VCAT staff report, above n 215, 7.

personal interests, and disruptive to the functioning of the courts and/or other agencies attempting to resolve the claims.²⁵¹

Dr Lester told the Committee that complaining behaviour was a spectrum and that what distinguished 'querulous' complainants from other complainants was 'focus and perspective'.²⁵² He and Professor Mullen have previously written that:

Querulousness in our opinion involves not just persistence but a totally disproportionate investment of time and resources in grievances that grow steadily from the mundane to the grandiose, and whose settlement requires not just apology, reparation, and/or compensation but retribution and personal vindication.²⁵³

Dr Lester told the Committee that this group had a specific personality structure which was obsessional, pedantic, combative, 'egotistic' (a lack of empathy or understanding that other people may just make mistakes), distrustful and vindictive.²⁵⁴ However, he favoured the view that '[n]o-one is born a querulent and no-one is born a vexatious litigant. You become that over a series of events.'²⁵⁵

The view that the behaviour is 'triggered' by a key event such as trauma or injustice is common to some other studies. Dr Lester has previously written that this may be the loss of a relationship, ill health or loss of employment.²⁵⁶

Other features noted in the psychiatric literature include:

- the rarity of the phenomenon²⁵⁷
- a higher incidence of the phenomenon in middle age²⁵⁸
- a greater proportion of males than females²⁵⁹
- use of other forums for complaint as well as litigation²⁶⁰
- a tendency to self-representation²⁶¹

²⁵¹ Mullen and Lester, above n 243, 334.

²⁵² Grant Lester, *Transcript of evidence*, above n 236, 29.

²⁵³ Mullen and Lester, above n 243, 340-341.

²⁵⁴ Grant Lester, *Transcript of evidence*, above n 236, 31. See also Grant Lester and Simon Smith, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 14-15; Christian Astrup, 'Querulent paranoia: A follow-up' (1984) 11 *Neuropsychobiology* 149, 150; Alfred H T Pang, Gabor S Ungvari, Francis Lum, Kelly Lai and C M Leung, 'Querulous paranoia in Chinese patients: A cultural paradox' (1996) 30 *Australian and New Zealand Journal of Psychiatry* 463, 465; Gabor S Ungvari and Rudolf I M Holloko, 'Successful treatment of litigious paranoia with Pimozide' (1993) 38(1) *Canadian Journal of Psychiatry* 4-8, 5.

²⁵⁵ Grant Lester, *Transcript of evidence*, above n 236, 30.

²⁵⁶ Lester, 'The vexatious litigant', above n 226, 18. cf M W D Rowlands, 'Psychiatric and legal aspects of persistent litigation' (1988) 153 *British Journal of Psychiatry* 317, 322; Astrup, above n 254, 150.

²⁵⁷ See Astrup, above n 254, 149; Pang, Ungvari, Lum, Lai and Leung, above n 254, 463; Grant Lester, *Transcript of evidence*, above n 236, 31; Lester, 'The vexatious litigant', above n 226, 18; Lester and Smith, above n 254, 14-16; Mullen and Lester, above n 243, 338, 229; Alistair Munro, 'Delusional (paranoid) disorders' (1988) 33 *Canadian Journal of Psychiatry* 399, 401.

²⁵⁸ See summary of studies in Rowlands, above n 256. See also Gabor S Ungvari, Alfred H T Pang and Helen F K Chiu, 'Delusional disorder, litigious type' (1995) 16 *Clinical Gerontologist* 71, 73; G S Ungvari, Alfred H T Pang and C K Wong, 'Querulous behaviour' (1997) 37(3) *Medicine Science and the Law* 265, 267; Astrup, above n 254, 150-151.

²⁵⁹ Ungvari, Pang and Chiu, above n 258, 267 cf Astrup, above n 254, 151.

²⁶⁰ Rowlands, above n 256; Ungvari, Pang and Chiu, above n 258; Lester and Smith, above n 254, 15; Mullen and Lester, above n 243, 335-337.

- reports of hyper-competency, that is intelligence and good factual knowledge of the law, but without understanding its spirit or social implications²⁶²
- distinctive styles of communication and presentation²⁶³
- negative impact on other areas of life such as family, friends, housing and employment²⁶⁴ and threats of violence in some cases.²⁶⁵

However, the Committee found little consensus about the nature of the condition.²⁶⁶ The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and the World Health Organisation's *International Statistical Classification of Diseases and Related Health Problems* refer to querulous paranoia under the category of 'delusional disorders'.²⁶⁷ Other studies refer to 'overvalued ideas', paranoia or a spectrum of diagnoses.²⁶⁸ American therapist, lawyer and mediator Bill Eddy takes a different approach again, arguing that 'high conflict people' are likely to suffer from a variety of personality disorders.²⁶⁹

Professor Mullen gave evidence that it was more important to identify the pattern of behaviour and its impact than to analyse the person's mental state:

if you spend all your time trying to distinguish whether this belief is a delusion or not a delusion, whether this person is psychiatrically or not psychiatrically ill, you are just going to find it an almost impossible task ... There is not one way to finish up as a vexatious litigant; there is a multitude of ways, which have certain common elements.²⁷⁰

²⁶¹ Robert Lloyd Goldstein, 'Paranooids in the legal system: The litigious paranoid and the paranoid criminal' (1995) 18(2) *The Psychiatric Clinics of North America* 303, 305. See also Lester and Smith, above n 254, 16; Lester, 'The vexatious litigant', above n 226, 18.

²⁶² Goldstein, above n 261, 305; Ungvari, Pang and Wong, above n 258, 268; Freckelton, 'Querulent paranoia and the vexatious complainant', above n 217, 131; Lester and Smith, above n 254, 16; Lester, 'The vexatious litigant', above n 256, 18; Grant Lester, *Transcript of evidence*, above n 236, 32; Ungvari and Holloko, above n 254, 5. cf Astrup, above n 254, 150.

²⁶³ Rowlands, above n 256, 318; Freckelton, 'Querulent paranoia and the vexatious complainant', above n 217, 130; Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen, 'Unusually persistent complainants' (2004) 184 *British Journal of Psychiatry* 352, 354, 355.

²⁶⁴ Rowlands, above n 256, 322; Ungvari, Pang and Wong, above n 258, 268; Mullen and Lester, above n 243, 337-339; Lester, 'The vexatious litigant', above n 226, 17.

²⁶⁵ Mullen and Lester, above n 243, 345-346; Lester and Smith, above n 254, 15.

²⁶⁶ Lester, 'The vexatious litigant', above n 226, 18-19; Lester and Smith, above n 254, 14; Mullen and Lester, above n 243, 334. See also Pang, Ungvari, Lum, Lai and Leung, above n 254, 463; Ungvari and Holloko, above n 254, 6.

²⁶⁷ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 4th edition, (2000) 323-329, 690-693; World Health Organization, *International Statistical Classification of Diseases and Related Health Problems 10th revision*, 2007, F22.28, F60.20. See also Munro, above n 257; George Winokur, 'Delusional disorder (paranoia)' (1977) 18(6) *Comprehensive Psychiatry* 511.

²⁶⁸ P J McKenna, 'Disorders with overvalued ideas' (1984) 145 *British Journal of Psychiatry* 579; Goldstein, above n 261; Rowlands, above n 256, 322; Ungvari, Pang and Wong, above n 258, 267.

²⁶⁹ Bill Eddy, *High conflict people in legal disputes* (2006); Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008, 49.

²⁷⁰ Paul Mullen, *Transcript of evidence*, above n 225, 34. See also Mullen and Lester, above n 243, 334, 343.

The perspective of other participants

The Committee asked other stakeholders about the relationship, if any, between mental health and vexatious litigation in its issue paper.

A number of people and organisations who had dealt with vexatious litigants agreed that there was some relationship between the two, although many acknowledged they were not experts. The State Revenue Office said that:

Whilst the [State Revenue Office] does not have experience in identifying mental health issues, in its experience with vexatious litigants, particularly correspondence and other dealings, the behaviour and communication styles of these individuals suggest that there may have been some underlying mental health issues in those individuals.²⁷¹

The Health Services Commissioner also wrote '[m]y personal view is that there is a definite link between mental health and vexatiousness and it is distressing to watch these people deteriorating as their quest overwhelms them.'²⁷²

Legal profession stakeholders reported a possible link as well, or told the Committee it was an issue requiring further consideration.²⁷³ A number of judicial officers and tribunal members who spoke to Dr Freckelton observed that people with personality disorders were overrepresented amongst declared vexatious litigants and possible vexatious litigants.²⁷⁴ Court staff from different courts variously reported that some showed signs of mental illness or personality disorders.²⁷⁵

However, other participants argued strongly against a link. Some community legal centres told the Committee it was not something they saw in clients. The Mental Health Legal Centre, for example, said '[i]t is not the experience of the Mental Health Legal Centre that there is any relationship between mental health and vexatious litigation'.²⁷⁶ Others objected to a link on principled grounds like those noted in chapter 2. The Fitzroy Legal Service argued that the discussion had:

the overt potential to breed prejudice and contempt for those seeking to pursue their rights (whether misguided or not) on the basis of conduct traits shared by a good many persons involved in legal proceedings generally.²⁷⁷

²⁷¹ State Revenue Office, *Submission no. 16*, 2.

²⁷² Health Services Commissioner, *Submission no. 41*, 3. See also Commonwealth Bank of Australia, *Submission no. 18*, 3; Wellington Shire Council, *Submission no. 15*, 2; Victorian WorkCover Authority, *Submission no. 48*, 1-2; Simon Smith, 'Goldsmith Collins: Footballer, fencer, maverick litigator' (2008) 34(1) *Monash University Law Review* 190, 193.

²⁷³ Law Institute of Victoria, *Submission no. 1B*, 1; The Victorian Bar, *Submission no. 8*, 8; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 20.

²⁷⁴ Freckelton, Judicial officers and VCAT members report, above n 229, 9.

²⁷⁵ Freckelton, Court and VCAT staff report, above n 215, 7-8.

²⁷⁶ Mental Health Legal Centre Incorporated, *Submission no. 40*, 5. See also Donna Williamson, *Transcript of evidence*, above n 202, 52; Charandev Singh, *Transcript of evidence*, above n 202, 45.

²⁷⁷ Fitzroy Legal Service Incorporated, *Submission no. 43*, 2.

The Darebin Community Legal Centre also said it was ‘not convinced of this link ... we believe that there is a tendency to classify “problem” litigants as persons suffering from some mental infirmity, almost as a matter of convenience.’²⁷⁸

Others pointed out that the behaviour described in the psychiatric literature could also describe a normal human reaction to the stresses and frustration of litigation. Professor Tania Sourdin noted Bill Eddy’s view that:

you can put perfectly sane people into a litigation process and ... those people who were previously quite sane as a result of the conflict will begin to develop behaviours, begin to develop obsessions and begin to do things they might not have otherwise done.²⁷⁹

Dr Atmore from the Federation of Community Legal Centres argued ‘[j]ust because somebody has been pushed over the edge does not necessarily mean they are mentally ill’.²⁸⁰ Academic commentators have also warned of the need for a cautious approach. In a paper on vexatious litigants from the 1980s, Professor Spencer Zifcak noted that:

attitudes of trust and mistrust, belief and disbelief, hope and dismay, commitment and disappointment are integral parts of everyone’s mood and thought. Each of us are subject to crises of confidence and credibility whether in other people or ourselves. Therefore, it is wise not to assume too readily the invalidity of similar feelings in those with whom we deal professionally.²⁸¹

4.3 The Committee’s view

The evidence in this Inquiry suggests that there is no one reason why some people become vexatious litigants. Most participants in the Inquiry who addressed this question listed a range of factors, or a combination of individual characteristics and external triggers, rather than any single cause.²⁸²

On the basis of the available evidence, the Committee is unable to make any clear finding about whether there is a link between mental health issues and vexatious litigants. The descriptions of querulous paranoia in the psychiatric literature accord

²⁷⁸ Darebin Community Legal Centre Inc, *Submission no. 46*, 8.

²⁷⁹ Tania Sourdin, *Transcript of evidence*, above n 206, 58.

²⁸⁰ Christine Atmore, *Transcript of evidence*, above n 216, 44. See also Kristen Hilton, *Transcript of evidence*, above n 210, 23; Fitzroy Legal Service Incorporated, *Submission no. 43*, 6; Darebin Community Legal Centre Inc, *Submission no. 46*, 8; Martin Thomas, *Transcript of evidence*, above n 212, 30, 32.

²⁸¹ Spencer Zifcak, ‘Vexatious complainants: A lawyer’s dilemma’, in Ellen Berah and Deidre Grieg (eds), *Community issues in psychiatry, psychology and the law: Proceedings of the 8th annual congress of the Australian and New Zealand Association of Psychiatry, Psychology and the Law*, 1987, 182; R Pal, ‘In defence of complainants’ (2005) 185 *The British Journal of Psychiatry* 175, 175-176.

²⁸² See, for example, Commonwealth Bank of Australia, *Submission no. 18*, 2; Health Services Commissioner, *Submission no. 41*, 2; Fitzroy Legal Service Incorporated, *Submission no. 43*, 5-6; Chris Wheeler, ‘Dealing with unreasonable complainant conduct’, above n 226, 2; Jim Wilson, *Transcript of evidence*, above n 247, 2; Hedley, above n 233; Greg Garde, *Transcript of evidence*, above n 230, 23, 25; Wellington Shire Council, *Submission no. 15*, 2.

Case Study 4: Mr D

The Supreme Court declared Mr D a vexatious litigant on 6 September 1963.

Newspaper articles from the time describe Mr D as a 29 year old engineer who had moved to Australia from Hungary. In 1954 he had married a woman who had been declared a vexatious litigant by the Supreme Court in 1941 (see case study 2).

According to the Supreme Court's decision, Mr D brought his first legal proceedings in 1960 against a Melbourne department store, its managing director and gas utilities claiming £68 000 in damages for loss and injury caused by the alleged explosion of a faulty bath heater and a fractured gas pipe.

This was the first of 16 proceedings over the next three years according to the Court. They included proceedings against Mr D's former solicitors alleging breach of duty and conspiracy with the defendants in the first proceedings. They also included proceedings against the managers and another employee of the department store, the gas utilities and some of their officers and two employees who tested the gas meter at Mr D's home. Mr D also sued lawyers who acted for the defendants, a County Court bailiff who entered Mr D's home, a judge who heard one of the earlier cases and his associate and the Attorney-General himself.

According to the Court's decision, Mr D succeeded in obtaining nominal damages of £2 in one proceeding against the gas utility for breach of contract after they failed to remedy the leaking gas pipe. Another was dismissed after a trial, one was dismissed in part before trial and in part at trial, three were struck out, nine did not proceed and the last was still before the Court at the time the vexatious litigant order was made.

One of the defendant's lawyers claimed that Mr D's wife was the 'motivating force' in all the proceedings but Mr Justice Sholl said he had no means of judging this.

Mr Justice Sholl found that 12 of the 16 proceedings, nine of which were issued in 1963, had been brought without any reasonable and probable cause. He said that:

after spending two days, or the best part of two days, in discussing them with [Mr D], I am convinced that he cannot distinguish between mere suspicion and matter which is capable of proof. He is prepared to attribute the worst motives, and to make the most extreme allegations, out of a sense of grievance and without the exercise of any balanced judgment; and I think his wife is no better ... I think the Attorney-General's case is made out.

The Court ordered that Mr D not institute legal proceedings in any court without the leave of the Supreme Court or a Judge.

The Committee did not locate evidence of any further legal proceedings by Mr D.

with descriptions of vexatious litigants in court decisions and other legal literature and with the experience of people who have worked in complaint-handling roles, whether as lawyers or professional complaints officers. The possibility of a medical solution to difficult legal or administrative problems is undoubtedly a persuasive one.

However, psychiatrists as well as lawyers acknowledge that not all vexatious litigants or persistent complainants can be explained in terms of querulous paranoia or other disorders. Dr Lester told the Committee that only half of the vexatious litigants in Professor Hedley's study of vexatious litigants in England and Wales 'mapped onto querulent' while the other half were 'completely different and not, perhaps, something that psychiatry would be involved with'.²⁸³ Supreme Court judge and President of VCAT Justice Kevin Bell told the Committee:

they do not all exhibit the kind of behaviours which querulous people exhibit either. Some of them are cool, calculating, deliberate, more in control than even the average person, and in some cases more in control than even the average lawyer.²⁸⁴

The NSW Deputy Ombudsman also told the Committee that not all complainants engaging in unreasonable complainant conduct in Ombudsmen's officers had behavioural, personality or psychiatric problems.²⁸⁵

This is one area which is ripe for further research.

²⁸³ Grant Lester, *Transcript of evidence*, above n 236, 33. See also Paul Mullen, *Transcript of evidence*, above n 225, 36; Lester, 'The vexatious litigant', above n 226, 17.

²⁸⁴ Justice Bell, *Transcript of evidence*, above n 217, 4.

²⁸⁵ Wheeler, 'Dealing with unreasonable complainant conduct', above n 226, 2; Chris Wheeler, *Transcript of evidence*, above n 269, 49.

Chapter 5: What is the impact of vexatious litigants on the justice system?

The terms of reference for this Inquiry require the Committee to consider the effect of vexatious litigants on the justice system. As noted in chapter 2 there is significant public interest in ensuring the efficient and effective operation of the justice system. In this chapter the Committee considers the impact that vexatious litigants have on key institutions of the justice system and the individuals who work within the system.

5.1 Impact on courts and tribunals

There is significant public cost in operating Victoria's courts and tribunals.²⁸⁶ However, as discussed in chapter 2, funding is not unlimited and courts and tribunals are under increasing pressure to administer justice effectively and efficiently.

There is evidence that court and tribunal caseloads are increasing while, at the same time, there is pressure to dispose of cases more quickly.²⁸⁷ The Committee acknowledges that, in light of the pressures currently experienced by the Victorian court and tribunal system, there is the potential for litigants instituting repeated unmeritorious actions to have a significant impact on court and tribunal operations and the access of other parties to the system. However, there is very limited evidence about the extent to which this is actually the case.

5.1.1 Disproportionate use of resources

The Committee was also not able to quantify how much court time and resources are currently consumed by possible vexatious litigants. However, it received a range of anecdotal evidence from participants that, while small in number, these litigants take up a disproportionate amount of court time.²⁸⁸

The burden that vexatious litigants place on court resources has been specifically noted by some judges when declaring a litigant to be vexatious. In one case Justice Kellam of the Supreme Court of Victoria commented on the 'very considerable and time consuming application of scarce judicial resources in this and other Courts which has been necessitated by the tortuous and convoluted passage of the proceedings ...',²⁸⁹

²⁸⁶ Steering Committee for the Review of Government Service Provision, *Report on Government Services 2008*, Productivity Commission, 2008, 7.12.

²⁸⁷ Chief Justice Marilyn Warren, 'State of the Victorian judiciary' (Speech delivered at the Banco Court, Supreme Court of Victoria, 22 May 2007) 12-13; Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 66-67; Steering Committee for the Review of Government Service Provision, above n 286, Table 7A.2.

²⁸⁸ Law Institute of Victoria, *Submission no. 1B*, 2; Victorian WorkCover Authority, *Submission no. 48*, 1; Judge Misso, *Submission no. 10*, 3-5; Matthew Groves, *Submission no. 6*, 1; State Revenue Office, *Submission no. 16*, 1, 2; The Institute of Legal Executives (Victoria), *Submission no. 42*, 1.

²⁸⁹ *Attorney-General (Vic) v Lindsey* (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998) 18-19.

These sentiments were echoed in the Commonwealth Bank of Australia's submission to the Inquiry which stated:

Such litigants have a debilitating effect on the whole justice system ... They occupy many hundreds of hours of time in fruitless, hopeless litigation ... In the proceedings involving the litigants referred to in this submission, the number of court appearances (at interlocutory and full hearings) that each litigant has occasioned average around 80. Hundreds of hours of court time are expended.²⁹⁰

In particular, participants were cognisant of the scarcity of judicial time and the impact that a vexatious litigant can have on this. Judge Misso of the County Court told the Committee about one litigant:

Each time this litigant has decided to make an interlocutory application this litigant has engaged in unnecessary and pointless correspondence with registry staff and the Judge appointed to hear this litigant's trial in circumstances where none of the interlocutory applications has had any merit and should not have been made yet this litigant was given a mention date and time which intruded significantly upon that Judge's obligation to undertake the ordinary work of the court.²⁹¹

Dr Freckelton's reports to the Committee suggest that the effect of vexatious litigants is felt more keenly in the Supreme and County Courts than in the Magistrates' Court and VCAT. Registry staff in the Supreme and County Courts commented on the significant amounts of resources and time that were consumed by a small number of possible vexatious litigants in these courts.²⁹² They told Dr Freckelton that these litigants may file large numbers of documents or exhibit challenging behaviour which necessitates a more senior staff member to deal with them when they appear in the registry.²⁹³ One County Court judge told Dr Freckelton, 'The amount put into their litigation can be ten times what it deserves.'²⁹⁴

In contrast, Dr Freckelton's consultations with the Magistrates' Court and VCAT suggested that the number of possible vexatious litigants in those jurisdictions is relatively low and that any such litigants are effectively managed by internal processes.²⁹⁵ This was further supported by the Magistrates' Court's submission to the Committee which stated that '[v]exatious litigants do not pose a significant impact for the administration of the Court', although the submission goes on to note that there are some specific issues in the family violence and stalking jurisdictions.²⁹⁶

²⁹⁰ Commonwealth Bank of Australia, *Submission no. 18*, 3. See also Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 16.

²⁹¹ Judge Misso, *Submission no. 10*, 5. See also Mark Yorston, Consultant, Wisewoulds Lawyers, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 19; *Bhamjee v Forsdick* [2003] EWCA Civ 799, 25.

²⁹² Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* ('Court and VCAT staff report'), Victorian Parliament Law Reform Committee, 2008, 10, 22. See also Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* ('Judicial officers and VCAT members report'), Victorian Parliament Law Reform Committee, 2008, 39.

²⁹³ Freckelton, Court and VCAT staff report, above n 292, 6, 11. See also Judge Misso, *Submission no. 10*, 5.

²⁹⁴ Freckelton, Judicial officers and VCAT members report, above n 292, 14.

²⁹⁵ Freckelton, Court and VCAT staff report, above n 292, 9, 12-13.

²⁹⁶ Magistrates' Court of Victoria, *Submission no. 37*, 1,2.

The Committee was not able to find any data on the precise amount of court hearing and administration time consumed by cases brought by vexatious litigants. The NSW Deputy Ombudsman, Mr Chris Wheeler, told the Committee that the evaluation of the unreasonable complainant conduct project has found that between 2% and 6% of complainants consume between 20% and 25% of resources in ombudsmen's offices.²⁹⁷ The Committee notes that it is not clear whether the justice system is affected in the same way.

The case studies set out in this report demonstrate considerable variation in the impact of vexatious litigants on courts and tribunals between declared vexatious litigants in Victoria, in terms of the number and types of cases they have instigated.

Mrs B and Mr G, for example, had instituted nine and eight proceedings respectively at the time of their vexatious litigant declarations (see case studies 2 and 7). On the other hand, Mr N had initiated 77 proceedings (see case study 14). Mr L brought 28 cases over a 12 year period prior to his declaration as a vexatious litigant, with one hearing occupying 119 court days (see case study 12).²⁹⁸

As chapter 2 noted, the use of court time to deal with repeated and unmeritorious claims has the potential to affect access to justice for other members of the community. A County Court judge told Dr Freckelton, 'Resources are taken away from deserving litigants.'²⁹⁹ This was echoed by a Supreme Court staff member who told Dr Freckelton, '[i]t takes up court resources and affects other people's cases as it delays or perhaps even sometimes prevents them from getting their own access to justice.'³⁰⁰

Several participants also commented that public confidence in the court system as a whole may be diminished if it is perceived that valuable court resources are being wasted by vexatious litigation. A Supreme Court judge interviewed by Dr Freckelton stated that vexatious litigants 'destabilise the administration of justice' and 'detract from the court's role in the community'.³⁰¹ Darebin Community Legal Centre told the Committee that delays caused by the diversion of court resources to vexatious matters at the expense of legitimate matters leads to frustration not just among court users, but also among the community in general.³⁰²

²⁹⁷ Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008, 47.

²⁹⁸ *Attorney-General (Vic) v Weston* [2004] VSC 314, 48.

²⁹⁹ Freckelton, Judicial officers and VCAT members report, above n 292, 13.

³⁰⁰ Freckelton, Court and VCAT staff report, above n 292, 10. See also Darebin Community Legal Centre Inc, *Submission no. 46*, 9; Judge Misso, *Submission no. 10*, 6; State Revenue Office, *Submission no. 16*, 2; Victoria Police, *Submission no. 47*, 1.

³⁰¹ Freckelton, Judicial officers and VCAT members report, above n 292, 13. See also George Zdenkowski, 'Magistrates' courts and public confidence' (Paper presented at the Confidence in the Courts conference, Canberra, 9-11 February 2007) 19; Deborah L Neveils, 'Florida's vexatious litigant law: An end to the *pro se* litigant's courtroom capers?' (2000) 25 *Nova Law Review* 343, 349.

³⁰² Darebin Community Legal Centre Inc, *Submission no. 46*, 9.

5.1.2 Comparison with other litigants

There is a tendency towards more complex and lengthy litigation generally. The Chief Justice of the Supreme Court, Marilyn Warren, noted this in her 2007 State of the Victorian Judicature address in which she gave an example of one civil case which consumed 71 days of court time.³⁰³ In this context, several participants emphasised that the cost of vexatious litigants to the justice system is overstated, particularly when compared to other forms of ‘legitimate’ litigation.

Former solicitor and PhD candidate, Mr Simon Smith informed the Committee that the impact of vexatious proceedings by corporate litigants was significantly greater than that of individual vexatious litigants, although it is the latter who are more likely to be the subject of a vexatious litigant order. He cited one recent instance of ‘corporate duelling’ in the Federal Court which used 120 court days over five years.³⁰⁴ The judge in that case stated, ‘In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.’³⁰⁵ Mr Smith extrapolated that ‘[u]sing that one case as a cost benchmark I estimate that is equivalent to every litigant in person declared vexatious in Victoria and Queensland in the last 77 years.’³⁰⁶

Other participants also commented on the wasteful use of court resources by corporate litigants, noting that such litigants are unlikely to be the subject of vexatious litigant orders. For example the Federation of Community Legal Centres stated ‘[t]here is no evidence of systematic enforcement [of section 21] against commercial litigants who in order to advance their business interests waste court resources and time ...’³⁰⁷

5.2 Impact on judicial officers and court and tribunal staff

Vexatious litigants also have the potential to have a significant impact on the individuals working within the justice system, particularly judicial officers and court and tribunal staff. Evidence received by the Committee suggests this impact is predominantly in the form of stress and concerns about safety and security.

³⁰³ Chief Justice Warren, above n 287, 16.

³⁰⁴ Simon Smith, *Submission no. 21*, 2.

³⁰⁵ *Seven Network Limited v News Limited* [2007] FCA 1062, 1064.

³⁰⁶ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 3. See also Julian Knight, *Submission no. 14*, 6.

³⁰⁷ Federation of Community Legal Centres (Victoria), *Submission no. 39*, 4; Fitzroy Legal Service Incorporated, *Submission no. 43*, 6.

Case Study 5: Mrs E

The Supreme Court declared Mrs E a vexatious litigant on 12 December 1969.

Mrs E was born in 1912 and established an engineering business with her husband in South Melbourne. She became involved in the animal welfare movement and, in 1959, attended her first meeting of the Royal Society for the Prevention of Cruelty to Animals (the RSPCA). According to former solicitor and PhD candidate Mr Simon Smith, she became disillusioned with the RSPCA's approach and became involved in a campaign for reform.

That campaign resulted in Mrs E's first legal proceeding in 1964 when she successfully obtained an injunction to stop the election of the RSPCA's General Committee. She had partial success in 1967 in her second proceeding when the Supreme Court agreed with her argument that the RSPCA had no valid by-laws. However, it held she was not entitled to succeed because she had no standing and had relied on the same by-laws in her previous case, and ordered her to pay the RSPCA's costs.

The Victorian Parliament legislated to validate the RSPCA's by-laws. In 1968 the RSPCA rejected the membership applications of Mrs E and a number of her supporters.

Mr Smith reports that Mrs E began to receive advice from a person she described in her diaries as 'Mr X'. In September 1968 she sued her former lawyers for 'actionable wrongs and breach of contract'. She brought seven further proceedings in 1969, including against her former lawyers and the RSPCA and its officers and lawyers. One proceeding reportedly named 32 parties including broadcasters and judges. They included allegations of conspiracy, obtaining judgment by fraud and defamation.

The Supreme Court's written reasons for declaring Mrs E vexatious are not on the Court's file. She appealed to High Court against the order but was unsuccessful.

In 1969 the RSPCA moved to bankrupt Mrs E over unpaid costs orders and this led to further litigation in the federal courts. Mr Smith reports that she began to receive advice from a second person in 1970, who he identifies as Victoria's third vexatious litigant (case study 3). In October 1971, the High Court declared Mrs E a vexatious litigant in that jurisdiction as well.

In 1982, Mrs E applied to the Supreme Court to have her vexatious litigant order set aside or revoked on the grounds that she had not been able to attend the hearing through ill health and she should have had a lawyer assigned to her. The Court held it could not revoke the order on these grounds.

Mrs E died in 1995 at the age of 83.

Mr Smith describes Mrs E as a 'passionate animal welfare activist'. He quotes Mr Hugh Wirth, the current President of the RSPCA in Victoria, as commenting that Mrs E had been 'more right than wrong' and was a catalyst for change.

5.2.1 Stress

Participants in this Inquiry noted that judicial officers and court and tribunal staff regularly have to deal with people demonstrating problematic or confrontational behaviour.³⁰⁸ However the Committee notes that just as not all difficult litigants are vexatious, not all vexatious litigants exhibit challenging behaviour. Judicial officers and court and tribunal staff interviewed by Dr Freckelton stated that responding appropriately to challenging litigant behaviour is a core function of persons working in the court system.³⁰⁹ Supreme Court Justice and President of VCAT, Justice Bell, told the Committee:

People may present at courts and tribunals with challenging behaviours for a variety of reasons. They may be emotionally upset or mentally ill ... They may be reacting to the profound sense of disempowerment that many people feel in the justice system. It is very common for the courts and tribunals to see people present with challenging behaviours for these and for other reasons.³¹⁰

The Committee heard, however, that some vexatious litigants do exhibit aggressive behaviour. Dr Freckelton's report on consultations with judicial officers notes that possible vexatious litigants can be 'harassing, time-consuming and threatening'.³¹¹ In addition, possible vexatious litigants may behave in an intimidating manner which is disruptive to the whole registry as well as personally upsetting for the individual staff member. Dr Freckelton's report on interviews with staff members states:

"They speak very loudly and intimidate staff. Not all staff can deal with people who get aggressive." When they come in, "there's going to be yelling and screaming and they're going to be a disruption to the registry." One staff member commented that such litigants need to be handled "with kid gloves".³¹²

It was noted by some court staff that inexperienced staff and female staff and judicial officers may be especially vulnerable to harassment by these litigants.³¹³ It was also acknowledged that working with such litigants takes a personal toll. One County Court staff member stated 'dealing with them can take a lot out of you. You put up that stony or impassive exterior but it's hard.'³¹⁴ Several judges stated that they saw this as an occupational health and safety matter³¹⁵ and one submission noted that

³⁰⁸ Freckelton, Court and VCAT staff report, above n 292, 11-13; Freckelton, Judicial officers and VCAT members report, above n 292, 14; Judge Misso, *Submission no. 10*, 2.

³⁰⁹ Freckelton, Court and VCAT staff report, above n 292, 22.

³¹⁰ Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 2.

³¹¹ Freckelton, Judicial officers and VCAT members report, above n 292, 14. See also Commonwealth Bank of Australia, *Submission no. 18*, 3.

³¹² Freckelton, Court and VCAT staff report, above n 292, 10.

³¹³ Freckelton, Court and VCAT staff report, above n 292, 11; Freckelton, Judicial officers and VCAT members report, above n 292, 10.

³¹⁴ Freckelton, Court and VCAT staff report, above n 292, 11.

³¹⁵ Freckelton, Judicial officers and VCAT members report, above n 292, 16.

additional expenditure may be required in terms of counselling for those distressed by their interactions with such litigants.³¹⁶

People working in the court system can also find themselves the subject of legal proceedings by vexatious litigants. Six of the 15 declared vexatious litigants in Victoria sued judges, court officials or court staff.³¹⁷ One of these litigants brought 35 criminal charges against 20 individuals including both justices of the High Court and judges and masters of the Victorian Supreme Court.³¹⁸

Judicial officers may find themselves subject to personal attacks by some litigants. In one case, cited by the Victorian WorkCover Authority in its submission to the Committee, Justices Kirby and Heydon of the High Court commented:

The applicant has now sought special leave to appeal to this Court from the orders of the Full Court. In her written case she makes unparticularised allegations of denial of procedural fairness and abusive and scandalous references to judicial officers and others.³¹⁹

The Victorian WorkCover Authority also suggests in its submission that the stress of dealing with a possible vexatious litigant may impair the judge's decision-making capacity.³²⁰

5.2.2 Safety and security issues

As was noted in chapter 3, vexatious litigants sometimes exhibit destructive and confrontational behaviour and the Committee heard evidence that some possible vexatious litigants may also raise safety and security issues. While these issues were not widely addressed in submissions to the Committee³²¹, several judicial officers and court staff mentioned concerns about security in the consultations conducted by Dr Freckelton.

The consultations revealed that the courts and tribunals have a range of mechanisms in place to respond to litigants who pose a security threat. For example, the County Court has a panic button for registry staff.³²² Some registry staff rely on security personnel to assist in some dealings with persistent litigants. A staff member at the Magistrates' Court explained how one such litigant is dealt with:

when she comes in she wants to stay for three hours. I just answer all her questions and then say, "We're done, that's everything, see you on the hearing day," and walk

³¹⁶ State Revenue Office, *Submission no. 16*, 2.

³¹⁷ Note that judicial officers have immunity in relation to civil suits. See, for example, *Towie v Victoria* [2008] VSC 177; *Nisselle v Brouwer* [2007] VSC 147; *County Court Act 1958* (Vic) s 9A; *Magistrates' Court Act 1989* (Vic) s 14; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 143.

³¹⁸ Commonwealth Director of Public Prosecutions, *Submission no. 36*, 4.

³¹⁹ *Bahonko v Commonwealth* [2008] HCASL 357 cited in Victorian WorkCover Authority, *Submission no. 48*, 3. See also *Her Majesty's Attorney-General v Ebert* [2001] EWHC Admin 695, 28.

³²⁰ Victorian WorkCover Authority, *Submission no. 48*, 2-3.

³²¹ State Revenue Office, *Submission no. 16*, 2.

³²² Freckelton, Court and VCAT staff report, above n 292, 11.

away. I just ignore her and tell the others [registry staff] to ignore her too and she usually just goes. Security know her too and if she won't go they'll come and walk her out.³²³

A Supreme Court master told Dr Freckelton, 'We've been in the position that we have been worried about our security. I try to make sure that my staff are not left alone with the litigant.'³²⁴

Psychiatric evidence suggests that some possible vexatious litigants may also make threats to judicial officers and court and tribunal staff.³²⁵ This was supported by evidence collected by Dr Freckelton on behalf of the Committee.³²⁶ On some occasions police have been called to investigate whether a criminal offence has been committed and judicial officers noted that this is an effective deterrent.³²⁷

5.3 Impact on other players in the justice system

5.3.1 Directors of Public Prosecutions

The other key justice agencies which have significant levels of contact with possible vexatious litigants are the Directors of Public Prosecutions (DPPs). Chapter 3 noted that some possible vexatious litigants institute private criminal prosecutions. The DPP at both the Commonwealth and state level has the power to take over and discontinue criminal prosecutions that are without merit. This process is discussed in more detail in chapter 8.

The Committee received limited evidence about the impact that possible vexatious litigants have on DPPs. Mr Peter Byrne of the Victorian Office of Public Prosecutions estimated that the cost of taking over and discontinuing a matter is between \$5000 and \$10 000. He estimated that approximately five cases are taken over each year, and advised 'it is not a huge amount, but I suppose in the context of our budget it is still a reasonable amount.'³²⁸ He told the Committee that:

Quite often the greater problem we would have would be after the director has made a decision [to take over and discontinue a proceeding] where the person may become aggrieved and may pursue proceedings in VCAT or FOI-type proceedings which may use up our resources to some extent. It is not a major problem within the office in terms of resources or generally.³²⁹

³²³ Freckelton, Court and VCAT staff report, above n 292, 12.

³²⁴ Freckelton, Judicial officers and VCAT members report, above n 292, 17.

³²⁵ Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen, 'Unusually persistent complainants' (2004) 184 *British Journal of Psychiatry* 352, 355

³²⁶ Freckelton, Court and VCAT staff report, above n 292, 6; Freckelton, Judicial officers and VCAT members report, above n 292, 14.

³²⁷ Freckelton, Judicial officers and VCAT members report, above n 292, 15.

³²⁸ Peter Byrne, Senior Solicitor, Policy and Advice Section, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 6 August 2008, 62.

³²⁹ *Ibid* 58.

Case Study 6: Mr F

The Supreme Court declared Mr F a vexatious litigant on 5 September 1977.

The Committee was able to find only very limited information about Mr F and his proceedings. The Supreme Court's file on Mr F could not be located and the only publicly available Court decision relates to an early unsuccessful application for vexatious litigant orders against Mr F and his wife in 1975.

According to the 1975 decision, in 1966 Mr F and his wife entered into an agreement to purchase a property in Kensington. For reasons which are unclear from the decision, settlement did not take place and in 1972 the vendor successfully brought proceedings seeking possession of the property. Mr F was arrested and removed from the property, placed in custody and charged with wilful trespass.

The 1975 decision refers to four proceedings brought by Mr F and his wife as a result. The defendants in those proceedings included the vendor of the property, a firm of solicitors and the police officer who took Mr F into custody.

Justice Starke of the Supreme Court said in his decision:

There can be no doubt in my mind that both the respondents have a genuine feeling of grievance. I also have no doubt that the male respondent at least is suffering in some degree from a litigation mania which is a condition well known to most lawyers. And I have little doubt that the male respondent at least, and perhaps his wife, are convinced there is a conspiracy against them, even to the extent of involving the Titles Office.

However, he said that the number of proceedings raised by the Attorney-General in the application fell 'far short of what I would regard as being habitual and persistent'. He said that all he could do was to urge Mr F and his wife to consider their position carefully before they issue further proceedings.

It appears the Supreme Court did agree to make an order in 1977, but the reasons for the decision and details of Mr F's subsequent litigation are unknown.

5.3.2 The legal profession

The Committee received evidence that possible vexatious litigants can have a significant impact on members of the legal profession, both those representing the litigant and those representing other parties to the legal proceedings.

While many vexatious litigants are self-represented, they have often engaged legal representation at the time they initially commenced litigation. Mr Mark Yorston from the Law Institute of Victoria told the Committee that the vexatious litigants seen by the courts are only the ‘tip of the iceberg ... it is only the most persistent who are going to proceed through a number of lawyers before they then go into the courts themselves ...’³³⁰

Mr Yorston told the Committee that many such litigants access lawyers through the Law Institute’s referral system, which provides an initial 30 minutes’ legal advice for no charge, and that this can be very time-consuming for practitioners. Mr Yorston described his own experience with one client:

Before coming to see me that person delivered some papers for me to consider. When they arrived there were approximately 1000 pages ... In my view when you get that amount of material you still have an obligation to read it just to see whether there is something serious behind it. That was pretty much a weekend’s work, to read it and form a view that there was no case and this person simply had some mental health issues that needed to be dealt with by people other than lawyers ... I gave him the advice that I did not think he had a cause of action and that we could not assist him further. I did not give him a bill, because it would have been a waste of time. He will go to other lawyers. He will try to get another referral through the Law Institute referral system ...³³¹

The Committee heard evidence that lawyers themselves sometimes become the targets of a vexatious litigant. Forensic psychiatrist Professor Paul Mullen indicated that lawyers who do represent such parties ‘inevitably finish up on the wrong end of complaints to the law society ...’³³² One member of the community who made a submission to the Inquiry claimed to be involved as a defendant in ongoing litigation with a possible vexatious litigant and stated that the litigant had made numerous complaints to the Law Institute of Victoria about the defendant’s lawyers’ conduct.³³³ In one instance in the United Kingdom a vexatious litigant arrested a barrister by citizen’s arrest.³³⁴

Some legal practitioners may even find themselves named as defendants in separate legal proceedings: at least seven of Victoria’s 15 declared vexatious litigants sued their own lawyers and 11 sued the lawyers representing the other parties. The

³³⁰ Mark Yorston, above n 293, 19.

³³¹ Ibid 15,16.

³³² Paul Mullen, Professor of Forensic Psychiatry, Department of Psychological Medicine, Monash University, and Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 39. See also Joanna Lobo, ‘Unreasonable behaviour’ (2003) 153 *New Law Journal* 1387, 1387.

³³³ Confidential, *Submission no. 12*.

³³⁴ *Her Majesty’s Attorney-General v Ebert* [2001] EWHC Admin 695, 18.

Commonwealth Bank told the Committee that defending such actions can be extremely stressful and time-consuming.³³⁵

The Victorian WorkCover Authority's submission to the Inquiry outlined the impact that possible vexatious litigants have on lawyers working for the Authority:

Our lawyers are often placed under considerable pressure and regularly subject to unfounded criticism of incompetence and lack of professionalism/ethics by vexatious litigants. Vexatious litigants become aware of the obligations of lawyers acting on behalf of a government organisation and supplement their formal litigated appeals with complaints, tying the lawyers up in attending to constant, repetitive and unfounded complaints and requests for review of management of the litigation itself. Lawyers have also been subject to threats of violence.³³⁶

Other stakeholders, for example the Women's Legal Service, also emphasised the stress experienced by lawyers dealing with parties who 'exhibit a wide range of hostile, irrational or challenging behaviours ...'³³⁷ Ms Sarah Vessali of the Service told the Committee that 'we have had to take steps to protect the service and to protect the lawyers'.³³⁸ These measures include increased security measures and staff debriefing arrangements.

