

**VEXATIOUS
LITIGANTS:
A REPORT ON
CONSULTATION WITH
JUDICIAL OFFICERS
AND VCAT MEMBERS**

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Methodology

The methodology employed in the judicial officer and tribunal member consultation process engaged in by the Law Reform Committee was to communicate with the Chief Justice of the Supreme Court, the Chief Judge of the County Court, the Chief Magistrate and the President of VCAT to obtain permission to consult directly with judicial officers and tribunal members designated for that purpose by the respective head of the jurisdiction.

By appointment Dr Ian Freckelton SC, and in all instances, save one, a staff member from the Law Reform Committee, met with the nominated judicial officer or VCAT member individually, although on two occasions meetings with more than one judicial officer or tribunal member took place at the one time for reasons of convenience. Interviews ranged from an hour to nearly two hours and canvassed the majority of the “Questions for Judicial Officers and VCAT Participants” to be found at Appendix One to this Report. The format of the interviews was semi-structured but flexible in order to maximise the provision of information by participants and to enable examples of issues to be provided, discussed and explored. The option was given to all participants that they could supplement what they had said during discussions by formal or informal submissions to the Committee.

At the commencement of each consultation, Dr Freckelton explained that notes would be taken of the discussions and of the opinions expressed and that the identity of those participating would be kept confidential, so far as that was possible, by anonymising those who participated. However, a Report summarising the different perspectives of those consulted would be generated and would form one of the bases for the Law Reform Committee’s report on Vexatious Litigants which will be tabled in the Victorian Parliament in December 2008. All participants signaled their agreement to be consulted on these terms.

The following were consulted:

- Four judges of the Supreme Court, including a judge of the Court of Appeal [referred to as S Ct J] ;
- a Master of the Supreme Court [referred to as S Ct M];
- Two judges of the County Court [referred to as C Ct J];
- Six magistrates [referred to as Mag]; and
- Seven members of VCAT, including a judicial member [referred to as VCAT M].

In addition, judges from the Supreme Court provided the Interviewer with the fruits of discussions that had taken place at a recent meeting of Supreme Court judges on the subject.

While the interviews provide a useful cross-section of views from within Victoria's courts and within VCAT, the following analysis should not be regarded as statistically significant or necessarily as representative of the views within all of Victoria's judiciary, magistracy or within VCAT.

To maintain anonymity of participants, so far as possible, gender specific descriptors have been avoided.

Registry staff from the Supreme, County and Magistrates' Courts, as well as VCAT, were also consulted as part of this project. Their views are canvassed in a separate Report.²

Distinctions in terminology

A level of discomfort with what was variously described as the "pejorative" and "judgmental" terminology of "vexatious litigants" was expressed by a number of judicial

² See I Freckelton , "Vexatious Litigants: A Report on Consultation with Court and VCAT Staff" (2008) report for Victorian Parliament Law Reform Committee.

officers and tribunal members. Many were concerned to distinguish between:

- unrepresented litigants;
- mentally unwell or personality disordered litigants;
- distressed or angry litigants; and
- declared and undeclared vexatious litigants.

C Ct J 2 observed that a litigant “might be mad, deranged and psychotic but still have a valid claim. It is important for a judge never to assume anything and to consider the evidence.” A number of participants raised the issue that there is a risk of discounting claims and disbelieving assertions and evidence if a litigant is “saddled” with a term as stigmatising as that of “vexatious litigant”. In addition, some interviewees preferred to use terms in general discussion such as “querulous litigants” and “unusually persistent litigants”.

SCt J 1 made the explicit point that the category of people which causes particular difficulty for the courts is much broader than “vexatious litigants”, whether they are or are not formally declared. It is a variety of people who, for one reason or another, are difficult, challenging or distressed. Often such persons do not and should not fit the criteria (howsoever exactly specified) for designation as “vexatious”.

C Ct J 1 noted that forensic psychiatrist Dr Lester³ prefers the term “querulous”⁴ but commented that there was no real difference between such a person and a vexatious litigant – “the symptoms are the same. Litigation becomes the purpose of their life. They lose all objectivity.” VCAT M 1 also preferred the designation “querulous” and

³ See Dr G Lester, submission:

<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL13%20-%20Grant%20Lester.pdf>, viewed 3 September 2008.

⁴ See too I Freckelton, “Querulous Paranoia and the Vexatious Complainant” in E Berah & D Greig (ed), *Community Issues in Psychiatry, Psychology and Law*, ANZAPPL, Melbourne, 1988.

emphasised the importance of not mixing categories of persons and inappropriately creating barriers for anxious or challenging litigants to have access to courts and tribunals.

Mag 3 made the point also that there is a distinction between litigants who make multiple applications within the one cause of action and litigants who bring multiple unmeritorious separate actions, either against the same defendant or a variety of defendants.

Mag 4 commented that for the most part querulous litigants (as against vexatious) can be handled satisfactorily on a case by case basis: “these are people who won’t take advice. They can’t see the wood for the trees. They take it up with a passion and they can’t let go. It’s part of the sickness. They see it as the only way of staying alone. Take it away and they have nothing. They are a pain but they are not vexatious.”

Usefulness of retaining the term “vexatious litigant” in Victorian legislation

There was a cross-section of views about whether the term “vexatious litigant” should be retained. Those who opposed its continued usage were concerned about its pejorative connotations and the risk that its application may further alienate and stigmatise the persons concerned. Two options were identified: using another less judgmental term or omitting the use of terminology and simply precluding the bringing of litigation by a person when certain preconditions are met.

