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LAW REFORM COMMITTEE

Inquiry into vexatious litigants

Melbourne — 6 August 2008

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Mr S. Smith, solicitor and PhD candidate, Monash University.

The CHAIR — Firstly, I welcome and thank Mr Simon Smith for coming in today. I declare this hearing open. I shall go through a few preliminaries before we begin.

This is an inquiry that the committee has into vexatious litigation. All evidence at these hearings is protected by parliamentary privilege, as provided under the act. That means, as I am sure you know, that anything you say in here is protected, but if you say some controversial things outside the forum of this hearing, then you will not be protected in this way.

Hansard will be recording the proceedings, and you will be provided with a copy of the transcript after the meeting. You can make some technical changes to that, but obviously you will not be able to change the substance of what you have said. Simon, thank you very much for the material you have provided us with, both the submission and also for an advance copy of your thesis.

The way we run these meetings is that you have about 45 minutes. We will leave it open to you to talk to us about your submission and your views on the terms of reference, and then we will have some questions that we want and need to ask you as part of our evidence gathering. If it is okay with you, we will run it that way and then just see how we go.

Mr SMITH — Thank you, Chair, for those remarks and the opportunity to be here. I thought, further to my submission, I would perhaps make the following points. It might be useful for the committee if I provided some of my professional background. I think that adds to my four years of doctoral research into the vexatious litigant sanction in Australia.

In particular, I practised as a solicitor for many years, having been admitted in 1975. For 10 years I was the coordinator of the Springvale Monash Legal Service, which is Australia's oldest and busiest grassroots community legal centre. In that role I assisted the pioneering of the first family law mediation centre in Australia in 1984, and I interviewed many litigants in person at those centres during that time.

In 1989 I established the state insurance consumer appeals centre, which is now part of the financial ombudsman service, and this was the first ombudsman or ADR service in the Australian financial services sector. I have also held senior executive positions in the financial services sector and have been actively involved in introducing customer charters into Australia.

Finally I have published extensively in legal practice and consumer protection areas. For example, I am a founding editor of the *Lawyers Practice Manual*, a leading practitioner text. So much for the background.

Access to justice has long been regarded as an important tenet of our democratic system. Indeed, just on 800 years ago it was the determination of a number of litigants in person that won concessions from the Crown of some fundamental liberties that we value today as part of our legal system. That document that those litigants in person fashioned is known as the *Magna Carta*.

We are here today discussing whether, and if so how, the states should narrow that access to the courts. At least that is my reading of the submissions on the committee's website. Let me say at the outset that I am in the corner of keeping the courts accessible, and in particular accessible to litigants in person. Here I endorse the views of a New Zealand academic, Professor Webb, who writes:

> … the primary function of the court system is to resolve disputes between citizens without them having to resort to force. In a sense courts are the original alternative method of dispute resolution. Advocates exist for one reason — to assist litigants in resolving those disputes. Litigants are practically and logically necessary for disputes to be settled, advocates are not.

Further he says that if:

> … self-represented litigants do not fit into the system perfectly, this may be due to the poor design of the system rather than the lack of ability, understanding, or good faith of the litigants.

So what are the data? My research shows vexatious litigants are no more a problem for Australian courts than they have ever been. As such, there is no publicly demonstrated, quantitative basis for reform. Indeed, declared vexatious litigants in Australia are small in number. Here I note that I use the term 'vexatious litigant' in its precise legal meaning. It is a person declared a vexatious litigant by a superior court. It is not, to use the language of the lawmakers to the north, a litigant person who is simply annoying or inconvenient.

In Victoria there have been 14 such declarations in 77 years, or 1 every 5.5 years. Australia-wide in the same period there have been 47 persons declared in 10 of the 11 superior courts — hardly an avalanche. Nor is there evidence of forum shopping. In 77 years there have been only four people declared as vexatious litigants in more than one jurisdiction. Nor is there evidence of broad movement of vexatious litigants: they are very much one-offs.

What is the cost of vexatious litigants to the legal system? There is no doubt that individual vexatious litigants take up court time and cause expense to parties. Unfortunately, there is very little data on actual costs. One 2007 estimate suggested the figure of $6.2 million per litigant. Interestingly, that same year the Channel 7 case in the Federal Court, where each party was represented, was dismissed after 120 sitting days over five years, with the presiding judge describing the use of legal resources as extremely wasteful, bordering on the scandalous. It cost $200 million. Using 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.