5.3.3 Witnesses

The Committee received very limited evidence about the impact that vexatious litigants have on persons who are witnesses in legal proceedings. Judicial officers interviewed by Dr Freckelton noted that possible vexatious litigants often attempt to subpoena large numbers of witnesses.³³⁹ However, appearing as a witness in such a case may be problematic. The Commonwealth Bank of Australia's submission states '[i]t is a common occurrence by vexatious litigants that any person who swears an affidavit in these matters will be joined as a defendant to the proceeding or in another civil or criminal proceeding. Practitioners and witnesses are therefore reluctant to swear affidavits in such matters.'³⁴⁰ The Committee also heard evidence that in some instances it may be traumatic to be examined by a possible vexatious litigant. The Commonwealth Bank indicated that vexatious litigants sometimes treat all persons involved in the proceedings, including witnesses, 'with little or no respect whatsoever'.³⁴¹

³³⁵ Commonwealth Bank of Australia, *Submission no. 18*, 1,4.

³³⁶ Victorian WorkCover Authority, *Submission no. 48*, 2.

³³⁷ Women's Legal Service Victoria, *Submission no. 38*, 6. See also Alison Meek, 'A vexing problem' (1999) 142(22) *Solicitors Journal* 534, 534.

³³⁸ Sarah Vessali, former Principal Lawyer, Women's Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 10-11.

³³⁹ Freckelton, Judicial officers and VCAT members report, above n 292, 22-23.

³⁴⁰ Commonwealth Bank of Australia, *Submission no. 18*, 4.

³⁴¹ Commonwealth Bank of Australia, *Submission no. 18*, 3. See also Paul Mullen, *Transcript of evidence*, above n 332, 38-39.

Chapter 6: What is the impact of vexatious litigants on other parties?

The Committee's terms of reference also require it to consider the effect of vexatious litigants on the other parties to their legal proceedings. Involvement in litigation is inherently costly and stressful. Parties encounter a range of pressures including financial costs, the time involved and the emotional burden of litigation. This chapter considers these impacts on parties who are sued by vexatious litigants.

6.1 Financial costs

6.1.1 Legal costs

Many participants in this Inquiry commented on the significant legal and financial costs incurred by parties who are sued by vexatious litigants.³⁴² It is difficult to quantify the amount that parties who have been involved in proceedings with vexatious litigants have spent on legal costs.

Evidence about the legal costs incurred by parties dealing with declared vexatious litigants was only available in a few cases. The Commonwealth Bank of Australia told the Committee it had spent between \$450 000 and \$650 000 in legal costs dealing with one declared vexatious litigant in Victoria.³⁴³ One newspaper article claimed that it cost the Victorian Government \$250 000 to defend 16 claims brought over a three-year period by another litigant who was subsequently declared vexatious. The author claimed Victoria's declared vexatious litigants had cost the Government nearly \$6.2 million in total, although this appears to be an extrapolation rather than an evidence-based estimate.³⁴⁴

The Committee received evidence from a number of persons who claimed to be currently involved in legal proceedings with possible vexatious litigants. The Commonwealth Bank of Australia informed the Committee that in 2001 the Supreme Court of Victoria entered judgment in the Bank's favour of \$293 000 in a case relating to a default on credit and overdraft facilities. However, the Bank has been unable to execute this judgment because of numerous appeals in both the state and federal courts, which in the Bank's view amount to re-litigation of the Supreme Court proceedings. The Bank estimates that it has spent \$460 000 on these subsequent legal proceedings.³⁴⁵ This example illustrates the Bank's claim that '[t]he

³⁴² Law Institute of Victoria, *Submission no. 1B*, 2; Corrections Victoria, *Submission no. 32*, 1; Darebin Community Legal Centre Inc, *Submission no. 46*, 9; Women's Legal Service Victoria, *Submission no. 38*, 6; Victoria Police, *Submission no. 47*, 1-2; Maartje Van-der-Vlies, *Submission no. 28*, 1.

³⁴³ Letter from Legal Officer, Commonwealth Bank of Australia, to Executive Officer, Victorian Parliament Law Reform Committee, 25 August 2008.

³⁴⁴ Carly Crawford, 'Pests cost \$6.2 million', *Herald Sun*, 11 September 2007, 4.

³⁴⁵ Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 15; Commonwealth Bank of Australia, *Submission no. 18*, Att 2.

costs of running the proceedings often exceed the value of any assets which may be available for realisation if and when the proceedings come to a conclusion'.³⁴⁶

Wellington Shire Council told the Committee it had spent nearly \$15 000 seeking legal advice on a number of occasions in relation to 'an apparent court proceeding'.³⁴⁷

While not providing any specific information about legal proceedings in which it has been involved, Foster's Group told the Committee that '[t]he costs associated with vexatious claims and the related proceedings are often disproportionate to the claims'.³⁴⁸

Chapter 3 noted that vexatious litigants sometimes also sue individual members of the community. The Committee heard that the financial cost of dealing with these proceedings can cause particular hardship. The Darebin Community Legal Centre told the Committee:

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.³⁴⁹

One member of the community who claimed to be involved in litigation with a possible vexatious litigant reported that he incurred over \$263 000 in legal costs dealing with unmeritorious applications. He claimed the litigant's 'intention was to send me broke through a 5 year legal process – so that we would let it go. We did not let it go, but are now broke in the process.'³⁵⁰ Another member of the community who made a submission to the Inquiry reported that he had been sued five times over a nine-year period, incurring over \$160 000 in legal costs.³⁵¹

The Law Institute of Victoria noted that although parties who succeed in defending claims brought by vexatious litigants can theoretically obtain a costs order, this is unlikely to cover all of their legal expenses.³⁵² Recent research by the Victorian Law Reform Commission suggested that only between 44% and 80% of actual legal costs were recovered when a cost order was awarded.³⁵³ In addition, several participants told the Committee that adverse cost orders are not effective in preventing vexatious

³⁴⁶ Commonwealth Bank of Australia, *Submission no. 18*, 4.

³⁴⁷ Jim Wilson, Director, Corporate Services, Wellington Shire Council, *Transcript of evidence*, Melbourne, 13 August 2008, 4,5; Wellington Shire Council, *Submission no. 15*, 2.

³⁴⁸ Foster's Group Limited, *Submission no. 23*, 1.

³⁴⁹ Darebin Community Legal Centre Inc, *Submission no. 46*, 9. See also Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* ('Judicial offices and VCAT members report'), Victorian Parliament Law Reform Committee, 2008, 17.

³⁵⁰ John Arnott, *Submission no. 3*, 1.

³⁵¹ Confidential, *Submission no. 12*.

³⁵² Law Institute of Victoria, *Submission no. 1B*, 2.

³⁵³ Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 650. Although note that the sample size was small.

litigants from bringing proceedings and that they are largely immune from these.³⁵⁴ This issue is discussed further in chapter 8.

6.1.2 Increased costs due to case conduct

The Committee heard that the costs of legal proceedings involving a possible vexatious litigant may be even greater than the costs of other legal proceedings because of the way vexatious litigants conduct proceedings.

The Committee heard evidence that such proceedings are often more complex and lengthy than other comparable cases. Telstra's submission stated it:

will frequently spend more time and money defending vexatious proceedings than it would defending other comparable proceedings. For example, vexatious proceedings will often involve a greater number of interlocutory applications brought by the claimant.³⁵⁵

Mr Ross Thomson of the Commonwealth Bank of Australia explained that vexatious litigants 'just appeal and challenge every single decision along the way which is energy sapping and very costly'.³⁵⁶ The Bank's submission stated that it employs a barrister 'to work almost full time' on matters brought by possible vexatious litigants.³⁵⁷ The State Revenue Office also reported that cases involving possible vexatious litigants require more time than other matters 'due to the way in which such persons conduct themselves, their "campaign" or the way such persons litigate (ie volumes) or due to the inherent characteristics of the litigants themselves'.³⁵⁸

Other participants in the Inquiry told the Committee vexatious litigants create higher costs because they sometimes bring proceedings over many years³⁵⁹, or repeatedly re-litigate matters that have already been finalised by a court.³⁶⁰

Fitzroy Legal Service's submission, however, emphasised that legal representatives in non-vexatious proceedings also engage in tactical conduct that lengthens legal proceedings and the problem is not exclusive to vexatious litigants.³⁶¹

³⁵⁴ Law Institute of Victoria, *Submission no. 1*, 2; Law Institute of Victoria, *Submission no. 1B*, 2; Greg Garde, Chair, Victorian Bar Law Reform Committee, *The Victorian Bar, Transcript of evidence*, Melbourne, 6 August 2008, 23; Foster's Group Limited, *Submission no. 23*, 2; Freckelton, *Judicial offices and VCAT members report*, above n 349, 26.

³⁵⁵ Telstra Corporation Limited, *Submission no. 29*, 2. See also Victorian WorkCover Authority, *Submission no. 48*, 3.

³⁵⁶ Ross Thomson, *Transcript of evidence*, above n 345, 18. See also Freckelton, *Judicial offices and VCAT members report*, above n 349, 19.

³⁵⁷ Commonwealth Bank of Australia, *Submission no. 18*, 4.

³⁵⁸ State Revenue Office, *Submission no. 16*, 2.

³⁵⁹ Penny Drysdale, Law Reform and Policy Officer, Women's Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 19; Women's Legal Service Victoria, *Submission no. 38*, 2.

³⁶⁰ Commonwealth Bank of Australia, *Submission no. 18*, 7.

³⁶¹ Fitzroy Legal Service Incorporated, *Submission no. 43*, 6.

6.1.3 Other costs

Some commentators in the United States have claimed that other parties sometimes pay vexatious litigants to settle claims, rather than defending them, and thereby incur even higher costs.³⁶² The Committee did not receive any evidence about whether this has been a problem in Victoria but notes this is an issue that may warrant further research.

6.2 Time

6.2.1 The impact on organisational time

The Committee heard that dealing with possible vexatious litigants can be very time-consuming for organisations and affect their ability to perform their other functions.

The Commonwealth Bank of Australia's submission reported that '[i]t is very difficult to conduct one's other work in an efficient manner when every couple of weeks, the vexatious litigant bring[s] applications of one sort or another. It is time consuming and energy sapping.'³⁶³

In its submission Wellington Shire Council stated that '[o]ften litigants become involved in regular and protracted meetings with staff in an effort to explain/resolve their issues, hence the time spent by staff dealing with these matters is very costly.'³⁶⁴ Mr Jim Wilson from the Council told the Committee that many such litigants talk to a number of staff members until they find someone who will give them the answer that they want.³⁶⁵ He also told the Committee that '[t]hey bombard us with emails as well, and you know how easy it is to push out a lot of emails very quickly to a lot of people. That happens and it is very hard to deal with.'³⁶⁶ The Council reported that this impacts on its ability to provide responsive services to all members of the community: 'Members of the community with bona fide issues requiring the attention of Council are discommoded while we divert our attention and resources to dealing with spurious claims.'³⁶⁷

Some government agencies also reported that their ordinary functions were compromised by vexatious litigants. Victoria Police stated '[t]he diversion of these

³⁶² Lee W Rawles, 'The California vexatious litigant statute: A viable judicial tool to deny the clever obstructionists access?' (1998) 72 *Southern California Law Review* 275, 282; Deborah L Neveils, 'Florida's vexatious litigant law: An end to the *pro se* litigant's courtroom capers?' (2000) 25 *Nova Law Review* 343, 348.

³⁶³ Commonwealth Bank of Australia, *Submission no. 18*, 4.

³⁶⁴ Wellington Shire Council, *Submission no. 15*, 3.

³⁶⁵ Jim Wilson, *Transcript of evidence*, above n 347, 2.

³⁶⁶ *Ibid.*

³⁶⁷ Wellington Shire Council, *Submission no. 15*, 2.

resources from core policing duties restricts the level of service that is able to be provided to the broader community ...³⁶⁸

In addition, the Committee heard that issues raised by possible vexatious litigants often required involvement of a number of staff within organisations. For example, Foster's Group's submission stated that 'claims made by vexatious litigants are often wild and exaggerated, which are likely to attract media attention. As a result, these claims must be managed at several levels throughout the organisation.'³⁶⁹

6.2.2 Increased time due to case conduct

The Darebin Community Legal Centre told the Committee, '[a]ll legal action has a cost, financially, in the consumption of time and resources'.³⁷⁰ However, the Committee heard that, as with financial costs, proceedings involving vexatious litigants also take more of other parties' time than other litigation.

As chapter 3 noted, one complaint about vexatious litigants is that they bring multiple proceedings and there can be numerous interlocutory applications within their proceedings. Ms Penny Drysdale from the Women's Legal Service Victoria provided one example of how lengthy and time-consuming some matters can be, and the impact they can have on a person's life:

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 ... 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.³⁷¹

A member of the community who contacted the Committee claimed that he has been unable to engage in meaningful employment because of the need to attend court frequently over a nine-year period.³⁷²

Other participants told the Committee that legal proceedings involving possible vexatious litigants often continue for long periods of time without any finality. The Wellington Shire Council, for instance, told the Committee that it had sought legal advice on three occasions in relation to one matter.³⁷³ Mr Jim Wilson of the Council stated:

³⁶⁸ Victoria Police, *Submission no. 47*, 1. See also Corrections Victoria, *Submission no. 32*, 1.

³⁶⁹ Foster's Group Limited, *Submission no. 23*, 1.

³⁷⁰ Darebin Community Legal Centre Inc, *Submission no. 46*, 9.

³⁷¹ Penny Drysdale, *Transcript of evidence*, above n 359, 9.

³⁷² Confidential, *Submission no. 12*. See also Belinda Paxton, 'Domestic violence and abuse of process' (2003) 17(1) *Australian Family Lawyer* 7, 7.

³⁷³ Wellington Shire Council, *Submission no. 15*, 2.

Case Study 7: Mr G

The Supreme Court declared Mr G a vexatious litigant on 10 March 1981.

According to an interview he gave to *The Age* later that year, Mr G was a 42 year old former Algerian who had been living in Australia since 1971. In 1976 he began a business studies course at the Whitehorse Technical College but the college terminated his enrolment on the grounds of his English language skills.

This led Mr G to bring seven legal proceedings and one appeal. According to *The Age*, they included proceedings against the Ombudsman and an assistant after they found he was not unfairly discriminated against. They also included proceedings against his barrister for defamation, followed by further proceedings against his barrister and his former solicitor for negligence. These were followed by proceedings against the principal of the College, the principal of another college and officials in the Premier's Department and Commonwealth Employment Service. He sued his former solicitor again, and the members of the Legal Aid Committee after they refused him legal aid.

Justice Starke of the Supreme Court said in his decision there was no doubt Mr G had 'a real sense of grievance'. However, he said that after looking at the documents in the proceedings:

all of them are to me [as] incomprehensible as they have been to the judges who heard the various applications. [Mr G] appears to suffer from some mild degree of paranoia because he quite obviously thinks the technical college and other people have entered into a conspiracy against him including his original lawyers.

Justice Starke said, 'there can be no doubt in my mind that unless restrained ... [Mr G] will continue to issue proceedings, probably in ever growing numbers.' He said, 'I am satisfied that there has not been any reasonable ground for instituting the proceedings he has instituted and I am also satisfied that the proceedings that were issued were vexatious because he pleads the same cause of action over and over again, sometimes against different defendants and sometimes against the same.'

Justice Starke ordered that Mr G not continue or institute legal proceedings in any court without the leave of the court or a judge.

Three months later *The Age* described Mr G as 'a dispirited man who lives alone in a small St Kilda flat, sparsely furnished with an empty fridge in the kitchen and a full filing cabinet in the spare room where he continues his legal studies after the library has closed.' Mr G told *The Age* that he was being treated for a 'mild degree of paranoia' but '[w]hen it is better, I shall take up my actions again ... I have been wronged and must keep going until I succeed.'

The Committee did not locate evidence of any further legal proceedings.

there was probably paperwork about an inch high, with quasi-legal stuff in it ... whilst I think we were talking about having been through that process two or three times with that person, the documentation has changed; that one has been running for many years, so we have been keen to make sure we are right, and we have asked the lawyers to have a good look at it for us.³⁷⁴

The Women's Legal Service claimed that one possible vexatious litigant had been suing a client over a 12-year period.³⁷⁵ Mr Ross Thomson from the Commonwealth Bank of Australia described litigation with vexatious litigants as 'a bit like fighting the war on the western front ... It goes on and on and on ... it does not become such fun after it has gone on for eight years in one case alone.'³⁷⁶

Another participant commented on the pain associated with lack of closure as cases remain unresolved: 'These cases take up a great deal of time with no satisfaction or closure at the end of each case. In other words, no closure of the issue and the pain continues.'³⁷⁷

6.3 Emotional costs

The litigation process has the potential to be extremely stressful for all parties to proceedings, not just those dealing with possible vexatious litigants. American judge and judicial philosopher Judge Learned Hand is famously quoted as saying that 'as a litigant I should dread a lawsuit beyond almost anything short of sickness and death'.³⁷⁸

Chapter 3 noted that, although declared vexatious litigants in Victoria generally sue government agencies and large organisations, there is evidence that ordinary members of the community are also affected by their litigation.

The Committee heard that dealing with possible vexatious litigants can be particularly distressing for people. As chapter 4 noted, some participants in the Inquiry reported that some vexatious litigants deliberately use the legal system to harass other parties. Mr Greg Garde QC of the Victorian Bar told the Committee that '[i]t is a form of harassment, if you like: one person harasses another through repeated litigious steps. It ought to be viewed in that light. People do need protection from it.'³⁷⁹

A number of participants in the Inquiry who reported dealing with possible vexatious litigants described the impact on them or their staff. The State Revenue Office

³⁷⁴ Jim Wilson, *Transcript of evidence*, above n 347, 4-5.

³⁷⁵ Women's Legal Service Victoria, *Submission no. 38*, 2.

³⁷⁶ Ross Thomson, *Transcript of evidence*, above n 345, 15.

³⁷⁷ Maartje Van-der-Vlies, *Submission no. 28*, 1.

³⁷⁸ Bruce J Winick, 'Therapeutic jurisprudence and the role of counsel in litigation', in Dennis P Stolle, David B Wexler and Bruce J Winnick (eds), *Practising therapeutic jurisprudence: Law as a helping profession*, 2000, 309, 312-313.

³⁷⁹ Greg Garde, *Transcript of evidence*, above n 354, 25.

reported that ‘vexatious litigants can stress and unsettle staff and in some cases threaten to physically harm staff. Whether or not the threat would ever be carried out, is irrelevant, the effect is the same – it creates fear or concerns about safety.’³⁸⁰ The Environment Protection Authority informed the Committee that staff had resigned because of the stress involved in dealing with some possible vexatious litigants.³⁸¹ Victoria Police reported that some police officers had taken out intervention orders.³⁸² Some described the problem as an occupational health and safety issue.³⁸³

Some participants reported that vexatious litigants had also sued individuals within their organisations. The Department of Education and Early Childhood Development informed the Committee that possible vexatious litigants had sued school staff, including teachers and principals, and this has ‘an enormous emotional and financial impact on the persons involved in the litigation’.³⁸⁴ The Wellington Shire Council also told the Committee individual staff and councillors had been sued in the past.³⁸⁵ Mr Jim Wilson from the Council told the Committee ‘[p]eople find it quite distressing when they get a document that seems to be a proper legal document claiming that they now own your house and all your assets, and you are just going along doing your job.’³⁸⁶

Mr Ross Thomson from the Commonwealth Bank of Australia told the Committee he had been prosecuted personally by one declared vexatious litigant in Victoria for treason, perjury and treachery and sabotage of the Constitution.³⁸⁷ He described this as ‘intimidating, time consuming and unpleasant’³⁸⁸ and told the Committee ‘[t]here is always the prospect of personal threats. I went to the trouble of getting a silent telephone number and the like.’³⁸⁹

The Committee heard that the emotional impact of vexatious litigation was particularly acute in family violence proceedings. As chapter 4 noted, the Women’s Legal Service Victoria drew the Committee’s attention to the ‘significant parallels’ between vexatious litigation and family violence. The Service told the Committee about one client who had been involved in proceedings for 19 years and had attended court 60 times in one year alone. Ms Penny Drysdale from the Service stated ‘the human impact on the women and often children involved in those cases is profound

³⁸⁰ State Revenue Office, *Submission no. 16*, 2.

³⁸¹ Environment Protection Authority Victoria, *Submission no. 44*.

³⁸² Victoria Police, *Submission no. 47*, 2.

³⁸³ Victoria Police, *Submission no. 47*, 2; Environment Protection Authority Victoria, *Submission no. 44*; Commonwealth Bank of Australia, *Submission no. 18*, 4. See also Nadia Boni, *Issues in civil litigation against police*, Australasian Centre for Policing Research, Current Commentary No.5-11/2002, 2002, 7-8.

³⁸⁴ Department of Education and Early Childhood Development, *Submission no. 26*, 1.

³⁸⁵ Wellington Shire Council, *Submission no. 15*, 3.

³⁸⁶ Jim Wilson, *Transcript of evidence*, above n 347, 3.

³⁸⁷ Commonwealth Bank of Australia, *Submission no. 18*, 1.

³⁸⁸ *Ibid* 3.

³⁸⁹ Ross Thomson, *Transcript of evidence*, above n 345, 15. See also Victoria Police, *Submission no. 47*, 2.

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 ...³⁹⁰

6.4 Loss of faith in the justice system

Several participants commented on the negative impact the experience of dealing with a vexatious litigant may have on a litigant's perception of the justice system. For example, the Law Institute of Victoria stated '[t]he non-vexatious party can lose faith in the justice system amid the often unreasonable and persistent legal proceedings'.³⁹¹

Some participants who reported dealing with possible vexatious litigants expressed such concerns to the Committee directly. For example, one member of the community who claimed that he was involved in ongoing litigation with a possible vexatious litigant stated '[m]y departing message to your group is that the legal system in Australia fails the average Australian'.³⁹² The Women's Legal Service's submission to the Committee also stated that clients, many of whom were victims of family violence or stalking, 'felt great frustration with the legal system itself and struggled to understand why the litigation was allowed to continue'.³⁹³

³⁹⁰ Penny Drysdale, *Transcript of evidence*, above n 359, 8. See also Women's Legal Service Victoria, *Submission no. 38*, 6; Paxton, above n 372, 7.

³⁹¹ Law Institute of Victoria, *Submission no. 1B*, 2.

³⁹² John Arnott, *Submission no. 3*, 1.

³⁹³ Women's Legal Service Victoria, *Submission no. 38*, 6.

Case Study 8: Mrs H

The Supreme Court declared Mrs H a vexatious litigant on 17 July 1981.

The Court's decision refers to 22 proceedings brought by Mrs H between 1977 and 1981. It is not possible to discern the nature of all of the proceedings from the decision or the affidavits filed in support of the application. They appear to include proceedings against two companies for alleged misrepresentations in connection with Mrs H's wholesale clothing business, a claim for damages against her bank, claims against lawyers acting for other parties and claims against a number of lawyers who had acted for her.

A substantial number of the proceedings appear to be appeals in cases where Mrs H was sued herself. They included two cases where Mrs H was ordered to pay damages for negligent driving, one case where she was ordered to pay a sum arising from use of a credit card and an application to review convictions imposed by the Magistrates' Court for assault with a weapon and possession of a firearm without a licence.

In 1981 the Attorney-General applied for a vexatious litigant order against Mrs H. Justice Gray of the Supreme Court stated that he was 'satisfied that the respondent has, without any reasonable ground, habitually and persistently issued vexatious legal proceedings and that the order should be made.' He ordered that Mrs H not continue or institute any legal proceedings without leave.

Mrs H appealed to the Full Court of the Supreme Court, where the Court considered only nine of the legal proceedings. Justice Starke noted submissions by Mrs H that 'she clearly has an indifferent command of the English language, both in writing and orally, and that ... she should not be prejudiced by her lack of command of the English language'. He said:

that submission is undoubtedly right. Litigants in this class of proceeding, and indeed in any class of proceeding, cannot be allowed to suffer through the lack of a reasonable command of the English language. However, there are limits to what can be permitted ... in my opinion, the point has been reached in this case, while it is right to take into account her disability in this regard, it cannot be regarded as a reasonable ground which would save her from the making of an order.

The Full Court held that the order was correct and dismissed the appeal.

The Committee found evidence that Mrs H sought leave from the Supreme Court to bring further proceedings on a number of occasions, and that she also brought proceedings in the High Court. As well as appealing the vexatious litigant order, she brought proceedings about property dealings including repossession of her house. The High Court's records show all 20 of her applications to the High Court were struck out or did not proceed.

Chapter 7: Reform of the justice system

The Committee's preferred approach to vexatious litigants, outlined earlier in this report, is to prevent and manage them within the justice system wherever possible rather than restricting access to justice. Participants in this Inquiry encouraged the Committee to address features of the justice system they believe cause or encourage vexatious litigation. They also suggested ways to deal with vexatious litigants better when they do appear in courts and tribunals. This chapter examines those proposals.

7.1 Alternative dispute resolution

7.1.1 Preventing vexatious litigants through early dispute resolution

This report has already described comments by some participants in the Inquiry that poor early dispute resolution and complaint handling is encouraging vexatious and unnecessary litigation because people feel unable to resolve disputes in any other way (see chapter 4).

Some of these participants suggested ways to improve alternative dispute resolution (ADR) and complaint-handling schemes to reduce these problems. The Disability Discrimination Legal Service called for increased regulation of standards for internal grievance procedures in public agencies.³⁹⁴ Former solicitor and Monash University PhD candidate Mr Simon Smith suggested greater use of ADR by local government, better industry ombudsman schemes and better coordination of ADR schemes.³⁹⁵ The Mental Health Legal Centre recommended what it called a 'hub point':

that tracks and refers complaints to assist a complainant to find the right complaints process, so that when they are starting out they do not get frustrated by entering into a system at the wrong point of entry. They can save a lot of time and frustration. Also, once the complaint has commenced, then there is the idea of allowing them to know where they stand at regular intervals. It is an excellent way of reassuring a person that they have not been forgotten and their issue is important.³⁹⁶

Dr Christine Atmore from the Federation of Community Legal Centres told the Committee '[i]t is not just a question of encouraging more ADR but making sure the quality of ADR is such that people find that a satisfying process of resolution'.³⁹⁷

The Committee did not receive sufficiently detailed evidence in this Inquiry to make specific recommendations about these proposals. The Committee is currently conducting a separate Inquiry into ADR which will be completed in 2009. Some of these issues will be addressed in that report.

³⁹⁴ Disability Discrimination Legal Service Incorporated, *Submission no. 24*, 2.

³⁹⁵ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 6, 8; Simon Smith, *Submission no. 21*, 8.

³⁹⁶ Martin Thomas, Policy Officer, Mental Health Legal Centre, *Transcript of evidence*, Melbourne, 13 August 2008, 34; Mental Health Legal Centre Incorporated, *Submission no. 40*.

³⁹⁷ Christine Atmore, Policy Officer, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 43.

The Victorian Government's Justice Statement 2, released in October 2008, states that the aim of the Government's policy is to prevent and minimise disputes and to provide a system that resolves them at the lowest level of intervention. It states that the Government is examining pre-litigation protocols that require litigants to make a genuine attempt to settle disputes before commencing litigation, and exploring better use of industry ombudsman schemes.³⁹⁸ The Committee draws the Victorian Government's attention to the issues raised by participants in this Inquiry about early dispute resolution and vexatious litigants and encourages the Government to consider them when developing its policies under the Justice Statement 2.

7.1.2 Dealing with vexatious litigants through ADR

The Committee also asked participants whether ADR is capable of resolving possible vexatious litigants' disputes once a pattern of vexatious behaviour has emerged.

ADR is occasionally presented as a possible solution to vexatious litigants. One UK commentator has suggested that mediation is a way to defuse these situations.³⁹⁹ Ms Maartje Van-der-Vlies, a consultant criminologist, suggested in her submission that independent panels of judges, mediators, counsellors and others could be established to hear these disputes. She told the Committee '[w]hat a vexatious litigant wants is justice, but all they can get is the law, so a hearing in which they are permitted to air all of their grievances may just put the matter or at least some of the issues to rest'.⁴⁰⁰

However, most participants in this Inquiry were sceptical about ADR's potential to resolve vexatious litigants' disputes. Forensic psychiatrist Dr Grant Lester told the Committee that some vexatious litigants are not actually looking for reparation or compensation:

you can offer them everything they ask for and they will then reconstruct. You can bring them to mediation, give them everything they want and then a day later ... they will come back with something else that has not been met, because there is something missing in the understanding of the process.⁴⁰¹

Evidence from the NSW Deputy Ombudsman and the Victorian Health Services Commissioner confirmed that some of their complainants resist resolution of their disputes. Mr Wheeler told the Committee '[y]ou are not going to reach a solution that they are happy with, because the closer you get to it, the further they will move the goalposts'.⁴⁰²

³⁹⁸ Attorney-General, Victoria, *Attorney-General's Justice Statement 2: The next chapter*, 2008, 39-42. These measures were recommended by the Victorian Law Reform Commission in its report on the civil justice system: see Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, Chapter 2 and Chapter 4.

³⁹⁹ Joanna Lobo, 'Unreasonable behaviour' (2003) 153 *New Law Journal* 1387, 1388.

⁴⁰⁰ Maartje Van-der-Vlies, *Submission no. 28*.

⁴⁰¹ Grant Lester, Forensic Psychiatrist, Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 31.

⁴⁰² Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008, 52; Health Services Commissioner, *Submission no. 41*, 2.

Organisations that had been sued by possible vexatious litigants and people within the justice system were also pessimistic. Mr Ross Thomson from the Commonwealth Bank of Australia told the Committee the Bank had participated in a court-ordered mediation with a possible vexatious litigant but ‘got nowhere’.⁴⁰³ Mr Greg Garde QC from the Victoria Bar described a case in which a mediation produced a settlement but the litigant later disowned it and went to court. He told the Committee, ‘ADR, whilst it is to be encouraged, is no particular solution to this issue.’⁴⁰⁴

The Committee sought evidence from Professor Tania Sourdin, Professor of Conflict Resolution at the University of Queensland and one of Australia’s foremost experts on ADR. She suggested that ADR was an option in these cases but it needed to be carefully managed. She told the Committee she was also aware of a case in which a mediation agreement had subsequently unravelled but that she had conducted mediations with ‘high conflict’ people and ‘I do not think this category should be ruled out of ADR processes automatically’.⁴⁰⁵ She listed a number of features of ADR processes that need to be considered in these situations including use of highly skilled mediators, proper intake processes, use of models such as co-mediation, clear guidelines and protocols and protections for ADR practitioners.⁴⁰⁶

The Committee also feels unable to make specific recommendations about these issues in the absence of more detailed evidence. The Victorian Government’s Justice Statement 2 commits the Government to promoting and expanding the use of ADR services.⁴⁰⁷ In light of Professor Sourdin’s evidence about the need for careful handling of these disputes and the fact that existing legal mediation models are not well placed to deal with them⁴⁰⁸, the Committee encourages the Government to make specific provision for these disputes in any expanded ADR services in Victoria.

7.2 Improving access to legal advice

Some participants in the Inquiry described lack of access to legal advice, or adequate legal advice, as another factor contributing to vexatious or inappropriate litigation behaviour. Chapter 4 sets out this evidence.

⁴⁰³ Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 16. See also Foster’s Group Limited, *Submission no. 23*; Jim Wilson, Director, Corporate Services, Wellington Shire Council, *Transcript of evidence*, Melbourne, 13 August 2008, 2.

⁴⁰⁴ Greg Garde, Chair, Victorian Bar Law Reform Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 6 August 2008, 24-25. See also Mark Yorston, Consultant, Wisewoulds Lawyers, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 17; Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* (‘Judicial officers and VCAT members report’), Victorian Parliament Law Reform Committee, 2008, 23.

⁴⁰⁵ Tania Sourdin, Professor of Conflict Resolution, University of Queensland, *Transcript of evidence*, Melbourne, 13 August 2008, 57, 60.

⁴⁰⁶ *Ibid* 57-61.

⁴⁰⁷ Attorney-General, Victoria, above n 398, 39-42.

⁴⁰⁸ Tania Sourdin, *Transcript of evidence*, above n 405, 57, 60.

A number of the community legal centres that raised this issue suggested increased government funding for legal assistance to address the problem.⁴⁰⁹ Some gave examples of times they had been able to diffuse the anger and frustration of clients by listening to them and providing clear advice. Dr Christine Atmore from the Federation of Community Legal Centres told the Committee:

I recently had the experience of spending quite some time with a client by the end of which I basically explained he had, in my view, no legal leg to stand on, and because he was quite angry when he was telling me the facts of his situation, I was expecting him to be either quite angry or quite disappointed. Instead, to my surprise, he got up, shook my hand and said, 'Thanks very much', and looked quite happy and left.

... people often want to be able to air their grievance and they want to be told the truth in layperson's terms about whether their grievance can translate into a legal cause of action or not ... I guess our overall ethos is that people deserve to be listened to with respect and that our role is as a kind of broker between the community and the very often intimidating legal process that they find very mystifying and frustrating.⁴¹⁰

Ms Kristen Hilton, executive director of the Public Interest Law Clearing House (PILCH) told the Committee that 'expectations are really important to manage in these situations' and clients were less likely to pursue an unmeritorious claim after clear advice about why the claim does not have legal merit, the likely costs and the difficulties in litigating the claims. She told the Committee, 'I cannot give you statistics on how many times that has happened, but anecdotally we know that that works.'⁴¹¹

These views had support from at least one organisation which reported being involved in proceedings with vexatious litigants. Corrections Victoria told the Committee that legal representation at an early stage would help identify whether there are real legal issues in dispute and help resolve those issues without resort to further litigation.⁴¹²

However, not all participants in the Inquiry thought that access to legal advice would reduce the number of vexatious litigants. A number argued that vexatious litigants choose not to be legally represented, a view reiterated in some of the psychiatric

⁴⁰⁹ Christine Atmore, *Transcript of evidence*, above n 397, 38; Martin Thomas, *Transcript of evidence*, above n 396, 32; Kristen Hilton, Executive Director, Public Interest Law Clearing House, *Transcript of evidence*, Melbourne, 13 August 2008, 22; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 4, 42-43; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5-6; Mental Health Legal Centre Incorporated, *Submission no. 40*; Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁴¹⁰ Christine Atmore, *Transcript of evidence*, above n 397, 41-42. See also Donna Williamson, Prison Outreach Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 52; Mental Health Legal Centre Incorporated, *Submission no. 40*.

⁴¹¹ Kristen Hilton, *Transcript of evidence*, above n 409, 25-26. See also Michelle Panayi, Manager, Law Institute Legal Assistance Scheme, Public Interest Law Clearing House, *Transcript of evidence*, Melbourne, 13 August 2008, 26.

⁴¹² Corrections Victoria, *Submission no. 32*, para 7.

literature.⁴¹³ Chapter 3 of this report noted that many of Victoria's declared vexatious litigants had in fact used legal representation at some stage.

Based on this evidence, the Committee notes it is possible that better access to legal assistance will assist litigants who are perceived as 'difficult' by the justice system, but who are not vexatious litigants in the sense used in this Inquiry. This issue is beyond the scope of this Inquiry and warrants research and consideration in its own right. The Committee has not made any specific recommendations for these reasons, but draws these issues to the attention of the Victorian Government.

7.3 Improving responses within the justice system

As chapter 4 noted, other participants in the Inquiry criticised courts and tribunals for contributing to frustrations felt by litigants, if not to the actual number of vexatious litigants.

Administrative complaints-handling agencies in Australia have been developing systematic responses to 'persistent' complainants to their services for some years. This report has already mentioned Australia's parliamentary ombudsmen's 'unreasonable complainant conduct' project, which is being conducted through the NSW Ombudsman's office. That project is trialling a series of management strategies to deal with different types of conduct, including unreasonable persistence. The strategies are set out in an interim practice manual and training workshops for complaint-handling staff. An evaluation of the project was being completed at the time this report was written.⁴¹⁴

The Committee wrote to other complaint-handling agencies in Victoria and found a similarly proactive approach.⁴¹⁵ The Privacy Commissioner told the Committee 'any complaint handling body should expect, and have the skills and resources, to deal with a certain level of persistent and difficult people.'⁴¹⁶

The Committee found there are pockets of the justice system in Victoria that are also taking steps to deal with these issues better. However, systemic reform has tended to focus on changes to the law rather than broader practices and policies. Supreme Court judge and President of VCAT, Justice Kevin Bell, told the Committee:

⁴¹³ Commonwealth Bank of Australia, *Submission no. 18*, 2; Victoria Legal Aid, *Submission no. 33B*; Grant Lester and Simon Smith, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 16; Grant Lester, 'The vexatious litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17, 18; Robert Lloyd Goldstein, 'Paranooids in the legal system: The litigious paranoid and the paranoid criminal' (1995) 18(2) *The Psychiatric Clinics of North America* 303, 305.

⁴¹⁴ See Ombudsman Victoria, *Submission no. 45*, 2-6.

⁴¹⁵ Energy and Water Ombudsman (Victoria), *Submission no. 5*; Chris Thwaites, Manager, Investigation and Conciliation Unit, Victorian Equal Opportunity and Human Rights Commission, *Transcript of evidence*, Melbourne, 6 August 2008, 44; Office of Police Integrity, *Submission no. 17*, 2-4; Disability Services Commissioner, *Submission no. 25*; Victorian Privacy Commissioner, *Submission no. 11*; Public Transport Ombudsman Victoria, *Submission no. 27*; Health Services Commissioner, *Submission no. 41*, 4.

⁴¹⁶ Victorian Privacy Commissioner, *Submission no. 11*.

The courts are not so good at dealing – at least not so far – with the emotional or the behavioural consequences of people of the kind you are talking about and it is there, I think, that we have the most to learn and that process has started.⁴¹⁷

In this Inquiry the Committee examined three potential areas for change: better support for self-represented litigants; better case management and more training; and guidance for people working in the justice system.

7.3.1 Support for self-represented litigants

The Committee asked the courts about current services to support self-represented litigants. The Supreme Court provided information about its Self-represented Litigant Coordinator, who acts as a contact and referral point for self-represented litigants in the Court. The Coordinator is not able to provide legal advice but does listen to litigants, provides information and appropriate referrals and helps ensure documents are prepared in accordance with court rules. The Coordinator also develops public information about court procedures.⁴¹⁸

The County Court told the Committee it had published a Self-Represented Litigants Information Kit on the Court's website along with other information.⁴¹⁹

The Magistrates' Court referred the Committee to a range of written information available to litigants. These include a brochure about going to court, which deals with practical issues such as the layout of the courtroom and how to address the magistrate. There are also links on its website to Victoria Legal Aid brochures about particular types of proceedings such as intervention orders and traffic offences.⁴²⁰

The President of VCAT told the Committee that VCAT was examining options such as improving VCAT's website and education and preparatory materials.⁴²¹

In its recent report on Victoria's civil justice system, the Victorian Law Reform Commission (VLRC) examined some additional ways to support self-represented litigants including:

- extension of the current Self-represented Litigant Coordinator program in the Supreme Court and funding for similar positions in the County Court and Magistrates' Court
- funding for information and material for self-represented litigants.⁴²²

⁴¹⁷ Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 6.

⁴¹⁸ Letter from Law Reform and Policy Officer, Supreme Court of Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 18 September 2008.

⁴¹⁹ Letter from Chief Judge of the County Court to Executive Officer, Victorian Parliament Law Reform Committee, 11 September 2008.

⁴²⁰ Letter from Project and Research Officer, Magistrates' Court of Victoria, to Research Officer, Victorian Parliament Law Reform Committee, 15 September 2008.

⁴²¹ Justice Bell, *Transcript of evidence*, above n 417, 5.

⁴²² Victorian Law Reform Commission, above n 398, 563-583.

The Self-represented Litigant Coordinator was praised by many of the judicial officers and court staff who participated in Dr Ian Freckelton SC's interviews for the Committee.⁴²³ A number of other participants in the Inquiry also expressed support for one or both of the proposals listed above.⁴²⁴ Other suggestions included more education for litigants, including about costs orders, as well as assistance for people with communication difficulties.⁴²⁵

As with the proposals to improve access to legal advice, there was conflicting evidence about whether such measures would prevent vexatious litigants. Chapter 4 has already noted the views of some participants that the justice system itself does not cause the problem.⁴²⁶ The Chief Judge of the County Court noted that '[l]earning on the subject of vexatious litigants indicates that increased assistance most often leads to increased demand for assistance along with a concomitant decrease in co-operation by the litigant'.⁴²⁷

This is one area where a multidisciplinary approach may yield benefits. This report has already described evidence about the importance of managing litigant expectations and the stresses involved in the litigation process. The Committee is aware that the Court Network, a voluntary service, assists individuals in their experience of the court system in Victoria by offering a free confidential support system by phone or in person that assists court users before, during and after a court appearance with emotional and practical support.⁴²⁸ However, other support services and information tend to focus on legal issues rather than broader issues such as managing expectations about the justice system.

The Committee is aware that the Family Court of Australia is addressing these types of issues in its Mental Health Support Program, which includes a system for referring litigants to support services and incorporates mental health messages into information for litigants.⁴²⁹

Although the Family Court faces particular issues due to the nature of its work, some of Victoria's courts and tribunals also deal with difficult and emotive issues for litigants. The Committee draws the Victorian Government's attention to these issues for consideration when developing further services for self-represented litigants.

⁴²³ Freckelton, Judicial officers and VCAT members report, above n 404, 19; Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* ('Court and VCAT staff report'), Victorian Parliament Law Reform Committee, 2008, 15.

⁴²⁴ Law Institute of Victoria, *Submission no. 1B*; Victoria Legal Aid, *Submission no. 33*; Darebin Community Legal Centre Inc, *Submission no. 46*; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 5-6, 42.

⁴²⁵ Law Institute of Victoria, *Submission no. 1*; Law Institute of Victoria, *Submission no. 1B*; Judge Misso, *Submission no. 10*, 8-9; Christine Atmore, *Transcript of evidence*, above n 397, 44.

⁴²⁶ See, for example, Justice Bell, *Transcript of evidence*, above n 417, 7.

⁴²⁷ Letter from Chief Judge, above n 419.

⁴²⁸ Court Network, *Court Network For humanity* (2008) <<http://www.courtnetwork.com.au/index.html>> viewed 21 October 2008; Department of Justice, Victoria, *Court Network* (2008) <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Courts/Going+to+Court/Personal+Support/JUSTICE++Court+Network++WEBLINK>> viewed 21 October 2008.

⁴²⁹ Family Court of Australia, *Mental health support pilot project: Final report, August 2006*, 2006.

Case Study 9: Mr I

The Supreme Court declared Mr I a vexatious litigant on 16 July 1998.

Mr I first brought proceedings in 1990 against a former employer in the County Court seeking damages for a knee injury sustained in 1964. After a trial before a judge and jury, Mr I was awarded \$120 000 in damages.

The Attorney-General's application for a vexatious litigant order against Mr I referred to 18 subsequent proceedings brought between 1992 and 1998. In 1992 Mr I issued proceedings in the County Court against a surgeon who treated the knee injury seeking damages for alleged negligence. Subsequent proceedings included workers compensation proceedings for payment of medical expenses, a claim of negligence against another surgeon, a claim against a former solicitor and a claim against his former employer for unfair or unlawful termination. Most of the proceedings were struck out, dismissed or did not proceed.

In 1997, the Attorney-General applied for a vexatious litigant order against Mr I. Justice Kellam of the Supreme Court noted Mr I's submission that in most instances the proceedings were 'brought to redress a genuine grievance or wrong which he considered he had suffered.' However, he found that 11 of his proceedings were vexatious. He said that these proceedings:

fail to provide even the glimmer of an arguable case. For some six years, it would appear that [Mr I's] life has been consumed by an obsessional pursuit through the Courts of grievances entertained by him against his employer, its workers compensation insurer, the [Victorian WorkCover Authority] and solicitors and doctors involved in his claims.

He ordered that Mr I not continue or commence legal proceedings without leave.

Mr I has made a number of applications for leave to bring proceedings since that time. It was difficult for the Committee to determine the number of applications from the Supreme Court's records and law reports. It did find evidence of at least 14 applications for leave since 2002, 11 of which were refused by the Court. In 2005, Mr I was granted leave to sue a cigarette company for injuries allegedly suffered as a result of smoking their cigarettes but that claim was unsuccessful. In May 2008, the Court granted Mr I leave to sue the same company for an alleged breach of duty of care, but the Court set aside the grant of leave in September 2008.

Mr I also appears to have brought proceedings in the federal courts, including claims against the cigarette company and workers compensation proceedings.

7.3.2 Case management

Some administrative complaint-handling agencies have developed formal complaint management strategies to respond to ‘persistent’ complainants. The Committee was interested in whether similar strategies might help courts and tribunals deal with vexatious litigants more effectively.

The Committee acknowledges that administrative complaint-handling agencies operate in a very different environment to courts and tribunals, but it was impressed by some of their general principles and approaches such as:

- dealing with unreasonable conduct is part of ‘core work’ and should be given proper priority and adequate resources
- management strategies should focus on observable conduct rather than labelling individuals
- complainants’ expectations should be managed from the outset
- agencies are responsible for health and safety of their staff who need to be given support, guidance and training.⁴³⁰

Some participants in the Inquiry saw improved case management as a way to minimise the impact of vexatious litigants in courts and tribunals. Dr Freckelton reported that a number of the judicial officers he interviewed regarded ‘sophisticated and patient case management’ as the best solution to the challenges posed by vexatious litigants.⁴³¹ This section describes existing practices in the courts and VCAT and some of the suggestions for reform made during this Inquiry.

Existing practices in courts and tribunals

It was evident from Dr Freckelton’s discussions with judicial officers and VCAT members that some are already using case management and other strategies with possible vexatious litigants. He reported that ‘[i]ndividual judges have developed different strategies to cope with vexatious litigants, including in some instances personally intervening to manage their litigation and bring it to trial as quickly as possible with a minimum of formalities and interlocutory proceedings.’⁴³² One VCAT member reported that active listening and setting clear limits were often effective.⁴³³

Some of the Magistrates’ Court and VCAT staff interviewed by Dr Freckelton were also adopting informal strategies and techniques. Magistrates’ Court staff reported that some registrars list cases involving possible vexatious litigants early in the day

⁴³⁰ See, for example, Ombudsman Victoria, *Submission no. 45*, 2-6; Chris Wheeler, *Transcript of evidence*, above n 402, 51-52; Health Services Commissioner, *Submission no. 41*; Energy and Water Ombudsman (Victoria), *Submission no. 5*; *Unreasonable complainant conduct: Interim practice manual: A joint project of the Australian Parliamentary Ombudsman*, 2007.

⁴³¹ Freckelton, *Judicial officers and VCAT members report*, above n 404, 40.

⁴³² *Ibid.*

⁴³³ *Ibid.* 22.

so these litigants are not in court waiting areas for long periods. VCAT staff reported that registrars sometimes advise staff to direct all correspondence or calls from a particular litigant to a nominated staff member to ensure a consistent approach and to stop ‘divide and rule’ behaviour.⁴³⁴ These staff already saw dealing with vexatious or ‘difficult’ litigants as part of their core work. One VCAT staff member said:

Dealing with problematic litigants comes with the territory. It is like the police officer who complained because he was forever having to deal with crooks – people who dislike dealing with problem litigants are perhaps in the wrong job, because it is part of the job.⁴³⁵

Magistrates’ Court’s staff also described difficult litigants as ‘simply part of the Magistrates’ Court landscape’.⁴³⁶

The Committee did not find evidence, however, that these views and practices are adopted across courts and tribunals in a formal or systematic way. One VCAT member told Dr Freckelton, ‘There are so few of these cases that there is not an established process for dealing with them.’⁴³⁷

Case management reform

In its 2008 report on Victoria’s civil justice system, the VLRC made a series of recommendations to improve case management in the civil justice system. It also recommended specific strategies for self-represented litigants. These included a power to appoint a ‘Special Master’ in the Supreme and County Courts to case-manage proceedings involving self-represented litigants, and development of self-represented litigant management plans in all courts.⁴³⁸

Other options raised by participants in this Inquiry included:

- a ‘docket system’ or ‘list’ for vexatious litigants, under which one judge would deal with all related proceedings by the litigant, or there would be a limited number of court staff and judges who deal with possible vexatious litigants⁴³⁹
- simpler court procedures that reduce the opportunity for vexatious litigants to abuse interlocutory proceedings and raise technical issues.⁴⁴⁰ Some of the magistrates and VCAT members who participated in Dr Freckelton’s

⁴³⁴ Freckelton, Court and VCAT staff report, above n 423, 7-8.

⁴³⁵ Ibid 12-13.

⁴³⁶ Ibid 11.

⁴³⁷ Freckelton, Judicial officers and VCAT members report, above n 404, 16.

⁴³⁸ Victorian Law Reform Commission, above n 398, Chapter 5 and 563-583. See also Simon Smith, *Submission no. 21*, 6-7.

⁴³⁹ Law Institute of Victoria, *Submission no. 1*; Law Institute of Victoria, *Submission no. 1B*; Judge Misso, *Submission no. 10*, 8. See also Darebin Community Legal Centre Inc, *Submission no. 46*.

⁴⁴⁰ Freckelton, Judicial officers and VCAT members report, above n 404, 25; Freckelton, Court and VCAT staff report, above n 423, 15; Australian Institute of Judicial Administration and The Federal Court of Australia, *Forum on self-represented litigants: Report*, 2005, 12.

interviews suggested the relative informality of their jurisdictions reduced the burden for defendants and litigants⁴⁴¹

- a system for bringing vexatious litigants' proceedings to trial earlier. This was proposed by a Supreme Court judge and a County Court judge who participated in Dr Freckelton's interviews, although there was some concern it might be rewarding 'bad behaviour'.⁴⁴² This was raised as a possible reason why jurisdictions like VCAT experience less of a problem than the higher courts. One VCAT member reported that 'VCAT's quick turnaround can cut matters off at the socks and means that people don't have time to stew about their grievances'.⁴⁴³
- computer or other systems to help judges and court staff to identify possible vexatious litigants. Some judicial officers and tribunal members who spoke to Dr Freckelton noted the absence of a coordinated system across or within courts. One magistrate told Dr Freckelton, 'Magistrates receive a paper file ... At the bottom of the form will (or should) be a chronology of previous applications. But the Magistrate won't have any evidence about what happened in another case.'⁴⁴⁴

The psychiatric and other behavioural literature about vexatious and 'high conflict' litigants also suggests strategies for dealing with them more effectively. Forensic psychiatrist Dr Grant Lester set out 10 guidelines in a paper for judicial officers, including maintaining rigorous boundaries with litigants, maintaining the formality of the court, clearly and repetitively maintaining the litigant's focus on what the court can offer in terms of outcomes, and always sharing the load with others.⁴⁴⁵ American lawyer, therapist and mediator Bill Eddy also sets out advice for judges in his work on 'high conflict people'.⁴⁴⁶

The Committee believes this is another area in which a multidisciplinary approach is appropriate. The Committee believes there would be benefit in collaborative work between courts and tribunals and other experts to develop, trial and evaluate case management strategies for vexatious litigants.

The Committee also believes there would be benefit in dialogue between different courts and VCAT about these issues. Judge Misso of the County Court told the Committee '[i]t is critically important that appellate courts develop the same approach otherwise the way in which these litigants are dealt with in the County Court might be misunderstood by an appellate court.'⁴⁴⁷ These issues are discussed further in the next chapter. An independent and rigorous appeal system is an important part of Victoria's justice system, but common strategies might reduce the possibility of 'forum shopping' by vexatious litigants.

⁴⁴¹ Freckelton, Judicial officers and VCAT members report, above n 404, 22.

⁴⁴² Ibid 20, 24.

⁴⁴³ Ibid 14-15.

⁴⁴⁴ Ibid 10, 18, 20; Freckelton, Court and VCAT staff report, above n 423, 16, 23. See also Ross Thomson, *Transcript of evidence*, above n 403, 18; Commonwealth Bank of Australia, *Submission no. 18*, 9.

⁴⁴⁵ Grant Lester, 'The vexatious litigant' (2005) 17(3) *Judicial Officers' Bulletin* 17, 19.

⁴⁴⁶ Bill Eddy, *High conflict people in legal disputes* (2006) 177-251.

⁴⁴⁷ Judge Misso, *Submission no. 10*, 9.

Recommendation 1: Case management

The courts and VCAT should develop, trial and evaluate agreed case management strategies for possible vexatious litigants. In particular, the courts and VCAT should consider docket systems, simpler litigation procedures, fast-tracking hearings and systems for information sharing between court and VCAT registries.

7.3.3 Training and guidance for people working in the justice system

Chapter 2 of this report noted that people working in the justice system sometimes find vexatious litigants challenging at a personal as well as professional level.

The Committee found that skills for managing these issues vary across the justice system. In their discussions with Dr Freckelton, Magistrates' Court and VCAT judicial officers, members and staff reported feeling better equipped to deal with vexatious litigants or litigants with difficult behaviours.⁴⁴⁸ There are no doubt judicial officers and court staff in the higher courts who, by reason of their experience or innate skills, are also adept at dealing with vexatious litigants.

The Committee heard that these skills are not universal across the justice system. The Women's Legal Service Victoria told the Committee some judges and court staff were unsure of how to deal with some vexatious litigants:

In general, there appears to be no guidance to the judiciary or court staff regarding how to deal with vexatious litigants. In some cases they can exhibit very challenging and hostile behaviour. They can be very demanding. In other cases they can appear charming and evoke sympathy and a disproportionate level of assistance from court staff.⁴⁴⁹

The psychiatric literature on vexatious litigants suggests they require particular knowledge and skills that may be counter-intuitive to usual ways of responding to self-represented litigants. Dr Lester's guidelines for judicial officers, for example, recommend not granting vexatious litigants more time because '[m]ore time granted will lead to more confusion'.⁴⁵⁰ Dr Lester suggested that training and education was one area where psychiatry had a proper role to play.⁴⁵¹

This section looks at the training and guidance currently available and makes recommendations about how they could be improved in the future.

⁴⁴⁸ Freckelton, Court and VCAT staff report, above n 423, 22; Freckelton, Judicial officers and VCAT members report, above n 404, 18.

⁴⁴⁹ Women's Legal Service Victoria, *Submission no. 38*, 5. See also Penny Drysdale, Law Reform and Policy Officer, Women's Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 10.

⁴⁵⁰ Lester, above n 445, 19.

⁴⁵¹ Grant Lester, *Transcript of evidence*, above n 401, 35.

Judicial officers and VCAT members

Although there are some existing training programs with potential to assist judicial officers dealing with vexatious litigants, their availability tends to be limited and they rarely deal specifically with vexatious litigants.

The Judicial College of Victoria is the main provider of judicial education in Victoria. It offers small group workshops and seminars on a range of topics, an intranet service and a two-year induction framework for new appointees. The Attorney-General informed the Committee that the College gives newly appointed judicial officers and VCAT members the opportunity to practise practical strategies and techniques for dealing with conflict in court in its annual judicial orientation course. He advised the Committee that the College ran an online educational forum program on dealing with self-represented litigants in criminal proceedings in 2007, and was delivering a two-day intensive program focusing on managing challenges posed by self-represented and vexatious litigants in 2008.⁴⁵²

At a national level, the National Judicial College provides orientation programs, seminars and other programs for judges from all Australian courts. Dr Lester told the Committee he had been providing training for the College for five or six years about unreasonable litigation behaviours.⁴⁵³ The College's curriculum includes a program on litigants in person which makes specific reference to 'abnormal and querulous litigants from a psychiatric perspective and strategies for dealing with them'.⁴⁵⁴

A number of participants both within and outside the justice system supported more training or guidance for judicial officers. Justice Bell told the Committee:

Dealing with [litigants with challenging behaviours] can be very difficult, both for administrative staff and judicial officers ... Proper support and training of administrative staff and judicial officers is crucial if the challenges raised by the trend are to be met.⁴⁵⁵

Judicial officers who participated in Dr Freckelton's interviews or made submissions to the Committee supported training.⁴⁵⁶ The Human Rights Law Resource Centre (HRLRC) and PILCH also recommended training and suggested that it should also cover mental health issues, the fact that vexatious litigants may have a valid grievance and setting achievable expectations.⁴⁵⁷

⁴⁵² Letter from The Hon Rob Hulls MP, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 22 August 2008.

⁴⁵³ Grant Lester, *Transcript of evidence*, above n 401, 35.

⁴⁵⁴ National Judicial College of Australia, *A curriculum for professional development for Australian judicial officers*, 2007, 23.

⁴⁵⁵ Justice Bell, *Transcript of evidence*, above n 417, 3.

⁴⁵⁶ Judge Misso, *Submission no. 10*, 7-8; Freckelton, *Judicial officers and VCAT members report*, above n 404, 25.

⁴⁵⁷ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 2, 26, 40. See also Kristen Hilton, *Transcript of evidence*, above n 409, 22, 24; State Revenue Office, *Submission no. 16*; Victorian WorkCover Authority, *Submission no. 48*.

This evidence suggests that judicial training in Victoria needs to be more widely available.

Recommendation 2: Training and guidance for judicial officers and VCAT members

The Judicial College of Victoria should provide training in and guidance for judicial officers and VCAT members on dealing with possible vexatious litigants. The training should be available through the College's intranet service and the orientation course for new appointees, as well as through other programs.

Court and tribunal staff

The Committee found less evidence of existing training or guidance for court and tribunal staff in Victoria. The Attorney-General advised the Committee the Supreme Court's Self-represented Litigants Coordinator had received training in dealing with all litigants. He said that other court employees were able to attend training provided by the Department of Justice, including a program on dealing with difficult clients.⁴⁵⁸ Magistrates' Court staff told Dr Freckelton that dealing with difficult people was part of the induction package for registrars in their Court and there was ongoing professional development about difficult complainants.⁴⁵⁹

Dr Freckelton reported that most court and tribunal staff who participated in his focus groups expressed enthusiasm for further training. One VCAT staff member stated, 'I would like to see more training to help staff deal with difficult people. The more experienced staff aren't always around to deal with them.'⁴⁶⁰

The Committee is aware that some courts and tribunals in other jurisdictions, as well as complaint-handling agencies, have developed specialist training and guidance for their staff. The NSW Ombudsman has produced an interim manual for complaints-handling staff as part of the Australian Parliamentary Ombudsmen's unreasonable complainant conduct project and conducts one day workshops. The NSW Deputy Ombudsman, Mr Chris Wheeler, told the Committee the office had trained staff at the New South Wales Supreme Court, Administrative Decisions Tribunal and Guardianship Tribunal and some court staff in New Zealand, and was booked to run workshops for one of the federal courts.⁴⁶¹

The Family Court of Australia also provides training for all court staff about mental health and emotional wellbeing issues. This is a key element of the Court's Mental Health Support Program, which began as a pilot in 2006. It aims to educate staff

⁴⁵⁸ Letter from The Hon Rob Hulls MP, above n 452.

⁴⁵⁹ Freckelton, Court and VCAT staff report, above n 423, 16.

⁴⁶⁰ Ibid 16, 23.

⁴⁶¹ Chris Wheeler, *Transcript of evidence*, above n 402, 53. Other agencies who participated in the Inquiry were also providing or arranging training for their staff. See, for example, Victorian Privacy Commissioner, *Submission no. 11*; Public Transport Ombudsman Victoria, *Submission no. 27*, 3.

about mental health issues, provide training to identify people at risk of self-harm and to destigmatise mental health issues in family law proceedings.⁴⁶²

The Committee believes there is scope for Victoria's courts and tribunals to introduce specialist training and guidance for staff to ensure they have the skills and support needed to deal with possible vexatious litigants effectively.

Recommendation 3: Training and guidance for court and tribunal staff

The Victorian Government should provide training in and guidance for all court and VCAT staff on dealing with possible vexatious litigants. The training and guidance should be provided in induction programs for new staff, as part of ongoing training for existing staff and in written manuals.

Lawyers

Evidence in this Inquiry suggests that lawyers may also benefit from more training or guidance about vexatious litigants. Chapter 4 noted that some participants believe lawyers can contribute to vexatious litigation if they provide poor quality advice. The Committee also heard that lawyers, like judges and court staff, also face interpersonal challenges dealing with vexatious litigants. The Fitzroy Legal Service's submission noted that:

some litigants may for a range of reasons be more challenging than others Most advocates will have experienced clients who do not accept the legal advice they are provided with, or who have other characteristics in communication background or personal experience that increase the challenges of obtaining or acting on instructions in an efficient manner.⁴⁶³

Chapter 3 noted that lawyers are amongst the groups more often sued by vexatious litigants.

Participants from within the legal system told the Committee that, while some lawyers become experienced in dealing with vexatious litigants, there is no formal training or guidance available. Mr Mark Yorston, who gave evidence of behalf of the Law Institute of Victoria, told the Committee:

the Institute does not proffer any training for people on how to deal with these sorts of client ... it is something that you learn as you go along, and it is generally the more experienced practitioners who are dealing with that.⁴⁶⁴

Mr Greg Garde from the Victorian Bar told the Committee the Bar did not provide specific training on vexatious litigants either, although he stressed that ethical

⁴⁶² Family Court of Australia, above n 429.

⁴⁶³ Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁴⁶⁴ Mark Yorston, *Transcript of evidence*, above n 404, 19.

Case Study 10: Mr J

The Supreme Court declared Mr J a vexatious litigant on 23 February 1999.

The Supreme Court's decision refers to at least 32 proceedings brought by Mr J in Victorian courts. The decision states that almost all of the proceedings derived from the breakdown of Mr J's marriage, his loss of custody and access to his three children and intervention orders taken out against him.

In particular, the decision refers to six applications in the Magistrates' Court seeking to revoke an intervention order and two appeals to the County Court against an intervention order or orders refusing applications for their revocation. It also refers to numerous Supreme Court proceedings seeking to quash County Court decisions, nine or 10 proceedings for damages against solicitors who had acted for or against Mr J, as well as politicians and police officers, and eight other appeals.

The Court's decision also refers to proceedings in the Family Court. On 21 March 1996, the Full Court of the Family Court made orders prohibiting Mr J from instituting guardianship, custody or access applications in that Court without leave.

In 1998 the Attorney-General applied for a vexatious litigant order against Mr J under Victorian law. In his decision, Justice Eames of the Supreme Court noted that '[Mr J] sees himself as a campaigner against what he regards as being the injustices meted out to men by the legal system.' However, he stated:

the conduct of the defendant is manifestly that of a vexatious litigant. The proceedings, to a significant degree, have failed to disclose a proper cause of action and have manifested a determination to ignore past adverse rulings and to re-litigate matters which he has repeatedly been told can not be litigated. [Mr J] is using the legal process for the purpose of waging a campaign, primarily against the Family Court. His pleadings often employ the strident language which he uses in his campaign waged outside the court precincts, and his pleadings are similarly unrestrained by reference to legal principle ... [Mr J] is wasting the time of the court, and his own, but enjoying the notoriety which his proceedings bring and the inconvenience and harassment of those who must defend those proceedings. Although [Mr J's] sincerity in his concern for loss of his children has been acknowledged many times by judges and magistrates, the time is fast approaching when much harsher judgment of his motives may be made.

He ordered that Mr J not continue or commence legal proceedings without leave, with the exception of one County Court proceeding. The Court of Appeal refused Mr J's application for leave to appeal against the vexatious litigant order in 2000.

Mr J appears to have made numerous applications to revoke the order and for leave to bring proceedings. It was difficult for the Committee to obtain an accurate indication of Mr J's contact with the courts based on current court records. The Court appears to have granted Mr J leave on at least three occasions to apply to the Magistrates' Court to revoke or vary intervention orders. The Supreme Court told the Committee that the Court of Appeal had reserved its decision in a recent appeal against a refusal to set aside the vexatious litigant order.

obligations and duties are the same as for other litigants.⁴⁶⁵ He said that the Bar had looked at other guidelines and they were ‘commendable, but frankly they do not take existing ethical rules any further than they are at the moment’.⁴⁶⁶

There are some useful resources for lawyers that deal with interpersonal as well as ethical issues. The NSW Bar Association’s guidelines for barristers dealing with self-represented litigants, for example, offer advice about the need for patience and adaptability and the need to avoid becoming embroiled in personal attacks or criticisms.⁴⁶⁷ Bill Eddy has also published practical advice for advocates dealing with ‘high conflict’ clients, such as the need to avoid creating unrealistic expectations.⁴⁶⁸

The VLRC’s report on Victoria’s civil justice system recommended that the Law Institute and Victorian Bar develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants.⁴⁶⁹ The Committee supports this recommendation as well as development of formal training programs and suggests they address specific issues raised by vexatious litigants, including the interpersonal skills required to deal with these litigants.

Recommendation 4: Training and support for lawyers

- 4.1 The Law Institute of Victoria should provide training in and publish professional guidelines for solicitors about dealing with possible vexatious litigants.
- 4.2 The Victorian Bar should provide training, including as part of the Bar reader’s course, and publish professional guidelines for barristers about dealing with possible vexatious litigants.

⁴⁶⁵ Greg Garde, *Transcript of evidence*, above n 404, 27.

⁴⁶⁶ *Ibid* 24.

⁴⁶⁷ New South Wales Bar Association, *Guidelines for barristers on dealing with self-represented litigants*, 2001, 6.

⁴⁶⁸ Eddy, above n 446, 177-251.

⁴⁶⁹ Victorian Law Reform Commission, above n 398, 581, 583.

Chapter 8: Other measures and powers to deal with vexatious proceedings

In addition to laws specifically directed at preventing vexatious litigants from continuing to litigate, the courts already have a range of powers to deal with vexatious civil and criminal proceedings on a case-by-case basis. These mechanisms have the potential to address vexatious litigation without restricting general rights of access to the courts. However, the Committee heard that these mechanisms are often ineffective: they are not always applied, or when they are applied, they do not stop the vexatious litigant's behaviour. This chapter considers a variety of these measures and considers their current and potential effectiveness to deal with vexatious proceedings.

8.1 Financial disincentives

The cost of bringing legal proceedings in Victoria's courts and tribunals has the potential to serve as a disincentive for vexatious litigants.

As noted in chapter 1, anyone who brings legal proceedings in Victoria can expect to incur a range of costs including court fees and the cost of legal representation. Litigants are also exposed to the risk of a costs order, requiring them to pay some of the other parties' legal costs should they be unsuccessful.

A cost benefit analysis suggests that a person would not take on these costs or risks unless he or she has a good chance of winning the legal proceedings, a result which is unlikely if the proceedings are vexatious. Legal costs and the reasons why people litigate are, of course, more complicated but these costs can act as some disincentive to vexatious litigants.

The Victorian Civil and Administrative Tribunal (VCAT) may be an exception, as it is designed to be a low-cost, accessible forum. Its fees and charges are usually lower than the courts' and there is a presumption against litigants using lawyers (with exceptions). VCAT also has a general rule that each party pays for their own legal costs regardless of who wins (again with exceptions).⁴⁷⁰

It was suggested by some participants to this Inquiry that there could be increased use of financial disincentives to discourage vexatious proceedings.

8.1.1 Enforcing court fees

A number of participants told the Committee that court fees did not provide a financial disincentive to vexatious litigants because they were often able to get the fees waived by the courts.

⁴⁷⁰ *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ss 62, 109.

Designated registrars in the Supreme Court, County Court, Magistrates' Court and VCAT all have a discretionary power to waive court fees on the grounds of financial hardship.⁴⁷¹

The Commonwealth Bank of Australia was one of the participants who told the Committee that vexatious litigants use these waivers to avoid court fees. Its submission said:

The discretion vested in the court officials to waive application fees does not help the situation. They do so in circumstances that are quite clearly not warranted and moreover where a vexatious litigant is well known to the Court. Waiving fees in undeserving cases makes it easy for a vexatious litigant to continue to waste court time and harass their opponents ...⁴⁷²

The Supreme Court's submission also raised concerns that the current system was vulnerable to misuse. The submission stated:

Some litigants are currently able to bring multiple unmeritorious applications at no cost, simply by obtaining a fee waiver ... The information available to the Prothonotary is limited (an affidavit by the applicant) and has on occasion been contradicted by material which comes to light subsequently in court. While the waiver is discretionary, the Prothonotary is not in a position to investigate the merits of an application for waiver.⁴⁷³

These sentiments were echoed by judicial officers and court and tribunal staff who participated in consultations with Dr Ian Freckelton SC. Dr Freckelton noted that 'Supreme Court staff expressed concern about the routine waiver of fees for litigants claiming to be indigent. Most persistent litigants know about the fees waiver: "It is their second question. They have already done this in the lower courts."⁴⁷⁴

Similar concerns about the misuse of fee waivers have been raised in other jurisdictions.⁴⁷⁵ However, research in the United Kingdom in 2005 found that the relationship between fee exemption and unreasonable litigant behaviour was only a factor in 'a very small number of cases'.⁴⁷⁶

⁴⁷¹ *Supreme Court Act 1986* (Vic) s 129(3); *County Court Act 1958* (Vic) s 28(4); *Magistrates' Court Act 1989* (Vic) s 22(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 132.

⁴⁷² Commonwealth Bank of Australia, *Submission no. 18*, 7. See also Victorian WorkCover Authority, *Submission no. 48*, 2; 'Current issues – Litigant pests cost \$6.2m' (2007) 81 *Australian Law Journal* 907, 909.

⁴⁷³ Supreme Court of Victoria, *Submission no. 34*, 6.

⁴⁷⁴ Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* ('Court and VCAT staff report'), Victorian Parliament Law Reform Committee, 2008, 15. See also Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* ('Judicial officers and VCAT members report'), Victorian Parliament Law Reform Committee, 2008, 26.

⁴⁷⁵ *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, 3; Richard Moorhead and Mark Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings*, Department of Constitutional Affairs Research Series 2/05, 2005, 86-87; Deborah L Neveils, 'Florida's vexatious litigant law: An end to the *pro se* litigant's courtroom capers?' (2000) 25 *Nova Law Review* 343, 349.

⁴⁷⁶ Moorhead and Sefton, above n 475, 87-88.

The Committee sought data from the Victorian Attorney-General about fee waivers in Victorian courts and tribunals. He advised the Committee ‘[s]ome declared vexatious litigants routinely seek such a waiver, while others do not’.⁴⁷⁷

Participants made a number of suggestions for reform, including:

- litigants wishing to have fees waived should be referred to a free lawyer service to assess the validity of their claim⁴⁷⁸
- the Prothonotary should be able to refer fee waiver applications to the Court ‘where there was a question as to the bona fides of the financial hardship claim or where there was a reasonable suspicion that the proceeding in question might be an abuse of process’⁴⁷⁹
- registrars could have the ability to defer fees to allow time to appropriately determine the fee waiver issue.⁴⁸⁰ Such an arrangement currently exists in the Federal Court⁴⁸¹
- there should be a legislative power allowing judges to revoke a fee waiver.⁴⁸²

One US commentator has observed that any tightening of fee waiver requirements needs to be applied consistently across all courts and tribunals in a jurisdiction to prevent forum shopping by litigants.⁴⁸³

The Committee also notes that there may be human rights concerns associated with the enforcement of court fees in a manner which may restrict access to justice.⁴⁸⁴

The Committee cannot make a definitive finding about the relationship between waiver of court fees and vexatious litigants in the absence of more detailed information, although the evidence provided by the Supreme Court about the occasional abuse of fee waivers is cause for concern.

In light of the limited evidence available, the Committee recommends there should be a review of fee waiver arrangements in Victorian courts and tribunals. This should include consideration of the extent to which fee waivers are being used by possible vexatious litigants who may not qualify for these and who may use fee waivers to conduct vexatious legal proceedings. The review should consider the impact of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘the Charter’) as well as general access to justice concerns. The Committee encourages the Victorian

⁴⁷⁷ Letter from The Hon Rob Hulls MP, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 22 August 2008, Att C, 2.

⁴⁷⁸ Freckelton, Court and VCAT staff report, above n 474, 15.

⁴⁷⁹ Supreme Court of Victoria, *Submission no. 34*, 6.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Federal Court of Australia Regulations 2004* (Cth) reg 10.

⁴⁸² Freckelton, Judicial officers and VCAT members report, above n 474, 26. See also Supreme Court of Victoria, *Submission no. 34*, 6.

⁴⁸³ Neveils, above n 475, 352.

⁴⁸⁴ United Nations Human Rights Committee, *General comment no.32*, UN Doc.CCPR/C/GC/32, 2007, 3. See also Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 643.

Government to consider the ideas for reform proposed by participants to this Inquiry when conducting this review.

Recommendation 5: Fee waivers

The Victorian Government should, in consultation with the courts and VCAT, review fee waiver provisions to ensure that fee waivers are only provided in cases of genuine financial hardship and to consider as an additional ground that the proceedings are not vexatious.

8.1.2 Costs orders

As noted in chapter 2, courts may make a costs order requiring an unsuccessful litigant to pay some of the legal costs incurred by the other parties.

There is evidence that adverse costs orders are not an effective deterrent to vexatious litigants and litigation. In *Bhamjee v Forsdick (No 2)*, in which the United Kingdom Court of Appeal set out its new system for dealing with vexatious litigants, the Master of the Rolls said that:

these litigants are often without the means to pay any costs orders made against them, and the parties in whose favour such costs orders are made are disinclined to throw good money after bad by making them bankrupt, particularly as the vexatious conduct may spill over into the bankruptcy proceedings themselves.⁴⁸⁵

In 1995 the Australian Law Reform Commission also concluded that, although it was not possible to measure accurately, it appeared that the risk of an adverse costs order did not deter people with frivolous, vexatious or unmeritorious claims.⁴⁸⁶

Participants in this Inquiry reported similar experiences. In its submission the Victorian WorkCover Authority reported that:

The usual costs orders made against unsuccessful litigants are not obstacles to vexatious litigants ... Costs orders are either not sought, or not executed for public policy reasons or are futile having regard to the person's financial circumstances. Hence the vexatious litigant knows that they are at liberty to bring actions without any financial risk.⁴⁸⁷

⁴⁸⁵ *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, 3. See also John Sorabji, 'Protection from litigants who abuse court process' (2005) 24 *Civil Justice Quarterly* 31, 31; David Bennett, 'Vexatious constitutional litigation' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006); Steve Hedley, 'Vexatious litigants in England and Wales 1990-present' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006).

⁴⁸⁶ Australian Law Reform Commission, *Costs shifting - who pays for litigation*, Report no. 75, 1995, para 4.12.

⁴⁸⁷ Victorian WorkCover Authority, *Submission no. 48*, 2. See also Greg Garde, Chair, Victorian Bar Law Reform Committee, *The Victorian Bar, Transcript of evidence*, Melbourne, 6 August 2008, 23.

The Foster's Group's submission stated it had also suffered substantial legal bills due to unpaid costs orders⁴⁸⁸, while the Law Institute of Victoria referred to litigants with 'a trail of unpaid costs'.⁴⁸⁹

Mr John Arnott, a member of the community who made a submission to the Inquiry, advised the Committee he had settled proceedings with a former employer but his attempts to recover the debt and his legal costs had just led to a series of further proceedings and appeals.⁴⁹⁰

Some of the judicial officers and tribunal members interviewed by Dr Freckelton also saw costs orders as having the potential to just generate further litigation. A County Court judge reported that he did not order costs against a possible vexatious litigant in one case for fear it would just "fan the flames" of the litigant's malcontent'.⁴⁹¹ One VCAT member reported making a costs order against a litigant who was subsequently declared vexatious, but the litigant simply appealed.⁴⁹²

At least four of Victoria's 15 declared vexatious litigants were subject to bankruptcy proceedings over unpaid costs orders⁴⁹³, but there are cases in which it appears that the litigant paid at least some of the costs orders made against them.⁴⁹⁴ The Committee notes that regardless of whether the costs orders were paid or not, they do not appear to have deterred the vexatious litigants from continuing to bring new proceedings.

8.1.3 Restraining litigation where costs orders are unpaid

The courts also have a discretion to stay a proceeding where the plaintiff has not paid a costs order from an earlier proceeding with the same or similar subject matter. However, the courts exercise this discretion sparingly and will consider the financial position of the plaintiff and the possibility that the stay might stifle the proceedings.⁴⁹⁵

The Law Institute of Victoria recommended a register of all persons who have outstanding cost orders, with a view to requiring such litigants to provide security for

⁴⁸⁸ Foster's Group Limited, *Submission no. 23*, 3.

⁴⁸⁹ Law Institute of Victoria, *Submission no. 1*, 2.

⁴⁹⁰ John Arnott, *Submission no. 3*, 3-4.

⁴⁹¹ Freckelton, Judicial officers and VCAT members report, above n 474, 24.

⁴⁹² *Ibid* 26.

⁴⁹³ See, for example, Grant Lester and Simon Smith, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 8; 'Mrs Edna Isaacs bankrupt', *The Herald*, 5 September 1941, 3; Simon Smith, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant' (2007) 11 *Legal History* 31, 53; *Attorney-General (Vic) v Moran* [2008] VSC 159, 3.

⁴⁹⁴ In Mr L's case (case study 12), for example, the Supreme Court's decision notes that Mr L and his wife mortgaged their farm to pay some costs orders made against them in proceedings against their local council: *Attorney-General (Vic) v Weston* [2004] VSC 314, 27. However, the Council stated that it had recovered only a small proportion of its costs in later proceedings: see affidavit sworn by Hugh McArdle, 12 November 2001, Supreme Court File No. 7711 of 2001, 1.

⁴⁹⁵ *Phillip Morris Limited v Attorney-General (Vic) & Lindsey* [2006] VSCA 21, 97.

costs if they issue new proceedings.⁴⁹⁶ No other participants provided evidence on this issue. The issue of security for costs is discussed further below.

Court rules in the United Kingdom provide that where a claim has been struck out and the claimant ordered to pay costs, the court may stay any subsequent claim against that defendant until the costs have been paid.⁴⁹⁷ The Committee is not aware of any evidence about the efficacy of this rule in preventing vexatious litigation.

The Committee did not receive sufficient evidence to determine whether restraining litigation where there are unpaid costs orders could be an effective mechanism for dealing with vexatious proceedings. It draws this issue to the attention of the courts and encourages them to consider this issue further.

8.1.4 Security for costs orders

Another mechanism for potentially discouraging vexatious proceedings is a security for costs order. Such an order requires the person bringing legal proceedings to pay 'security for costs' at the beginning of the process.⁴⁹⁸ This stays the proceedings until the person provides the security nominated by the court. This can be used to cover the other parties' legal costs if the person loses the proceedings.

Although court rules do not expressly allow the courts to order security for costs on the ground that a legal proceeding may be vexatious, the courts can make orders under their inherent jurisdiction in these circumstances. The power is discretionary, however, and the courts will also consider countervailing factors.⁴⁹⁹ In general, security for costs will not be ordered merely because a person is indigent, but may be ordered where the proceedings are vexatious or would amount to an abuse of process.⁵⁰⁰

The Committee heard evidence that a security for costs order does not prevent some vexatious litigants from continuing to litigate and may in fact just lead to further litigation. Mr Greg Garde QC of the Victorian Bar told the Committee:

even if security for costs is ordered, it can be appealed. You can have multiple appeals taking place as to whether a security for costs order should be made. You have some people who regardless of a security for costs order will proceed anyway, or issue fresh proceedings.⁵⁰¹

⁴⁹⁶ Law Institute of Victoria, *Submission no. 1*, 2.

⁴⁹⁷ *Civil Procedure Rules* (UK) r 3.4 and Practice direction 3 - Striking out a statement of case.

⁴⁹⁸ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 62.02; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) r 62.02; *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 31.02.

⁴⁹⁹ See, for example, *Morris v Hanley* [2000] NSWSC 957 and *Bhattacharya v Freedman* [2001] NSWSC 498. See generally Richard Douglas, 'Ordering personal litigants to provide security for costs' (1997) 18 *Queensland Lawyer* 86, 87-88; B C Cairns, *Australian civil procedure*, 5th edition, 2002, 533-535.

⁵⁰⁰ Douglas, above n 499, 87-88.

⁵⁰¹ Greg Garde, *Transcript of evidence*, above n 487, 25. See also Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 10.

This was borne out in part by the Committee's research which found that a security for costs order made against one vexatious litigant just led to appeals and the institution of new proceedings.⁵⁰²

As noted above, the Law Institute of Victoria argued that requiring a litigant to pay security for costs when they have an outstanding costs order would prevent further abuse of the system.⁵⁰³ The security for costs order could be reviewed and potentially reversed if the court finds at the directions hearing stage that the litigant's claim has merit.

The Committee was not able to obtain any data about the extent to which security for costs orders are currently being utilised by courts in relation to vexatious proceedings. The Committee recognises that there is no evidence that such orders are effective in addressing vexatious litigation and notes there is a risk that such an order may merely lead to further litigation in the form of appeals.

However, the Committee believes there would be merit in the codification of the courts' inherent power to order security for costs in relation to vexatious proceedings. In addition, the Committee believes that judicial officers should be provided with information about their power to make a security for costs order where a proceeding is vexatious. This should form part of the training and guidance on dealing with possible vexatious litigants that the Committee proposed in recommendation 2. The Committee believes the amended rule and additional guidance will strengthen the ability of judicial officers to make a security for costs order in appropriate cases where it may prevent the continuation of vexatious proceedings.

Recommendation 6: Security for costs

The courts should amend their rules to clarify that security for costs may be ordered when the proceedings are vexatious. The training and guidance for judicial officers in recommendation 2 should include information about the power to make a security for costs order where the proceedings are vexatious.

8.2 Courts' powers to deal with vexatious civil proceedings

As chapter 1 noted, the courts have a range of powers to deal with vexatious civil proceedings on a case-by-case basis, including powers to refuse to accept an originating process and powers to strike out pleadings or to dismiss proceedings at an early stage. This section considers the effectiveness of these powers in dealing with vexatious civil proceedings and explores possible mechanisms for increasing their utility.

⁵⁰² *Attorney-General (Vic) v Kay* (Unreported, Supreme Court of Victoria, Eames J, 23 February 1999) 22.

⁵⁰³ Law Institute of Victoria, *Submission no. 1, 2*.

Case Study 11: Mr K

The Supreme Court declared Mr K a vexatious litigant on 9 August 2001.

The Supreme Court's decision refers to 13 proceedings in Victorian courts dating back to 1997, as well as numerous interlocutory applications and appeals. The description of the proceedings in the Court's decision are lengthy and complex. Most have their origins in legal proceedings taken by a bank in December 1994 against Mr K, his wife and their son alleging that they had defaulted on a mortgage over industrial land in Dandenong South. Mr K filed a defence and counterclaim alleging, amongst other things, that he had not signed any loan document, that the court should investigate the bank's legal department and that he should be paid \$30 million in compensation.

In 1997 Mr K and his wife were bankrupted leading to further litigation in the federal courts. In 1999 the Federal Court made an order prohibiting Mr K and his wife from bringing proceedings against the bank or their trustee in bankruptcy in that Court.

Mr K then issued a series of private criminal prosecutions in the Magistrates' Court against bank employees and lawyers and his trustee in bankruptcy. He appealed the magistrate's decisions to strike out most of those proceedings to a Supreme Court master and then a Supreme Court judge. He then filed summons in the County Court seeking prosecution of the same people for perjury.

In November 2000, the Attorney-General applied to have Mr K declared a vexatious litigant in Victoria. Justice Ashley found that Mr K had habitually, persistently and without any reasonable ground instituted vexatious legal proceedings based on nine of the 13 proceedings raised by the Attorney-General. He stated that Mr K had:

for a period of quite some years waged an unrelenting, ingenious and unfounded campaign against the Bank and the various individuals. In doing so he has made much use of court time. As one door to his campaign has been closed, he has sought to open another. I have no doubt at all that unless an order is made [Mr K] will continue his campaign, to the detriment of the resources of Victorian courts, and to the unjustified distraction of (and cost to) the Bank and [other persons].

The Court ordered that Mr K not continue or commence any legal proceedings without leave against 14 persons and organisations including the bank, his trustee in bankruptcy, the Attorney-General and the Victorian Government Solicitor.

According to court records, Mr K's contact with the courts continued. The Committee found evidence of at least three attempts to bring further proceedings in the Supreme Court. In July 2001 the Federal Magistrates Court ordered that Mr K not institute proceedings in that Court against the bank and his trustee in bankruptcy without leave. The High Court's records also show that Mr K has made 10 applications in that Court since 2001, most recently in 2008 about the validity of the federal election.

8.2.1 Courts' powers

Striking out

Court rules allow the courts to strike out, or order amendment of, a person's statement of claim where the whole or part of the document does not disclose a cause of action, is 'scandalous, frivolous or vexatious', may prejudice, embarrass or delay the fair trial of the proceeding or is otherwise an abuse of process.⁵⁰⁴ This power only disposes of the *document* used to set out the legal proceeding. The proceeding itself continues in existence.⁵⁰⁵ If the proceeding itself is vexatious, summary stay or dismissal of the proceedings may be more appropriate.