While I suggest that if wastage of legal resources is a motivator for this inquiry, then inappropriate corporate use of the courts, although with legal counsel, should also be examined. Perhaps it is time for a user-pays corporate litigation diversion scheme to be explored and for tax deductible legal cost thresholds to be reviewed.

What do the stories of the declared litigants tell us? My research is the first time there has been a detailed analysis of what lies behind the stories of declared litigants. It tells us much as about the system as the litigants. For example, our legal system is the best we have, but it is not perfect. Indeed its cost, delays and focus on form are factors why we have a strong ADR (alternative dispute resolution) movement, 'alternative' being the operative word.

My case studies illustrate that the system can show bias and can be unfair. For example, at the magistrates court level, there is a strong culture that allows people to have their day in court. I suggest that is a strong factor why that court is not a focus for vexatious litigants, and I suggest the Magistrates Court submission to this inquiry supports that view.

However, in the superior courts the emphasis is on paperwork, form and professional representation. It is here where statistics on frustrated litigants in person are found. The case studies suggest they can get rough justice because of the impatience and the inability of the court to get to the essence of the dispute. They can even show prejudice, and here I refer to my case study of Elsa Davis as an example of that. The case studies also show that the law can lag behind community needs in providing appropriate tools for dispute resolution.

In two case studies it was unsympathetic family law that contributed to the escalation of the dispute. I note here that the current family law court has three times the number of vexatious litigant orders than the other 10 superior courts combined, in a third of the time. Although it is a federal jurisdiction, this is the elephant in the lounge room in any discussion on modernisation of the sanction. The case studies also show that local government is a birthplace for many disputes. Councils' resort to legal proceedings to obtain compliance can escalate rather than settle local grievances.

Again I would refer you to the case studies of Collins and Soegemeirer for an example of that. Even in the 21st century there is a lack of explicit and enforceable standards and of a local government ombudsman. For example, the service charter that I recently received from my local authority, the Port Phillip council, is simply aspirational. It contains few specific standards and no articulated redress process. I lived in Cambridge in the UK in the early 1990s, and the Cambridge council had its own local government ombudsman. Australia is years behind on that.

The case studies also suggest there is a medical explanation for the behaviour of persons declared vexatious litigants as seen through the work of psychiatrists Mullen and Lester. My case studies suggest that the imperfections of the legal system were a significant contributor to that behaviour, but I will leave the medical discussion to Drs Mullen and Lester.

Importantly the historical perspective shows that the litigants in person whom contemporary society judges as vexatious can also be described as activists, agitators and reformers who are necessary for a democratic society to advance. My case study of Constance Bienvenu is a good example of the Victorian context, and we need to be wary of stifling such people. Indeed if one looks further back in Australian history at the people who were sent involuntarily from Britain, we see a strong representation of agitators, reformers and such.

Finally, the case studies show that the vexatious litigants sanction is a clumsy sanction. It was introduced for a specific challenge — Rupert Millane — in 1928, and it has only been of marginal effect.

I will make some concluding remarks. I think this inquiry faces a number of challenges, and they include the reality that there is an increasing realignment, if not marginalisation, of the Victorian legal system going on. The ability of the state to influence citizens' attitudes and approaches is limited. In particular I note the massive growth of federal law in courts and tribunals in the last 30 years — for example, social security law, family law and tax law. These jurisdictions have a major impact on community attitudes and experience as to what justice is. The federal government, obviously, is the only one that can review issues such as tax deduction thresholds of legal expenses.

There has also been the rise of industry ombudsman schemes over the last 20 years — again, under the auspice of an alternative. They fall under the light touch of the federal regulators. They are large scale and remote, they are done on the papers only and they do not permit a day in court. However, they do inform popular understanding of what justice is, and I suggest that despite the access they have given, they are also causing growing frustration for litigants in person by their inability to provide a day in court. The lack of independent monitoring and quality assurance of those schemes is also a growing challenge. I note that these federal jurisdictions and these ADR schemes have not made a submission to this inquiry, notwithstanding the influence that they have on public perceptions.