Stay and summary judgment

Court rules allow the courts to stay a proceeding, or give judgment for the other parties, where the proceeding does not disclose a cause of action, is scandalous, frivolous or vexatious or is an abuse of process of the court.⁵⁰⁶ VCAT also has a power to make an order summarily dismissing a proceeding that is 'frivolous, vexatious, misconceived or lacking in substance' or is otherwise an abuse of process.⁵⁰⁷

This power is discretionary and, while different courts have taken different approaches, it is clear that courts are reluctant to terminate proceedings without the benefit of a proper hearing and will only use the power sparingly. In the 1949 case *Dey v Victorian Railway Commissioners*, future Chief Justice of the High Court Owen Dixon stated:

a case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury ... once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.⁵⁰⁸

Registrars' powers to refuse to seal documents

Court rules give the Prothonotary of the Supreme Court and the Registrar of the County Court the power to refuse to seal an originating process without the direction

⁵⁰⁴ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 23.02; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) r 23.02; *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 9A.02. In the case of the Magistrates' Court, the power is described as a power to strike out the statement of claim.

⁵⁰⁵ Cairns, above n 499, 194-196.

⁵⁰⁶ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 23.01; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) r 23.01; *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 9A.01 In the case of the Magistrates' Court, the power is described as a power to stay or make an order for the defendant.

⁵⁰⁷ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 75.

⁵⁰⁸ *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91. See also Cairns, above n 499, 399-409; *Lindon v Commonwealth (No 2)* [1996] HCA 14, 14.

of the court where the form or contents of the document show that the proposed legal proceeding would be an ‘abuse of process’.⁵⁰⁹ Registrars in the Magistrates’ Court have a similar power to refuse to accept documents.⁵¹⁰ This allows the courts to stop potentially vexatious legal proceedings before they are formally commenced.

This power is not available to the registrar at VCAT.

While the rules do not require the registrar to consult with a judge in exercising this power, in practice such matters in the Supreme Court of Victoria are usually referred to a Practice Court judge who will determine the matter either in chambers or open court.⁵¹¹ Again the courts will only use this power in the clearest of cases.⁵¹²

8.2.2 Effectiveness

The Attorney-General informed the Committee that data about how often some of these powers are used was either not maintained by the courts or could not be obtained.⁵¹³ Participants in the consultations conducted by Dr Freckelton did provide some anecdotal evidence about the use of these powers. One VCAT member stated that he could ‘count on one hand’ the number of cases that have been summarily dismissed for abuse of process in his eight years with the Tribunal.⁵¹⁴

However, an article by Dr Grant Lester and Mr Simon Smith, both of whom participated in this Inquiry, suggests that these pre-emptive controls are used frequently in the case of self-represented litigants.⁵¹⁵

Several participants viewed these types of measures as adequate to address instances of vexatious litigation. The Fitzroy Legal Service said in its submission that these types of measures were ‘generally adequate to respond to the occurrence of vexatious litigation’.⁵¹⁶ Supreme Court judge and VCAT President, Justice Kevin Bell, told the Committee:

You sometimes get a judge or a tribunal member saying, ‘We need stronger rules, or we need stronger legislation to deal with a problem’. When you look at the problem, you realise that it is actually not a question of legislation or rule power, it is a question of real resolve to act judicially ... in order to address the problem.⁵¹⁷

⁵⁰⁹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 27.06; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) r 27.06.

⁵¹⁰ *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 3.06.

⁵¹¹ Victorian Law Reform Commission, above n 484, 373.

⁵¹² *Little v State of Victoria* (Unreported, Supreme Court of Victoria, Gillard J, 17 July 1997). See also *Little v State of Victoria* (Unreported, Supreme Court of Victoria, Gillard J, 18 July 1997); *Re Davison (No 1)* [1997] HCA 42.

⁵¹³ Letter from The Hon Rob Hulls MP, above n 477, Att C, 2.

⁵¹⁴ Freckelton, Judicial officers and VCAT members report, above n 474, 16. See also Julian Knight, *Submission no. 14*, 8.

⁵¹⁵ Lester and Smith, above n 493, 18.

⁵¹⁶ Fitzroy Legal Service Inc, *Submission no. 43*, 12.

⁵¹⁷ Justice Bell, President, Victorian Civil and Administrative Tribunal, *Transcript of evidence*, Melbourne, 6 October 2008, 6. See also Federation of Community Legal Centres (Victoria), *Submission no. 39*, 6; Darebin Community Legal Centre Inc, *Submission no. 46*, 14-15.

However, participants in the Inquiry who had been sued by vexatious litigants did not see these generic powers as an adequate protection in practice. It was observed that the courts are reluctant to use these powers except in very clear cases and a number of participants noted a tendency to let people ‘have their day in court’.⁵¹⁸

The influence of appeal courts has also been raised as a factor. Judges in some Australian trial courts have reported feeling ‘hamstrung in exercising powers such as the grant of summary judgment, because of appeal court decision[s] that they feel force them to indulge vexatious litigants’.⁵¹⁹

Participants to this Inquiry argued that courts’ reluctance to use these powers was also compounded in the case of vexatious litigants by the fact that they are often self-represented. A number of cases have described the obligation of judges to advise and assist self-represented litigants to ensure a fair trial, while maintaining a position of neutrality.⁵²⁰ Although some recognised the ‘dilemma’ faced by judges in these circumstances, they argued that it left other parties unprotected against vexatious litigants. Ms Penny Drysdale from Women’s Legal Service Victoria, which has represented a number of women dealing with persistent litigants in family violence and stalking proceedings, told the Committee:

often judges, we feel, in their efforts to be fair, to properly assist the unrepresented litigant and to prevent 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.⁵²¹

Victoria Police also said that in many instances vexatious litigants were given ‘an unreasonable and disproportionate amount of support in pursuing their complaints that on any objective and independent analysis lacks the required substance’.⁵²²

Others were concerned that vexatious litigants take advantage of judges’ reluctance to control their litigation and courtroom conduct. Solicitor Mr Mark Yorston, who gave evidence on behalf of the Law Institute of Victoria, told the Committee:

⁵¹⁸ Sarah Vessali, former Principal Lawyer, Women’s Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 12; Foster’s Group Limited, *Submission no. 23*, 3; Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 19. See also Lester and Smith, above n 493, 18; *Lindon v Commonwealth (No 2)* [1996] HCA 14, 19; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 92; Cairns, above n 499, 399-409; ‘Current issues – Litigant pests cost \$6.2m’, above n 472, 909.

⁵¹⁹ Australian Institute of Judicial Administration and The Federal Court of Australia, *Forum on self-represented litigants: Report*, 2005, 12, which notes that in other jurisdictions it seemed possible to take a ‘more robust approach’.

⁵²⁰ *Minogue v Human Rights and Equal Opportunity Commission* [1999] FCA 85, 29. See also *Tomasevic v Travaglini* [2007] VSC 337, 89-143; John Dewar, Bronwyn Jerrard and Fiona Bowd, ‘Self-representing litigants: A Queensland perspective’ (2002) 23(3) *Queensland Lawyer* 65, 69-71.

⁵²¹ Penny Drysdale, Law Reform and Policy Officer, Women’s Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 9. See also Commonwealth Bank of Australia, *Submission no. 18*, 8.

⁵²² Victoria Police, *Submission no. 47*, 1

Where there are self-represented litigants, once a matter gets to court the courts in order to ensure proper access to justice are always at great pains to make sure that those people's rights are protected. For those people who fall under the category of vexatious or persistent litigants they will simply take advantage of the court's attitude ...⁵²³

The Commonwealth Bank of Australia's submission argued that unwillingness to deal with disrespectful conduct in court 'encourages vexatious litigants, and emboldens them to bring further proceedings and to push the boundaries of disrespect for the Judiciary [and] other officers of the court ...'⁵²⁴ The Foster's Group told the Committee that '[p]ersistent failure to meet agreed deadlines is rewarded with successive extensions if the plaintiff, on minimal supporting evidence, can show he is "working on it".'⁵²⁵

Some witnesses from within the justice system expressed similar types of concerns. Judge Misso from the County Court wrote in his submission:

The relative infrequency of litigants of this kind in courts tends to see courts suffer them. The result is that these litigants absorb significant amounts of the time of registry staff and Judges depriving other litigants of the attention which their litigation deserves. ... Judges are very concerned to ensure that these litigants are given a fair trial ... There is a tendency now to allow these litigants to run their litigation on the basis that it is better to allow that to occur than to have the litigation brought to a natural conclusion even though the cause of action may be without any merit.⁵²⁶

Participants who have dealt with vexatious litigants stated that, even where courts do use these powers, vexatious litigants just appeal or commence new proceedings. A Supreme Court master told Dr Freckelton, 'You strike out their cases but they come back.'⁵²⁷ Telstra told the Committee that it does not always apply for strike out orders, even where that is an option:

because of the likelihood that the claimants will bring fresh proceedings against Telstra. It will often be more cost-effective for Telstra to defend vexatious proceedings to trial than to make continuous applications for proceedings to be struck out.⁵²⁸

The cases of Victoria's 15 declared vexatious litigants support these types of concerns. There were many examples where courts struck out pleadings or summarily dismissed the proceedings. In some cases this ended the individual proceedings, while in others the vexatious litigant appealed. In none of the cases does it appear that the vexatious litigant was deterred from issuing new legal proceedings.

⁵²³ Mark Yorston, Consultant, Wisewoulds Lawyers, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 15.

⁵²⁴ Commonwealth Bank of Australia, *Submission no. 18*, 6.

⁵²⁵ Foster's Group Limited, *Submission no. 23*, 2.

⁵²⁶ Judge Misso, *Submission no. 10*, 6-7.

⁵²⁷ Freckelton, Judicial officers and VCAT members report, above n 474, 24.

⁵²⁸ Telstra Corporation Limited, *Submission no. 29*, 2. See also Bennett, above n 485.

There are also questions about whether these powers are capable of dealing with the pattern of behaviour shown by vexatious litigants. Ms Penny Drysdale of the Women's Legal Service told the Committee that striking out looks 'at that matter in isolation from the whole pattern of conduct ...'.⁵²⁹

8.2.3 Enhancing the effectiveness of the courts' powers to deal with vexatious civil proceedings

A number of reviews in other Australian jurisdictions have recommended that the powers to strike out and summarily dismiss matters be broadened or that courts use these powers 'more robustly and more often' in relation to vexatious matters.⁵³⁰ The Victorian Law Reform Commission (VLRC) recently recommended that these powers should be exercised where there is 'no real prospect of success'.⁵³¹

To promote attitudinal change in relation to the use of this power the VLRC also recommended that there should be 'an explicit case management objective that the court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others'.⁵³²

Several reviews have also considered mechanisms for increasing the use of registrars' powers to refuse to seal documents. The Law Reform Commission of Western Australia recommended that the registrar should be able to consider the litigant's conduct generally, including outside the current case, when exercising this power.⁵³³ In its recent report on Victoria's civil justice system the VLRC recommended that this power be extended so that it applies to documents filed in relation to interlocutory matters.⁵³⁴

The equivalent rule in some other jurisdictions such as the High Court requires the registrar to consult a judge who will direct that the document be issued or only issued with the leave of a judge.⁵³⁵ This issue of accountability was raised by participants. One submission from a member of the community stated '[i]t is clearly an abuse of the administration of justice for a Registrar to perform a judgment on the contents of a Writ when his or her job is to ascertain that the document fulfils the Form layout not the content'.⁵³⁶ The VLRC noted that the exercise of this power is 'particularly useful where the judge determining the matter is able to hear it in open court and the

⁵²⁹ Penny Drysdale, *Transcript of evidence*, above n 521, 12.

⁵³⁰ Australian Law Reform Commission, *For the sake of the kids: complex contact cases and the Family Court*, Report no. 73, 1995, 5.30. See also Law Reform Commission of Western Australia, *Review of the criminal and civil justice systems in Western Australia - Final report*, 1999, 109.

⁵³¹ Victorian Law Reform Commission, above n 484, 358.

⁵³² *Ibid.*

⁵³³ Law Reform Commission of Western Australia, above n 530, 162

⁵³⁴ Victorian Law Reform Commission, above n 484, 373-374.

⁵³⁵ *High Court Rules 2004* (Cth) r 6.07.

⁵³⁶ Darryl O'Bryan, *Submission no. 19*, 1. See also G Lloyd Smith, *Submission no. 7*, 1; Simon Smith, *Submission no. 21*, 6.

person seeking to commence the proceeding has the benefit of hearing the judge's reasons.⁵³⁷

While the Committee does not believe it has sufficient evidence to make recommendations about the increased use of summary dismissal mechanisms, it strongly supports the case management objective recommended by the VLRC, which would see courts better utilise their powers to promptly dispose of vexatious proceedings. The Committee draws these issues to the attention of the courts for further consideration.

The Committee acknowledges that there are issues of transparency in relation to the exercise of registrars' powers to refuse to seal or accept documents. In light of this it recommends that court rules be amended to make it clear that registrars must seek directions from a judge before exercising this power. The Committee understands this will codify the current practice. In addition, the Committee believes that data on the use of this power should be collected and reported.

Recommendation 7: Registrars' powers to refuse to seal documents

- 7.1 The courts should amend their rules to make it clear that registrars must seek directions from a judge before refusing to seal or accept documents. The rules should also specify that a judge may make this determination in open court.
- 7.2 The courts should publish on an annual basis information about the number of times the power to refuse to seal or accept documents is exercised.

8.3 Vexatious criminal proceedings

Although the state usually brings criminal prosecutions, members of the community can initiate private criminal proceedings themselves.⁵³⁸ If a person brings vexatious criminal proceedings there are two ways to dispose of them at an early stage: intervention by the Directors of Public Prosecutions (DPPs) or a court staying the proceedings.

8.3.1 Intervention by DPPs

The Victorian DPP, who prosecutes crimes under Victorian laws, and the Commonwealth DPP, who prosecutes crimes under Commonwealth laws, both have the power to take over and discontinue private prosecutions.⁵³⁹

The Commonwealth and Victorian DPPs told the Committee they are informed of private criminal prosecutions by the defendant or sometimes the courts.⁵⁴⁰ Mr Peter

⁵³⁷ Victorian Law Reform Commission, above n 484, 373.

⁵³⁸ There are some restrictions. See Richard Fox, *Victorian criminal procedure: State and Federal law*, 12th edition, 2005, 53-55. In the case of crimes under Commonwealth law, this power is protected by legislation: *Crimes Act 1914* (Cth) s 13; *Director of Public Prosecutions Act 1983* (Cth) s 10(2).

⁵³⁹ *Public Prosecutions Act 1994* (Vic) s 22(1)(b)(ii); *Director of Public Prosecutions Act 1983* (Cth) s 9(5).

Byrne from the Office of Public Prosecutions in Victoria, which supports the Victorian DPP, informed the Committee that since June 2006 the Magistrates' Court has provided a copy of the charges to the Victorian DPP in most circumstances so matters can be dealt with earlier.⁵⁴¹

Mr Byrne told the Committee that the office had taken over and discontinued approximately 25 matters in the last five years.⁵⁴² The Commonwealth DPP advised the Committee that in 2006-07 it took over and discontinued proceedings brought by 11 private prosecutors who had commenced private prosecutions against more than 50 people, including politicians, judges and magistrates.⁵⁴³ The Commonwealth DPP stated that the power to take over and discontinue private prosecutions was exercised once in 2005-06, 18 times in 2004-05, 14 times in 2003-07 and seven times in 2002-03.⁵⁴⁴

Mr Byrne told the Committee the Victorian DPP decides whether to exercise this power on a case-by-case basis according to well established criteria. These are:

whether continuation of the proceedings would constitute an abuse of process; an abuse of process may occur where there is some improper purpose in bringing the proceedings, such as personal malice or gain, or there is a conflict of interest, or there is insufficient evidence on which to base the proceeding, or where there is no reasonable prospect of a conviction.⁵⁴⁵

He noted that these criteria are not set out in a publicly available document.⁵⁴⁶

The Office of the Commonwealth DPP informed the Committee that the Commonwealth DPP exercises his power in accordance with criteria set out in the *Prosecution Policy of the Commonwealth*. It states that a private prosecutor should be permitted to retain the conduct of a prosecution except in certain circumstances. These include where there is insufficient evidence to justify continuation of the prosecution, that is, where there is no reasonable prospect of conviction on the available evidence, and where there are reasonable grounds for suspecting that the decision to prosecute was motivated by improper personal or other motives.

The Committee received only limited evidence about whether DPPs exercising their powers to take over and discontinue private prosecutions was an effective way of dealing with vexatious criminal proceedings.

Court staff and judicial officers interviewed by Dr Freckelton commented that these powers appear to be operating effectively⁵⁴⁷; however, one Magistrate gave an

⁵⁴⁰ Victorian Director of Public Prosecutions, *Submission no. 22*, 2; Commonwealth Director of Public Prosecutions, *Submission no. 36*, 3.

⁵⁴¹ Peter Byrne, Senior Solicitor, Policy and Advice Section, Office of Public Prosecutions, *Transcript of evidence*, Melbourne, 6 August 2008, 59-60.

⁵⁴² *Ibid* 58.

⁵⁴³ Commonwealth Director of Public Prosecutions, *Submission no. 36*, 3.

⁵⁴⁴ *Ibid*.

⁵⁴⁵ Peter Byrne, *Transcript of evidence*, above n 541, 61.

⁵⁴⁶ *Ibid*.

example of an occasion when neither she nor the prosecuting party had been given notice that a matter would be taken over by the DPP.⁵⁴⁸

The Victorian DPP and the Office of the Commonwealth DPP expressed satisfaction with the current arrangements. The Victorian DPP described the process as ‘relatively effective in dealing with criminal proceedings initiated by vexatious litigants’.⁵⁴⁹ The Office of the Commonwealth DPP pointed to the use of the powers in the case of a Victorian declared vexatious litigant to show their ‘importance’.⁵⁵⁰ Other participants in the Inquiry did not express any views on these provisions.

The Committee did note some transparency and accountability issues with the powers. There have been some cases in which the DPPs themselves, or their officers, have been the defendants in the vexatious criminal proceedings. The Committee is not suggesting that the DPPs acted inappropriately in those cases, but Mr Byrne acknowledged that ‘it puts one of the defendants in the position of taking over the proceedings against himself and terminating them, which is probably a little unusual’.⁵⁵¹

Mr Byrne also told the Committee that the DPP’s decisions were not ones that could be appealed or reviewed.⁵⁵² A magistrate interviewed as part of Dr Freckelton’s research, who had experience with a prosecution being taken over, suggested that the DPP’s exercise of power to take over and discontinue a prosecution should be reviewable.⁵⁵³

The Commonwealth DPP’s Prosecution Policy provides that decisions to take over and discontinue a case are reviewable merely by the individual instituting a fresh prosecution. It states:

A private individual may institute a prosecution in circumstances where he or she disagrees with a previous decision of the DPP. If, upon reviewing the case, it is considered the decision not to proceed with the prosecution was the proper one in all the circumstances, the appropriate course may be to take over the private prosecution with a view to discontinuing it.⁵⁵⁴

On the basis of the available evidence the Committee finds that the DPPs’ power to take over and discontinue private prosecutions is operating adequately to deal with vexatious criminal proceedings. However, the Committee believes that there is scope to increase the transparency of the process used by the DPP, in particular that there

⁵⁴⁷ Freckelton, Judicial officers and VCAT members report, above n 474, 35; Freckelton, Court and VCAT staff report, above n 474, 21.

⁵⁴⁸ Freckelton, Judicial officers and VCAT members report, above n 474, 36.

⁵⁴⁹ Victorian Director of Public Prosecutions, *Submission no. 22*, 2.

⁵⁵⁰ Commonwealth Director of Public Prosecutions, *Submission no. 36*, 4.

⁵⁵¹ Peter Byrne, *Transcript of evidence*, above n 541, 62. See also *Walsh v Director of Public Prosecutions* [2005] VSC 469, 32, 61-62, in which the Supreme Court heard arguments that the DPP was affected by a conflict of interest because the charges had been brought against a Crown prosecutor.

⁵⁵² Peter Byrne, *Transcript of evidence*, above n 541, 62. See *Stefanovski v Magistrates’ Court of Victoria* [2004] VSC 313, 13; *Walsh v DPP* [2005] VSC 469, 64; *Maxwell v The Queen* (1996) 184 CLR 501.

⁵⁵³ Freckelton, Judicial officers and VCAT members report, above n 474, 36.

⁵⁵⁴ Commonwealth Director of Public Prosecutions, *Submission no. 36*, 3.

should be a clear articulation of the criteria used to assess whether a matter will be taken over and discontinued. In addition, the Committee believes it is desirable that decisions of the DPP under this power should be reviewable. The participants in this Inquiry did not suggest any appropriate review or appeal mechanisms and the Committee recommends that the Victorian Government consider this matter further.

The Committee also notes it is undesirable for the DPP to be able to take over and discontinue proceedings against himself or his officers. The Committee recommends that the DPP's prosecution policy should clearly stipulate a mechanism for these prosecutions to be dealt with independently. The Committee notes that under the *Public Prosecutions Act 1994* (Vic) the DPP may request the Attorney-General to exercise the DPP's powers in a situation where there is a conflict of interest.⁵⁵⁵ The Committee suggests that such a referral be made when the DPP or a DPP officer is the subject of the criminal prosecution.

In addition, the Committee is of the view that there should be increased accountability in relation to the exercise of this power through the regular reporting of data about the number of private prosecutions taken over and discontinued each year.

Recommendation 8: Interventions by the Victorian DPP

- 8.1 The Victorian DPP should publish the policy for taking over private criminal prosecutions under section 22(1)(b)(ii) of the *Public Prosecutions Act 1994* (Vic).
- 8.2 The Victorian DPP's policy for taking over private criminal prosecutions under section 22(1)(b)(ii) should include mechanisms for dealing with apparent conflicts of interest which arise when the DPP or an officer of the DPP is the subject of the prosecution.
- 8.3 The Victorian Government should examine possible mechanisms to enable a litigant to appeal decisions of the DPP under section 22(1)(b)(ii).
- 8.4 The Office of Public Prosecutions should publish in its annual report the number of private criminal prosecutions taken over and discontinued by the Victorian DPP under section 22(1)(b)(ii).

8.3.2 The courts' power to stay criminal proceedings

Victorian courts do not have specific statutory powers to stay criminal proceedings on the grounds that they are vexatious. However, they can use their inherent powers to stay criminal proceedings that are an abuse of process. Most of the reported decisions about this power deal with state rather than private prosecutions. Examples

⁵⁵⁵ *Public Prosecutions Act 1994* (Vic) s 29.

of cases where the courts have used this power include criminal proceedings brought for an ulterior purpose, and proceedings that were doomed to fail.⁵⁵⁶

In Western Australia there is a statutory power allowing a court to stay a charge permanently if it finds that it is an abuse of the process of the court.⁵⁵⁷

The Committee received very little evidence about the effectiveness of the courts' power to stay proceedings in dealing with vexatious criminal proceedings. Mr Byrne from the Office of Public Prosecutions in Victoria told the Committee that he thought that giving courts a statutory power to summarily dismiss private criminal prosecutions 'certainly has a lot of merit ... but again it would have to have the sorts of safeguards that I talked about such as the right of appeal and possibly even the right to funding for an appeal.'⁵⁵⁸

While the Committee received very limited evidence in relation to this issue, it believes the inherent powers of the courts should be codified to allow courts to stay criminal proceedings that are an abuse of process. It understands this may be an efficient mechanism for dealing with vexatious criminal proceedings and may be, in some instances, simpler and more time-effective than relying on the DPP's powers. It also has the advantage of being at arm's-length from the DPP and may be more appropriate where the DPP or his officers are the subject of a vexatious prosecution. The Committee notes also that the decision to stay criminal proceedings would be reviewable by the usual court appeal mechanisms.

Recommendation 9: Courts' power to stay criminal proceedings

The Victorian Government should introduce legislation codifying the courts' inherent power to stay criminal proceedings that are an abuse of process.

8.3.3 Registrars' power to refuse to issue vexatious criminal proceedings

Registrars in Victorian courts do not have any discretion to refuse to issue a charge if the charge complies with relevant statutes (for example that the charge exists and that the statute of limitations has not expired).⁵⁵⁹

Registrars in some other jurisdictions have greater powers in relation to filing vexatious criminal proceedings. For example, in New South Wales the registrar must not accept criminal proceedings if they do not disclose grounds for the proceedings or if the proceedings are not within the rules of the court.⁵⁶⁰

⁵⁵⁶ See Fox, above n 538, 60.

⁵⁵⁷ *Criminal Procedure Act 2004* (WA) s 76(1).

⁵⁵⁸ Peter Byrne, *Transcript of evidence*, above n 541, 63.

⁵⁵⁹ Freckelton, Court and VCAT staff report, above n 474, 21.

⁵⁶⁰ *Criminal Procedure Act 1986* (NSW) s 49(2).

In relation to the suggestion that the registrar have the power to refuse to file vexatious criminal proceedings, Mr Byrne stated, ‘I think that would be a pretty drastic step to take, to not even allow the proceedings to be filed ...’.⁵⁶¹ No other participants to the Inquiry provided evidence on this issue.

The VLRC briefly considered registrars’ powers in relation to criminal proceedings as part of its recent report on the Victorian civil justice system. The VLRC did not make any recommendations about this issue but stated that ‘[c]onsideration should be given to making legislative provision for the registrar to also refuse to accept an originating process for criminal proceedings where he or she considers that the form or contents would be irregular or an abuse of process of the court’.⁵⁶²

Again the Committee notes the limited evidence on this issue. However, it believes the registrars’ power to refuse to issue vexatious criminal proceedings may be an effective pre-emptive control to stop vexatious criminal proceedings and suggests that the Victorian Government should consider this further. The Committee notes, however, that as in the case of the registrars’ power to refuse to seal or accept documents in the civil jurisdiction, discussed above, registrars should be required to consult with a judge before exercising this power.

Recommendation 10: Registrars’ powers to refuse to issue vexatious criminal proceedings

The Victorian Government should consider giving registrars a statutory power to refuse to issue vexatious criminal proceedings. Any such legislation should make it clear that registrars must seek directions from a judge before refusing to issue proceedings.

8.4 Powers to deal with mental health issues

Chapter 4 of this report noted that there are conflicting views about whether there is a link between mental health and vexatious litigation. The Committee’s issues paper asked how courts and tribunals should respond to any such issues and again a variety of views were expressed.

In the previous chapter the Committee considered a number of informal mechanisms through which the justice system could improve its responses to litigants generally, including those with mental illnesses. However, the Committee also received evidence that where a person who may be a vexatious litigant is suffering from a mental illness and requires treatment because they risk harming either themselves or others, the courts may not currently have appropriate responses. The submission of the Supreme Court of Victoria succinctly summarises the practical difficulties encountered by courts:

⁵⁶¹ Peter Byrne, *Transcript of evidence*, above n 541, 63.

⁵⁶² Victorian Law Reform Commission, above n 484, 602.

Particular difficulty is encountered where the litigant appears to be suffering from an untreated mental illness or personality disorder. Sometimes the judicial officer becomes concerned that the person's growing frustration with court processes might lead to self-harm or violence towards court officials.

There are limited options available to address what may be an underlying cause of vexatious litigation.⁵⁶³

This section explores powers for responding to possible vexatious litigants with mental health issues.

8.4.1 Referrals to treatment

Involuntary referrals to treatment

The *Mental Health Act 1986* (Vic) provides the legislative framework for the treatment and care of those with mental illnesses in Victoria. The Act establishes a process for initiating involuntary treatment in a narrow range of circumstances where a person is mentally ill, requires immediate treatment, is unable to consent, the treatment is necessary because of risk to the health and safety of the person or others, and the person cannot receive adequate treatment in a less restrictive manner.⁵⁶⁴

Any person over the age of 18 can make a request that another person be treated involuntarily. The person in relation to whom the request is made is then examined by a medical practitioner who must certify that the criteria for involuntary treatment apply before such treatment is possible.⁵⁶⁵ The Act is currently being reviewed with a particular focus on its compatibility with the Charter.⁵⁶⁶

It is possible for a court or tribunal to initiate a referral to compulsory treatment under this Act. However, the Supreme Court's submission indicated that this is only done in extreme cases.⁵⁶⁷

There was limited participant support for involuntary referrals of possible vexatious litigants to mental health services. The Commonwealth Bank of Australia's submission suggested that a court could order that possible vexatious litigants attend counselling with appropriately qualified psychiatrists.⁵⁶⁸ One Western Australian barrister has suggested that courts could be able to order litigants to undergo a psychiatric assessment or treatment either as a consequence of being declared

⁵⁶³ Supreme Court of Victoria, *Submission no. 34*, 5.

⁵⁶⁴ *Mental Health Act 1986* (Vic) s 8.

⁵⁶⁵ *Mental Health Act 1986* (Vic) s 9.

⁵⁶⁶ Department of Human Services, Victoria, *Mental Health Act 1986 Review* (2008) <<http://www.health.vic.gov.au/mentalhealth/mhactreview/index.htm>> at 16 October 2008.

⁵⁶⁷ Supreme Court of Victoria, *Submission no. 34*, 5.

⁵⁶⁸ Commonwealth Bank of Australia, *Submission no. 18*, 9.

vexatious, or as a prerequisite to granting leave to a declared vexatious litigant to commence legal proceedings.⁵⁶⁹

Most participants providing evidence to the Committee were unsupportive of courts making involuntary referrals to treatment. For example, Legal Aid's submission stated that any compulsory psychiatric evaluation 'would be overly intrusive into that person's private life and may raise mental health issues unrelated to the court proceedings'.⁵⁷⁰

The psychiatric evidence received by the Committee suggested that involuntary referral was only appropriate in very limited circumstances, consistent with current mental health law. Both Professor Mullen and Dr Lester agreed that involuntary referrals to treatment are most appropriate in circumstances where a person has broken the law or where the treatment is necessary to prevent them from committing a crime of violence.⁵⁷¹

Voluntary referrals to treatment

There was more support amongst participants for referral of possible vexatious litigants to mental health services on a voluntary basis where appropriate.

Mr Matthew Carroll of the Victorian Equal Opportunity and Human Rights Commission told the Committee that '[t]he recognition that for some of the people their problem is essentially a medical or psychiatric issue more so than legal is a positive development, and referral to potential supports is a positive response to that syndrome'.⁵⁷² The Victorian Bar's submission suggested that a litigation support facility be established whereby judicial officers and court staff can offer declared or possible vexatious litigants the opportunity to talk to a mental health professional.⁵⁷³

The Family Court of Australia has conducted a pilot mental health support project which involves referring appropriate cases to community based and government organisations providing mental health services.⁵⁷⁴ The Committee understands that

⁵⁶⁹ Clare Thompson, 'Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)' (2004) 14 *Journal of Judicial Administration* 64, 70. See also G S Ungvari, A H T Pang and C K Wong, 'Querulous behaviour' (1997) 37(3) *Medicine Science and the Law* 265.

⁵⁷⁰ Victoria Legal Aid, *Submission no. 33*, 2. See also The Victorian Bar, *Submission no. 8*, 8; Fitzroy Legal Service Inc, *Submission no. 43*, 13; Mental Health Legal Centre Inc, *Submission no. 40*, 7-8.

⁵⁷¹ Paul Mullen, Professor of Forensic Psychiatry, Department of Psychological Medicine, Monash University, and Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 36. See also Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 42; Matthew Carroll, Acting Chief Executive Officer, Victorian Equal Opportunity and Human Rights Commission, *Transcript of evidence*, Melbourne, 6 August 2008, 46.

⁵⁷² Matthew Carroll, *Transcript of evidence*, above n 571, 46. See also Fitzroy Legal Service Inc, *Submission no. 43*, 13.

⁵⁷³ The Victorian Bar, *Submission no. 8*, 8-9.

⁵⁷⁴ Chief Justice Diana Bryant, 'Self-represented and vexatious litigants in the Family Court of Australia' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006) 35-36.

this project has been positively evaluated and is to be rolled out more broadly throughout the Court.

The Committee also heard that voluntary referrals are unlikely to be effective in the case of vexatious litigants because they rarely agree to treatment.⁵⁷⁵ Mr Greg Garde of the Victorian Bar stated '[p]eople still have resistance to that sort of support, and of course vexatious litigants do not view themselves necessarily, or indeed in all probability, as having a mental health problem ...'⁵⁷⁶

Treatment issues

The Committee also found that there is no agreement about the treatment that is appropriate for 'querulous paranoia'. Some studies have proposed medication⁵⁷⁷ or therapy⁵⁷⁸, but it has been suggested that further research is required to identify effective treatments.⁵⁷⁹ The Health Services Commissioner told the Committee that 'psychiatric treatment will not "cure" them but may reduce the querulent behaviours'.⁵⁸⁰

The Committee's view

The Committee has noted in previous chapters the concerns about pathologising vexatious litigants' behaviour and the diversity of views about the link between mental health and vexatious litigation. This section has raised further concerns about appropriate referral mechanisms and the lack of consensus about appropriate medical treatment. In light of these issues, and the limited evidence available, the Committee does not propose to recommend formal mechanisms to refer possible vexatious litigants with mental health issues to treatment.

The Committee notes that the New South Wales Attorney-General has requested the courts in that state to consider developing protocols to refer vexatious litigants to mental health services in appropriate cases.⁵⁸¹ The Committee was not able to obtain detailed information about this proposal. The Committee draws these initiatives to

⁵⁷⁵ Grant Lester, *Submission no. 13*, 36; Victorian WorkCover Authority, *Submission no. 48*, 1. See also Lester and Smith, above n 493, 16; Alistair Munro, 'Delusional (paranoid) disorders' (1988) 33 *Canadian Journal of Psychiatry* 399; Alfred H T Pang, Gabor S Ungvari, Francis Lum, Kelly Lai and C M Leung, 'Querulous paranoia in Chinese patients: A cultural paradox' (1996) 30 *Australian and New Zealand Journal of Psychiatry* 463; M W D Rowlands, 'Psychiatric and legal aspects of persistent litigation' (1988) 153 *British Journal of Psychiatry* 317.

⁵⁷⁶ Greg Garde, *Transcript of evidence*, above n 487, 26.

⁵⁷⁷ Ungvari, Pang and Wong, above n 569, 265; Gabor S Ungvari, Alfred H T Pang and Helen F K Chui, 'Delusional disorder, litigious type' (1995) 16 *Clinical Gerontologist* 71; Gabor S Ungvari and Rudolf I M Hollokoi, 'Successful treatment of litigious paranoia with Pimozide' (1993) 38(1) *Canadian Journal of Psychiatry* 4-8.

⁵⁷⁸ Paul E Mullen and Grant Lester, 'Vexatious litigants and unusually persistent complainants and petitioners: From querulous paranoia to querulous behaviour' (2006) 24 *Behavioural Sciences and the Law* 333, 347; Lester and Smith, above n 493, 16.

⁵⁷⁹ Grant Lester, Beth Wilson, Lynn Griffin and Paul E Mullen, 'Unusually persistent complainants' (2004) 184 *British Journal of Psychiatry* 352, 355-356.

⁵⁸⁰ Health Services Commissioner, *Submission no. 41*, 3.

⁵⁸¹ Attorney General, New South Wales, 'New laws to stop legal harassment' (Media release, 11 May 2008).

the attention of the Victorian courts and encourages them to monitor developments in New South Wales, as well as in the Family Court.

The Committee notes that there are broader issues about support for mental health in courts generally but those are outside the Committee's terms of reference.

8.4.2 Litigation guardians

Another mechanism for assisting a litigant with a mental health issue is the appointment of a litigation guardian. The rules of the Supreme, County and Magistrates' Courts allow the court to appoint a litigation guardian for a litigant with a disability who is unable to manage his or her affairs in relation to a legal proceeding.⁵⁸² A litigation guardian is usually a family member or a friend and assumes full authority for conducting the litigation, including exposing themselves to the risk of paying the other parties' court costs.

The evidence received by the Committee suggested that litigation guardians are not often appointed in relation to possible vexatious litigants.⁵⁸³ Victoria Legal Aid noted that people and organisations are often unwilling to act as litigation guardians as they potentially expose themselves to adverse costs orders and suggested that cost indemnities should be granted to those acting as litigation guardians.⁵⁸⁴ One Supreme Court judge commented in an interview with Dr Freckelton that many possible vexatious litigants are socially isolated and may not have an appropriate 'friend' to act as a litigation guardian.⁵⁸⁵

However, a County Court judge commented to Dr Freckelton that appointing a litigation guardian for a possible vexatious litigant may not be useful and that there is a risk that it may just lead to more litigation.⁵⁸⁶

The Committee notes that the test for appointing a litigation guardian is quite high and it is likely that it will not be met by most possible vexatious litigants.

8.4.3 Appointment of a guardian

Section 66 of the *Guardianship and Administration Act 1986* (Vic) allows the Supreme Court, County Court and Magistrates' Court to refer a party to VCAT if the court considers that a party may need to have a guardian appointed. The referral is treated as a guardianship or administration application by the registrar of the court. The Act does not specifically state that a person appointed as a guardian under the legislation is able to conduct litigation, and the guardian may still be required to be

⁵⁸² *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 15; *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) O 15; *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 32.02.

⁵⁸³ Victorian WorkCover Authority, *Submission no. 48*, 2.

⁵⁸⁴ Victoria Legal Aid, *Submission no. 33*, 2.

⁵⁸⁵ Freckelton, Judicial officers and VCAT members report, above n 474, 10.

⁵⁸⁶ *Ibid.*

appointed as a litigation guardian in order to do this.⁵⁸⁷ The Attorney-General informed the Committee that there have only been a small number of referrals under section 66 in the last five years.⁵⁸⁸

Dr Freckelton's consultations with judicial officers revealed some uncertainty in relation to the application of section 66 to possible vexatious litigants. One VCAT member stated that there is still not clear authority that a person with a personality order has 'a disability' for the purposes of the Act.⁵⁸⁹ Another VCAT member gave an example of one case referred under section 66 where the litigant was 'was implacably opposed to the application and raised a large number of procedural objections to it; she viewed the application as "defamatory, abusive and psychologically harmful to her".'⁵⁹⁰

The Victorian WorkCover Authority stated that '[j]udges may make observations about a person's demeanour but the courts appear reluctant to take the step of determining whether someone's psychiatric competence ought to be reviewed by referring the person to VCAT ...'⁵⁹¹ It suggests that training should be provided to judges to allow them to use this power when appropriate.

The Committee notes the uncertainty about the applicability and appropriate use of section 66 of the Guardianship and Administration Act to refer possible vexatious litigants to VCAT for the appointment of a litigation guardian. However, the Committee encourages the Judicial College to consider training for judges in the use of this power, as suggested by the Victorian WorkCover Authority. This could be conducted as part of the additional training for judicial officers the Committee recommended in the previous chapter.

8.5 Other possible mechanisms for dealing with vexatious proceedings

8.5.1 Dealing with vexatious litigant networks – McKenzie friends

The Committee noted evidence in chapter 3 that there are sometimes connections or networks between vexatious litigants. One mechanism which stakeholders suggested may currently be being used by declared vexatious litigants to assist others to conduct unmeritorious litigation is the McKenzie friend.

A court may give permission to an unrepresented litigant to be assisted in proceedings by a friend known as a McKenzie friend.⁵⁹² Such a helper is not a party to the proceedings.

⁵⁸⁷ Victorian Law Reform Commission, above n 484, 601.

⁵⁸⁸ Letter from The Hon Rob Hulls MP, above n 477, Att C, 2.

⁵⁸⁹ Freckelton, Judicial officers and VCAT members report, above n 474, 21.

⁵⁹⁰ Ibid.

⁵⁹¹ Victorian WorkCover Authority, *Submission no. 48*, 2.

⁵⁹² *McKenzie v McKenzie* [1970] 3 All ER 1034.

Dr Grant Lester told the Committee that vexatious litigants:

hang around the courts and become in a sense McKenzie friends for others, they become secret advisers and/or they marry someone and then make them into their hobbyhorse and then these people, their spouses, eventually have to be made vexatious litigants.⁵⁹³

While the judicial officers interviewed by Dr Freckelton as part of this Inquiry did not think that vexatious litigants acting as McKenzie friends was a major problem⁵⁹⁴, the Supreme Court's submission suggested that in some instances it can raise serious issues. The submission stated that:

The Court can be placed in a difficult position where the proposed McKenzie friend or representative is not considered an appropriate person. Where the litigant is from a non-English speaking background, or is inarticulate or unprepared to represent themselves, to refuse leave may effectively deny them any representation.⁵⁹⁵

The Court also suggested that plain language material containing general information about the principles of representation and McKenzie friends be available at the courts.⁵⁹⁶ The Court's submission states that this material would help to manage the expectations litigants have about people who will be permitted to assist them in their proceedings. The Court suggested that this material could be developed drawing on material in the County Court's publication *Self-represented parties: A trial management guide for the judiciary*.

The system of civil restraint orders in the United Kingdom does not specifically apply to McKenzie friends. However, it has been clearly established by the courts that such an order can be imposed against a person who is acting as a McKenzie friend.⁵⁹⁷ Courts in Victoria do not have such an option. While a court can refuse leave to allow a person to act as a McKenzie friend, it cannot declare such a person to be vexatious under the current legislation.

The Committee does not believe it has received sufficient evidence to make detailed recommendations in relation to McKenzie friends. However, it believes that it is important to support self-represented litigants and assist them in selecting an appropriate person to act as a McKenzie friend in court proceedings. The Committee therefore considers that there is merit in the Supreme Court's suggestion that information be developed for litigants to provide guidance about appropriate persons to act as McKenzie friends. The Committee believes that a person who has been declared to be a vexatious litigant will not be an appropriate person to act as a McKenzie friend in most circumstances.

⁵⁹³ Dr Grant Lester, Forensic Psychiatrist, Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 32.

⁵⁹⁴ Freckelton, Judicial officers and VCAT members report, above n 474, 10.

⁵⁹⁵ Supreme Court of Victoria, *Submission no. 34*, 5.

⁵⁹⁶ Supreme Court of Victoria, *Submission no. 34*, 5-6.

⁵⁹⁷ *Her Majesty's Attorney-General v Purvis* [2003] EWHC Admin 3190. See also Sorabji, above n 485, 36; Sara Partington, 'Tackling the time wasters' (2004) 154 *New Law Journal* 1472, 1472.