I suspect that the real driver of this inquiry and the real challenge to the superior courts is the rise in litigants in person. That offends — if I can put it in inverted commas — 'the traditional order of representation' only. It would appear that there is a realignment going on in the nature of appearance; the problem here is that there is little data. This has been commented on by Law Reform Commission reports going back over the last decade. As I say in my submission, what you do not measure you cannot manage, let alone reform, and I am a believer in data-based reform.

For these reasons I would urge caution against uncritically supporting the modernisation proposals of the sanction. They are not supported by the data. They are lawyers' solutions to a more complicated problem. I do not have any particular answers to these questions, but I throw them open as part of the discourse. Thank you for listening to me.

The CHAIR — Thanks very much, Simon. You said you did not want to talk about the medical side of particular people involved in your case studies, and you have described them, I think, variously as activists and reformers. I wonder if you could just give us a bit of a word picture, based on your case studies, of what brought these individuals to be classified as vexatious litigants, what their causes were and what their backgrounds were.

Mr SMITH — Certainly. They are all one-offs. They are not a movement. If one looks at the American experience, which I look at in the thesis, there are different drivers there, and you get frivolous appeals et cetera which are part of the surges of activity and which are joined up, but you do not get that in Australia. They are one-off sorts of cases.

The legal system is not a good venue necessarily for resolving community disputes. One example is Constance Bienvenu. In my view she was an animal welfare activist ahead of her time. She wanted to be hands-on in assisting animals and what have you, but the RSPCA at the time — in the 1950s and 1960s — was very much run by the gentry of Melbourne; they turned up for a meeting once a month, and they expected their membership to just pay their fee and to leave it to the staff to run. But the community was changing, and they wanted to be hands-on.

Every attempt that Mrs Bienvenu made to become hands-on was rebuffed, and eventually she sued. She was not well served by her lawyers — partly, I think, because she was a woman. They took the view that she should not be involved in legal proceedings, and they even rang her husband to make sure she had the money to pay. They did not serve her well. Lawyers became personally involved in it, and then there was a bad performance by the judge.

The judge said at the end that she was right and that she had discovered a fine point in the rules, which was really not the dispute. The dispute was not about what the rules said — the dispute was really about saying, 'We just want to be hands-on' — but the way it manifested before the court was to ask the question, 'Did the rules allow certain things to happen?'.

When it came before the Supreme Court judge, he said, 'I am terribly sorry, but in 1896 when Alfred Deakin, the honorary solicitor to the RSPCA, set you up as a corporation, he was obliged to have a meeting one month after the first meeting just to confirm it, but' — guess what! — 'he never had the meeting, so you are functus. You do not

exist any more'. Parliament had to then pass retrospective legislation in the 1960s to legitimise the RSPCA. But what the judge did was order costs against her for being a troublemaker.

Her lawyers served her poorly by not fighting the costs order. Costs awards are discretionary, but they could have fought that order. They just accepted the order and just attempted to whittle it down rather than fight it. It was really that bad costs order coming on top of the fact that she had won the case and shown the rules were inappropriate that just veered it all off on a complete tangent.

She became one of the few people declared vexatious in two jurisdictions, because then she was so het up et cetera. But it could have been resolved earlier, and I think the recent civil justice report is onto what I would call a winner here when it talks about a special master in the Supreme Court — someone who can get down from the bench and not be so focused on principle, on admissible evidence and on what the man in the wig and the gown is saying, and who can say, 'What is this actually all about?'.

They can give them a day in court around a table and listen to the issues and divert them or make sure that the issues that come forward are really the issues, because the lawyers do not really focus on them until it gets closer to a court date, and then they do not give them their full attention. Also, their professional training says, 'We can't get too involved in this. We are not really interested in this' — and perhaps they should be sometimes. But the Special Master would be a way of doing it.

That was an example of the court system only wanting to hear about legal principles, rules et cetera, when the real dispute in that case was about wanting to be hands-on in the RSPCA. Interestingly that was the turning point for the RSPCA. It is now more hands-on, and it set up a number of other organisations which spun out of that dispute which are now also big. You would like to think that if everyone had been on the same side, it could have been a much better organisation at the start.

Elsa Davis is another example of the system behaving very poorly, because in that case I would argue that the vexatious litigant was her brother-in-law, Sir Isaac Isaacs, who had been the Chief Justice and the Governor-General. He really took the matter personally, because her behaviour in respect of his brother offended his Victorian morality, and so he was determined to go after her. That was the time when the family law really did not recognise women. So Isaac Isaacs, when the marriage of his brother broke down, took control of it and just arranged for the power to be cut off from the house, the furniture to be moved, the title to be put in his name et cetera. So she lashed back.

She was a feisty woman, and so she sued the removalists, she sued Isaac Isaacs and she sued the pawnbrokers to whom she had taken her wedding ring to get some money, because they had then given it back to Sir Isaac Isaacs in breach of all the laws, and understandably she lashed back. He used his resources to come back at her. These are examples of how the legal system does not cope well with an unusual dispute and uses the sanction of the vexatious litigant just to get rid of it.

It does not get rid of it because that Isaacs matter, or the Davis matter, went on for another 10 years because Isaac Isaacs would not let it go; he was the one who promoted it. That is one of the things that comes through these cases — that the 'defendants' become so personally involved in these matters that they get determined to get their costs back and so bankrupt them. Elsa Davis had already been bankrupted by Ridgeway, the removalists whom she had sued unsuccessfully to get her furniture back, but then Isaac Isaacs sued her a second time, for £50. She appealed to the High Court and all sorts of things and went on for 10 years. That only died when he died — once he died, that was the end of it; there was no more litigation.

The CHAIR — If I understand you, you are saying that in those two instances and the other case studies that you examined, the issue became complex and then started to fit the definition of vexatious litigation?

Mr SMITH — Yes. The court system drives it.

The CHAIR — Because the court system did not take the time to analyse and understand what the substantive issue was.

Mr SMITH — That is right. Each case is different. In the Isaacs case, I think they were overwhelmed by Sir Isaac's reputation and stature. She was at the very lower end of cases that are a vexatious concept — there are eight or nine cases — whereas Millane, the first one, had 200 litigations. So she is at the lower benchmark.

That just shows how the system was closing her down. He was using his networks and friends in high places — not in any sort of necessarily overt way, but that is the impression that absolutely comes through. These cases make for bad law, and they leave a bad taste. Had they been able to distance themselves and work out another way, you could divert them and you could change them.

Mr CLARK — Your submission is focused mainly, as you say, on those who are vexatious litigants in the strict sense of the word. Do you have any views on the broader issue of people who persist in making a series of complaints to a whole lot of bodies, including ombudsmen, members of Parliament and others in positions of authority, who may have a grievance at the bottom of their problems lodged in the grievance but go off on a whole range of tangents? Do you have any suggestions as to what the system should do to best help these people resolve their situation?

Mr SMITH — There are a number of steps in this process. I am a great believer in early identification of the challenge and perhaps diversion or getting them involved more appropriately to start with. Local government is an example of that. Local government lets matters run too far. If it did have ombudsmen and did have clear standards to deal with, a lot of these things would not have come forward in the first place. I am not absolutely convinced that people do forum shop ruthlessly around. I have been an ombudsman and I have been in legal sentencing; and I have seen quite a lot of the people we are talking about here and interviewed them.

Often it is really getting someone just to listen to you and take the time. Our system is developing in a direction which is inappropriate, I think, because it is developing into a remote system, where it is done on the papers or through cyberspace — we are not actually engaging with people. I suspect that if we were to train up the people in the front line on some of these things, on how to identify the issues — you cannot give everyone in that sense a day in court, we do not have the resources to do that; but we can say to people, 'We are going to take you seriously, and we are going to do this; come into the office'.

One of the things you find with the superior courts, when you look at the history cases, is the senior registrars and the prothonotaries say, 'We are going to deal with you ourselves', and they take them into the offices et cetera and it does calm it down; it comes into better focus. I think that one of the ways is for the registrars, clerks of court or whatever they are called now, to be trained up to be able to identify which are the ones that are not going to go away. Some of these cases will never go away. It is just a cost of democracy. We just have to wear it, in a sense, because there is no magic silver bullet here. I think the more that we are able to deal with people and minimise the frustration and the distress, then you do it.

In police offices it is a skill to be able to manage people who come to see you because that is part of the GP process; and legal centres sort of see it the same way — as long as people get a hearing.