Recommendation 11: McKenzie friends

The courts should develop and circulate plain-language materials about the principles of representation and appropriate persons to act as McKenzie friends.

8.5.2 Dealing with large numbers of subpoenas

Court and tribunal staff and judicial officers interviewed by Dr Freckelton as part of this Inquiry indicated that possible vexatious litigants tend to seek to issue large numbers of subpoenas, often to very high profile people such as ministers, the Premier and the Prime Minister.⁵⁹⁸ This issue was also raised by two other participants.⁵⁹⁹

While recognising that powers in this regard are generally sufficient, one Supreme Court judge suggested that the Prothonotary's power to decline to receive an originating process if it would amount to an abuse of process should be extended to subpoenas.⁶⁰⁰ Another suggestion from a County Court judge was that litigants should be required to obtain permission from the court if they 'appear to be endeavouring to subpoena unreasonable numbers of witnesses or if their grounds for the issuing of subpoenas are tenuous.'⁶⁰¹

The Committee recognises that litigants' issuing of large numbers of vexatious subpoenas may be time-consuming for registry staff as well as the recipient individuals and organisations who will have to respond to the subpoena. While the Committee received limited evidence about this issue, it believes there is scope to expand existing court rules to allow the registrar to refuse to issue a subpoena which is an abuse of process. The Committee suggests that this should be further considered by the courts. The Committee has already recommended that registrars must seek directions from a judge before refusing to seal or accept documents and this requirement should also apply to the issuing of subpoenas to ensure transparency in relation to the exercise of the power.

Recommendation 12: Vexatious subpoenas

The courts should consider amending the court rules to extend the registrars' power to refuse to seal or accept documents where the proceeding would be an abuse of process to include the power to refuse to issue subpoenas. Any expanded power should require registrars to seek directions from a judge before refusing to issue subpoenas on this ground.

⁵⁹⁸ Freckelton, Judicial officers and VCAT members report, above n 474, 22-23; Freckelton, Court and VCAT staff report, above n 474, 10.

⁵⁹⁹ Victoria Police, *Submission no. 47*, 2; Judge Misso, *Submission no. 10*, 4.

⁶⁰⁰ Freckelton, Judicial officers and VCAT members report, above n 474, 23.

⁶⁰¹ *Ibid.*

8.5.3 Stalking and intervention order laws

Several participants to the Inquiry commented that bringing repeated unmeritorious actions against another person may constitute harassment.⁶⁰² The Victorian DPP characterised such action as ‘stalking through the courts’.⁶⁰³

Under Victoria’s stalking laws it is a criminal offence to repeatedly inflict unwanted contact or communications on another person.⁶⁰⁴ In addition, an intervention order may be obtained to prevent continuing contact.⁶⁰⁵

One commentator, writing in the UK context, suggested that such laws could be applied to prevent harassment by vexatious litigants.⁶⁰⁶ The Committee did not receive any evidence about Victoria’s stalking and intervention order laws being used in this way, however, it acknowledges that it is one possible response to the behaviour of a vexatious litigant where it does amount to stalking. The State Revenue Office’s submission was the only evidence received by the Committee about this issue. It noted that intervention orders may not always be appropriate where the harassment occurs in an organisational environment:

restraining orders will not always work when being applied for by a statutory authority. For example, it may be difficult to establish grounds for a restraining order when multiple “one off” threats are made to different staff as opposed to repeated threats to one person.⁶⁰⁷

The Committee does not feel that it received sufficient evidence to make recommendations in relation to the use of stalking and intervention order laws to respond to inappropriate behaviour by declared and possible vexatious litigants.

⁶⁰² Women’s Legal Service Victoria, *Submission no. 38*, 2; Greg Garde, *Transcript of evidence*, above n 487, 25.

⁶⁰³ Victorian Director of Public Prosecutions, *Submission no. 22*, 3.

⁶⁰⁴ *Crimes Act 1958* (Vic) s 21A.

⁶⁰⁵ *Crimes (Family Violence) Act 1987* (Vic) Part 2.

⁶⁰⁶ Joanna Lobo, ‘Unreasonable behaviour’ (2003) 153 *New Law Journal* 1387, 1388.

⁶⁰⁷ State Revenue Office, *Submission no. 16*, 4-5.

Case Study 12: Mr L

The Supreme Court declared Mr L a vexatious litigant on 27 August 2004.

According to the Court's decision, Mr L was the owner of a farm in northern Victoria when he brought his first legal proceedings in 1989. Mr L and his wife sued their local council in the Planning Division of the Administrative Appeals Tribunal seeking, amongst other things, orders restraining the council from diverting water onto their land, orders that the council fill certain drains and damages of \$13 500. The Tribunal dismissed the claim and ordered Mr L to pay the council's costs.

The Supreme Court's decision refers to 27 further proceedings that followed this decision. They included litigation over costs payable from the 1989 proceedings, multiple attempts to overturn or appeal the Tribunal's decision, a dispute with the solicitors who represented Mr L in the 1989 proceedings and further litigation with the council about drainage works. They also included disputes with lenders who gave mortgages over the farm, the estate agent who conducted a mortgagee sale and the person who bought the farm. Mr L also brought proceedings against police arising from Mr L's arrest after an incident with a council grader conducting work near the farm, and litigation arising from the cancellation of his shooters licence.

The Attorney-General applied for a vexatious litigant order against Mr L in September 2001. Mr L gave an undertaking to the Court not to commence or continue any proceedings without leave but sought to be released from this undertaking in 2004. In an affidavit filed in the proceedings he stated '[i]t is with great difficulty that I prepare this application as I feel extremely sick when I attempt to convey 10 years of viciously aggressive litigation by the [council].'

Mr Justice Whelan of the Supreme Court found that 13 of the 28 proceedings were vexatious. In his decision, he commented that:

[Mr L] is a person who habitually and persistently institutes vexatious legal proceedings. He brings unmeritorious counterclaims and appeals as a matter of course. He prosecutes his vexatious proceedings with determination in the face of strike-outs and judgments against him. He repeatedly attempts to "revive" applications already dismissed ... [Mr L] has responded to the adverse decisions against him by escalating the seriousness of the allegations which he makes and by widening the circle of persons against whom he makes those allegations. The material before me leads me to conclude that it is very likely that, unless he is restrained, that process will continue.

The Court ordered that Mr L not continue or commence any legal proceedings without leave.

The High Court's records show that a 2005 appeal by Mr L from one of his proceedings against the council was dismissed. The Committee did not locate evidence of further proceedings brought by Mr L in Victoria.

Chapter 9: Is Victoria's vexatious litigant provision effective?

The recent wave of reforms to vexatious litigant provisions in Australia and overseas has been prompted by concerns that previous laws have not been adequate to deal with the phenomenon. However, there is little published research about the operation of vexatious litigant provisions. A rigorous, evidence-based approach to reform is required in this area given the implications for access to justice. This chapter examines the evidence gathered in this Inquiry about the effectiveness of Victoria's current provision.

9.1 General views of participants

The Committee heard mixed views during its Inquiry about whether the current vexatious litigant provision in section 21 of the *Supreme Court Act 1986* (Vic) is effective in dealing with vexatious litigants.

The Commonwealth Director of Public Prosecutions (DPP) described it as an adequate mechanism for responding to vexatious litigants while Victoria Legal Aid said it was 'effective in limiting litigation activity'.⁶⁰⁸

However, participants who had dealt with possible vexatious litigants expressed frustration. The Wellington Shire Council told the Committee 'the current justice system seems to be unable to control or prevent the activities of these individuals'.⁶⁰⁹ The Foster's Group described section 21 as 'ineffective in preventing litigants from abusing the Court's process and time'⁶¹⁰, while the Commonwealth Bank of Australia told the Committee:

There is often a perception of hopelessness in fighting these people as so few persons have been declared vexatious. One is faced with the dilemma of utilising one's time in working up a submission for the attorney general or just hoping that the next appeal/application by the vexatious litigant will be the last ... One always hopes that a matter will resolve at the next hearing. Unfortunately, they never do.⁶¹¹

The recent Victorian Law Reform Commission report on Victoria's civil justice system also expressed concern about 'significant obstacles' with section 21.⁶¹²

The Committee examined three aspects of the effectiveness of section 21 in this Inquiry:

⁶⁰⁸ Commonwealth Director of Public Prosecutions, *Submission no. 36*, 6; Victoria Legal Aid, *Submission no. 33B*.

⁶⁰⁹ Wellington Shire Council, *Submission no. 15*, 1.

⁶¹⁰ Foster's Group Limited, *Submission no. 23*, 4.

⁶¹¹ Commonwealth Bank of Australia, *Submission no. 18*, 4. See also Penny Drysdale, Law Reform and Policy Officer, Women's Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 9; Women's Legal Service Victoria, *Submission no. 38*, paras 2-6.

⁶¹² Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 598. See also Law Reform Commission of Western Australia, *Review of the criminal and civil justice systems in Western Australia - Final report*, 1999, 165.

- whether section 21 has been used effectively, that is, whether the process for applying for orders is effective
- whether section 21 itself has made it too easy or too difficult for the Supreme Court to make an order
- whether orders under section 21 have achieved their purpose, that is, whether they have stopped vexatious litigants from bringing further vexatious legal proceedings.

9.2 Is the current application process effective?

Chapter 3 noted anecdotal evidence that there are a number of possible vexatious litigants in Victoria's courts and tribunals who have never been the subject of an application under section 21. The Committee heard a number of criticisms of the current application process during the Inquiry.

The Supreme Court's submission to the Inquiry suggested that the Attorney-General's current monopoly on vexatious litigant applications has limited the use of section 21, a view supported by earlier inquiries.⁶¹³ Commentators have noted that Attorneys-General tend to take a cautious and conservative approach to their role. Professor Steve Hedley from University College Cork has argued they 'prefer to present the court with a huge dossier of futile litigation to make an unanswerable case for an order, rather than intervening sooner but more controversially'.⁶¹⁴

The Attorney-General advised the Committee that the Victorian Government Solicitor's Office (VGSO), which acts for the Attorney in vexatious litigant applications, has created 30 files in response to communications about possible vexatious litigants since 1996.⁶¹⁵ The advice did not disclose the outcome of those files but the Committee notes that only seven applications were made under section 21 over the same period. Several participants in this Inquiry said they had asked Attorneys-General to apply for orders against particular litigants but had been refused.⁶¹⁶

It is not the Committee's intention to 'second guess' decisions made by Attorneys-General under section 21. The Committee appreciates that a refusal to apply for an order can be frustrating for people who are being sued repeatedly by people they

⁶¹³ Supreme Court of Victoria, *Submission no. 34*, 1. See also Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* ('Judicial officers and VCAT members report'), Victorian Parliament Law Reform Committee, 2008, 27, 29; Victorian Law Reform Commission, above n 612, 593; Law Reform Commission of Western Australia, above n 612, 165.

⁶¹⁴ Steve Hedley, 'Vexatious litigants in England and Wales 1990-present' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006). See also Michael Taggart and Jenny Klosser, 'Controlling persistently vexatious litigants', in Matthew Groves (ed), *Law and Government in Australia*, 2005, 272, 295; Simon Smith, 'Vexatious litigants and their judicial control – The Victorian experience' (1989) 15(1) *Monash University Law Review* 48, 60.

⁶¹⁵ Letter from The Hon Rob Hulls MP, Attorney-General, to Chair, Victorian Parliament Law Reform Committee, 22 August 2008, Att A, 1-2.

⁶¹⁶ Commonwealth Bank of Australia, *Submission no. 18*, 1, 5; Victoria Police, *Submission no. 47*, 2; Foster's Group Limited, *Submission no. 23*, 2.

believe to be vexatious. On the other hand, Attorneys-General would be expected to take a cautious approach given the serious nature of vexatious litigant orders.

The Committee is interested in whether the *processes* surrounding these decisions are effective.

9.2.1 Notification of the Attorney-General

The Committee heard evidence that there is no clear process for notifying the Attorney-General about possible vexatious litigants in Victoria's courts and tribunals and, as a result, the Attorney's capacity to make applications under section 21 is limited.

The Attorney-General advised the Committee that the Attorney usually first receives allegations that someone is a vexatious litigant from lawyers acting for the other parties in the proceedings. The Attorney-General receives advice from the VGSO about the prospects of success in any application.⁶¹⁷ Some jurisdictions publish information about their vexatious litigant provisions for the broader community, including how to raise cases with the Attorney-General and the criteria used by the Attorney-General when deciding whether to make applications.⁶¹⁸ The Committee was unable to find any equivalent public information in Victoria.

Participants in the Inquiry told the Committee that there is a lack of community awareness about the laws. The Supreme Court's submission, for example, noted '[i]t may be that there is a lack of awareness in the community of the capacity for application to be made by the Attorney-General to have a person declared vexatious, and so matters may not be brought to the Attorney's attention'.⁶¹⁹

Participants from within the justice system were sometimes equally uncertain about the process for informing the Attorney-General about possible vexatious litigants. One of the Supreme Court judges interviewed by Dr Ian Freckelton SC on the Committee's behalf expressed frustration that there was 'no clear system' for bringing matters to the Attorney-General's attention.⁶²⁰ Supreme Court staff were unclear about how the Attorney becomes aware of possible vexatious litigants, observing that a number of vexatious litigants seem to 'fly under the radar'.⁶²¹

⁶¹⁷ Letter from The Hon Rob Hulls MP, above n 615, Att A, 1-2.

⁶¹⁸ See, for example, Attorney General's Office, United Kingdom, '*Vexatious litigants*' <http://www.attorneygeneral.gov.uk/sub_our_role_vex.htm> viewed 13 February 2008; Treasury Solicitor's Department, United Kingdom, '*Policy on vexatious litigants*' (2002); <http://www.tsol.gov.uk/Publications/scheme_publications/internal_guidance/vexatious_litigants_policy.pdf> viewed 13 May 2008; Queensland Courts, '*Vexatious litigants*' (2007) <<http://www.courts.qld.gov.au/151.htm>> viewed 13 May 2008; Supreme Court of New South Wales, '*Fact sheet on vexatious litigants*' <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_vexlitstable> viewed 15 February 2008.

⁶¹⁹ Supreme Court of Victoria, *Submission no. 34*, 2. See also Darebin Community Legal Centre Inc, *Submission no. 46*; Health Services Commissioner, *Submission no. 41*, 5.

⁶²⁰ Freckelton, Judicial officers and VCAT members report, above n 613, 28.

⁶²¹ Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* ('Court and VCAT staff report'), Victorian Parliament Law Reform Committee, 2008, 13-14, 17.

Case Study 13: Mr M

The Supreme Court declared Mr M a vexatious litigant on 19 October 2004.

Mr M is a prisoner who was sentenced to life imprisonment with a minimum non-parole period of 27 years after being convicted on seven counts of murder.

The Attorney-General's application for a vexatious litigant order against Mr M refers to 18 legal proceedings brought between September 2001 and November 2003. According to the Supreme Court's decision, all the proceedings concerned matters that had arisen in the course of Mr M's custody. The first proceedings were brought against prison managers and arose from the seizure of a file of documents which Mr M claimed were prepared by his legal advisers and were subject to legal professional privilege. The parties resolved the dispute to the extent that all but one document was returned to Mr M. The Supreme Court ordered that the proceeding be struck out. Mr M appealed unsuccessfully.

Other proceedings arose from a prison classification decision, a complaint under equal opportunity legislation alleging discrimination about political beliefs and activities following removal of articles from Mr M's cell, applications under freedom of information legislation for documents in the possession of prison authorities and challenges to findings he had committed prison offences.

Justice Smith of the Supreme Court found that a substantial number, although not all, of the proceedings raised by the Attorney-General in his application were vexatious. He stated that:

A clear picture emerges of a person who is habitually, persistently and without reasonable cause instituting hopeless, and therefore, vexatious proceedings. There is a high probability he will continue to do so. It is true that a few proceedings had merit, but even in those cases he showed a tendency to pursue the relief sought through the appeal process even though he must have known he had no prospects of success. His conduct generally reveals a strong tendency to pursue hopeless proceedings.

The Court ordered that Mr M not commence any legal proceedings without leave for a period of 10 years.

Court records show that Mr M has applied for leave to commence proceedings on one occasion. In 2007 he sought leave to bring proceedings against prison authorities to compel them to formulate a sentence plan and to prevent them from stopping letters he wanted to send to victims of his crimes. The Court refused to grant Mr M leave to bring proceedings about the first issue, but granted leave to bring proceedings about the second subject to conditions.

The Parliament subsequently passed legislation to enable prison authorities to intercept or censor letters sent by prisoners to any person if they reasonably believe it contains material that may be distressing or traumatic.

9.2.2 The Attorney-General's response to notifications

Some participants told the Committee they were aware of section 21, but had not asked the Attorney-General to make an application. The State Revenue Office wrote that it had not taken action in the past:

Instead, the SRO continued to rebut all allegations made by the person and advise them of their statutory appeal rights and to try to encourage them to seek independent legal advice with a view to getting an independent person to explain the position in a manner which the vexatious litigant was willing to accept.⁶²²

Mr Grant Dewar from the Commonwealth Bank of Australia told the Committee that the Bank's strategy with one possible vexatious litigant was to use bankruptcy laws to try to contain his litigation.⁶²³ The Victorian WorkCover Authority said it had dealt with litigants who would in all likelihood qualify as vexatious if an application was brought but this was generally not done.⁶²⁴

Some participants in the Inquiry perceived the current process as too time-consuming and inaccessible. Wellington Shire Council, located in Gippsland, told the Committee the process 'seems to be, for us, quite remote and possibly expensive, and it is possibly quite time consuming'.⁶²⁵ Mr Greg Garde QC from the Victorian Bar told the Committee:

the Department of Justice, has an enormous amount on its plate ... it has been the real experience that it can take months or years for a particular person who may be causing mayhem to come to the attention of the department and for the department to accumulate the necessary material to support affidavits to make an application. I am not being critical of the department; I am just saying that is the reality of the experience. Therefore, we might say to clients, 'You could seek the Attorney-General's intervention, but in reality it will take too long.'⁶²⁶

Some of the judicial officers, tribunal members and court staff who spoke to Dr Freckelton also expressed concern that the process was slow, 'with the result that some vexatious litigants have caused a good deal of trouble in the courts before an application is made for them to be declared'.⁶²⁷

⁶²² State Revenue Office, *Submission no. 16*.

⁶²³ Grant Dewar, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 17.

⁶²⁴ Victorian WorkCover Authority, *Submission no. 48*.

⁶²⁵ Jim Wilson, Director, Corporate Services, Wellington Shire Council, *Transcript of evidence*, Melbourne, 13 August 2008, 3.

⁶²⁶ Greg Garde, Chair, Victorian Bar Law Reform Committee, The Victorian Bar, *Transcript of evidence*, Melbourne, 6 August 2008, 22. See also The Victorian Bar, *Submission no. 8*, 3-4; State Revenue Office, *Submission no. 16*; Commonwealth Bank of Australia, *Submission no. 18*, 4. Similar comments have been made in other jurisdictions: see, for example, Alison Meek, 'A vexing problem' (1999) 142(22) *Solicitors Journal* 534, 534; Taggart and Klosser, above n 614, 296; Scott Trueman, 'Vexatious litigants' (2000) 144(28) *Solicitors Journal* 676, 677.

⁶²⁷ Freckelton, Judicial officers and VCAT members report, above n 613, 28. See also Freckelton, Court and VCAT staff report, above n 621, 14, 18.

The Women's Legal Service Victoria gave confidential evidence to the Committee about one case in which there had been a lengthy delay by the Attorney-General in responding to its notification. Mr Ross Thomson from the Commonwealth Bank of Australia, on the other hand, told the Committee that although preparing material for the Attorney-General was time-consuming, the Attorney-General's response time in the case of Mr K (case study 11) was 'excellent ... as far as I can recall it was dealt with very quickly and with no problem whatsoever.'⁶²⁸

9.2.3 Allegations of politicisation and inconsistency

The Committee also heard that the current process is vulnerable to allegations of politicisation and inconsistency. Dr Grant Lester and Mr Simon Smith have written that the involvement of the Attorney-General 'inevitably adds a political dimension to the initiating process'.⁶²⁹ Some commentators believe this inhibits the number of applications.⁶³⁰ Others claim that Attorneys-General are too willing to apply in some types of cases but not others.⁶³¹

One of the more common criticisms in Australia and overseas is that vexatious litigant provisions are used to protect public officers and agencies rather than ordinary members of the community.⁶³² Participants in this Inquiry also complained that applications are only brought against self-represented individuals and not against large commercial litigants who bring frequent legal proceedings.⁶³³

From an historical perspective, there do appear to be some inconsistencies in applications under section 21. Chapter 3 noted the marked differences between Victoria's declared vexatious litigants in terms of the number of proceedings they were able to bring, and the period of time over which they were able to litigate, before an application was made. Although some of their disputes started as private disputes, all had sued public agencies or officials or large institutions by the time the application was made. The Committee heard that vexatious litigants are a problem in family violence proceedings but this is not reflected in orders under section 21.

⁶²⁸ Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 17.

⁶²⁹ Grant Lester and Simon Smith, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 18. See also Freckelton, Judicial officers and VCAT members report, above n 613, 28.

⁶³⁰ Lester and Smith, above n 629, 18; Smith, 'Vexatious litigants and their judicial control – The Victorian experience', above n 614, 57; Clare Thompson, 'Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)' (2004) 14 *Journal of Judicial Administration* 64, 79. See also Freckelton, Court and VCAT staff report, above n 621, 18.

⁶³¹ Julian Knight, *Submission no. 14*, 7. See also Hugh de Kretser, 'Even Julian Knight is entitled to basic human rights', *The Age*, 25 November 2003, 11.

⁶³² Smith, 'Vexatious litigants and their judicial control – The Victorian experience', above n 614, 57-58; Taggart and Klosser, above n 614, 296; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 4.

⁶³³ See, for example, Simon Smith, *Submission no. 21*, 7-8; Fitzroy Legal Service Incorporated, *Submission no. 43*; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 4.

There may be justifiable reasons for these apparent discrepancies. For example, if ordinary members of the community are not aware of section 21 they cannot seek the Attorney-General's intervention.

9.3 Is the current provision effective?

The Committee's issues paper asked whether section 21 makes it too easy or too difficult for a person to be declared a vexatious litigant. It also asked whether the current laws strike the right balance between access to the courts and the need to protect the courts and other parties from vexatious litigants.

Two individuals, including the one declared vexatious litigant who made a submission to the Inquiry, told the Committee it was too easy to make a vexatious litigant order in Victoria.⁶³⁴

Others thought the current provision was adequate or struck a reasonable balance between the competing interests. The joint submission from the Human Rights Law Resource Centre and the Public Interest Law Clearing House (PILCH), for example, said the current provisions 'strike the correct balance' in many respects.⁶³⁵

Those participants who reported dealing with possible vexatious litigants took a contrary view. Many thought there was a need to preserve access to the courts and that other interests had to be balanced against this right, but they argued the current laws favoured vexatious litigants.⁶³⁶ One individual who made a submission said he had been sued five times by his former solicitor but had been advised the current test precluded him from applying for an order.⁶³⁷ Wellington Shire Council told the Committee it had sought legal advice about individuals in the past but had been told 'the criteria for this is unattainable'.⁶³⁸ Victoria Police expressed concern that there had to be 'a prolonged period of unsubstantiated litigation' before an application could be made.⁶³⁹ The Department of Education and Early Childhood Development and the Environment Protection Authority also thought it was 'too difficult' for a person to be declared.⁶⁴⁰

Most of the judicial officers and tribunal members who spoke to Dr Freckelton criticised the current threshold test, which requires the Supreme Court to be satisfied that a person has 'habitually', 'persistently' and 'without reasonable ground' brought

⁶³⁴ Darryl O'Bryan, *Submission no. 19*, 1; Julian Knight, *Submission no. 14*, 8.

⁶³⁵ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 1. See also Fitzroy Legal Service Incorporated, *Submission no. 43*; Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 2.

⁶³⁶ Corrections Victoria, *Submission no. 32*, paras 23-25; State Revenue Office, *Submission no. 16*; Wellington Shire Council, *Submission no. 15*, 5; Commonwealth Bank of Australia, *Submission no. 18*, 9.

⁶³⁷ Confidential, *Submission no. 12*.

⁶³⁸ Wellington Shire Council, *Submission no. 15*, 3.

⁶³⁹ Victoria Police, *Submission no. 47*, 1.

⁶⁴⁰ Department of Education and Early Childhood Development, *Submission no. 26*; Environment Protection Authority Victoria, *Submission no. 44*, 1. See also Foster's Group Limited, *Submission no. 23*, 2; Victorian WorkCover Authority, *Submission no. 48*; The Victorian Bar, *Submission no. 8*, 4; Commonwealth Bank of Australia, *Submission no. 18*, 5.

vexatious legal proceedings, as ‘too demanding’. Some questioned whether ‘habitually’ raised the bar too high, or expressed reservations about ‘persistently’.⁶⁴¹ One County Court judge told Dr Freckelton, ‘History shows how difficult it is to get someone declared. It is too hard and it is not fair on defendants – some have never been the same afterwards.’⁶⁴² Other commentators and law reform bodies have also criticised the type of test in section 21 as ‘narrow’.⁶⁴³

There is no doubt that section 21 sets a high threshold for making a vexatious litigant order. The Committee is aware of at least one application under section 21 that was unsuccessful initially. However, the Attorney-General advised the Committee that every application over the past 20 years had been successful.⁶⁴⁴

9.4 Do orders stop vexatious litigation?

The vexatious litigant provision in section 21 is not intended to completely stop declared vexatious litigants from litigating. In effect, it is a mechanism to stop further *vexatious* proceedings by allowing the courts to ‘vet’ proceedings before they are issued.

The evidence before the Committee about whether section 21 achieves this aim was mixed.

Some participants in the Inquiry were pessimistic about section 21’s capacity to restrain vexatious litigants. Former solicitor and PhD candidate Mr Simon Smith told the Committee the laws had only been of ‘marginal effect’.⁶⁴⁵ The Women’s Legal Service Victoria reported that a declaration ‘appears to have no real impact’ in some cases and ‘the litigious conduct escalates or gains new impetus as a result of the declaration’.⁶⁴⁶ Ms Sarah Vessali, the Service’s former principal lawyer, told the Committee that in one case the declaration ‘has pretty much made no difference, very little’.⁶⁴⁷ Ms Penny Drysdale, who also gave evidence on the Service’s behalf, said that their client in that case had ‘described ... the declaration ... like a speed hump in the road. It slowed it down slightly – marginally – but in fact it kept going.’⁶⁴⁸

⁶⁴¹ Freckelton, Judicial officers and VCAT members report, above n 613, 8.

⁶⁴² Ibid 18.

⁶⁴³ Lester and Smith, above n 629, 18; Law Reform Commission of Western Australia, above n 612, 165.

⁶⁴⁴ *Re an application by Cousins* (Unreported, Supreme Court of Victoria, Starke J, 4 February 1975); Letter from The Hon Rob Hulls MP, above n 615, Att A, 2.

⁶⁴⁵ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 4. See also Lester and Smith, above n 629, 20; Smith, ‘Vexatious litigants and their judicial control – The Victorian experience’, above n 614, 67.

⁶⁴⁶ Women’s Legal Service Victoria, *Submission no. 38*, 5.

⁶⁴⁷ Sarah Vessali, former Principal Lawyer, Women’s Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 11.

⁶⁴⁸ Penny Drysdale, *Transcript of evidence*, above n 611, 11.

The submission from the Supreme Court reported that in some instances the declared vexatious litigants ceased to attempt to bring further proceedings while, in others, a number of applications for leave to bring further proceedings had been brought.⁶⁴⁹

The Committee's own research into Victoria's declared vexatious litigants supports the view that section 21's effectiveness varies from litigant to litigant. In some cases, such as Mr D and Mr G (case studies 4 and 7), the Committee found no evidence of any litigation following the declaration. Other declared vexatious litigants became involved in litigation from time to time. A small number appear to continue to bring, or at least try to bring, legal proceedings at almost the same rate.

This section looks at some of the problems with the current system that allows these litigants to avoid the intended effect of vexatious litigant orders.

9.4.1 Enforcement of orders

In its recent report on Victoria's civil justice system, the Victorian Law Reform Commission (VLRC) noted that although section 21 requires the Attorney-General to cause vexatious litigant orders to be published in the Government Gazette, there is no requirement to notify other persons. The VLRC said this raised the possibility that orders might not come to the attention of those responsible for enforcing them.⁶⁵⁰

The courts told the Committee there were procedures in place for making relevant staff aware of orders. The Supreme Court stated that the Prothonotary sends a copy of orders to registrars in the other courts and maintains a list of declared vexatious litigants for reference within the registry and the wider Court.⁶⁵¹ The County Court said it was generally advised of orders by the Supreme Court and maintains a list of names in its registry of which appropriate registry staff are advised.⁶⁵² The Magistrates' Court's submission noted that the Principal Registrar issues a practice direction when the Court is notified of an order and the Court provided copies of recent examples.⁶⁵³

The Attorney-General advised the Committee that the VGSO also has an informal process whereby it forwards a copy of orders to the Supreme Court Prothonotary and other court registrars.⁶⁵⁴

The Committee heard other evidence suggesting these procedures were not failsafe. The Women's Legal Service Victoria drew the Committee's attention to one declared vexatious litigant who had been able to continue bringing legal proceedings because

⁶⁴⁹ Supreme Court of Victoria, *Submission no. 34*, 3.

⁶⁵⁰ Victorian Law Reform Commission, above n 612, 594.

⁶⁵¹ Letter from Law Reform and Policy Officer, Supreme Court of Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 18 September 2008.

⁶⁵² Letter from Chief Judge of the County Court to Executive Officer, Victorian Parliament Law Reform Committee, 11 September 2008.

⁶⁵³ Magistrates' Court of Victoria, *Submission no. 37*; Letter from Project and Research Officer, Magistrates' Court of Victoria, to Research Officer, Victorian Parliament Law Reform Committee, 15 September 2008.

⁶⁵⁴ Letter from The Hon Rob Hulls MP, above n 615, Att A, 3.

courts were not aware of his status, or were mistaken about whether he had leave under section 21 to bring proceedings.⁶⁵⁵ The Committee did not hear evidence of other such cases, although one Magistrates' Court staff member who spoke to Dr Freckelton reported difficulty finding out whether a particular litigant had been declared.⁶⁵⁶

9.4.2 Appeals, applications to revoke declarations and applications for leave

Chapter 1 described how declared vexatious litigants can seek leave to appeal an order, can apply to have their order varied or revoked, and can seek leave to bring new legal proceedings.

Although these rights are intended to operate as safeguards, the Committee was told that some vexatious litigants use them as avenues for continued litigation. Ms Penny Drysdale from the Women's Legal Service told the Committee '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'.⁶⁵⁷

The Committee found little evidence of any problem with appeals from orders. At least seven of Victoria's 15 declared vexatious litigants had unsuccessfully appealed or sought leave to appeal their declarations based on records available to the Committee. The view generally expressed to Dr Freckelton by judicial officers was that the appeal mechanisms worked 'fairly and effectively'.⁶⁵⁸

The Committee found isolated evidence of problems with applications to revoke declarations. The information available to the Committee suggests that only two declared vexatious litigants have applied for revocation of their orders (see case studies 5 and 10). However, one of those litigants had made multiple unsuccessful applications, along with multiple applications for leave to bring proceedings.

Applications for leave to bring proceedings are a greater cause for concern based on evidence in this Inquiry. Although information available to the Committee suggests that only five of Victoria's declared vexatious litigants have sought leave to bring further proceedings, several made multiple applications. Mr Simon Smith has written that Mr A filed 81 proceedings in the Supreme Court after he was declared in 1930⁶⁵⁹, although it is not clear whether he required or sought leave for all of those proceedings (case study 1). The Committee also found evidence of multiple leave applications from two more recently declared vexatious litigants, Mr I and Mr J (case studies 9 and 10).

⁶⁵⁵ Sarah Vessali, *Transcript of evidence*, above n 647, 11.

⁶⁵⁶ Freckelton, Court and VCAT staff report, above n 621, 14.

⁶⁵⁷ Penny Drysdale, *Transcript of evidence*, above n 611, 9. See also Sarah Vessali, *Transcript of evidence*, above n 647, 13.

⁶⁵⁸ Freckelton, Judicial officers and VCAT members report, above n 613, 36.

⁶⁵⁹ Lester and Smith, above n 629, 12.

The Committee heard that leave applications do have an impact on court resources and, to a lesser extent, other parties. The Supreme Court's submission reported that '[d]ealing with applications for leave can be time consuming for the court, and that time comes at the expense of other litigants who have not abused court process'.⁶⁶⁰ Although there is no requirement for other parties to appear in leave applications, Corrections Victoria told the Committee it had appeared in a leave application on one occasion. It described the leave hearing as 'almost as complex, lengthy and resource consuming as a full hearing' and suggested this 'does raise questions as to the utility of going through the process of having a person declared a vexatious litigant'.⁶⁶¹

The lack of reliable data about leave applications makes it difficult to determine the true extent of this problem. The Attorney-General advised the Committee that the Supreme Court does not maintain data about leave applications, but that the information should be available on court files or through published judgments.⁶⁶² The Committee's search of court files found that applications were not always on the file. It also found that published judgments sometimes refer to additional leave applications for which there is no record either on court files or in published judgments.

Some participants in the Inquiry told the Committee the current provision makes it too easy for a declared vexatious litigant to obtain leave to bring new proceedings. The State Revenue Office expressed concern that it was difficult for the court to properly apprise itself of the issues at a leave hearing, leading to it 'erring on the side of caution'.⁶⁶³ The Women's Legal Service Victoria said that many judges and court staff were unsure of how to deal with some vexatious litigants and this could 'lead to the vexatious litigant being granted leave by the court to bring a fresh application notwithstanding the vexatious litigant declaration'.⁶⁶⁴

In those cases for which information was available, the Committee did not find evidence that leave was routinely granted by the courts. Although Julian Knight's successful application for leave to bring proceedings against the Commissioner for Corrections in 2007 attracted substantial publicity⁶⁶⁵, grants of leave appear to be rare historically. Mrs B appears to have been granted leave three times prior to her death (case study 2). Mr I and Mr J appear to have been granted leave on only a few occasions despite their multiple applications (case studies 9 and 10).

9.4.3 Vexatious litigant networks and 'acting in concert'

Some participants in this Inquiry told the Committee that declared vexatious litigants continue to bring legal proceedings through or 'in concert' with other litigants who

⁶⁶⁰ Supreme Court of Victoria, *Submission no. 34*, 3.

⁶⁶¹ Corrections Victoria, *Submission no. 32*, paras 9-14.

⁶⁶² Letter from The Hon Rob Hulls MP, above n 615, Att C, 1.

⁶⁶³ State Revenue Office, *Submission no. 16*.

⁶⁶⁴ Women's Legal Service Victoria, *Submission no. 38*, 5.

⁶⁶⁵ See, for example, Ellen Whinnett, 'Knight gag law', *Herald Sun*, 4 August 2007, 1; Andrea Petrie and Peter Gregory, 'State vow on killer's attempt to contact victims', *The Age*, 2 August 2007, 3; Katie Bice, 'Fury at killer's mail win', *Herald Sun*, 2 August 2007, 7.

are not declared. Chapter 3 of this report noted evidence of links between some declared vexatious litigants. Mr Greg Garde from the Victorian Bar told the Committee:

It has certainly been our experience that you get people who are acting in concert with vexatious litigants. You get some people who stand behind vexatious litigants. You get situations where vexatious litigants are encouraged, or who act, if you like, as front man or front woman for some other purpose.⁶⁶⁶

Anecdotal and other evidence suggests that at least four of Victoria's declared vexatious litigants litigated through third parties after they were declared. Mr Simon Smith has written that Mr A (case study 1) attached the name of his brother to a number of applications to get around his declaration and sat with him in court prompting him with questions.⁶⁶⁷ Mr Smith has also suggested that Mrs B (case study 2) was the driving force behind legal proceedings brought by her husband Mr D, who was later declared himself (case study 4). He has also written that Mr C (case study 3) advised Mrs E about some of her proceedings before she was also declared (case study 5).⁶⁶⁸ One of Victoria's more recent cases, Mr N (case study 14), reportedly provided assistance to several litigants who were later declared in Western Australia.⁶⁶⁹

It is difficult to determine the extent of this problem in Victoria given that information about networks and associates is not always readily ascertainable from public documents.

9.4.4 'Forum shopping'

Vexatious litigant orders in Australia generally apply only in the jurisdiction where the order is made. Orders by the Supreme Court of Victoria do not prevent litigants from bringing proceedings in Commonwealth courts, for example, and vice versa.

The Committee heard some evidence that vexatious litigants who are declared in one jurisdiction simply move their legal proceedings to jurisdictions where the order does not apply. Ms Sarah Vessali from the Women's Legal Service Victoria told the Committee that the Service was aware of one case in which the Family Court made an order and the litigant 'just shifted the focus sideways into a different court

⁶⁶⁶ Greg Garde, *Transcript of evidence*, above n 626, 22. See also Commonwealth Bank of Australia, *Submission no. 18*, 2; Victorian WorkCover Authority, *Submission no. 48*. cf Darebin Community Legal Centre Inc, *Submission no. 46*.

⁶⁶⁷ Lester and Smith, above n 629, 11.

⁶⁶⁸ Simon Smith, 'The vexatious litigant sanction: An overview of the first 110 years' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006); Simon Smith, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant' (2007) 11 *Legal History* 31, 56-57.

⁶⁶⁹ *Commonwealth Bank of Australia v Ridout* [2004] WASC 136, 22.

system'.⁶⁷⁰ Supreme Court staff told Dr Freckelton that a litigant who had been declared in Queensland had brought proceedings in Victoria.⁶⁷¹

However, Mr Simon Smith told the Committee there was 'no evidence of large scale interstate "forum shopping" amongst declared vexatious litigants'.⁶⁷²

The Committee conducted its own research into the extent of this problem in Australia. It asked Commonwealth, state and territory Attorneys-General to provide lists of declared vexatious litigants in their courts. All jurisdictions provided lists apart from the Federal Magistrates Court, although the Committee was able to find some information about that court based on its published decisions.

The Committee cross-checked these lists with one another to determine how many litigants had been declared vexatious in more than one jurisdiction. Excluding orders by the Federal Magistrates Court, it found there had been 305 vexatious litigant orders made nationwide relating to 290 individual litigants. Fourteen of those litigants had been declared vexatious by more than one court in Australia.⁶⁷³ In most cases, the declared vexatious litigants had been declared by the state court in their place of residence and the federal courts. This figure is higher than some previous estimates, although it is still small compared with the total number of declared vexatious litigants in Australia.

The Committee also undertook two further research projects. Firstly, the Committee checked whether declared vexatious litigants from other jurisdictions have been able to litigate in Victoria without attracting a section 21 application. It ran the names of the declared vexatious litigants from other jurisdictions through the County Court's online database, and the registries at the Supreme Court, Magistrates' Court and VCAT checked the names against their records. The Committee only searched for proceedings brought since 1996, given the difficulties with searching older records, and it did not include declared vexatious litigants from the Family Court or Federal Magistrates Court. Of the 54 declared vexatious litigants from other jurisdictions whose names were checked, 11 persons by the same name had brought one or more proceedings in Victoria. It is of course possible that in some cases the proceedings were brought by a different individual with the same name as the declared vexatious litigant.

Secondly, the Committee checked to see whether Victoria's declared vexatious litigants had brought proceedings in other jurisdictions. This research was limited to proceedings in the High Court, Federal Court and Federal Magistrates Court. The Committee found that seven of Victoria's 15 declared vexatious litigants had filed proceedings in those courts after they had been declared in Victoria. Mr I, for example, brought multiple applications in federal courts and tribunals after he was

⁶⁷⁰ Sarah Vessali, *Transcript of evidence*, above n 647, 13.

⁶⁷¹ Freckelton, Court and VCAT staff report, above n 621, 21. See also Commonwealth Bank of Australia, *Submission no. 18*, 7; Foster's Group Limited, *Submission no. 23*, 3.

⁶⁷² Simon Smith, *Submission no. 21*, 3.

⁶⁷³ The Committee's own search of judgments of the Federal Magistrates' Court disclosed a further two litigants who were the subject of orders in that court and in another jurisdiction.

declared vexatious in Victoria (see case study 10), including applications against some of the people and organisations he had been suing in Victoria's courts.

9.4.5 Defending proceedings

Orders under section 21 restrain vexatious litigants from continuing or instituting legal proceedings, but they do not prevent them from defending proceedings against them.

Some of Victoria's declared vexatious litigants continued to find themselves involved in litigation as defendants. At least four were bankrupted over unpaid costs orders, sometimes leading to further litigation in the federal courts.⁶⁷⁴ Others continued to find themselves involved in legal proceedings with authorities, such as Mr C (case study 3) who was imprisoned a number of times for contempt of court.

The Committee received limited evidence about this issue however, and whether it was undermining the aims of section 21.⁶⁷⁵

⁶⁷⁴ See, for example, Lester and Smith, above n 629, 8; 'Mrs Edna Isaacs bankrupt', *The Herald*, 5 September 1941, 3; Smith, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant', above n 668, 53; *Attorney-General (Vic) v Moran* [2008] VSC 159, 13.

⁶⁷⁵ Simon Smith, *Transcript of evidence*, above n 645, 10.

Chapter 10: Reform of Victoria's vexatious litigant provision

The Committee heard conflicting views in this Inquiry about whether Victoria's vexatious litigant provision should be reformed and how. This chapter explores the issues raised by participants in the Inquiry and their suggestions for change. It examines whether there is a need for reform in Victoria, and sets out the Committee's recommendations for striking a better balance between individual rights of access to justice on the one hand, and the public interest in protecting the efficiency of the justice system and members of the community on the other.

10.1 Is there a case for reform?

Participants in the Inquiry were sharply divided about whether the vexatious litigant provision in section 21 of the *Supreme Court Act 1986* (Vic) should be reformed.