I always took the view that if I got a four or five-page letter closely typed, that was a warning: 'Warning, warning, warning; this person requires a bit more attention; you need to get in there and treat this as a special case'. I think one of the challenges here is that we tend to have just the one-dimensional approach to it all. We need a bit more sophistication about how we approach it. They do present in certain ways and the letters are a good presenting indicator to me.

I do not know whether that necessarily answers your question. It was a sort of general response.

Mr FOLEY — While the cases that you pointed to just then, and presumably in your thesis you support your contention — and each case is different and they are small in number, I concede all those points — what about cases like Julian Knight? He is already in prison for a very long time and from reading his submission it looks like just a bit of a wild punt to knock over everything he possibly can. He is obviously not a silly bloke — he has got himself a law degree and all those kinds of things — but he is now one of the 14 and I cannot see any redeeming merit from his applications. Perhaps in time we will, but I cannot see them now, in terms of some of the reformers, agitators and actors-type of paradigm you have brought to some of your cases.

Mr SMITH — You raise a good point in how will history judge it, because it is hard for a contemporary society to give a full perspective on this. I would say a couple of things because there is the American experience and there is Julian Knight. Only two prisoners in Australia have been declared vexatious, which surprises me, quite frankly, because the American experience is that there is an enormous volume of what are called jailhouse lawyers and they are extremely active in the courts at a state and federal level. I suspect with the coming of the human rights charter this is going to be a growth area.

In respect of Julian Knight, I cannot say that I have read his cases but if I put on my historian hat I suspect that they will be judged more as a failure of the prison grievance procedure because you have to ask yourself: why did those matters go to court? In the couple that I have read, the corrections authority folded the day before it came to court, and they gave him back his TV or his books or whatever.

Prisons are a difficult environment because the prison authorities do not have the range of sanctions to get discipline that perhaps would work in other environments. So things like whether you have your TV or have computer access loom much larger than they would in other lives. But you have to ask yourself: well, why wasn't it possible for the grievance procedures of the prisons to resolve that? Historians will be looking at that, I would suspect, whereas contemporary society gets a bit thrown by the other, surrounding circumstances to Julian Knight and so dismisses it for a start.

I suspect that prisons going forward will be a fertile area for litigation because there has been massive litigation in the United States by prisoners on all manner of things. He may well be just at the vanguard of what is coming. If that forces society to look at the way it manages its prisons and to find better, effective ways of grievances and to be truly honest about reform and rehabilitation, as distinct from punishment, as the aims of the criminal law, then that is a good thing. So I do not write off that case because I think it sort of shows there are issues there that have yet to be properly — —

The big change that has come with online court reporting — and I think this is an interesting thing in this whole area — is that in the first 50 years of this sanction, up to 1980, only one case was reported. What does that tell you about the system? Law reports are censored. There is no doubt about that; the editors of law journals decide what goes in. The fact they reported only one, which was the first one, Rupert Millane which was a bad case in any event, the way that they pushed that one through — and Isaac Isaacs was again involved in that one — says that is the system not wishing to give the oxygen of publicity to people they have already classed as troublemakers, and they are pushing them down.

That is not a good thing in a democracy. That has now changed. With online reporting you do get much more access to these sorts of things. 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.

Mr O'DONOHUE — Thank you for your evidence this morning, Simon. Following on from Robert's question and your comment about forum shopping and there not being a lot of forum shopping from jurisdiction to jurisdiction, has there been any analysis done, that you are aware of, of forum shopping within the same jurisdiction — as Robert alluded to, from the ombudsman to VCAT to MP to the Magistrates Court et cetera?

Mr SMITH — Not that I am aware of, no — this is a fertile area for research — there has not been. Some of these things are not necessarily lineal. There is not a natural path for these things. I am sure you would be able to find individual cases of people going to different places, but I do not see it as a major problem. There is no doubt that people coming to the counter take up time, but for example, the banking ombudsman — you cannot go to the counter. There is no counter. You cannot even find out where they are. That is part of the frustration. So that is why they would be sending letters to the banking ombudsman or going to the banks. You go back to the banks when you cannot get to the banking ombudsman because it is all online.

What tends to happen is once people are declared, the focus obviously becomes the court then, and they keep going back for leave applications et cetera, and they are managed by the staff. That is the worrying trend here of the modernisation proposals, that they want to do that in private, on the papers, out of the glare of what is going on. If that is to be the way the legislation goes, I would be strongly urging your recommendations to make sure that there is transparency on that, that perhaps at the end of the year the Supreme Court annual report has to say, 'In the previous year we knocked back so many leave applications', or whatever, so that the society knows what is going on in the courts.

Mr O'DONOHUE — As you say, it may be an area for potential research in the future because having a greater understanding of how people interact with the different components of a jurisdiction may be worthwhile.

Mr SMITH — The Victorian judicial hierarchy has changed a lot in the last 25 years, because we are focusing really on the Supreme Court, which is really at the margins for most people. We have got this whole VCAT jurisdiction. The civil jurisdiction of the Magistrates Court really is obsolete now, so we have got VCAT. But what is VCAT? We also have Consumer Affairs. So if you look at what could be called the pyramid of dispute

resolution, at the bottom you have information provision. I think we can do a lot better in the way that we provide information about problems. At the moment that is essentially Consumer Affairs, which has a telephone service. I think that could be much better. That could be a national thing.

Then you move into conciliation/mediation. That is a bit of a dog's breakfast at the moment; different people do it. I think that could be joined up a lot more. This area does it here, that area does it there. That could be joined up — a much better use of resources. That is the way that you are filtering out all the time these disputes. These are not just individual disputes against individual disputes. These can be disputes of consumers with traders and professionals. There is a whole range of different — then you move into what I would call when the conciliation/mediation fails, and that provides the day in court, if you like, the face-to-face thing. Then you move into a decision-maker mode.

There is something there that I think we can take a lesson from the industry ombudsman schemes because they do offer a seamless elevation. You go through your information, advice, you move up to your mediation/conciliation, and then if that does not work, it goes directly to the ombudsman and the ombudsman makes a decision — bang! But when you are in the state system you have your information and advice from, let us say, Consumer Affairs. You will get sure mediation/conciliation from Consumer Affairs, essentially on the telephone, not necessarily as face-to-face as it could be in targeted cases, and then when you need to go to the decision-maker they say, 'Terribly sorry, we can't take it any more. You'll have to go off to VCAT'.

If you are a consumer, you are going to say, 'Give up'. So what we need to do, really — and we can do it with the technology — is we need to be able to say, 'We haven't been able to resolve this consumer versus trader. If you pay $5', or whatever, 'we will now elevate it seamlessly to the VCAT decision-maker'. I think elevating it seeming seamlessly, assuming all the documentation is sort of distilling as you go forward in an acceptable format, sends a clear message to the traders, 'You can run, but you can't hide', because at the moment they, the traders, know that no-one is going to take them off to VCAT or the small claims tribunal because the people are exhausted. They have had to do it themselves and they are intimidated by the system and what have you.

So it elevates it seamlessly. I think that joined-up approach would do a lot to getting rid of a lot of frustrations that exist here. If we were to go around the table here and ask people for their service or customer service or disappointments and complaints, every one of you would have a complaint which you have given up when dealing with a trader or what have you. So it is not just individual vexatious people, it is a wider issue. I think we can do a lot better in the way that we have a joined-up, seamless dispute resolution service. I think this committee also has a reference on alternative dispute resolution. I do not know whether anyone has put that view to you, but I think that would be a massive improvement in the system.

The CHAIR — Could I come from that to the Standing Committee of Attorneys-General model bill that you would be familiar with? You make reference to it in your submission. Could you just outline for us what your concerns are with the proposals in that model bill — the solutions suggested in that bill?

Mr SMITH — It was a mystery to me, that bill. I know it has been working its way — Queensland has been driving it, and I have not been really able to get a full understanding of why Queensland has been driving it. I mean, they have had a run of vexatious litigants in Queensland. Mr Skyring is, I think, the only person to have three declarations against him. Themes come through in some of these things. There is a view that paper money is not legal tender. It is amazing how many people pick up on that and run with it. So I think Mr Skyring and his supporters in Queensland have influenced the Queensland government, and I do not think it is the Queensland government as such. I think it is the public servants, the law departments and the people who have to give advice. They are the ones who I suspect have been driving it.