A number of participants argued there was no demonstrated need for reform. They stressed that vexatious litigant orders have serious consequences or expressed concern that, if it becomes easier to make orders, vulnerable members of the community who use courts and tribunals might also be affected.⁶⁷⁶ While some acknowledged the impact of vexatious litigants on the justice system and other members of the community, they saw this as the price to be paid for access to justice. The Victorian Director of Public Prosecutions, for example, said there was a fine balance involved and 'to some extent it can be said that a free and open society will and must be prepared to pay a price for that freedom and openness'.⁶⁷⁷

Some participants also pointed to the small number of declared vexatious litigants in Victoria and questioned the need for additional restrictions on access to justice. The Darebin Community Legal Centre, for example, warned there was:

real danger in succumbing to the hysteria whipped up by those who have the most to gain in expanding the scope of vexatious litigant legislation, that is, big business and government, who are most often the targets of vexatious litigation.⁶⁷⁸

Other participants noted the lack of empirical evidence and research about vexatious litigants that would justify tightening the vexatious litigant provision.⁶⁷⁹

⁶⁷⁶ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 1; Darebin Community Legal Centre Inc, *Submission no. 46*; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 3-4.

⁶⁷⁷ Victorian Director of Public Prosecutions, *Submission no. 22*. See also Simon Smith, *Submission no. 21*, 10.

⁶⁷⁸ Darebin Community Legal Centre Inc, *Submission no. 46*. See also Donna Williamson, Prison Outreach Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 49; Kristen Hilton, Executive Director, Public Interest Law Clearing House, *Transcript of evidence*, Melbourne, 13 August 2008, 22; Christine Atmore, Policy Officer, Federation of Community Legal Centres, *Transcript of evidence*, Melbourne, 13 August 2008, 37.

⁶⁷⁹ Federation of Community Legal Centres (Victoria), *Submission no. 39*, 3. See also Christine Atmore, *Transcript of evidence*, above n 678, 41; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 2.

However, there were other participants who, while acknowledging the rights at stake, thought the vexatious litigant provision did need to be reformed to protect other interests better. One member of the community who made a submission to the Inquiry argued '[w]e must all agree there comes a time when these rights must give way to the justice system which is the backbone of our society'.⁶⁸⁰ Ms Penny Drysdale from Women's Legal Service Victoria told the Committee:

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 erosion of community confidence in the justice system.⁶⁸¹

In its 2008 report on the civil justice system, the Victorian Law Reform Commission (VLRC) argued that '[a]lthough having a person declared a vexatious litigant should be done sparingly and with utmost caution, it should nonetheless be possible to take such a step efficiently and in a straightforward manner when necessary'.⁶⁸²

The Committee agrees it is important not to overstate the problems caused by vexatious litigants in Victoria. Chapter 3 noted that the number of possible vexatious litigants in Victoria's courts and tribunals appears to be relatively small. Although the Committee heard evidence about problems in family violence proceedings in the Magistrates' Court, the recently enacted *Family Violence Protection Act 2008* (Vic) is intended to address this problem.

The Committee does believe reform is justified in *some* areas where section 21 does not appear to be working effectively. The Committee believes such reform is justified by the evidence about the impact that vexatious litigants have on the justice system and on the other parties against whom they bring proceedings. Although the Committee agrees with the participants who preferred alternative ways of addressing these problems⁶⁸³, chapters 7 and 8 show that measures such as ADR and the use of the legal system's other measures and powers are unlikely to deter and deal with vexatious litigants in all cases.

The difficulty is finding a solution that not only balances the competing rights and interests in way that complies with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), but also deals with the problem effectively. Former Commonwealth Solicitor-General Mr David Bennett QC said in 2006 that '[s]hort of sending State and federal authorities on a search-and-destroy mission against all

⁶⁸⁰ Kevin Davies, *Submission no. 4*.

⁶⁸¹ Penny Drysdale, Law Reform and Policy Officer, Women's Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 9.

⁶⁸² Victorian Law Reform Commission, *Civil justice review*, Report no. 14, 2008, 590.

⁶⁸³ See, for example, Christine Atmore, *Transcript of evidence*, above n 678, 38; Darebin Community Legal Centre Inc, *Submission no. 46*; Justice Bell, President, Victorian Civil and Administrative Tribunal (VCAT), *Transcript of evidence*, Melbourne, 6 October 2008, 2. See also section 2.2.2 of this report.

vexatious litigants, I doubt there is a cure'.⁶⁸⁴ This chapter sets out the Committee's view about the reforms to section 21 that might address these issues better.

10.2 Which model should Victoria use?

The Committee considered two basic models for reforming section 21 in this Inquiry. The first was the Standing Committee of Attorneys-General's (SCAG's) 2004 model vexatious proceedings bill, which would expand and strengthen section 21 to make it more effective. The second was the approach adopted in the United Kingdom (UK), which provides for a series of graduated orders that vary according to the seriousness of the vexatious litigant's behaviour.

10.2.1 The SCAG model

The SCAG model bill retains the same basic model as section 21 – if a litigant repeatedly brings vexatious legal proceedings, the courts can make an order restraining further litigation without leave. An order is a sanction of last resort designed to deal with the most serious cases of vexatious litigation in the courts.

However, the SCAG model bill would expand and strengthen section 21 in a number of ways:

- it would allow a broader range of people, including other parties, to apply for orders
- it would lower the threshold test for making orders
- it would expand the definition of 'vexatious legal proceedings' so that courts can consider a broader range of proceedings and conduct
- it would help to address 'forum shopping' between different Australian jurisdictions.

The SCAG model bill makes it easier to use vexatious litigant provisions while still incorporating safeguards. The second reading speech for the NSW legislation based on the model bill stated that 'the new test has deliberately been chosen to make it easier to obtain a vexatious proceedings order against a vexatious litigant'.⁶⁸⁵

10.2.2 A 'graduated system'

The UK's system of civil restraint orders also allows the courts to restrain further litigation by a person without leave where they have repeatedly brought unmeritorious proceedings. However, it gives courts the option of choosing between a series of orders which increase in severity depending on the extent of the problem.

⁶⁸⁴ David Bennett, 'Vexatious constitutional litigation' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006).

⁶⁸⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 9459 (Mr Barry Collier, Parliamentary Secretary).

Case Study 14: Mr N

The Supreme Court declared Mr N a vexatious litigant on 17 May 2007.

An annexure to the Supreme Court's decision refers to 77 separate civil proceedings and criminal prosecutions brought in Victoria by Mr N since 1996.

Some of the proceedings involved appeals from orders and convictions for speeding offences on the basis that, amongst other things, the Victorian Constitution was invalid and the judicial process in Victoria had been subverted by the involvement of Freemasonry. Other proceedings were brought against the purchaser of a farm in which Mr N and his family had an interest under a sharefarming agreement with the farm's original owner. The largest number of proceedings were private prosecutions or attempts to summon grand juries. They alleged offences such as taking and administering unlawful oaths and treason by judicial officers, the Governor-General, Directors of Public Prosecutions and Commonwealth, state and territory ministers.

Mr N's barrister in the vexatious litigant application told the Court that Mr N's submission, amongst other things, was that republicans were pursuing a republic by stealth in Australia driven by the Masonic order.

In 2004, Mr N was declared a vexatious litigant in Western Australia. Commissioner Braddock SC noted that Mr N had come to Western Australia to assist a litigant who was later also declared vexatious in that state and had also been involved in other litigation. He said:

I have been conscious of the significant restriction this places upon the respondent, but I am persuaded by the repeated steps taken in pursuit of his belief in a conspiracy theory by the respondent that such orders are justified. The actions have caused embarrassment, expense and inconvenience to all who have been caught up in this irrational use of the court process. Without such restraint I am satisfied that the respondent will seek to pursue his arguments in other similar process which may involve other members of Parliament, or the judicial officers, public officers or ordinary citizens engaged in their lawful activities.

In November 2006 the Attorney-General applied for a vexatious litigant order against Mr N in Victoria. In his decision Justice Hansen said:

Viewing the matter overall, I am of the opinion that the defendant has habitually and persistently instituted vexatious legal proceedings, without any reasonable ground. The allegations made by the defendant are of the most serious nature, yet completely lacking in substance.

The Court ordered that Mr N not commence or continue any legal proceedings without leave, with the exception of one proceeding against the purchaser of the farm.

The Supreme Court informed the Committee that the Court of Appeal dismissed an application by Mr N for leave to appeal Justice Hansen's order on 14 March 2008.

The system, which is set out in the UK's Civil Procedure Rules, provides for the following orders:

- **limited civil restraint orders** – these orders restrain the litigant from making any further applications in the proceedings in which the order is made without leave. A judge can make an order where a party has made two or more applications which are ‘totally without merit’
- **extended civil restraint orders** – these orders restrain a litigant from issuing future claims or making future applications that effectively relitigate issues without leave. The Rules refer to these as claims or applications ‘concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made’. Specified judges may make these orders where a party has ‘persistently’ issued claims or made applications which are ‘totally without merit’
- **general civil restraint orders** – these orders are similar to Victoria's section 21 orders. They restrain a litigant from issuing any claim or making any application without leave. Specified judges may make an order if the litigant persists in issuing claims or making applications which are totally without merit, ‘in circumstances where an extended civil restraint order would not be sufficient or appropriate.’⁶⁸⁶

The UK courts are required to consider whether it is appropriate to make a civil restraint order where a claim is struck out or dismissed, or an appeal is refused leave, struck out or dismissed, and the court considers it to be totally without merit.⁶⁸⁷

10.2.3 The views of participants and other inquiries

The VLRC did not examine the UK model in its 2008 report on the civil justice system. It recommended a number of reforms to the current provision in section 21, including some contained in the SCAG model bill.⁶⁸⁸

Participants in this Inquiry expressed mixed views about both models.

There was some general support for the SCAG model bill amongst the judiciary and legal profession, as well as support for particular features of the model bill such as its

⁶⁸⁶ *Civil Procedure Rules* (UK) r 3.11 and Practice Direction 3c – Civil Restraint Orders. See generally John Sorabji, 'Protection from litigants who abuse court process' (2005) 24 *Civil Justice Quarterly* 31; Sara Partington, 'Tackling the time wasters' (2004) 154 *New Law Journal* 1472.

⁶⁸⁷ *Civil Procedure Rules* (UK) rr 3.3(7), 3.4(6), 23.12, 52.10(26). The rules require the court to record the fact that the proceeding was totally without merit in the order.

⁶⁸⁸ Victorian Law Reform Commission, above n 682, 599-600.

lower threshold test.⁶⁸⁹ Members of the judiciary and court staff were also attracted to the national uniform approach promoted by the SCAG bill.⁶⁹⁰

However, the SCAG model bill attracted equal amounts of criticism. Mr Simon Smith was highly critical of the bill, including for what he saw as its failure to address the nature of vexatious litigants and its failure to explore the potential for a multidisciplinary approach. He described it as ‘very much legal reforms by and for lawyers. There is no reason to think they will be any more effective than the [previous laws]. Indeed, the impact of many of the reforms may well be counterproductive.’⁶⁹¹ Other participants also criticised particular features of the bill or argued they were unnecessary.⁶⁹²

Some participants were critical of the ‘all or nothing’ approach in section 21 and the SCAG model bill. One VCAT staff member who spoke to Dr Ian Freckelton SC during his consultations on the Committee’s behalf drew comparisons to a sentencing process ‘where you have hanging at one end, freedom at the other, and nothing in between’.⁶⁹³ Mr Simon Smith told the Committee the current type of power ‘was really a blunderbuss’, while a limited power ‘is more focused on the particular person and the particular parties, and I think that is a sensible way to go’.⁶⁹⁴

Although most participants were unfamiliar with the UK’s graduated system, it attracted some interest during the Inquiry. The Supreme Court’s submission noted ‘[a] statutory system of graduated orders, similar to those developed in the United Kingdom, could provide a more flexible regime for dealing with litigation constituting an abuse of process’.⁶⁹⁵ The Law Institute also described it as ‘arguably more flexible and less draconian’ than the current type of model.⁶⁹⁶

A number of community legal centres expressed support for ‘partial’ vexatious litigant orders. The Federation of Community Legal Centres said:

In our experience, while some of the matters [brought by vexatious litigants] may be without merit, one or more may have merit and may be the result of a real injustice. A blanket declaration of vexatiousness could unnecessarily restrict access to redress for matters with merit. A more flexible declaration would permit the client to litigate

⁶⁸⁹ Greg Garde, Chair, Victorian Bar Law Reform Committee, *The Victorian Bar, Transcript of evidence*, Melbourne, 6 August 2008, 26. See sections 10.4, 10.6.1, 10.6.2, 10.9.2 and 10.10.2 of this chapter for discussion of particular features of the SCAG model bill.

⁶⁹⁰ Justice Bell, *Transcript of evidence*, above n 683, 4; Ian Freckelton, *Vexatious litigants: A report on consultation with court and VCAT staff* (‘Court and VCAT staff report’), Victorian Parliament Law Reform Committee, 2008, 21.

⁶⁹¹ Simon Smith, *Submission no. 21*, 6.

⁶⁹² See sections 10.4, 10.6.1, 10.6.2, 10.9.2 and 10.10.2 of this chapter.

⁶⁹³ Freckelton, *Court and VCAT staff report*, above n 690, 14.

⁶⁹⁴ Simon Smith, former solicitor and PhD candidate, Monash University, *Transcript of evidence*, Melbourne, 6 August 2008, 9.

⁶⁹⁵ Supreme Court of Victoria, *Submission no. 34*, 5. See also Ian Freckelton, *Vexatious litigants: A report on consultation with judicial officers and VCAT members* (‘Judicial officers and VCAT members report’), Victorian Parliament Law Reform Committee, 2008, 23-24; Freckelton, *Court and VCAT staff report*, above n 690, 16-17.

⁶⁹⁶ Law Institute of Victoria, *Submission no. 1C*.

certain issues without the need to obtain leave, while still imposing the leave restriction on the other vexatious matters.⁶⁹⁷

Although, as chapter 2 noted, the Committee heard that the current provision is likely to be compatible with the Charter, the Public Interest Law Clearing House (PILCH) told the Committee it thought civil restraint orders 'provide a more individualised and human-rights based approach to dealing with vexatious litigants'.⁶⁹⁸

10.2.4 The Committee's view

The Committee's view is that the UK's graduated system has a number of advantages over the SCAG model bill. It provides a more proportionate response to vexatious litigants by restricting their access to justice only to the extent necessary to deal with their behaviour. The Committee believes this promotes greater compatibility with the Charter which requires consideration of whether there are less restrictive means reasonably available to achieve the purpose of the limitation on human rights. At the same time, it may offer more effective protection for the justice system and other parties by providing for vexatious litigation to be restrained at an earlier stage and not just as a last resort.

The types of orders available under the UK system are not a radical departure from the existing law in Victoria. Chapter 1 noted that Victorian courts and tribunals can already make orders akin to limited civil restraint orders under their inherent jurisdiction. Section 21 also gives the Supreme Court the power to make 'partial orders' similar to extended civil restraint orders.⁶⁹⁹ However, these powers appear to be rarely used. The Committee's research into Victoria's 15 declared vexatious litigants found the Supreme Court made a 'partial order' preventing further proceedings against particular parties in only one case.⁷⁰⁰

The Committee is conscious that this model would be a departure from the national uniform approach promoted by the SCAG model bill. The key difference between Victoria and those jurisdictions which have adopted the SCAG bill is the Charter. The Committee heard that the UK model promotes a more proportionate, human rights-based response.

The Committee had limited opportunity to examine the operation of the UK system during its Inquiry. The Committee wrote to the UK Law Society asking about the new system. It stated that it did not have information about the system that was likely

⁶⁹⁷ Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5. See also Christine Atmore, *Transcript of evidence*, above n 678, 38; Cameron Shilton, Community Legal Education Worker, Darebin Community Legal Centre, *Transcript of evidence*, Melbourne, 6 August 2008, 53; Mental Health Legal Centre Incorporated, *Submission no. 40*.

⁶⁹⁸ Public Interest Law Clearing House, *Submission no. 31B*. The UK Court of Appeal considered whether the system was compatible with human rights obligations in the UK in *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, 54. See also Sorabji, above n 686, 32-33.

⁶⁹⁹ This power was added in 1996: see *Courts and Tribunals (General Amendment) Act 1996* (Vic), amending *Supreme Court Act 1986* (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 10 October 1996, 501 (the Hon Jan Wade MP, Attorney-General).

⁷⁰⁰ *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 165.

to help the Committee. It stated that it was unaware of significant problems but has not seen any formal research.⁷⁰¹ The Committee considers that Victoria should trial such a system for a period of five years, after which it should evaluate both its effectiveness and its impact on access to justice.

10.3 Terminology

The Committee did not canvas the use of the term ‘vexatious litigant’ in detail during the Inquiry, but it did hear evidence that there should be a change in terminology.

Some participants told the Committee that the term had become problematic. Some reported that community members were unfamiliar with the term or confused about its meaning.⁷⁰² Chapter 1 noted evidence of a tendency to equate vexatious litigants with other litigants who might exhibit challenging behaviours or be associated with unpopular causes. Other participants told the Committee the term had developed broad negative connotations beyond its strict legal meaning. A number of judicial officers and tribunal members who spoke to Dr Freckelton expressed ‘a level of discomfort’ with the ‘pejorative’ or ‘judgmental’ nature of the term.⁷⁰³

The NSW Deputy Ombudsman, Mr Chris Wheeler, told the Committee that ombudsmen’s offices had moved away from an approach that labels people. He told the Committee:

we have realised that we need to move away from a focus on the person to a focus on their behaviour and to move away from prejudicial terms that seriously annoy the people we are dealing with to terms that are more descriptive ... to say to somebody, “We find you a difficult complainant” or “We think you are vexatious” is not likely to lead to any very quick resolution of the problem!⁷⁰⁴

These views were not universal. Dr Freckelton noted a cross-section of views amongst judicial officers and tribunal members. One Supreme Court judge thought the term was ‘straightforward, well understood and should be retained’ and that this was an instance where it was appropriate ‘to call a spade a spade’.⁷⁰⁵

The terminology used to describe this phenomenon is, in one sense, cosmetic. It does not alter the nature of the behaviour or the need for the law to deal with it effectively. However the Committee was concerned by evidence that the term ‘vexatious litigant’ has developed wider negative connotations. There is a risk the term will have counterproductive effects, further alienating litigants already disgruntled with the

⁷⁰¹ Letter from Director of Legal Policy, The Law Society, to Chair, Victorian Parliament Law Reform Committee, 19 August 2008.

⁷⁰² Donna Williamson, *Transcript of evidence*, above n 678, 49; Maartje Van-der-Vlies, *Submission no. 28*

⁷⁰³ Freckelton, Judicial officers and VCAT members report, above n 695, 5-8. See also Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 28. Christine Atmore, *Transcript of evidence*, above n 678, 40.

⁷⁰⁴ Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, Melbourne, 13 August 2008, 47.

⁷⁰⁵ Freckelton, Judicial officers and VCAT members report, above n 695, 7-8.

justice system. A more modern approach avoids 'labelling' individuals and, for these reasons, the Committee supports a change.

There are a range of alternatives. Some of the judicial officers and tribunal members who spoke to Dr Freckelton suggested terms like 'querulous' or 'unreasonably persistent litigant'.⁷⁰⁶ The UK's system refers to 'civil restraint orders' without describing the individuals involved. The Committee prefers the latter approach, although it needs to be modified in Victoria because our vexatious litigant laws cover both civil and criminal proceedings. The Committee's preferred terminology is 'litigation limitation orders'.

10.4 Standing – who should be able to apply for orders?

The previous chapter described evidence that the Attorney-General's current monopoly on making applications under section 21 is limiting the effective use of the provision.

Victoria is now the only jurisdiction in Australia where the Attorney-General still has a monopoly on applications for vexatious litigant orders.⁷⁰⁷ Most jurisdictions in Australia and the SCAG model bill allow other public or court officials to apply for orders as well.⁷⁰⁸ All jurisdictions in Australia except for the High Court allow the other parties who are sued by possible vexatious litigants or persons with a sufficient interest to apply, as does the SCAG bill and the UK's graduated system.⁷⁰⁹ Victoria's new Family Violence Protection Act also allows other parties to apply for vexatious litigant orders in family violence proceedings.⁷¹⁰

10.4.1 The views of participants and other inquiries

In its recent report, the VLRC recommended that standing to apply for vexatious litigant orders should be broadened to include the Victorian Government Solicitor,

⁷⁰⁶ Ibid 6.

⁷⁰⁷ Some overseas jurisdictions still limit applications to the Attorney-General or an equivalent office: see *Judicature Act 1908* (NZ) s 88B; *Judicature (Northern Ireland) Act 1978* (UK) c 23 s 32; *Vexatious Actions (Scotland) Act 1898* (UK) c 35 s 1. See also the United Kingdom's vexatious litigant provision, which limits applications to the Attorney-General: *Supreme Court Act 1981* (UK) c 54 s 42. This provision operates alongside the UK's graduated system.

⁷⁰⁸ *High Court Rules 2004* (Cth) r 6.06; *Federal Court Rules* (Cth) r 21.01; *Federal Magistrates Court Rules 2001* (Cth) r 13.11; *Family Law Rules 2004* (Cth) r 11.04; *Vexatious Proceedings Act 2005* (Qld) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 194G; *Vexatious Proceedings Restriction Act 2002* (WA) s 4; *Vexatious Proceedings Act* (NT) s 7; *Vexatious Proceedings Act 2008* (NSW) s 8. See also Letter from The Hon Rob Hulls MP, to Chair, Victorian Parliament Law Reform Committee, 22 August 2008, Att B.

⁷⁰⁹ *Federal Court Rules* (Cth) r 21.01; *Federal Magistrates Court Rules 2001* (Cth) r 13.11; *Supreme Court Act 1933* (ACT) s 67A; *Supreme Court Act 1935* (SA) s 39; *Supreme Court Civil Procedure Act 1932* (Tas) s 194G; *Family Law Rules 2004* (Cth) r 11.04; *Vexatious Proceedings Act 2005* (Qld) s 5; *Vexatious Proceedings Restriction Act 2002* (WA) s 4; *Vexatious Proceedings Act* (NT) s 7; *Vexatious Proceedings Act 2008* (NSW) s 8; Letter from The Hon Rob Hulls MP, above n 708, Att B; *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders, cl 5.1.

⁷¹⁰ *Family Violence Protection Act 2008* (Vic) s 189.

the Prothonotary of the Supreme Court, the Principal Registrar of the County Court and, subject to leave, other parties and persons with a ‘sufficient interest’.⁷¹¹

Participants in this Inquiry were divided about who should be able to apply for vexatious litigant orders.

Support for the Attorney-General’s monopoly

Some participants in the Inquiry argued that the Attorney-General should continue to have a monopoly on applying for vexatious litigant orders given their serious consequences and impact on rights. Supreme Court judge and President of VCAT, Justice Kevin Bell, told the Committee:

to arm other parties who are not officials or representing the public interest with that capacity I think would be very dangerous ... the application for the exercise of this jurisdiction is special, it is an act that is regulatory in nature, it is an act that results in a right being highly qualified.⁷¹²

The Victorian Director of Public Prosecutions also described the process as ‘an important safeguard, whereby a member of the executive branch of government refers the matter to the judicial branch’.⁷¹³

Some of these participants did think there should be more public information about the laws and better handling of applications. The Women’s Legal Service Victoria recommended a central coordinating organisation, possibly within the Victorian Government Solicitor’s Office, that could accept referrals about possible vexatious litigants, investigate cases and prepare applications.⁷¹⁴ The Federation of Community Legal Centres suggested guidelines to promote consistency and transparency in the making of applications⁷¹⁵, while the Darebin Community Legal Centre suggested ‘fact sheets’ about the laws.⁷¹⁶ A number of judicial officers called for formal referral systems in the courts, an issue which is discussed further below.

Support for broader standing rules

Several participants in the Inquiry thought other categories of people should be able to apply for orders as well. Some suggested other government or court officials should be able to apply for orders, with one Supreme Court judge suggesting the

⁷¹¹ Victorian Law Reform Commission, above n 682, 598-599.

⁷¹² Justice Bell, *Transcript of evidence*, above n 683, 7.

⁷¹³ Victorian Director of Public Prosecutions, *Submission no. 22*, 3. See also City of Melbourne, *Submission no. 9*; Women’s Legal Service Victoria, *Submission no. 38*, 3; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5; Mental Health Legal Centre Incorporated, *Submission no. 40*; Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁷¹⁴ Women’s Legal Service Victoria, *Submission no. 38*, 4.

⁷¹⁵ Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5. See also City of Melbourne, *Submission no. 9*.

⁷¹⁶ Darebin Community Legal Centre Inc, *Submission no. 46*.

Prothonotary of the Supreme Court, the Secretary of the Department of Justice or the Victorian Government Solicitor.⁷¹⁷

Other participants thought that other parties who are sued by vexatious litigants should be able to apply for orders as well.⁷¹⁸ They argued that other parties are more likely to be aware of the vexatious nature of the behaviour and have more incentive to take action. Mr Matthew Carroll from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) told the Committee:

if vexatious conduct is occurring it is serious and needs to be responded to, it is quite legitimate to enable the subject of that to be part of initiating the process. It seems sort of counterintuitive to say we are dealing with this because it is serious, but it is not so serious as to give the victim, for want of a better word, themselves a right to trigger that process.⁷¹⁹

Some participants told the Committee there should be safeguards to prevent potential misuse of applications by other parties. A number noted that applications could be brought for tactical rather than genuine reasons, making them 'just another litigation strategy with the potential for abuse'.⁷²⁰ The Victorian Bar's submission said that:

An applicant should be required to demonstrate that he or she has an appropriate interest in securing an order of the Court in order to safeguard against the jurisdiction being exploited as a tactic or used by an adversary in an oppressive way.⁷²¹

A number of participants suggested a requirement that other parties get leave from the court before making an application, which is a requirement in the SCAG bill and the new Family Violence Protection Act.⁷²² The Supreme Court's submission said '[a] leave requirement is considered necessary to prevent misuse of such applications'.⁷²³ The joint submission from the Human Rights Law Resource Centre

⁷¹⁷ Freckelton, Judicial officers and VCAT members report, above n 695, 29. See also Freckelton, Court and VCAT staff report, above n 690, 18; Telstra Corporation Limited, *Submission no. 29*; Law Institute of Victoria, *Submission no. 1*; Law Institute of Victoria, *Submission no. 1B*; Australian Corporate Lawyers Association, *Submission no. 35*; Health Services Commissioner, *Submission no. 41*, 5; State Revenue Office, *Submission no. 16*; Commonwealth Bank of Australia, *Submission no. 18*, 5; Foster's Group Limited, *Submission no. 23*; Victoria Legal Aid, *Submission no. 33*.

⁷¹⁸ Supreme Court of Victoria, *Submission no. 34*, 1; Health Services Commissioner, *Submission no. 41*; Law Institute of Victoria, *Submission no. 1B*; Commonwealth Bank of Australia, *Submission no. 18*, 5; Foster's Group Limited, *Submission no. 23*, 3; Telstra Corporation Limited, *Submission no. 29*; The Victorian Bar, *Submission no. 8*, 4; Greg Garde, *Transcript of evidence*, above n 689, 25; Freckelton, Judicial officers and VCAT members report, above n 695, 28-30.

⁷¹⁹ Matthew Carroll, Acting Chief Executive Officer, Victorian Equal Opportunity and Human Rights Commission, *Transcript of evidence*, Melbourne, 6 August 2008, 45.

⁷²⁰ Freckelton, Judicial officers and VCAT members report, above n 695, 30. See also Freckelton, Court and VCAT staff report, above n 690, 17; Darebin Community Legal Centre Inc, *Submission no. 46*; Matthew Carroll, *Transcript of evidence*, above n 719, 45.

⁷²¹ The Victorian Bar, *Submission no. 8*, 4.

⁷²² Letter from The Hon Rob Hulls MP, above n 708, Att B. See *Vexatious Proceedings Act 2005* (Qld) s 5; *Vexatious Proceedings Restriction Act 2002* (WA) s 4(2); *Vexatious Proceedings Act* (NT) s 7(6), 7(7); *Family Violence Protection Act 2008* (Vic) s 189.

⁷²³ Supreme Court of Victoria, *Submission no. 34*, 1. See also, for example, Australian Corporate Lawyers Association, *Submission no. 35*; The Victorian Bar, *Submission no. 8*, 4; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 27-29.

(HRLRC) and PILCH also recommended ‘stringent guidelines and standards’ to ensure officials ‘practice an independent and impartial approach’.⁷²⁴

Many of these participants thought the Attorney-General should still play a role in making applications for vexatious litigant orders. The Supreme Court, for example, noted that there were broader public interests at stake in some cases that individual parties could not always be expected to protect. Its submission noted that:

The Attorney-General’s role in bringing applications would still be an important part of his or her function in ensuring the court’s process is not abused. This is particularly so where a litigant brings a series of unmeritorious proceedings against different parties rather than targeting a single person or organisation. In those circumstances an individual defendant might not have sufficient interest in bringing an application once their own proceedings were resolved, but an application should nonetheless be brought in the public interest.⁷²⁵

Others noted that parties are not always in a position to protect their own interests because of the cost involved in making applications or fear of repercussions. The Women’s Legal Service Victoria submitted that:

The hostility vexatious litigants often direct at the other party is likely to be exacerbated if an application to have someone declared a vexatious litigant was initiated by them ... Many of our clients would not want to be involved in such applications. They have previously experienced violence. They do not want the vexatious litigant to hold them responsible for the declaration.⁷²⁶

10.4.2 The Committee’s view

A graduated system of orders creates scope to vary the categories of persons who can apply for orders according to the type of order.

The Committee believes that, given the evidence about problems with the current application process, other parties should be able to apply for orders to protect their own interests, that is, limited and extended orders. Other parties should be required to get leave before making an application to ensure applications are only made in genuine cases. Other Australian jurisdictions already have similar laws and the Committee did not hear any concerns about their operation.

The Committee believes that applications for general orders, which restrain all litigation without leave, are so serious that they should be brought only by public officials in the public interest. The power to apply for these orders should be limited to the Attorney-General, and also the Solicitor-General. The Attorney-General and the Solicitor-General should also be able to apply for limited and extended orders to deal with situations where the other parties involved are unable to, for good

⁷²⁴ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 27-29.

⁷²⁵ Supreme Court of Victoria, *Submission no. 34*, 1; Freckelton, Judicial officers and VCAT members report, above n 695, 29.

⁷²⁶ Women’s Legal Service Victoria, *Submission no. 38*, 3. See also Freckelton, Court and VCAT staff report, above n 690, 18.

reason, are reluctant to make applications themselves. The Committee does not believe the Secretary of the Department of Justice or the Victorian Government Solicitor should be given an express power to apply for orders, given that the primary function of those officers is to advise or represent the Attorney-General. Although the Solicitor-General also acts as counsel for the state, it is an independent statutory office.

The Committee believes there should be clearer public information about the laws and how to refer possible vexatious litigants to the Attorney-General, as well as more transparent and timely processes for handling referrals. This should include publication of information on websites like those mentioned in section 9.2.1 of this report. The Committee also supports the call for a central, coordinating agency within the Victorian Government which can receive and investigate referrals in a timely way.

10.4.3 Should courts and tribunals be able to initiate orders?

Some jurisdictions and the SCAG model bill allow court registrars and officials to apply for vexatious litigant orders, or allow courts to make vexatious litigant orders on their 'own motion' without any application from a third party.⁷²⁷

The VLRC recommended that court registrars should be able to apply for orders, but concluded that it was not necessary or desirable for courts in Victoria to make orders on their own initiative. It suggested a procedure under which judicial officers could refer matters to court registrars who could then make an application.⁷²⁸

Some participants in this Inquiry supported the introduction of an 'own motion' power and a power for court officials to make applications in Victoria. Telstra, for example, told the Committee '[c]ourts and tribunals will often be best placed to identify persons who may be vexatious claimants ... [and] should be able to make orders under the vexatious proceedings legislation on their own motion. For the same reason, the prothonotary or registrar of a court or tribunal should be able to apply for orders under the legislation.'⁷²⁹

However, a number of judicial officers and court and tribunal staff were concerned that an 'own motion' power, or a power for court officials to apply for orders, could create perceptions of bias. The Supreme Court's submission said:

⁷²⁷ See *Federal Court Rules* (Cth) O 21; *Family Law Rules 2004* (Cth) r 11.04; *Federal Magistrates Court Rules 2001* (Cth) r 13.11; *Vexatious Proceedings Act 2005* (Qld) s 6; *Vexatious Proceedings Restriction Act 2002* (WA) s 4; *Vexatious Proceedings Act* (NT) s 7; *Vexatious Proceedings Act 2008* (NSW) s 8; *Supreme Court Civil Procedure Act 1932* (Tas) s 194G; Letter from The Hon Rob Hulls MP, above n 708, Att B.

⁷²⁸ Victorian Law Reform Commission, above n 682, 599.

⁷²⁹ Telstra Corporation Limited, *Submission no. 29*, 5. See also Law Institute of Victoria, *Submission no. 1*, 2; Law Institute of Victoria, *Submission no. 1B*, 2; State Revenue Office, *Submission no. 16*, 3; Foster's Group Limited, *Submission no. 23*, 3; Victoria Police, *Submission no. 47*, 2.

There are difficulties with the court having ‘own motion’ power to initiate an application, because of questions of bias in the subsequent determination of the application.⁷³⁰

Supreme Court and County Court staff told Dr Freckelton they were uncomfortable with the idea that judges or court staff should bring applications because of potential for perceptions of bias.⁷³¹ Mr Simon Smith also expressed concern that ‘[i]t may move [courts and tribunals and officers] too far toward an unsatisfactory dual role of prosecutor and judge’.⁷³²

Some participants did call for a formal process by which courts and tribunals could refer possible vexatious litigants to the Attorney-General. Supreme and County Court judges suggested options including referrals from a committee of judges or the head of jurisdiction.⁷³³

In light of the concerns expressed by judicial officers and court staff, the Committee does not recommend an ‘own motion’ power or a power for court staff to apply for orders. The Committee believes the Attorney-General should work with the courts and VCAT to develop a protocol under which judicial officers, VCAT members and court staff can refer possible vexatious litigants for investigation and possible action.

10.5 Which courts and tribunals should be able to make orders?

The Supreme Court has traditionally been the only court in Victoria with the power to make a vexatious litigant order. The Family Violence Protection Act creates an exception to this rule by allowing senior judicial officers in the Magistrates’ Court and Children’s Courts to make orders in family violence proceedings.⁷³⁴

The Committee is aware that some other jurisdictions in Australia have given their ‘inferior courts’ the power to make orders more generally.⁷³⁵ The UK’s system of graduated orders also allows different courts to make orders, although the power to make extended and general orders is limited to more senior courts and judges.⁷³⁶

⁷³⁰ Supreme Court of Victoria, *Submission no. 34*, 2.

⁷³¹ Freckelton, Court and VCAT staff report, above n 690, 17-18.

⁷³² Simon Smith, *Submission no. 21*, 6. See also Simon Smith, *Transcript of evidence*, above n 694, 9. The HRLRC and PILCH also opposed an ‘own motion power’: Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 28.

⁷³³ Supreme Court of Victoria, *Submission no. 34*, 2; Judge Misso, *Submission no. 10*, 10; Freckelton, Judicial officers and VCAT members report, above n 695, 29.

⁷³⁴ *Family Violence Protection Act 2008* (Vic) ss 188, 189.

⁷³⁵ *Vexatious Proceedings Restriction Act 2002* (WA) s 3; *High Court Rules 2004* (Cth) r 6.06; *Federal Court Rules* (Cth) O 21; *Federal Magistrates Court Rules 2001* (Cth) r 3.11; *Family Law Act 1975* (Cth) s 118; *Family Law Rules 2004* (Cth) r 11.04. New South Wales provides for courts of equivalent status to the Supreme Court to make declarations as well: see *Vexatious Proceedings Act 2008* (NSW) s 3; *New South Wales Parliamentary Debates*, Legislative Assembly, 26 June 2008, 9459 (Mr Barry Collier, Parliamentary Secretary).

⁷³⁶ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders, cl 2.1, 3.1, 3.11.

In its issues paper, the Committee asked whether other courts and tribunals should also be able to make vexatious litigant orders in Victoria.

10.5.1 The views of participants and other inquiries

In its report on Victoria's civil justice system the VLRC recommended that courts and tribunals other than the Supreme Court should have the power to make vexatious litigant orders that restrain further legal proceedings in their own jurisdiction.⁷³⁷

Participants in this Inquiry were divided about the issue.

One view, held by a cross-section of participants, was that the Supreme Court should continue to be the only court that can make orders. These participants pointed to the serious impact of orders on rights and the Supreme Court's status as a superior court responsible for all courts and tribunals in Victoria. The Supreme Court's submission said '[t]he serious nature of a declaration under s 21 justifies applications being brought in the highest court in the State'.⁷³⁸ The Darebin Community Legal Centre said '[a]s 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'.⁷³⁹

Some participants also raised practical considerations. The Supreme Court's submission noted that if other courts are able to make orders it could lead to uncertainty and confusion, forum shopping and appeals to the Supreme Court and Court of Appeal.⁷⁴⁰ The Health Services Commissioner, Ms Beth Wilson, also told the Committee, '[f]rankly I think a person who was declared vexatious by a tribunal would appeal to the Supreme Court in any event'.⁷⁴¹

The contrary view, which also had support amongst a cross-section of participants, was that other courts and tribunals should have at least limited powers to make orders. Wellington Shire Council, located in Gippsland, said it preferred a process that was accessible locally and suggested local magistrates could decide applications.⁷⁴² The Supreme Court's submission also acknowledged '[i]t might be more affordable for a defendant ... to make application for orders in the court or tribunal where the vexatious proceedings have been brought.'⁷⁴³ The Victorian

⁷³⁷ Victorian Law Reform Commission, above n 682, 600.

⁷³⁸ Supreme Court of Victoria, *Submission no. 34*, 2.

⁷³⁹ Darebin Community Legal Centre Inc, *Submission no. 46*, 11. See also Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5; Mental Health Legal Centre Incorporated, *Submission no. 40*, 5; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 28-29; The Victorian Bar, *Submission no. 8*, 4; Greg Garde, *Transcript of evidence*, above n 689, 24; Mark Yorston, Consultant, Wisewoulds Lawyers, Law Institute of Victoria, *Transcript of evidence*, Melbourne, 6 August 2008, 16; Justice Bell, *Transcript of evidence*, above n 683, 8; Commonwealth Bank of Australia, *Submission no. 18*, 5; Victorian WorkCover Authority, *Submission no. 48*, 4; Freckelton, Judicial officers and VCAT members report, above n 695, 30-31.

⁷⁴⁰ Supreme Court of Victoria, *Submission no. 34*, 2; Commonwealth Bank of Australia, *Submission no. 18*, 5.

⁷⁴¹ Health Services Commissioner, *Submission no. 41*, 5. See also Freckelton, Judicial officers and VCAT members report, above n 695, 31.

⁷⁴² Wellington Shire Council, *Submission no. 15*, 3.

⁷⁴³ Supreme Court of Victoria, *Submission no. 34*, 2. See also Australian Corporate Lawyers Association, *Submission no. 35*; State Revenue Office, *Submission no. 16*, 3; Freckelton, Judicial officers and VCAT

Director of Public Prosecutions suggested the power could be limited to the Chief Judge and Chief Magistrate, subject to rights to written reasons and appeal to the Supreme Court.⁷⁴⁴

Other participants suggested that, if Victoria had a graduated system of orders, there might be scope for allowing other courts and tribunals to make limited orders but the Supreme Court should continue to have a monopoly on extended and general orders. Mr Matthew Carroll from the VEOHRC, for example, told the Committee:

vesting that very extreme power in our highest court, the Supreme Court, would appear to be an appropriate mechanism and maintaining that may well be important in ensuring ongoing compliance with human rights.⁷⁴⁵

10.5.2 The Committee's view

The graduated system recommended by the Committee creates scope to tailor the courts and tribunals that can make orders to the seriousness of the order. The Committee considers the power to make limited orders should be available to all courts and VCAT. The Committee believes the power to make extended orders should also be available to all courts and VCAT but, with the exception of the Supreme Court, should be confined to the head of jurisdiction and should only restrain litigation in the jurisdiction where the order is made. The Supreme Court should be the only court with the power to make general orders, given their serious consequences for access to justice and individual rights.

The Committee considers there would be benefit in information sharing about orders between the courts and VCAT to help avoid some of the problems with multiple orders, an issue which is discussed later in this chapter.

The Committee acknowledges there may be situations, such as family violence proceedings, where particular courts or VCAT require additional powers to deal with problems specific to their jurisdiction. The Family Violence Protection Act was supported by a number of participants in this Inquiry including the Magistrates' Court.⁷⁴⁶ The Magistrates' Court noted that the Act does not extend to stalking proceedings and said it would welcome the enactment of similar provisions in that area.⁷⁴⁷ The Committee did not receive sufficient evidence about the extent of the problem in stalking cases to make a recommendation. It notes that the Victorian

members report, above n 695, 31-32, 41; Victoria Legal Aid, *Submission no. 33*; Kevin Davies, *Submission no. 4*.

⁷⁴⁴ Victorian Director of Public Prosecutions, *Submission no. 22*, 3. See also Freckelton, Judicial officers and VCAT members report, above n 695, 30-32.

⁷⁴⁵ Matthew Carroll, *Transcript of evidence*, above n 719, 45. See also Supreme Court of Victoria, *Submission no. 34*, 5; Public Interest Law Clearing House, *Submission no. 31B*; Law Institute of Victoria, *Submission no. 1C*, 5.

⁷⁴⁶ Magistrates' Court of Victoria, *Submission no. 37*, 2. See also Public Interest Law Clearing House, *Submission no. 31B*, 1; Penny Drysdale, *Transcript of evidence*, above n 681, 12; Women's Legal Service Victoria, *Submission no. 38*, 6.

⁷⁴⁷ Magistrates' Court of Victoria, *Submission no. 37*, 2. See also Freckelton, Judicial officers and VCAT members report, above n 695, 32-35.

Government proposes to review the intervention order system in non-family violence cases and draws the Government's attention to the Magistrates' Court's views.⁷⁴⁸

10.6 When should courts and tribunals be able to make orders?

The Committee heard conflicting evidence in this Inquiry about whether the current law makes it too easy or too difficult for the Supreme Court to declare a person a vexatious litigant. This section explores possible areas for reform – the 'threshold test' for making an order, the definition of 'vexatious legal proceeding' and whether the courts should be able to consider legal proceedings outside Victoria.