The model bill that has been put forward, which I think to date has been passed in Queensland and has been adopted in the Northern Territory, but in the Northern Territory this is the first time they have had the sanction. They did not have a need to have it before now. I think New South Wales is now sort of moving just to holus bolus adopt it without any critical thinking. They have produced no data to say why they need it. It has just been a sort of public servant-driven thing.

It is a lawyer response to a problem that it really will not fix. It is widening the standing of who can make an application, and you can make a case for that, but I think I would go very carefully about the locus standi on who can make an application, because traditionally it has been the Attorney-General. If we are going to say no-one can

go to court for the future — we have said the Attorney-General should be the only one who can make the application.

What they are trying to do is water that down and say basically anybody can make the application, and putting the court in charge of that, which I think is a bad move too, because if you say to the court, 'Court, you can decide who can make the application to make anyone vexatious?', what that does, in an area which is quite provocative, is say to the litigant, 'A court has been against you all along, and now they are going to decide who is going to be able to make you vexatious'. The court should be at a distance from that. Putting the court in the middle of it is not a good idea because it makes them prosecutor and judge as well.

They are planning to change the criteria — they have changed the criteria in Queensland, not that there was anything magical about the traditional criterion of habitually and persistently unsuccessful proceedings. But they are replacing one set of vague criteria with another set of vague criteria, and that is always a problem, because when you introduce new law, you introduce new legal argument and you have got to get new precedents and all the rest of it, so you cause more disputes. You have got to get different evidence.

It is interesting to look at the Californian experience. In California, which has more recently come to this, they do it by the numbers. They say you can get seven, I think off the top of my head, unsuccessful applications, and after that there is a prima facie case of you being vexatious. I think there is a case for saying as a system, as a state, 'We are prepared to let you have so many goes, but after you get to so many goes, your time is up, not that you are automatically banned from the system or put to one side, but it raises a presumption of you have got to show why you should go forward.

The CHAIR — What would your view be on the UK stepping in?

Mr SMITH — The UK is interesting because when you look at the history of this sanction, it only came about a hundred years ago in Britain because of an individual called Alexander Chaffers who was suing the Queen and the houses of Parliament and what have you. The courts had said, 'We don't have the power to ban people from issuing future proceedings, so we need you, Parliament, to do it'. So Parliament obliged and did it.

Victoria faced the same challenge with Rupert Millane in the 1920s. He was a fabulous entrepreneur et cetera. If he could have just implemented any one of his things he could have been Australia's Henry Ford or whatever; he just could not implement them. So what Victoria did was just holus-bolus adopt the English provision. It did not even change it. It just slipped it in in a consolidation of the legislation — in camera, I hasten to say. It was not a good thing to have done, when you are introducing a new provision like that, just to do it on the side.

There is nothing magical about the wording. I can see a problem with the wording, because when you change wording you get unintended consequences. There is an argument that that wording that is coming in — 'if you are annoying, harassing' or whatever — could be used perhaps against the ACCC in doing some of its work, or it could be used against a big corporation — constantly using the courts for applications. These things have unintended consequences.

Why has England done it? Traditionally the view was that Parliament needs to give us the power. Clearly the English courts became frustrated with litigants in person coming through when they wanted to take that control, so they just said, 'We do have the power' after having said 100 years earlier they did not have the power. They now say they have the power, but they have been quite clever about it.

Whereas the first power was really a blunderbuss — you know it was, 'You are banned forever', more or less — what they are now saying is that it is a much limited power, and it is more focused on the particular person and the particular parties, and I think that is a sensible way to go. It is a staged approach, and they are also putting a time limit on it. They are saying it is not forever and ever, so that introduces a very important transparency. It says it is for two years — or it is for three years or for four years.

In my view there is nothing to stop the Victorian Supreme Court doing that as well. They have got enough movement in their rules, enough movement in the inherent jurisdiction to say, 'We are going to adopt this English case of Bahmjee' and whatever the other one's name is. They could do that. I do not think that is a good move. I think it would be better for Parliament to lay down the guidelines on it.

I think the staged approach does work, and I think Parliament should be providing some guidance on transparency about it so that we keep the courts accountable on this, because one of the things — as I go back to the lack of reporting on these cases — is that the courts can slip into inappropriate practices and not have transparency when they should have. If they are going to use a particular sanction that excludes people from the court, they should be obliged to report on it so that we know what is going on in the courts. I am not suggesting anything underhanded is going on, but it is all part of the transparency process that is necessary.

It is interesting to see that English development. On the one hand it is frustration, by presumably the Attorney-General not doing something in the UK — and they do not have that many orders either in the UK. The courts could respond here if they wish to, but the fact that they have not suggests that they do not see the same need. They have had opportunity to do it, but they have not done it, so that tells me that they are not absolutely fussed by litigants in person.

I think it would be preferable for it to be by legislation that is staged. I think the criteria need to be clearer. You just cannot have vague things like 'harass and intimidate' et cetera; I think there is a case for numbers to go around it. I say let us look at the cases. What do the cases tell us? What is coming out of it? What are the criteria that are coming out of these cases? Let us fashion a formula around that. I think most people would accept that you can have so many goes at the system, but in the end there has to be a limit to it.

The CHAIR — Thank you.

Mr CLARK — Briefly, two aspects: firstly, the issue of costs and the potential for obliging litigants to meet their costs as a control option — a restraint option — that if people have got unpaid bills of costs, that prevents them issuing new proceedings. Or alternatively, if they have got unpaid cost orders against them and if they initiate new proceedings, they need to post some sort of bond as security for their costs in the new litigation. What are your comments on that as a mechanism to deal with excesses?

Secondly, you mentioned in the course of your evidence potential complications arising out of the charter now that that has come into effect. Is this the point about having proceedings decided by a competent and impartial court or tribunal, and could you elaborate on what you think the complications might be?

Mr SMITH — You might have to remind me of your questions as we go along here in case I forget or have a seniors moment. On the cost issue the courts already have power to say, 'We are not going to proceed unless there is money paid in for security of costs' et cetera. The experience in these cases is that people do not have the money, and they just go on.

The interesting thing is that it is the defendants who do not let go of the cost issue and they prolong the litigation. What happens in these cases is that, although you can ban somebody from going to court, they can of course defend. So what happens is that the aggrieved defendant who has a costs order then goes to enforce it, and they move into the federal bankruptcy jurisdiction. Of course when you go into the federal bankruptcy jurisdiction you have oral hearings et cetera, so that is a forum, and away we go again — other applications et cetera.

My advice to people in these situations is, 'Just write the costs off. Let it die a natural death'. If they let it die a natural death — as Wridgways, the furniture removalists, did — you can just drop out of it. It is an expense of doing business. This determination to get the money back is not going to work. The courts already have the power not to proceed if they take the view there is no security of costs. They have got that already, so they do not need any more power there, really. Whether or not it works is a different issue, because people can start a new application, and it may have merit in it. That is going to be a difficult thing.

My concern is that these things — the genuine cases — can miss out on the appropriateness of going forward because of something that has happened over here. There is no easy answer to that, so it might be that the system has just got to wear it.

Going back to the charter, the European experience is interesting here, because the Europeans of course have had a charter — the ECHR — and of course England has had to adopt it, which has been a bit of a struggle for them because they have had an independent legal system and suddenly becoming part of a federation, which is what they now are, has been difficult, so they have had this charter coming in on the side.

As I said before, when you change the wording of anything you have unintended consequences and you provide opportunities for people to discuss what these words mean. So there is a whole new range of words coming through in this charter et cetera, and they will pick up on the European experience of what has been happening, particularly when you get into prisoners' rights, because prisoners' rights, and particularly human rights, is a big issue in Europe for different political reasons. You can see it is a growing force here.

We have human rights law centres and things which did not exist five or 10 years ago, so there is momentum growing. I can see litigation coming out of this, because lawyers are very inventive and they will see — 'That is a peg we can put our argument on; let us go with that one'. I am not suggesting it is going to be a major challenge, but it will happen. That is progress.

The CHAIR — We are out of time and over time. Simon, I would like to thank you very much. It has been a very valuable and an extremely interesting presentation and discussion, so thank you for coming along and thank you for the work that you have done in this area. As I said, you will get a copy of the transcript, and I hope you do not mind if Susan and Kerryn get in touch with you about any matters that we might need your views on. Thank you very much.

Mr SMITH — It has been a pleasure.

Witness withdrew.