10.6.1 The 'threshold test'

Section 21 sets a high threshold for a vexatious litigant order. The Supreme Court can only make an order if it is satisfied that a person has 'habitually', 'persistently' and 'without reasonable grounds' brought vexatious legal proceedings.

Victoria is one of the few jurisdictions in Australia and overseas that still uses this test.⁷⁴⁹ The states that have adopted the SCAG model bill use the less strict test of 'frequently' bringing vexatious legal proceedings.⁷⁵⁰ Other jurisdictions use tests with terms such as 'persistently',⁷⁵¹ 'persistently' and 'without reasonable grounds',⁷⁵² or has, or is likely to, institute vexatious proceedings.⁷⁵³

The Committee's issues paper sought views about whether Victoria should adopt a different test as well.

The views of participants and other inquiries

The VLRC recommended that the test should be 'liberalised' to allow the courts to make orders where a person has 'frequently' instituted or conducted vexatious proceedings.⁷⁵⁴

⁷⁴⁸ See Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 2637 (The Hon Rob Hulls MP, Attorney-General) 2649; Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 2008, 3660 (The Hon Rob Hulls MP, Attorney-General).

⁷⁴⁹ *Supreme Court Act 1933* (ACT) s 67A; *Federal Court Rules* (Cth) O 21; *Federal Magistrates Court Rules 2001* (Cth) r 13.11. See also *Supreme Court Act 1981* (UK) c 54 s 42; *Vexatious Actions (Scotland) Act 1898* (UK) c 35 s 1; *Judicature (Northern Ireland) Act 1978* (UK) c 23 s 32; *Ohio Revised Code*, OHIO REV CODE ch 2323.52; *Supreme Court Act*, RSBC 1996, c 443 s 18.

⁷⁵⁰ Letter from The Hon Rob Hulls MP, above n 708, Att B; *Vexatious Proceedings Act 2005* (Qld) s 6; *Vexatious Proceedings Act* (NT) s 7; *Vexatious Proceedings Act 2008* (NSW) s 8. See also *Family Law Rules 2004* (Cth) r 11.04; *Supreme Court Act 1933* (ACT) s 67A.

⁷⁵¹ *Supreme Court Act 1935* (SA) s 39; *Federal Courts Act*, RSC 1985, c F-7 s 40.

⁷⁵² *Supreme Court Civil Procedure Act 1932* (Tas) s 194G. See also *Court of Queen's Bench Act*, CCSM, c C280 ss 73-75; *Courts of Justice Act*, RSO 1990, c C.43 s 140; *Judicature Act 1908* (NZ) s 88B.

⁷⁵³ *Vexatious Proceedings Restriction Act 2002* (WA) s 4.

⁷⁵⁴ Victorian Law Reform Commission, above n 682, 599.

Some participants in this Inquiry thought the current test should be retained. One of the judges who spoke to Dr Freckelton noted that an order ‘is such a draconian thing to do, the criteria should continue to be strict’.⁷⁵⁵ The joint submission from the HRLRC and PILCH argued that the terms ‘habitually’ and ‘persistently’ ‘capture the essence’ of vexatious conduct compared with a term like ‘frequently’, which is ‘too general and open to interpretation’. They expressed concern that broadening the test too much might make legitimate litigants vulnerable to vexatious litigant orders as well.⁷⁵⁶

Other participants favoured a change to the current test. Mr Simon Smith expressed some interest in replacing ‘vague criteria’ with a numerical approach like that in some US states, where an order can be made once a self-represented litigant has brought five unsuccessful proceedings over a set period of time.⁷⁵⁷ Telstra supported the test used in Western Australia, where an order can be made where a person has or is likely to institute or conduct vexatious proceedings, while the State Revenue Office suggested a range of factors should be considered.⁷⁵⁸ Most participants who supported a change favoured a threshold test which allows an order to be made when a person has ‘frequently’ brought vexatious legal proceedings.⁷⁵⁹

However, the Committee heard some evidence that adopting ‘frequently’ as a test would require careful consideration under the Charter. Mr Matthew Carroll from the VEOHRC told the Committee:

using a test of frequent initiation of proceedings may be lowering the threshold beyond an appropriate level of seriousness to govern vexatious litigant orders ... it would be unrealistic to say that there is a concern that there would be an avalanche of vexatious orders, but ‘frequently’ does seem to take it below the threshold that is established by notions of habitualness and persistence.⁷⁶⁰

This test is used in the Australian Capital Territory and the United Kingdom which have similar human rights legislation.

⁷⁵⁵ Freckelton, Judicial officers and VCAT members report, above n 695, 8-9. See also Simon Smith, *Transcript of evidence*, above n 694, 9; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5; Women’s Legal Service Victoria, *Submission no. 38*, 4 Fitzroy Legal Service Incorporated, *Submission no. 43*, 8.

⁷⁵⁶ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 30-32. See also Kristen Hilton, *Transcript of evidence*, above n 678, 24.

⁷⁵⁷ Simon Smith, *Transcript of evidence*, above n 694, 9. See *Code of Civil Procedure*, CAL CODE §391; Lee W Rawles, ‘The California vexatious litigant statute: A viable judicial tool to deny the clever obstructionists access?’ (1998) 72 *Southern California Law Review* 275; *Florida Vexatious Litigant Law*, FLA STAT §68.093; *Civil Practice and Remedies Code*, TEX CODE ANN §11.054; *Hawaii Revised Statutes*, HAW REV STAT §634J; Deborah L Neveils, ‘Florida’s vexatious litigant law: An end to the *pro se* litigant’s courtroom capers?’ (2000) 25 *Nova Law Review* 343.

⁷⁵⁸ Telstra Corporation Limited, *Submission no. 29*; State Revenue Office, *Submission no. 16*, 3-4.

⁷⁵⁹ Freckelton, Judicial officers and VCAT members report, above n 695, 8-9, 26. See also Wellington Shire Council, *Submission no. 15*, 4; Commonwealth Bank of Australia, *Submission no. 18*, 6; Department of Education and Early Childhood Development, *Submission no. 26*; Australian Corporate Lawyers Association, *Submission no. 35*; Environment Protection Authority Victoria, *Submission no. 44*, 1; Confidential, *Submission no. 12*.

⁷⁶⁰ Matthew Carroll, *Transcript of evidence*, above n 719, 45. See also Kristen Hilton, *Transcript of evidence*, above n 678, 25.

The Committee's view

As the previous chapter noted, it is difficult to make judgments based on existing evidence about whether the current threshold test in Victoria is limiting section 21's effectiveness.

The Committee's preference for a graduated system of orders nevertheless requires it to consider different tests for different orders. The Committee believes Victoria should trial tests similar to those in the UK.⁷⁶¹ The Committee recommends the following tests for its proposed orders:

- limited order – a person has brought two or more applications that are without merit
- extended order – a person has 'frequently' brought legal proceedings that are without merit
- general order – a person has 'persistently' and 'without reasonable grounds' brought legal proceedings that are without merit in circumstances where an extended order is not appropriate.

The Committee's proposed limitation litigation orders are summarised in Figure 7 on page 174.

Recommendation 13: Reform of Victoria's vexatious litigant provision

The Victorian Government should introduce legislation to replace the vexatious litigant provision in section 21 of the *Supreme Court Act 1986* (Vic) with new legislation providing for a graduated system of 'litigation limitation orders'.

Recommendation 14: Limited litigation limitation orders

- 14.1 The new legislation should give all courts and VCAT the power to make a 'limited litigation limitation order'.
- 14.2 The Attorney-General and the Solicitor-General should be able to apply for this order. A person against whom the person has instituted or conducted proceedings that are without merit and a person who has a 'sufficient interest' in the matter should also be able to apply, subject to leave.
- 14.3 The threshold test for this order should be that the person has brought two or more applications in the existing litigation that are without merit.
- 14.4 The effect of the order should be to prohibit further applications in the existing litigation without leave.

⁷⁶¹ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders, cl 2.2, 3.1, 4.1.

Recommendation 15: Extended litigation limitation orders

- 15.1 The new legislation should give the Supreme Court, the Chief Judge of the County Court, the Chief Magistrate and the President of VCAT the power to make an ‘extended litigation limitation order’.
- 15.2 The Attorney-General and the Solicitor-General should be able to apply for this order. A person against whom the person has instituted or conducted proceedings that are without merit and a person who has a ‘sufficient interest’ in the matter should also be able to apply, subject to leave.
- 15.3 The threshold test for this order should be that the person has frequently brought legal proceedings that are without merit.
- 15.4 The effect of the order should be to prohibit the person from continuing or bringing any applications or legal proceedings against the persons or organisations named in the order, or about the issues described in the order. Orders made by the Chief Judge, Chief Magistrate and President of VCAT should only prohibit legal proceedings in their respective jurisdictions.

Recommendation 16: General litigation limitation orders

- 16.1 The new legislation should give the Supreme Court the power to make a general litigation limitation order on the application of the Attorney-General and the Solicitor-General.
- 16.2 The Supreme Court should be able to make an order if it is satisfied that the person has persistently and without reasonable ground brought legal proceedings that are without merit in circumstances where an extended litigation limitation order would not be appropriate.
- 16.3 The effect of the order should be to prohibit the person from continuing or bringing any legal proceedings in any Victorian court or tribunal without leave.

Recommendation 17: Referral of cases to the Attorney-General

- 17.1 The Victorian Government should publish information about litigation limitation orders, including how to apply for an order and how to ask the Attorney-General to apply for an order.
- 17.2 The Victorian Government should work with the courts and VCAT to develop a protocol under which the courts and VCAT can refer persons for whom a litigation limitation order may be warranted to the Attorney-General for consideration.
- 17.3 The Victorian Government should establish or designate an agency responsible for publishing information about litigation limitation orders, receiving and investigating referrals and advising the Attorney-General about applications. The Government should develop and publish key performance criteria for the exercise of these functions.

Recommendation 18: Evaluation of reforms

The Victorian Government should commission an evaluation of the new legislation after it has been in operation for five years to determine whether it has been effective in meeting its objectives and its impact on access to justice.

Recommendation 19: Implications for the Family Violence Protection Act

The Victorian Government should review the vexatious litigant provisions in the *Family Violence Protection Act 2008* (Vic) to ensure they are consistent with the new legislation proposed by the Committee.

10.6.2 What is a vexatious legal proceeding?

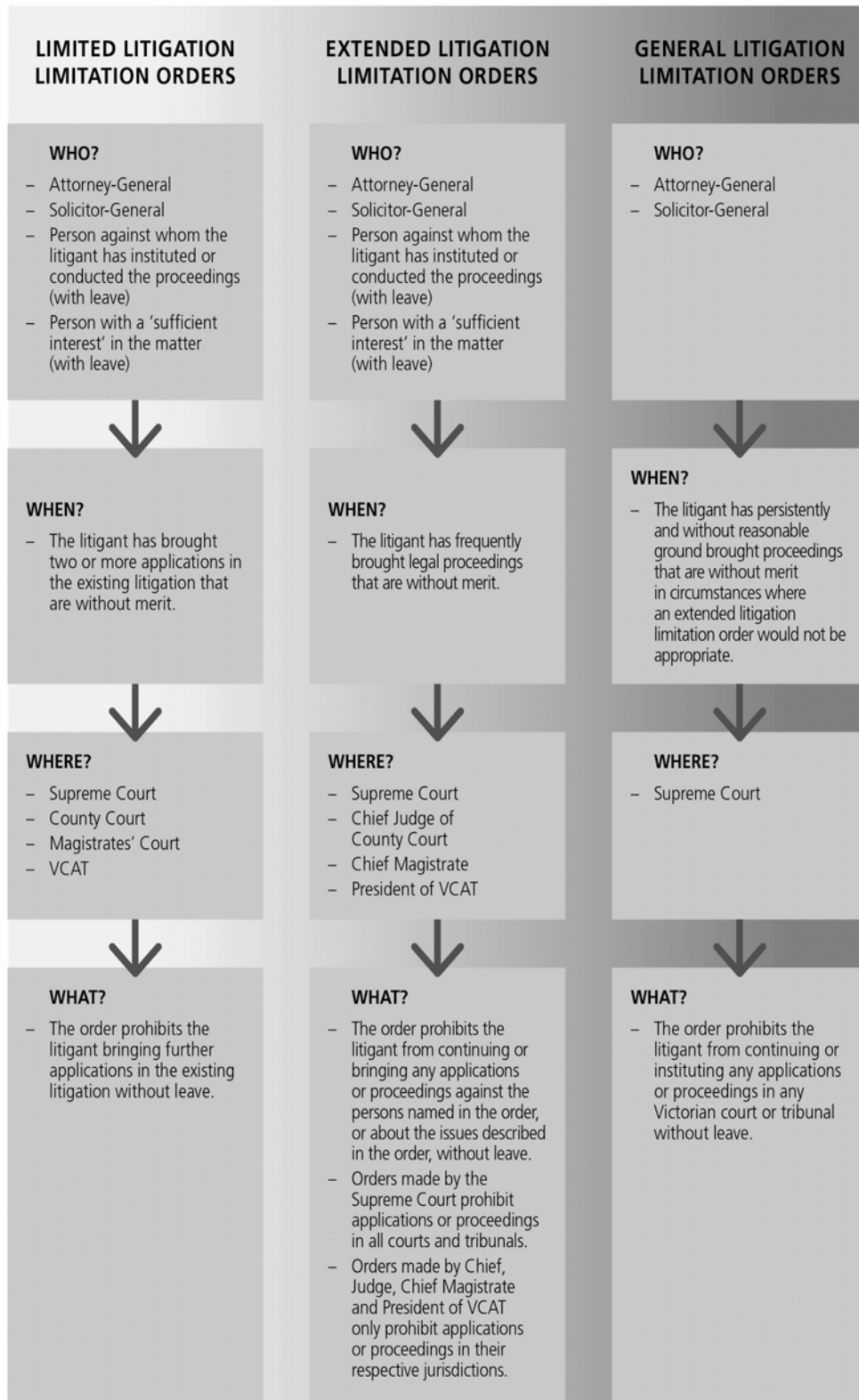
Content, motive and conduct

Section 21 does not define 'vexatious legal proceedings' but the Supreme Court has interpreted the phrase to refer to proceedings brought for an improper purpose or shown to be hopeless.⁷⁶² This allows the Court to consider the content of the proceedings and the motive of the litigant, but not the way the proceeding is conducted. The Court has stated that the question is not whether the manner in which the proceeding was conducted is vexatious, but whether the proceeding itself should be characterised as vexatious having regard to its nature and substance.⁷⁶³

⁷⁶² *Attorney-General (Vic) v Knight* [2004] VSC 407, 5.

⁷⁶³ *Attorney-General (Vic) v Shaw* [2007] VSC 148, 5; *Attorney-General (Vic) v Horvath, Senior* [2001] VSC 269, 28; *Attorney-General (Vic) v Weston* [2004] VSC 314, 14, 23; *Attorney-General (Vic) v Moran* [2008] VSC 159, 26.

Figure 7 – Litigation limitation orders



In light of evidence that part of the damage caused by vexatious litigants is due to the way they conduct proceedings, the Committee's issues paper asked whether the laws should allow consideration of conduct and motive more broadly.

The SCAG model bill allows courts to consider the content of the proceedings, the motive of the litigant and the way the litigant conducts the proceedings. It defines 'vexatious proceedings' to include:

- (a) proceedings that are an abuse of the process of a court or tribunal; and
- (b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) proceedings instituted or pursued without reasonable ground; and
- (d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.⁷⁶⁴

The VLRC's report on Victoria's civil justice system recommended that vexatious proceedings be defined along the same lines.⁷⁶⁵

Some participants in the Inquiry, particularly those who had dealt with possible vexatious litigants, also thought courts should be able to consider conduct and motive as well as content. The Commonwealth Bank of Australia argued that the law should take '[a] global approach, not an insular one' and that courts should be able to:

take into account the conduct of a defendant who frequently brings appeals and applications, interlocutory or otherwise, that are hopeless and devoid of merit and that the conduct of the applicant in general should be taken into account, including the strategic seeking of adjournments as a matter of course and on spurious grounds.⁷⁶⁶

The Women's Legal Service Victoria, which gave evidence to the Committee about possible vexatious litigants in family violence proceedings, submitted that courts should be able to take into account the surrounding circumstances and history of the litigation and the person's motive. It argued this should include recognition of cases where the litigation is linked to family violence or stalking.⁷⁶⁷

⁷⁶⁴ Letter from The Hon Rob Hulls MP, above n 708, Att B. See also *Vexatious Proceedings Restriction Act 2002* (WA) s 3.

⁷⁶⁵ Victorian Law Reform Commission, above n 682, 599.

⁷⁶⁶ Commonwealth Bank of Australia, *Submission no. 18*, 6. See also Ross Thomson, Legal Officer, Commonwealth Bank of Australia, *Transcript of evidence*, Melbourne, 13 August 2008, 18; Environment Protection Authority Victoria, *Submission no. 44*; Department of Education and Early Childhood Development, *Submission no. 26*; Victorian Director of Public Prosecutions, *Submission no. 22*, 5; Foster's Group Limited, *Submission no. 23*, 3; Confidential, *Submission no. 12*. The Commonwealth Director of Public Prosecutions supported a similar definition to that in Western Australia: see Commonwealth Director of Public Prosecutions, *Submission no. 36*, 6.

⁷⁶⁷ Women's Legal Service Victoria, *Submission no. 38*, 4.

Other participants were concerned by proposals that the courts consider motive and conduct. They noted it was difficult to determine motive objectively, while consideration of conduct could make legitimate litigants who are unable to articulate their cases clearly vulnerable to orders.⁷⁶⁸ The State Revenue Office noted ‘[i]t may in some cases be a fine line between using court processes legitimately, as opposed to frustrate or annoy another person’.⁷⁶⁹

Some participants thought the courts should be able to consider ‘exculpatory’ circumstances as well as conduct that confirms the vexatious nature of proceedings. The Fitzroy Legal Service, for example, argued that lack of legal representation should be considered.⁷⁷⁰

The Committee’s view is that, in light of the evidence it received about the behaviour of vexatious litigants in Victoria, an approach that allows the courts and VCAT to consider a broad range of factors, as in the SCAG model bill, is appropriate. The Committee is mindful that some legitimate litigants may engage in conduct that is inappropriate due to inexperience and lack of skill rather than vexatiousness. It does not believe the definition in the SCAG bill is so broad that it captures those litigants.

Consistent with the Committee’s views about the benefits of using new terminology in this area, the legislation should refer to ‘proceedings that are without merit’, rather than vexatious legal proceedings.

Interlocutory applications and appeals

Under section 21 as it currently stands, the Supreme Court cannot consider interlocutory applications or appeals when deciding whether a person meets the threshold test for a vexatious litigant order. Participants who had dealt with declared or possible vexatious litigants told the Committee that misuse of interlocutory applications was one of their characteristics.

The SCAG model bill defines vexatious proceedings in a broad way that includes interlocutory applications and appeals.⁷⁷¹

The VLRC also recommended the courts should be able to have regard to ‘proceedings’ broadly defined, including interlocutory proceedings.⁷⁷²

A number of participants in this Inquiry also thought the courts should be able to consider interlocutory proceedings. The Victorian WorkCover Authority, for example, told the Committee ‘[i]n our experience appeals arising from rulings on interlocutory applications can be used to the same effect as originating proceedings

⁷⁶⁸ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 31. See also Chris Wheeler, *Transcript of evidence*, above n 704, 49.

⁷⁶⁹ State Revenue Office, *Submission no. 16*, 4.

⁷⁷⁰ Fitzroy Legal Service Incorporated, *Submission no. 43*, 12.

⁷⁷¹ Letter from The Hon Rob Hulls MP, above n 708, Att B. See also *Vexatious Proceedings Restriction Act 2002 (WA)* s 3.

⁷⁷² Victorian Law Reform Commission, above n 682, 599.

and should be relevant in consideration of whether a person has proper intent in their use of the civil justice system.⁷⁷³

The Committee's view, based on the evidence in this Inquiry, is that the courts and VCAT should be able to consider the whole of a litigant's litigation history when considering an order and it supports the definition in the SCAG model bill.

Recommendation 20: When is a proceeding vexatious or without merit?

The new legislation should define 'institute', 'proceedings' and 'proceedings that are without merit' in a manner consistent with the definitions in the Standing Committee of Attorneys-General's model vexatious proceedings bill.

10.6.3 Proceedings and orders in other Australian courts

Under the current law, the Supreme Court can only consider proceedings brought in Victorian courts and tribunals when determining whether a person meets the threshold test for a vexatious litigant order. The Court cannot consider proceedings brought in other Australian jurisdictions at this stage, although it can consider them when exercising its discretion whether to make an order.

Some jurisdictions in Australia allow their courts to consider any proceedings brought 'in Australia', not just proceedings in their own courts and tribunals.⁷⁷⁴

Western Australia's laws go further and provide that vexatious litigant orders made in other jurisdictions automatically stay or prohibit litigation in Western Australian courts as well.⁷⁷⁵

The VLRC did not recommend the Western Australian approach in its report on the civil justice system, but it did recommend that Victoria's courts and tribunals should be able to consider proceedings in any Australian court and tribunal.⁷⁷⁶

There was some support for this approach during the Committee's Inquiry. The Supreme Court submitted that it should be able to take into account proceedings brought in any Australian court.⁷⁷⁷ A Supreme Court Master who spoke to Dr Freckelton commented that it made 'no sense' for a person to be declared interstate

⁷⁷³ Victorian WorkCover Authority, *Submission no. 48*, 5. See also Women's Legal Service Victoria, *Submission no. 38*, 4; Department of Education and Early Childhood Development, *Submission no. 26*; Environment Protection Authority Victoria, *Submission no. 44*; Foster's Group Limited, *Submission no. 23*, 3; State Revenue Office, *Submission no. 16*, 4.

⁷⁷⁴ *Federal Court Rules* (Cth) r 21.01; *Federal Magistrates Court Rules 2001* (Cth) r 13.11. This is also a feature of the SCAG model bill: see letter from The Hon Rob Hulls MP, above n 708, Att B.

⁷⁷⁵ *Vexatious Proceedings Restriction Act 2002* (WA) s 8. Similar provisions apply in some US states: see *Code of Civil Procedure*, CAL CODE §391; *Civil Practice and Remedies Code*, TEX CODE ANN §11.054; *Hawaii Revised Statutes*, HAW REV STAT §634J-1.

⁷⁷⁶ Victorian Law Reform Commission, above n 682, 599.

⁷⁷⁷ Supreme Court of Victoria, *Submission no. 34*, 3.

and ‘we know nothing about it’.⁷⁷⁸ Mr Matthew Carroll from the VEOHRC told the Committee that extending the scope of the litigation that can be considered ‘would appear quite reasonable in terms of a human rights test’.⁷⁷⁹

There was less support for a Western Australia-style law that would apply vexatious litigant orders from other jurisdictions to Victoria’s courts and tribunals. Wellington Shire Council supported the idea, noting that new technology including the internet had undermined traditional jurisdictional boundaries.⁷⁸⁰ The Foster’s Group also submitted ‘[a] finding that a person is a vexatious litigant ought not to require a complete and new hearing in each State’.⁷⁸¹ Other participants opposed such a reform or saw it as unnecessary. Darebin Community Legal Centre, for example, noted that it would be difficult to implement while vexatious litigant laws in other jurisdictions are different from those in Victoria.⁷⁸²

Based on the evidence in this Inquiry about the extent to which declared and possible vexatious litigants bring legal proceedings across different jurisdictions, the Committee’s view is that Victoria’s courts and tribunals should be able to consider proceedings brought in all Australian courts.

The Committee does not believe that vexatious litigant orders made by other Australian courts should automatically apply in Victoria. The Committee is conscious that the model it has recommended in this report is different to the laws in other jurisdictions. The Government could work with the courts and VCAT to monitor vexatious litigant orders from other jurisdictions and determine whether applications should be brought against those litigants in Victoria. This is discussed later in this chapter.

Recommendation 21: ‘Forum shopping’

The new legislation should allow the Supreme Court, and the courts and VCAT where relevant, to consider proceedings in any Australian court when determining whether to make a litigation limitation order.

⁷⁷⁸ Freckelton, Judicial officers and VCAT members report, above n 695, 39. See also Women’s Legal Service Victoria, *Submission no. 38*, 4; The Victorian Bar, *Submission no. 8*, 6; Greg Garde, *Transcript of evidence*, above n 689, 23; Australian Corporate Lawyers Association, *Submission no. 35*; Victorian WorkCover Authority, *Submission no. 48*, 7; Confidential, *Submission no. 12*, 7; Victorian Director of Public Prosecutions, *Submission no. 22*, 4.

⁷⁷⁹ Matthew Carroll, *Transcript of evidence*, above n 719, 45.

⁷⁸⁰ Wellington Shire Council, *Submission no. 15*, 6. See also Commonwealth Bank of Australia, *Submission no. 18*, 10; The Victorian Bar, *Submission no. 8*, 7.

⁷⁸¹ Foster’s Group Limited, *Submission no. 23*, 3.

⁷⁸² Darebin Community Legal Centre Inc, *Submission no. 46*, 15-16. See also Victorian Director of Public Prosecutions, *Submission no. 22*, 4; Federation of Community Legal Centres (Victoria), *Submission no. 39*, 5; Fitzroy Legal Service Incorporated, *Submission no. 43*.

10.7 Hearings

10.7.1 Rights of possible vexatious litigants

Section 21 gives possible vexatious litigants few express rights. The section gives a possible vexatious litigant a right to be heard before an order is made. In its issues paper, the Committee asked whether possible vexatious litigants should have any other rights.

The Committee was particularly interested in whether possible vexatious litigants should have a right to legal representation at a hearing. As noted in chapter 3, only three of the 14 declared vexatious litigants in Victoria for which information is available were represented at their section 21 hearing.

The original 1928 vexatious litigant provision provided for the court to assign counsel to a person but that provision was excluded when the Supreme Court Act was rewritten in 1986.

The Committee asked Victoria Legal Aid about its funding guidelines and practices in these cases. It told the Committee these matters would be dealt with under its general civil law guidelines or could be regarded as a public interest matter and would be subject to merits and means testing. It said it did not keep data on the issue but anecdotal evidence indicated it had provided funding to two people who were the subject of an application under section 21, but in relation to other issues and not the section 21 application itself.⁷⁸³

Victoria Legal Aid and community legal centres thought people should have legal assistance at section 21 hearings. Victoria Legal Aid noted '[v]exatious litigant declarations are a significant limitation on a person's civil liberties and should be considered only in a context of natural justice and fair play'.⁷⁸⁴ Darebin Community Legal Centre also argued it was 'essential' that possible vexatious litigants be represented in hearings given the effect of orders and noted the possibility of a pro bono scheme.⁷⁸⁵ The Federation of Community Legal Centres, and the joint submission from the HRLRC and PILCH, said access to legal representation may be required in some cases to give effect to the right to a fair hearing under the Charter.⁷⁸⁶

These views were not universal. The Victorian WorkCover Authority agreed resources for legal assistance should be expanded but was concerned that a 'right' to legal representation might prove another source of litigation.⁷⁸⁷ The Women's Legal

⁷⁸³ Victoria Legal Aid, *Submission no. 33B*, 1-2.

⁷⁸⁴ *Ibid.*

⁷⁸⁵ Darebin Community Legal Centre Inc, *Submission no. 46*, 12-13. See also Mental Health Legal Centre Incorporated, *Submission no. 40*, 6; Fitzroy Legal Service Incorporated, *Submission no. 43*, 12.

⁷⁸⁶ Federation of Community Legal Centres (Victoria), *Submission no. 39*, 6; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 17, 33-34.

⁷⁸⁷ Victorian WorkCover Authority, *Submission no. 48*, 5.

Service Victoria was concerned that it ‘would deplete scarce legal resources and potentially give legitimacy and impetus to further groundless litigation’.⁷⁸⁸

As noted in chapter 3, some possible vexatious litigants deliberately choose to be self-represented. It is clear from the Victorian judgments that some vexatious litigants declined the court’s advice that they seek legal representation.⁷⁸⁹

The Committee’s view is that, given the impact of vexatious litigant orders on the rights of litigants, possible vexatious litigants should have the opportunity to obtain free legal assistance if they choose and satisfy relevant means tests. The Committee did not receive sufficient information about current assistance schemes to determine how this could best be achieved. The Committee draws the Victorian Government’s attention to this issue and encourages the Government to explore appropriate arrangements with legal assistance providers.

10.7.2 Other issues

Some participants in the Inquiry raised additional concerns about the way the Supreme Court hears applications under section 21:

- cross-examination of witnesses – the Women’s Legal Service Victoria argued that possible vexatious litigants who represented themselves should not be able to cross-examine witnesses, particularly where they have been subjected to family violence, sexual offences, stalking or threatening conduct by the litigant⁷⁹⁰
- delays – the Law Institute and Victorian Bar both expressed concern about delays in dealing with applications in the Supreme Court.⁷⁹¹

The VLRC recommended that evidence in support of applications should be on affidavit, with cross-examination allowed only with leave of the court. It also recommended that applications should automatically restrain further proceedings pending the hearing unless the court orders otherwise.⁷⁹²

The Committee did not receive sufficient evidence to make recommendations about these issues in this Inquiry and simply draws the Victorian Government’s attention to the VLRC’s report.

⁷⁸⁸ Wellington Shire Council, *Submission no. 15*, 4. See also Women’s Legal Service Victoria, *Submission no. 38*, 5.

⁷⁸⁹ See, for example, *Attorney-General (Vic) v Moran* [2008] VSC 159, 16; *Gallo v Attorney-General (Vic)* (Unreported, Full Court of the Supreme Court of Victoria, Starke, Crockett and Beach JJ, 4 September 1984)

⁷⁹⁰ Women’s Legal Service Victoria, *Submission no. 38*, 5.

⁷⁹¹ The Victorian Bar, *Submission no. 8*, 4-5. See also Law Institute of Victoria, *Submission no. 1B*, 2.

⁷⁹² Victorian Law Reform Commission, above n 682, 600.

10.8 Effect of orders

Although the current law restrains a vexatious litigant from bringing proceedings without leave, it does not expressly address situations where a declared vexatious litigant brings proceedings in breach of an order. As chapter 7 noted, there have been isolated instances where this has occurred in Victoria.

Other jurisdictions have included provisions to deal with such cases. The SCAG model bill provides that proceedings instituted in contravention of an order are permanently stayed. It also allows courts and tribunals to make an order confirming this and any other order it considers appropriate, including an order for costs.⁷⁹³ The UK's Civil Procedure Rules provide for applications and claims brought in breach of civil restraint orders to be automatically dismissed without the judge having to make any further order, and without the need for the other party to respond.⁷⁹⁴ The laws in some US states also deal with proceedings filed by mistake in their courts.⁷⁹⁵

In its report the VLRC recommended that proceedings commenced by a declared vexatious litigant should be a nullity.⁷⁹⁶ This issue was not addressed by participants in the Inquiry, although the Victoria DPP submitted that the effect of a declaration should be to stay proceedings where no other order is made.⁷⁹⁷

The Committee believes this is an area where the law should be clarified so that courts and tribunals and other parties are not required to expend further resources if declared vexatious litigant acts in breach of an order. It agrees that the law should be reformed so it is clear that an order stays any existing proceedings, and that new proceedings brought in breach of an order are a nullity.

Recommendation 22: The effect of litigation limitation orders

- 22.1 The new legislation should provide that the effect of a litigation limitation order is to stay any existing applications or proceedings covered by the order.
- 22.2 The new legislation should provide that any new applications or proceedings brought in contravention of the order are a nullity.

⁷⁹³ Letter from The Hon Rob Hulls MP, above n 708, Att B. See also *Vexatious Proceedings Restriction Act 2002* (WA) s 5; *Supreme Court Act 1933* (ACT) s 67A.

⁷⁹⁴ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders, cl 2.3(1), 3.3(1) and 4.3(1).

⁷⁹⁵ See *Code of Civil Procedure*, CAL CODE §391.7; *Hawaii Revised Statutes*, HAW REV STAT §634J-7; *Civil Practice and Remedies Code*, TEX CODE ANN §11.003; OHIO REV CODE ch 2323.52; *Florida Vexatious Litigant Law*, FLA STAT §68.093.

⁷⁹⁶ Victorian Law Reform Commission, above n 682, 600.

⁷⁹⁷ Victorian Director of Public Prosecutions, *Submission no. 22*, 3.

10.9 Additional orders

10.9.1 Vexatious litigant networks

As chapter 3 noted, there is evidence of relationships and networks between some declared vexatious litigants.

Other jurisdictions have attempted to address these issues. The SCAG model bill allows courts to make orders against people who, while not possible vexatious litigants themselves, have instituted or conducted vexatious proceedings ‘acting in concert’ with a declared vexatious litigant.⁷⁹⁸ In the UK there has been at least one case in which a court restrained a litigant not only from bringing proceedings himself, but also from acting as a McKenzie friend for other litigants.⁷⁹⁹

In its report the VLRC recommended the court be empowered to make an order against a person acting in concert with a vexatious litigant, and be able to restrain a declared vexatious litigant acting in concert with others. It also recommended the court be able to extend its orders to corporations or incorporated associations affiliated with the declared vexatious litigant.⁸⁰⁰

Few participants in this Inquiry addressed the issue in detail. Some noted that this had been a problem and supported adoption of similar powers in Victoria.⁸⁰¹ The Fitzroy Legal Service urged caution, noting a personal connection with a vexatious litigant should not preclude a person from bringing litigation where they are personally affected.⁸⁰²

The Committee received little evidence about the effectiveness of the ‘acting in concert’ provisions in other jurisdictions. It also notes that, while they may stop declared vexatious litigants circumventing orders by bringing proceedings in the names of other people, they do not deal with the broader problem of organisations and websites that promote discredited legal arguments. The Committee supports further research into these issues before any particular reforms are implemented.

Recommendation 23: Vexatious litigant networks

The Victorian Government should commission research into the nature and extent of vexatious litigant networks in Victoria and develop a strategy to deal with any problems that may be identified. This should include consideration of a power to restrain litigation by persons ‘acting in concert’ with persons who are subject to a litigation limitation order.

⁷⁹⁸ Letter from The Hon Rob Hulls MP, above n 708, Att B.

⁷⁹⁹ See *Her Majesty’s Attorney-General v Chitolie* [2004] EWHC 1943 (Admin).

⁸⁰⁰ Victorian Law Reform Commission, above n 682, 599-600.

⁸⁰¹ Greg Garde, *Transcript of evidence*, above n 689, 22-23; Telstra Corporation Limited, *Submission no. 29*; State Revenue Office, *Submission no. 16*.

⁸⁰² Fitzroy Legal Service Incorporated, *Submission no. 43*.

10.9.2 Other orders

The Committee's issues paper asked whether courts and tribunals should be able to make other orders to deal with vexatious litigants, such as requiring them to use legal representation for proceedings or prohibiting access to court premises.

The Committee is aware of instances where similar orders have been made by courts in relation to vexatious litigants in Victoria and other jurisdictions to address certain behaviours or proceedings.⁸⁰³ The SCAG model bill gives courts an express power to make 'any other order the Court considers appropriate in relation to the person'. The example cited in the bill is an order directing the person to file documents by mail.⁸⁰⁴

In its report, the VLRC recommended a similar provision in Victoria.⁸⁰⁵

The question of legal representation attracted most comment from participants in this Inquiry. The Law Institute of Victoria supported the proposal, stating that:

a requirement that a solicitor be on the record for all proceedings involving a vexatious litigant would be a useful mechanism to help filter out unmeritorious defences and claims. Vexatious litigants should either be required to obtain legal representation or be required to have a solicitor sign off on any proceedings in which the vexatious litigant is involved.⁸⁰⁶

Other participants were concerned about the practical impact of such orders given that some litigants are unable to afford legal representation. The Mental Health Legal Centre noted that '[p]eople living in poverty find it extremely difficult to access legal representation'.⁸⁰⁷ The joint submission from the HRLRC and PILCH stated that imposing such conditions could be a possible breach of the equality rights in the Charter.⁸⁰⁸

Participants were also divided about orders restricting access to court premises. The community legal centres that addressed the issue argued they were unnecessary given the presence of security in court, or thought they should be limited to cases where there were security risks or occupational health and safety considerations.⁸⁰⁹

⁸⁰³ See, for example, *Knight v Anderson* [2007] VSC 278, where a decision to grant leave was conditional on the litigant being legally represented; 'Ex-footballer gets gaol for contempt', *The Herald*, 21 April 1958, 1, which refers to contempt proceedings against a declared vexatious litigant for breaching an undertaking not to enter the Supreme Court without consent of the Chief Justice; *Her Majesty's Attorney-General v Ebert* [2001] EWHC Admin 695 and *Her Majesty's Attorney-General v Ebert* [2005] EWHC 1254 (Admin), where the High Court made orders restricting the litigant's access to court premises and regulating his contact with judges and court staff.

⁸⁰⁴ Letter from The Hon Rob Hulls MP, above n 708, Att B.

⁸⁰⁵ Victorian Law Reform Commission, above n 682, 600.

⁸⁰⁶ Law Institute of Victoria, *Submission no. 1B*.

⁸⁰⁷ Mental Health Legal Centre Incorporated, *Submission no. 40*. See also Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁸⁰⁸ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 36.

⁸⁰⁹ Darebin Community Legal Centre Inc, *Submission no. 46*; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 36; Fitzroy Legal Service Incorporated, *Submission no. 43*.

Case Study 15: Mr O

The Supreme Court declared Mr O a vexatious litigant on 2 May 2008.

The Supreme Court's decision contains a detailed history of Mr O's litigation. In short, in 1982 Mr O's mother took a mortgage of \$135 000 from a company over land she owned at Clarkes Hill. The company launched legal proceedings after there was a default on the mortgage. The County Court granted the finance company possession of the land and it was sold at public auction in 1997. Mr O's mother died in 2002.

According to the Court, Mr O subsequently issued 12 proceedings which were 'designed to seek justice for what he sees as the unlawful dispossession of his family's land'. The first proceedings, brought in December 2002, were private prosecutions against lawyers from the company, the real estate agent who sold the land and a barrister from earlier proceedings. They alleged, amongst other things, conspiracy to defraud, obtaining property by deception and attempting to pervert the course of justice. Other proceedings brought by Mr O in his own name or as executor of his mother's estate included appeals from, or attempts to appeal, earlier orders and a claim that the company had obtained possession of the land by fraud.

The Court's decision also refers to the fact that a bankruptcy notice was filed against Mr O in 2005 on the basis of unpaid costs orders, leading to further proceedings in the federal courts.

In 2006 the Attorney-General filed an application seeking a vexatious litigant order against Mr O.

According to the Court, Mr O submitted that he had been thwarted on technicalities in the proceedings rather than on the substantive issues. He also submitted an extract from *Blackstone's Commentaries* that it is 'the third subordinate right of every Englishman to apply to the Court of Justice for redress of injuries'.

However, Justice Curtain of the Supreme Court made the order sought by the Attorney-General. She stated that:

It is not that [Mr O] has shown an inability to accept the finality of the decision which has gone against him but rather his response to an adverse decision is to institute further proceedings where there is no prospect of success and where the true purpose of the proceedings is ultimately to relitigate issues concerning the repossession of Clarkes Hill and presumably to relitigate those issues until the property has been restored to him or he is compensated for its loss.

She ordered that Mr O not continue or commence legal proceedings without leave.

The Supreme Court told the Committee the Court of Appeal dismissed an application by Mr O for leave to appeal this order on 13 June 2008.

The Committee believes a general power to make other orders would help to address specific problems caused by particular vexatious litigants and is consistent with existing practice. The Committee is conscious of the practical and human rights concerns raised by some participants in the Inquiry. It notes that the Charter requires Victorian courts and tribunals to interpret legislation in a way that is compatible with human rights and this should help ensure competing interests are balanced in individual cases.

Recommendation 24: Power to make additional orders

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to make any other order they consider appropriate when making a litigation limitation order, consistent with the Standing Committee of Attorneys-General's model vexatious proceedings bill.

10.9.3 Cost shifting

Some agencies who had dealt with possible vexatious litigants suggested that courts should be able to make orders regulating these litigants' further dealings with government agencies.⁸¹⁰

The Committee heard that declared vexatious litigants continue to press their claims when their access to the courts is restricted. Forensic psychiatrist Dr Grant Lester told the Committee:

They do not disappear; they inhabit the steps of the courthouses, they inhabit the law libraries, they inhabit the ombudsmen's offices, they fall back and rest and recuperate in a range of alternative dispute resolution areas.⁸¹¹

Some participants expressed concern that vexatious litigant provisions may lead to 'cost shifting' of the problem from the courts and tribunals to other agencies. Professor Paul Mullen told the Committee, 'It is a matter of managing them in the place they are, in my view, rather than squirting them off to somewhere else.'⁸¹²

As chapter 1 noted, the focus of this Inquiry was on courts and tribunals rather than administrative agencies. Some complaint-handling agencies, such as the Disability Services Commissioner, told the Committee they do have powers to decline to deal with complaints which have already been considered by the courts.⁸¹³ The Committee did not receive sufficient evidence to recommend additional powers, but

⁸¹⁰ Wellington Shire Council, *Submission no. 15*; State Revenue Office, *Submission no. 16*.

⁸¹¹ Grant Lester, Forensic Psychiatrist, Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 39.

⁸¹² Paul Mullen, Professor of Forensic Psychiatry, Department of Psychological Medicine, Monash University, and Victorian Institute of Forensic Mental Health, *Transcript of evidence*, Melbourne, 6 August 2008, 39. See also Matthew Groves, *Submission no. 6*; Victorian Law Reform Commission, above n 682, 590.

⁸¹³ Disability Services Commissioner, *Submission no. 25*, 3; Health Services Commissioner, *Submission no. 41*, 2; Ombudsman Victoria, *Submission no. 45*, 6.

draws the Government's attention to the concerns raised by its agencies in this Inquiry.

10.10 Applications for leave

The ability of declared vexatious litigants to seek leave to bring proceedings is an important feature of vexatious litigant provisions because it safeguards continued access to justice in meritorious cases. However, as chapter 9 noted, the Committee heard that applications for leave are undermining the effectiveness of vexatious litigant orders. This section looks at proposals to improve the current arrangements.

10.10.1 The 'threshold test' for granting leave

Section 21 provides that the Supreme Court, or another court or tribunal if the vexatious litigant order provides, can grant leave to a declared vexatious litigant to continue or bring legal proceedings if satisfied the proceedings are not or will not be an abuse of process.

Victoria is one of the only jurisdictions in Australia and overseas to use this test. The SCAG model bill requires the declared vexatious litigant to show the proposed proceedings are 'not vexatious proceedings'.⁸¹⁴ Other jurisdictions require the declared vexatious litigant to also show that there are prima facie or reasonable grounds for the proceedings.⁸¹⁵ The Family Court's Rules require the Court to be satisfied that the case has a 'reasonable likelihood of success'.⁸¹⁶

The Committee heard mixed views about this issue. The Fitzroy Legal Service told the Committee it thought the current laws provided a fair procedure⁸¹⁷, but some other participants supported adding a 'reasonable grounds' or 'reasonable prospects' requirement.⁸¹⁸ Corrections Victoria submitted that:

[T]he current requirement for a vexatious litigant to obtain leave to bring proceedings adds nothing to the legal requirements imposed on every litigant who brings proceedings. The requirement appears to serve little purpose except to reverse the onus of proof – that is, the vexatious litigant must establish that the proceeding is not an abuse of process in order to obtain leave, whereas in other cases a defendant who is seeking to have proceedings issued by an "ordinary" litigant stayed as an abuse of process bears the onus of establishing that it is an abuse.⁸¹⁹

⁸¹⁴ Letter from The Hon Rob Hulls MP, above n 708. See also *Vexatious Proceedings Act 2005* (Qld) s 13; *Vexatious Proceedings Act* (NT) s 13.

⁸¹⁵ *High Court Rules 2004* (Cth) r 6.06; *Federal Court Rules* (Cth) r 21.25; *Federal Magistrates Court Rules 2001* (Cth) r 13.11; *Vexatious Proceedings Restriction Act 2002* (WA) s 6; *Judicature Act 1908* (NZ) s 88B; *Supreme Court Act 1981* (UK) c 54 s 42; *Federal Courts Act*, RSC 1985, c F-7 s 40; *Court of Queen's Bench Act*, CCSM, c C280 s 74; *Judicature Act*, RSA 2000, c J-2 s 23; *Vexatious Proceedings Act 2008* (NSW) s 16.

⁸¹⁶ *Family Law Rules 2004* (Cth) r 11.05.

⁸¹⁷ Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁸¹⁸ Women's Legal Service Victoria, *Submission no. 38*, 5; Commonwealth Bank of Australia, *Submission no. 18*, 7.

⁸¹⁹ Corrections Victoria, *Submission no. 32*, para 20.

As the Committee noted in the previous chapter, although some declared vexatious litigants bring multiple applications for leave, there is no evidence that the courts grant leave readily. Given that the aim of vexatious litigant laws is to restrain future vexatious litigation, the Committee supports the approach in the SCAG model bill that requires the litigant to show that the proceedings in question are 'not vexatious'. In Victoria's case, the test should be that the application or proceeding is not 'without merit' to reflect the Committee's recommended new terminology.

Recommendation 25: Granting leave to continue or bring proceedings

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to grant leave to continue or bring new applications or proceedings only if the application or proceeding is not 'without merit'.

10.10.2 Should other persons be notified about applications for leave?

The Committee heard varying evidence about whether the Attorney-General and other parties are notified and given a chance to object when a declared vexatious litigant seeks leave to bring new proceedings.

Corrections Victoria and Mr Julian Knight both advised the Committee that Corrections Victoria had been notified about Mr Knight's application for leave to sue the Commissioner of Corrections.⁸²⁰ However, Ms Sarah Vessali, the former principal solicitor with the Women's Legal Service Victoria, told the Committee that the Service had not been notified of another vexatious litigant's applications for leave to sue one of its clients. She told the Committee the Service had found out about the applications informally from other practitioners.⁸²¹

The Supreme Court told the Committee there was conflicting authority about notifying other persons of leave applications. One judge had ruled that the Court could require a litigant to notify the Attorney-General in appropriate cases, and that leave decisions made *ex parte* could be challenged later by other parties. Another judge had expressed the view that the Attorney-General should always be a party.⁸²²

Other jurisdictions have statutory notification requirements. The SCAG model bill requires the Court, if it is proposing to grant leave, to order service of the application on relevant persons and to give them an opportunity to be heard. The relevant persons include the defendant to the proposed proceedings and the Attorney-General.⁸²³ The UK's Civil Procedure Rules require litigants seeking leave to notify

⁸²⁰ Ibid para 10; Julian Knight, *Submission no. 14*, 10.

⁸²¹ Sarah Vessali, former Principal Lawyer, Women's Legal Service Victoria, *Transcript of evidence*, Melbourne, 13 August 2008, 12.

⁸²² Letter from Law Reform and Policy Officer, Supreme Court of Victoria, to Executive Officer, Victorian Parliament Law Reform Committee, 18 September 2008 citing *Attorney-General (Vic) & Phillip Morris Ltd v Lindsey* [2005] VSC 53, 5 and *Attorney-General v Kay* [2005] VSC 426.

⁸²³ Letter from The Hon Rob Hulls MP, above n 708, Att B. See also *Vexatious Proceedings Restriction Act 2002* (WA) s 6; *Vexatious Proceedings Act 2008* (NSW) s 16; *Vexatious Proceedings Act* (NT) s 13; *Vexatious Proceedings Act 2005* (Qld) s 13.

the other party in all cases. The notice must set out the nature and grounds of the application and give the other party seven days to respond. The litigant must include the other party's response, if any, in the application for leave.⁸²⁴

Some participants in the Inquiry agreed that the Attorney-General or other parties should be notified about applications for leave.⁸²⁵ Judge Misso of the County Court also thought that the Attorney-General should appear in applications for leave, 'otherwise the Judge hearing the application is put in an unenviable position of not being assisted in determining whether there is any merit in the proposed litigation and whether leave to proceed should be granted'.⁸²⁶

Other participants opposed notification as a matter of principle, or because they thought it could complicate leave hearings. The Darebin Community Legal Centre, for example, submitted 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'.⁸²⁷

Some participants who had experience with vexatious litigants raised similar concerns. Although they wanted to be, or did not object to being, notified of applications, they did not want to be compelled to appear at the hearings. As noted in the previous chapter, Corrections Victoria raised concerns about the cost and time involved in objecting to Mr Julian Knight's application for leave to sue the Commissioner for Corrections.⁸²⁸ The Commonwealth Bank of Australia advised that 'it does not wish to incur costs opposing such applications in cases that are absolutely unmeritorious'.⁸²⁹ Mr Ross Thomson from the Commonwealth Bank told the Committee, 'I feel the judiciary is sufficiently sophisticated and smart enough to handle these applications ... [otherwise] it becomes a cost safari'.⁸³⁰

The Committee's view is that there should be statutory rules about notification of other parties to overcome the current inconsistencies in law and practice. It favours a similar approach to that in the SCAG bill, which provides for notification if the court is proposing to grant leave. The proposed defendants should be notified, as should the Attorney-General in the case of extended and general orders. The Committee believes they should also have an opportunity to appear at the hearing but, given the potential time and cost involved, they should not be compelled to appear.

⁸²⁴ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders cl 2.4-2.6, 3.4-3.6, 4.4-4.6.

⁸²⁵ Department of Education and Early Childhood Development, *Submission no. 26*; Maartje Van-der-Vlies, *Submission no. 28*.

⁸²⁶ Judge Misso, *Submission no. 10*, 10.

⁸²⁷ Darebin Community Legal Centre Inc, *Submission no. 46*. See also Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31, 37*; Fitzroy Legal Service Incorporated, *Submission no. 43*.

⁸²⁸ Corrections Victoria, *Submission no. 32*, paras 10-14.

⁸²⁹ Commonwealth Bank of Australia, *Submission no. 18*, 7.

⁸³⁰ Ross Thomson, *Transcript of evidence*, above n 766, 19. See also Women's Legal Service Victoria, *Submission no. 38*, 5.

Recommendation 26: Notification of other persons about leave applications

The new legislation should require the Supreme Court, and other courts and VCAT where relevant, to notify designated persons and to provide them with an opportunity to be heard where it proposes to grant leave to a person to continue or bring an application or proceeding. The designated persons should include the Attorney-General, the person who applied for the litigation limitation order and the person/s named in the proposed application or proceedings.

10.10.3 Oral hearings or 'on the papers' decisions

In its issues paper, the Committee asked whether courts and tribunals should be able to determine leave applications 'on the papers' without an oral hearing. Given evidence that some declared vexatious litigants make multiple applications for leave, this appears to be one way to reduce the time and cost involved for the courts.

Some other jurisdictions allow leave applications to be determined on the papers. The UK Civil Procedure Rules provide for applications for leave to be determined without a hearing.⁸³¹ The courts in NSW have made similar orders in the case of some of their declared vexatious litigants.⁸³²

In its report the VLRC recommended that leave applications should be determined on the papers unless the court orders otherwise.⁸³³

There was some support for this proposal amongst participants in this Inquiry. The Supreme Court submitted that:

There may be scope to permit applications by declared vexatious litigants for leave to bring proceedings to be determined 'on the papers' without an oral hearing. This would enable those applications which are without merit to be dealt with more efficiently.⁸³⁴

The Commonwealth Bank of Australia told the Committee it was undesirable to waste court time on matters that could easily be decided on documentary evidence and there should be a hearing only in exceptional cases.⁸³⁵ Darebin Community Legal Centre said it saw no reason why it should not be allowed as long as the parties consented.⁸³⁶ Others thought there should still be an option for oral hearings. The Fitzroy Legal Service, for example, suggested decisions 'on the papers' might be adequate where parties were legally represented, but there could be circumstances where further inquiry is required.⁸³⁷

⁸³¹ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders cl 2.6(3), 3.6(3), 4.6(3).

⁸³² *Public Trustee v Gittoes aka Caldar* [2005] NSWSC 373; *Wentworth v Graham* [2003] NSWCA 307.

⁸³³ Victorian Law Reform Commission, above n 682, 600.

⁸³⁴ Supreme Court of Victoria, *Submission no. 34*, 3. See also Freckelton, Judicial officers and VCAT members report, above n 695, 20, 36.

⁸³⁵ Commonwealth Bank of Australia, *Submission no. 18*, 8.

⁸³⁶ Darebin Community Legal Centre Inc, *Submission no. 46*.

⁸³⁷ Fitzroy Legal Service Incorporated, *Submission no. 43*. See also Wellington Shire Council, *Submission no. 15*, 5; Department of Education and Early Childhood Development, *Submission no. 26*.

Other participants were not as supportive. Mr Simon Smith raised concerns that it would lead to courts making decisions ‘in private’ and there would need to be reporting about these decisions.⁸³⁸ The joint submission from the HRLRC and PILCH noted that ‘the fact that the vexatious litigant would feel that they have not been fully heard would further entrench their sense of grievance and their experience of unfairness in the legal system’.⁸³⁹

The Committee also heard that proposals to determine applications on the papers would require close consideration under the Charter. Mr Matthew Carroll from the VEOHRC told the Committee:

Generally the right to a fair hearing would incorporate a process whereby you have the ability to hear what is being said and respond to it. A process on the papers is not automatically and always contrary to human rights, but certainly the alarm bells go off and there is a need to look at it closely.⁸⁴⁰

In light of this evidence, the Committee does not propose to recommend that all leave applications be determined on the papers. It believes the courts and tribunals should have an option to do so where it is necessary to protect their resources, such as where a declared vexatious litigant brings multiple leave applications.

Recommendation 27: Determining leave applications ‘on the papers’

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to determine a leave application without an oral hearing if the court considers it appropriate.

10.10.4 Conditions on leave

The Committee’s issues paper also asked whether courts and tribunals should be able to impose conditions on leave, such as security for costs, to reduce their impact of proceedings on the courts and other parties.

The Committee heard that the Supreme Court has imposed conditions on leave on one occasion in the past.⁸⁴¹ Some jurisdictions have given their courts a statutory power to impose conditions.⁸⁴²

⁸³⁸ Simon Smith, *Transcript of evidence*, above n 694, 7.

⁸³⁹ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 37-38. See also State Revenue Office, *Submission no. 16*.

⁸⁴⁰ Matthew Carroll, *Transcript of evidence*, above n 719, 47. See also Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 37-38 which suggested that determining appeals on the papers may amount to a possible breach of the right to a fair hearing.

⁸⁴¹ See *Knight v Anderson* [2007] VSC 278, where leave was granted on condition the applicant was legally represented. See also Simon Smith, ‘Vexatious litigants and their judicial control – The Victorian experience’ (1989) 15(1) *Monash University Law Review* 48, 64.

⁸⁴² See, for example, *Vexatious Proceedings Restriction Act 2002* (WA) s 6; *Supreme Court Act 1933* (ACT) s 67A; *Judicature Act 1908* (NZ) s 88B; *Vexatious Proceedings Act 2005* (Qld) s 13; *Vexatious Proceedings Act* (NT) s 13; *Vexatious Proceedings Act 2008* (NSW) s 16.

Some participants supported a similar discretionary power for Victoria's courts and tribunals.⁸⁴³ Others noted the need for caution. Darebin Community Legal Centre, for example, submitted:

Conditions should not be so onerous as to be crushing or to seriously compromise the litigant's ability to proceed with the case ... 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.⁸⁴⁴

The Centre noted that one of its clients had obtained leave on condition he obtain legal representation and was now reliant on the goodwill of members of the legal profession for pro bono assistance.

Victorian Legal Aid, the HRLRC and PILCH opposed imposition of conditions on leave. The HRLRC and PILCH recommended conditions only be imposed in exceptional circumstances and where it would be compatible with the Charter.⁸⁴⁵

The Committee's view is that the courts and tribunals should have a discretion to impose conditions on leave where appropriate. It notes that the courts and tribunals must interpret legislation in a way that is compatible with human rights and this should ensure that competing rights and interests are balanced in each case.

Recommendation 28: Conditions on leave

The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to impose conditions on leave to continue or bring applications or proceedings.

10.10.5 Appeals from leave decisions

The Committee's issues paper also asked whether declared vexatious litigants should be able to appeal from decisions to refuse leave.

The SCAG model bill gives jurisdictions the option of making leave decisions non-appellable and the jurisdictions that have implemented the model bill have adopted this approach.⁸⁴⁶ Some other overseas jurisdictions take a similar approach.⁸⁴⁷ Under the UK's Civil Procedure Rules, the court can make an order that a leave decision is final and not appellable if the litigant repeatedly makes applications without merit.⁸⁴⁸

⁸⁴³ Commonwealth Bank of Australia, *Submission no. 18*, 8; Department of Education and Early Childhood Development, *Submission no. 26*.

⁸⁴⁴ Darebin Community Legal Centre Inc, *Submission no. 46*.

⁸⁴⁵ Victoria Legal Aid, *Submission no. 33B*; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 38.

⁸⁴⁶ Letter from The Hon Rob Hulls MP, above n 708, Att B; *Vexatious Proceedings Act 2005* (Qld) s 11; *Vexatious Proceedings Act* (NT) s 11; *Vexatious Proceedings Act 2008* (NSW) s 14.

⁸⁴⁷ See *Judicature Act 1908* (NZ) s 88B; *Federal Courts Act*, RSC 1985, c F-7 s 40.

⁸⁴⁸ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders, cl 2.3(2).

Few participants addressed this issue during the Inquiry. The Commonwealth Bank of Australia supported limitations on appeals, while Darebin Community Legal Centre noted that appeals seem to defeat the purpose of a finalised declaration and litigants can always bring another leave application if circumstances change.⁸⁴⁹ Other participants thought there should be a right of appeal.⁸⁵⁰

The Committee found limited evidence during the Inquiry that declared vexatious litigants are appealing from leave decisions in a way that is significantly affecting the resources of courts and tribunals. Rather than limiting appeal rights for all litigants, the Committee prefers the UK approach which allows appeals to be limited only where there is evidence a litigant has brought repeated unmeritorious applications.

10.10.6 Dealing with excessive leave applications

Chapter 9 noted that a small number of declared vexatious litigants in Victoria have brought large numbers of leave applications, most of which have been unsuccessful. This raises concerns about whether additional steps are required to protect the resources of courts and tribunals.

The UK High Court has previously limited the number of times a declared vexatious litigant can make leave applications.⁸⁵¹ The SCAG model bill does not attempt to limit the number of times leave applications may be brought, but it does require declared vexatious litigants to disclose to the court all occasions on which they have previously sought leave whenever they lodge a leave application.⁸⁵²

In light of the evidence it received, the Committee supports the provisions in the SCAG model bill that require declared vexatious litigants to disclose previous leave applications. This will help to ensure the courts are aware of any pattern of multiple applications and will help to prevent any ‘judge shopping’ by litigants.

The Committee also believes that the courts and tribunals should have a statutory power to limit the number of occasions on which leave applications can be made. Given the importance of the leave mechanism to ensuring continued access to justice, this power should only be exercised in the most extreme cases.

⁸⁴⁹ Commonwealth Bank of Australia, *Submission no. 18*, 8; Darebin Community Legal Centre Inc, *Submission no. 46*, 13.

⁸⁵⁰ State Revenue Office, *Submission no. 16*, 6.

⁸⁵¹ *Her Majesty's Attorney-General v Ebert* [2005] EWHC 1254 (Admin).

⁸⁵² Letter from The Hon Rob Hulls MP, above n 708, Att B. See also *Vexatious Proceedings Act 2008* (NSW) s 14; *Vexatious Proceedings Act 2005* (Qld) s 11; *Vexatious Proceedings Act* (NT) s 11.

Recommendation 29: Controlling excessive leave applications

- 29.1 The new legislation should require a person seeking leave under a litigation limitation order to disclose all previous applications for leave.
- 29.2 The new legislation should also give the Supreme Court, and other courts and VCAT where relevant, the power to limit the number of occasions on which a person may seek leave if there is evidence that the person has frequently brought applications for leave that are without merit.

10.11 Review of orders

10.11.1 Appeals from orders

Declared vexatious litigants in Victoria have a right of appeal from an order, subject to leave from the Supreme Court or Court of Appeal.

Most participants in this Inquiry supported continued rights of appeal.⁸⁵³ The Privacy Commissioner, for example, submitted '[i]n the event that an individual is declared a vexatious litigant, there should always be a right of review of that decision'.⁸⁵⁴ Participants also drew the Committee's attention to the importance of incorporating appeal rights into any new laws.⁸⁵⁵

The previous chapter noted that there was only limited evidence to suggest that declared vexatious litigants were using appeal rights in a way that undermined the purpose of section 21. The Committee considers there should be rights of appeal from all orders under its proposed graduated system, subject to a leave requirement consistent with the current law.

10.11.2 Applications to vary or revoke orders

Section 21 currently allows a declared vexatious litigant to apply for variation or revocation of his or her vexatious litigant order.

The Family Violence Protection Act gives vexatious litigants in family violence proceedings a similar right, but it imposes a leave requirement on applications and requires notification of the Attorney-General and the person protected by the order.⁸⁵⁶ The UK's rules contain similar provisions.⁸⁵⁷

⁸⁵³ Public Interest Law Clearing House and Human Rights Law Resource Centre, *Submission no. 31*, 34-35; Fitzroy Legal Service Incorporated, *Submission no. 43*, 10; Darebin Community Legal Centre Inc, *Submission no. 46*, 13; Maartje Van-der-Vlies, *Submission no. 28*, 2. cf Women's Legal Service Victoria, *Submission no. 38*, 6, which said there may be grounds for limiting appeals.

⁸⁵⁴ Victorian Privacy Commissioner, *Submission no. 11*.

⁸⁵⁵ Public Interest Law Clearing House, *Submission no. 31B*, 2; Victorian Director of Public Prosecutions, *Submission no. 22*, 4; Wellington Shire Council, *Submission no. 15*, 4.

⁸⁵⁶ *Family Violence Protection Act 2008* (Vic) s 197.

The previous chapter noted that, although few declared vexatious litigants have applied to vary or revoke orders, one litigant has made multiple applications. The Committee understands that the Supreme Court previously raised, but did not make, an order preventing further applications by that person without leave.⁸⁵⁸

The Committee believes there is a need to deal with such isolated cases, but without reducing rights of other declared vexatious litigants. The Committee does not believe a leave requirement would be effective because a determined vexatious litigant could simply bring multiple leave applications. The Committee prefers an approach similar to its approach to applications for leave to bring proceedings. This would give the courts the power to determine applications without an oral hearing if the court considers it appropriate, and to limit the occasions on which applications can be made.

10.11.3 Periodic reviews

Vexatious litigant orders in Victoria are usually drafted so that they remain in force for the remainder of the litigant's life. The Committee is only aware of one case in which the Supreme Court imposed a time limit on an order.⁸⁵⁹

Mr Matthew Carroll from the VEOHRC told the Committee the absence of any mechanism for automatic reviewing orders was one feature of the current system that might cause concern from a human rights perspective.⁸⁶⁰

Orders under the UK's system have built-in time limits. Limited civil restraint orders remain in effect for the duration of the proceedings in which they are made, unless the court orders otherwise. Extended and general civil restraint orders apply for specified periods up to two years, although they can be extended for further periods of up to two years if the court considers it appropriate.⁸⁶¹

The Law Institute told the Committee an expiry period of two years would ensure rights of access to justice were balanced against public interest considerations.⁸⁶² However, Mr Greg Garde from the Victorian Bar told the Committee 'two years is not long enough. Two years is but a short time frame, let me assure you, in the view of a vexatious litigant.'⁸⁶³

The Committee considers there is benefit from a human rights perspective in giving courts and VCAT an express power to impose time limits on orders, with an option to extend the order at the end of that period. The Committee agrees that two years will not always be a sufficient period in light of the evidence it received about the behaviour of some declared vexatious litigants in Victoria. The Committee believes

⁸⁵⁷ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders cl 2.6(3), 3.6(3), 4.6(3).

⁸⁵⁸ *Attorney-General (Vic) v Kay* [2006] VSC 9; *Attorney-General (Vic) v Kay* [2006] VSC 11.

⁸⁵⁹ See *Attorney-General (Vic) v Knight* [2004] VSC 407.

⁸⁶⁰ Matthew Carroll, *Transcript of evidence*, above n 719, 43.

⁸⁶¹ *Civil Procedure Rules* (UK) Practice Direction 3c – Civil Restraint Orders cl 2.9, 3.9-3.10, 14.19-14.10.

⁸⁶² Law Institute of Victoria, *Submission no. 1C*, 5.

⁸⁶³ Greg Garde, Chair, *Transcript of evidence*, above n 689, 24.

the courts should be able to determine appropriate time limits on a case-by-case basis according to the individual litigant and the nature of their proceedings.

Recommendation 30: Review of orders

- 30.1 The new legislation should give persons who are subject to litigation limitation orders a right to appeal, subject to leave, and a right to apply for variation or revocation of the order.
- 30.2 The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to determine an application for variation or revocation of the order without an oral hearing if the court considers it appropriate.
- 30.3 The new legislation should give the Supreme Court, and other courts and VCAT where relevant, the power to limit the number of occasions on which a person may apply for variation or revocation of the order if there is evidence that the person has frequently brought applications that are without merit.
- 30.4 The new legislation should provide that litigation limitation orders remain in effect for the period determined by the court or VCAT.

10.12 Publication and communication of orders

10.12.1 Publication of orders

There has been very limited public information available about vexatious litigant orders in Victoria. Section 21 requires the Attorney-General to cause vexatious litigant orders to be published in the Government Gazette. Most decisions under section 21 are now published on the internet, but very few of the early decisions are available from law reports.

Some jurisdictions in Australia and overseas publish lists of declared vexatious litigants on websites.⁸⁶⁴ The SCAG model bill requires designated court officials to gazette orders and to enter them into a publicly available register.⁸⁶⁵ The VLRC recommended that, in addition to gazettal requirements, the Prothonotary of the Supreme Court should be required to keep a register of orders that is searchable through the Court's website.⁸⁶⁶

⁸⁶⁴ Supreme Court of New South Wales, *Fact sheet on vexatious litigants* (2008) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_vexlitstable> viewed 15 February 2008; Queensland Courts, *Vexatious litigants* (2007) <<http://www.courts.qld.gov.au/151.htm>> viewed 13 May 2008; Her Majesty's Court Service, *Vexatious litigants* (2008) <http://www.hmcourts-service.gov.uk/infoabout/vexatious_litigant/index> viewed 15 February 2008; Scottish Courts, *Vexatious litigants under the Vexatious Actions (Scotland) Act 1898* (2008) <<http://www.scotcourts.gov.uk/session/vexatiousLitigants.asp>> viewed 20 August 2008.

⁸⁶⁵ Letter from The Hon Rob Hulls MP, above n 708, Att B. The Queensland legislation gives the Supreme Court registrar the power to publish details of orders in other ways: *Vexatious Proceedings Act 2005* (Qld) s 9.

⁸⁶⁶ Victorian Law Reform Commission, above n 682, 600.

The Darebin Community Legal Centre raised concerns about the impact of such registers on the privacy and reputation of litigants, submitting they were:

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. ...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.⁸⁶⁷

The contrary argument put by other participants in the Inquiry was that public access to orders would make it easier for people working in the justice system and other parties to determine when they are dealing with a vexatious litigant. Mr Greg Garde from the Victorian Bar told the Committee there was a need for a register in some form ‘so that other people who are subjected to problems that may be caused by vexatious litigants can become aware of the fact that they are vexatious litigants.’⁸⁶⁸

Other participants also thought publication of orders would promote greater transparency under the provision. Mr Simon Smith told the Committee, ‘I am a great believer in the glare of publicity being able to bring issues to the surface. That is a very important thing for democracy.’⁸⁶⁹ PILCH was supportive of the provisions of the Family Violence Protection Act which would require the Magistrates’ Court and Children’s Court to report to the Attorney-General about the number of vexatious litigant orders made, describing it as ‘an essential mechanism to ensure accountability and transparency’.⁸⁷⁰

The Committee agrees that a publicly searchable register would improve the transparency of the current laws and allow interested persons to determine when they are dealing with a declared vexatious litigant. The Committee has already recommended a central coordinating agency to carry out various functions under the proposed new laws and it should be responsible for maintaining the central register.

The Committee acknowledges there is potential for information on the register to affect privacy. The courts should have the option of suppressing the names of parties in appropriate cases.

Recommendation 31: Public register of orders

31.1 The agency established or designated in accordance with recommendation 17.3 should establish a publicly searchable register of all litigation limitation orders, including on the internet.

31.2 The courts and VCAT should have the power to order non-publication of the name of a person mentioned in the order.

⁸⁶⁷ Darebin Community Legal Centre Inc, *Submission no. 46*, 14.

⁸⁶⁸ Greg Garde, *Transcript of evidence*, above n 689, 22; The Victorian Bar, *Submission no. 8*, 5.

⁸⁶⁹ Simon Smith, *Transcript of evidence*, above n 694, 7.

⁸⁷⁰ Public Interest Law Clearing House, *Submission no. 31B*, 3.

10.12.2 Communication within the justice system

Chapter 7 noted that all courts in Victoria have procedures to alert relevant staff about vexatious litigant orders but these have not been effective in every case.

The Family Violence Protection Act contains statutory requirements for service of orders between courts.⁸⁷¹

The VLRC recommended statutory notification requirements in its recent report.⁸⁷²

The Committee heard some alternative suggestions for reform in this Inquiry. The Women's Legal Service Victoria suggested that its recommended central coordinating agency could keep a register of orders and provide information to the judiciary, court staff and members of the public.⁸⁷³ The State Revenue Office thought there should be appropriate laws for internal and cross-border communication, subject to appropriate privacy safeguards.⁸⁷⁴ Some Magistrates' Court staff who spoke to Dr Freckelton suggested an internet list of vexatious litigants.⁸⁷⁵

The Committee believes that statutory notification requirements are unnecessary and cumbersome if there are sufficiently robust administrative systems in place for communication between the Government, courts and VCAT. These systems could also extend to monitoring orders from other jurisdictions to determine whether applications should be made against those litigants in Victoria as well, an issue discussed earlier in this chapter.

The Committee has recommended there be a central coordinating agency within the Government to carry out functions under laws, and that agency should ensure that appropriate arrangements are in place.

Recommendation 32: Coordination within the justice system

- 32.1 The agency established or designated in accordance with recommendation 17.3 should establish appropriate arrangements for ensuring that all courts and VCAT are aware of litigation limitation orders relevant to their jurisdiction.
- 32.2 The agency should monitor orders in Victoria and vexatious litigant orders in other jurisdictions to identify cases which may warrant a general litigation limitation order and should bring these cases to the attention of the Attorney-General.

⁸⁷¹ *Family Violence Protection Act 2008* (Vic) s 199. There are similar provisions in the United States: see *Code of Civil Procedure*, CAL CODE §391.7; *Civil Practice and Remedies Code*, TEX CODE ANN §11.104; *Ohio Revised Code*, OHIO REV CODE ch 2323.52.

⁸⁷² Victorian Law Reform Commission, above n 682, 600.

⁸⁷³ Women's Legal Service Victoria, *Submission no. 38*, 4.

⁸⁷⁴ State Revenue Office, *Submission no. 16*, 8.

⁸⁷⁵ Freckelton, Court and VCAT staff report, above n 690, 14

Chapter 11: Conclusion

The Committee's Inquiry into vexatious litigants attracted considerable interest and a multitude of differing views.

For all the attention given to vexatious litigants in recent years, there is still little published research or data about the phenomenon. The Committee had difficulty in this Inquiry finding out exactly how many there are, why they behave in the way they do and what happens when they are restrained from accessing the courts.

The Committee did hear evidence that vexatious litigants use the justice system in a way that not only wastes public resources but sometimes resembles little more than harassment. The easy option would simply be to extend the existing vexatious litigant provision to make it easier to stop people who behave in this way from using courts and tribunals.

However, based on evidence to this Inquiry, legislating to further restrict access to the courts would be unlikely to solve the problem. The justice system is reluctant to apply laws that restrict access to justice and, even when they have been applied in the past, they have not always been effective. It could simply lead to 'cost shifting' as vexatious litigants turn to other avenues to press their claims. Such laws also risk capturing genuine litigants who are frequent users of the justice system.

The Committee's preferred approach is one that seeks to balance rights of access to justice against the need to protect the justice system and other members of the community from vexatious litigation. This approach accords with Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic). It is one that recognises the human as well as legal dimensions of the problem and uses strategies based on evidence.

In this report the Committee has recommended that the justice system trial a number of strategies for managing vexatious litigants better within the justice system, such as case management, training and support and greater use of existing powers to control vexatious proceedings. Administrative complaints agencies such as parliamentary ombudsmen's offices have been developing similar strategies for some time. Parts of the justice system, for example the Victorian Civil and Administrative Tribunal, are also starting to look at ways to manage these issues better.

The Committee recognises there will continue to be extreme cases where the only solution is to limit access to courts and tribunals. The Committee believes its recommended graduated system of orders has the potential to give the justice system scope to deal with these issues earlier, and in a way that is more proportionate to the problem. Trial and evaluation of such laws should put the justice system in a better position to respond to the challenges posed by vexatious litigants in the future.

**Adopted by the Law Reform Committee
17 November 2008**

Appendix A – List of written submissions

	Name of individual or organisation	Date received
1	Law Institute of Victoria	7 September 2007
1B	Law Institute of Victoria – supplementary submission	27 June 2008
1C	Law Institute of Victoria – supplementary submission	15 September 2008
2	Confidential	7 May 2008
3	Mr John Arnott	19 May 2008
4	Mr Kevin Davies	21 May 2008
5	Energy and Water Ombudsman (Victoria)	4 June 2008
6	Dr Matthew Groves	6 June 2008
7	G Lloyd-Smith	12 June 2008
8	The Victorian Bar	17 June 2008
9	City of Melbourne	18 June 2008
10	Judge Misso	18 June 2008
11	Victorian Privacy Commissioner	19 June 2008
12	Confidential	23 June 2008
13	Dr Grant Lester	26 June 2008
14	Mr Julian Knight	24 June 2008
15	Wellington Shire Council	26 June 2008
16	State Revenue Office	26 June 2008
17	Office of Police Integrity	26 June 2008
18	Commonwealth Bank of Australia	26 June 2008
19	Mr Darryl O'Bryan	26 June 2008
20	Australian Bankers' Association	27 June 2008
21	Mr Simon Smith	27 June 2008
22	Victorian Director of Public Prosecutions	27 June 2008
23	Foster's Group Limited	27 June 2008
24	Disability Discrimination Legal Service Inc	27 June 2008
25	Disability Services Commissioner	27 June 2008
26	Department of Education and Early Childhood Development	30 June 2008
27	Public Transport Ombudsman of Victoria	30 June 2008
28	Ms Maartje Van-der-Vlies	30 June 2008
29	Telstra Corporation Limited	1 July 2008
30	Medical Practitioners Board of Victoria	1 July 2008
31	Public Interest Law Clearing House and Human Rights Law Resource Centre	1 July 2008
31B	Public Interest Law Clearing House – supplementary submission	3 October 2008
32	Corrections Victoria	1 July 2008
33	Victoria Legal Aid	1 July 2008
33B	Victoria Legal Aid – supplementary submission	15 September 2008
34	Supreme Court of Victoria	1 July 2008
35	Australian Corporate Lawyers Association	1 July 2008

36	Commonwealth Director of Public Prosecutions	2 July 2008
37	Magistrates' Court of Victoria	2 July 2008
38	Women's Legal Service Victoria	4 July 2008
39	Federation of Community Legal Centres (Vic)	7 July 2008
40	Mental Health Legal Centre Inc	8 July 2008
41	Health Services Commissioner	9 July 2008
42	The Institute of Legal Executives (Victoria)	10 July 2008
43	Fitzroy Legal Service Inc	11 July 2008
44	Environment Protection Authority Victoria	14 July 2008
45	Ombudsman Victoria	17 July 2008
46	Darebin Community Legal Centre Inc	18 July 2008
47	Victoria Police	29 July 2008
48	Victorian WorkCover Authority	29 July 2008

Appendix B – List of witnesses

Public Hearing, 6 August 2008
Room G1, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Mr Simon Smith	Former solicitor and PhD candidate, Monash University
Ms Irene Chrisafis, Lawyer, Litigation Lawyers Section	Law Institute of Victoria
Mr Mark Yorston, Consultant, Wisewoulds Lawyers	
Ms Mimi Marcus, Associate, Maddocks	
Mr Greg Garde QC, Chair, Victorian Bar Law Reform Committee	The Victorian Bar
Mr Tony O'Donoghue, Member, Victorian Bar Law Reform Committee	
Mr Franz Holzer, Member, Victorian Bar Law Reform Committee	
Dr Grant Lester, Forensic Psychiatrist	Victorian Institute of Forensic Mental Health
Professor Paul Mullen, Professor of Forensic Psychiatry, Department of Psychological Medicine, Monash University	
Mr Matthew Carroll, Acting Chief Executive Officer	Victorian Equal Opportunity and Human Rights Commission
Mr Chris Thwaites, Manager, Investigation and Conciliation Unit	
Ms Donna Williamson, Prison Outreach Worker	Darebin Community Legal Centre
Mr Cameron Shilton, Community Legal Education Worker	
Mr Peter Byrne, Principal Solicitor, Policy and Advice Section	Office of Public Prosecutions

Public Hearing, 13 August 2008
Room G1, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Mr Jim Wilson, Director of Corporate Services	Wellington Shire Council
Ms Penny Drysdale, Law Reform and Policy Officer	Women's Legal Service Victoria
Ms Sarah Vessali, former Principal Lawyer	
Mr Ross Thomson, Legal Officer	Commonwealth Bank of Australia
Mr Grant Dewar, Legal Officer	
Mr Ben Schokman, Human Rights Lawyer	Human Rights Law Resource Centre (HRLRC)
Ms Kristen Hilton, Executive Director	
Ms Michelle Panayi, Victorian Bar Legal Assistance Scheme Co-Manager	
Mr Martin Thomas, Policy Officer	Public Interest Law Clearing House (PILCH)
Dr Christine Atmore, Policy Officer	
Mr Charandev Singh, Human Rights and Advocacy Worker, Brimbank Melton Community Legal Centre	Mental Health Legal Centre Inc
Mr Chris Wheeler, Deputy Ombudsman	Federation of Community Legal Centres (Vic)
Professor Tania Sourdin, Professor of Conflict Resolution	
	NSW Ombudsman
	University of Queensland

Public Hearing, 6 October 2008
Room G8, 55 St Andrews Place, East Melbourne

Witness(es)	Organisation
Justice Kevin Bell, President	Victorian Civil and Administrative Tribunal (VCAT)

Appendix C – List of events attended, meetings and site visits

Organisation	Event	Date
Law Institute of Victoria	Courts Practice Committee meeting	22 May 2008
Victorian Law Reform Commission	Civil Justice Review report launch	28 May 2008
NSW Ombudsman	Dealing with unreasonable complainant conduct workshop	31 July 2008
Australian Centre for Peace and Conflict Studies	Working with High Conflict Clients seminar	23 September 2008
Centre for Comparative Constitutional Studies	2008 Protecting Human Rights Conference	3 October 2008

Appendix D – References used in case studies

Case study 1

Affidavit sworn by Rupert Francis Millane, 19 October 1954, Supreme Court File No. 1236 of 1948

Lester, Grant and Smith, Simon, 'Inventor, entrepreneur, rascal, crank or querulent?: Australia's vexatious litigant sanction 75 years on' (2006) 13(1) *Psychiatry, Psychology and Law* 1

Re Millane [1930] VLR 381

Case study 2

Affidavit sworn by Edna Frances Isaacs, 16 July 1941, Supreme Court File No. M501

Affidavit sworn by Joseph Davis, 8 July 1941, Supreme Court File No. M501

Affidavit sworn by Thomas Augustine Keely, 10 July 1941, Supreme Court File No. M501

'Court gives composer leave to sue "The Age"', *The Age* (Melbourne), 11 December 1984, 15

'Mrs Edna Isaacs bankrupt', *The Herald* (Melbourne), 5 September 1941, 3

Smith, Simon, 'The vexatious litigant sanction: An overview of the first 110 years' (Paper presented at the Access to justice: How much is too much? conference, Prato, Italy, 30 June-1 July 2006)

'Woman held to be vexatious litigant', *The Herald* (Melbourne), 21 July 1941, 3

Case study 3

'Collapse in Court; man blames dope', *The Herald* (Melbourne), 20 March 1953, 3

Collins v Hudson [1953] VLR 396

Collins v Supreme Court Library Committee [1953] VLR 161

'Contempt order on ex-Fitzroy star', *The Sun* (Melbourne), 11 April 1953, 5

'Court flurry when man disappears', *The Sun* (Melbourne), 21 March 1953, 5

'Court stir as man put out', *The Sun* (Melbourne), 1 June 1963, 9

'Declared vexatious litigant', *The Herald* (Melbourne), 27 March 1953, 3

'Ex-footballer gets gaol for contempt', *The Herald* (Melbourne), 21 April 1958, 1

'Ex-footballer should be locked up', *The Sun* (Melbourne), 24 March 1953, 7

'Exit Goldie, fighter', *The Age* (Melbourne), 1 May 1982, 2

Francis, C, 'Valete Goldie' (1982) *Victorian Bar News* 20

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Laszloffy v Victoria (Unreported, Supreme Court of Victoria, Sholl J, 6 September 1963)

'Engineer declared vexatious litigant', *The Age* (Melbourne), 7 September 1963, 7

'Mrs Isaacs weds', *The Herald* (Melbourne), 20 February 1954, 2

Case study 5

Affidavit sworn by John Joseph Andrew Sharkey, 4 December 1969, Supreme Court File No. M7029

Bienvenu v Attorney-General (Vic) [1982] VR 563

Bienvenu v Royal Society for the Protection of Animals [1967] VLR 656

Smith, Simon, 'Constance May Bienvenu: Animal welfare activist to vexatious litigant' (2007) 11 *Legal History* 31

Case study 6

Re an application by Cousins (Unreported, Supreme Court of Victoria, Starke J, 4 February 1975)

Letter from The Hon Rob Hulls MP, Attorney-General to Chair, Victorian Parliament Law Reform Committee, 22 August 2008, Att A, 1

Case study 7

Attorney-General (Vic) v Ben Hemici (Unreported, Supreme Court of Victoria, Starke J, 10 March 1981)

Elias, David, "'Self-taught lawyer" ruled out of court', *The Age* (Melbourne), 2 June 1981, 3

Case study 8

Affidavit sworn by Channagiri Krishna Jaisimha Rao, 14 April 1981, Supreme Court File No. M15122 of 1981

Affidavit sworn by Channagiri Krishna Jaisimha Rao, 29 June 1981, Supreme Court File No. M15122 of 1981

Affidavit sworn by Percival Stanley Malbon, 14 April 1981, Supreme Court File No. M15122 of 1981

Gallo v Attorney-General (Vic) (Unreported, Full Court of the Supreme Court of Victoria, Starke, Crockett and Beach JJ, 4 September 1984)

Re Gallo (Unreported, Supreme Court of Victoria, Gray J, 17 July 1981)

Case study 9

Attorney-General (Vic) v Lindsey (Unreported, Supreme Court of Victoria, Kellam J, 16 July 1998)

Attorney-General (Vic) v Lindsey [2004] VSC 383

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Order of Justice Harper, 28 November 2007, Supreme Court File No. 7476 of 1997

Phillip Morris Limited v Attorney-General (Vic) & Lindsey [2006] VSCA 21

Re Sjostrom-Clemens-Lindsey [2003] VSC 94

Case study 10

Attorney-General (Vic) v Kay (Unreported, Supreme Court of Victoria, Eames J, 23 February 1999)

Attorney-General (Vic) v Kay [2005] VSC 349

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Attorney-General (Vic) v Kay [2006] VSC 11

Kay v Attorney-General (Vic) [2000] VSCA 176

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Letter from Law Reform and Policy Officer, Supreme Court of Victoria to Executive Officer, Victorian Parliament Law Reform Committee, 18 September 2008

Case study 11

Application by Horvath (Senior) [2004] VSC 332

Attorney-General (Vic) v Horvath, Senior [2001] VSC 269

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Case study 12

Affidavit sworn by Michael Weston, 20 May 2004, Supreme Court File No. 7711 of 2001

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Case study 13

Affidavit sworn by James Patrick Ruddle, 25 March 2004, Supreme Court File No. 9420 of 2003

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Case study 14

Attorney-General (Vic) v Shaw [2007] VSC 148

Attorney General (WA) v Shaw [2004] WASC 280

Shaw v Attorney-General (WA) [2005] WASC 149

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