S Ct J 3 expressed the view that the term “vexatious litigant” should be jettisoned as unhelpfully stigmatising persons with mental illness or personality disorder and replaced with “unreasonably persistent litigant”.

However, S Ct J 4 argued that the current terminology is straightforward, well understood

and should be retained. S Ct J 4 argued that the “vexatious litigant declaration regime” meets a need and observed that although there was good reason to avoid labelling people unfairly, this is an instance of where it is appropriate “to call a spade a spade”. S Ct J 4 doubted that the same objects of the regime could be achieved without usage of the term.

The test for declaration of a person to be a “vexatious litigant”

Most participants were critical of the current formula in s21 of the *Supreme Court Act 1986* (Vic)⁵, suggesting that it is “too demanding”, especially in terms of the requirement for litigation to have been brought “habitually”, a term about which many participants expressed uncertainty in terms of what it added and whether it “raised the bar too high”. Reservations were also articulated about the word “persistently”. All participants saw merit in adoption of a formula defining a “vexatious litigant” by reference to “frequently” bringing litigation “without reasonable grounds”. In addition, there was general

⁵ (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.

consensus that regard should be able to be had to conduct by litigants in any Australian court.⁶

S Ct J 4, however, noted the need for care in liberalising the definition because of the risk of abuse if the threshold is too low.

S Ct J 3 expressed the view that declaring someone unable to bring further litigation without leave “is such a draconian thing to do, the criteria should continue to be strict. The system should accommodate turbulence; that is part of what we are paid to do.”

S Ct J 2 argued in determining whether someone is vexatious, weight should be given to both quantitative and qualitative matters: for example, a judge should be able to consider cases where there have been only two or three proceedings which have gone on for a long time, with every point taken.

Profiles/common characteristics of vexatious litigants

A number of the participants observed that persons with personality disorders were over-represented amongst those who have been declared to be vexatious or would meet the criteria under s21 of the *Supreme Court Act 1986* (Vic). S Ct J 1 noted that a difficulty is that “people with personality problems are sometimes the victims”. It was also observed that a characteristic of such litigants is an absorption with detail and technical rules, as well as an inability to have any overall perspective on their situation and the risks they are running or the impact they are having on other by instituting litigation. Sometimes, it can seem like “a battle of wills” (C Ct J 2).

S Ct J 2 observed that many persons described as vexatious, whether or not declared,

⁶ See too Supreme Court submission:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL34%20-%20Supreme%20Court.pdf>, viewed 24 September 2008.

have a paranoid aspect to their thinking, as well as obsessive traits. The line between mental illness and personality disorder can be complex but in either case “the judge cannot say: ‘I think you are bonkers’. Many such people are socially isolated and do not have a person whom they know who could act as a litigation guardian. The involvement of the Public Advocate in this regard may be useful.” By contrast C Ct J 1 expressed reservations about the utility of appointment of litigation guardians in relation to litigants who are vexatious; there is a risk that the process will just generate more unhelpful litigation. S Ct M 1 observed: “Some of these people won’t trust anyone. They won’t trust lawyers – it’s not just that they can’t afford one.”

S Ct J 2 observed that “these litigants are usually unemployed and have unlimited amounts of time to devote to litigation”. However, a distinction is to be made between a person who has a “bee in their bonnet” in relation to their own litigation and a person who brings multiple pieces of litigation against multiple defendants.

C Ct J 1 and C Ct J 2 noted that many vexatious litigants are “intelligent” and “very committed”. They lack a sense of relevance and an ability to reason rationally about the issues before the court. C Ct J 1 wondered whether they tended to behave worse with female judges and registry staff, some such litigants apparently perceiving female judges to be less authoritative than their male counterparts.

S Ct J 2 observed that “Magna Carta people” “tend to be one-off litigants” so do not fit the vexatious designation.⁷ In addition, while “McKenzie friends” purporting to assist litigants⁸ do occur across litigation to some degree, they tend not to be a major problem.

⁷ Certain litigants emphasise at considerable length and with very limited success the importance of the Magna Carta to contemporary litigation. See eg *Knight v Bell*, H Ct Trans: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/hca/transcripts/2000/M46/2.html?query=^carta>; *Bryant v The Commonwealth of Australia*, H Ct Trans: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/hca/transcripts/2002/S153/1.html?query=^carta>; *Essenberg v The Queen*, H Ct Trans: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/hca/transcripts/1999/B55/1.html?query=^carta>. See too *Grant v Aplin* [2000] NZCA 256; *Pavlomanolakos v National Australia Bank*; *Longmuir and Clark* [1993] FCA 29; *Re Fisher and Australian Guarantee Corporation Ltd* [1992] FCA 390. *This has particularly arisen in the context of vexatious litigant litigation; see eg Lohe v Gunter* [2003] QSC 150

⁸ The term “McKenzie friend” has its origin in *McKenzie v McKenzie* (1970) 3 All ER 1034 where the Court of Appeal approved the statement by Lord Tenderden CJ in *Collier v Hicks* (1831) 2 B & Ad 663 at

A problem exists from the absence of a co-ordinated system across courts which enables profiling of the litigation conduct of litigants with the potential to be declared vexatious. Mag 1 also expressed concern in this regard within Magistrates' Courts throughout Victoria, as well as in relation to other courts:

How do I inform myself? Magistrates receive a paper file (and don't look at computer records). At the bottom of the form will (or should) be a chronology or previous applications. But the Magistrate won't have any evidence about what happened in another case, for example in Dandenong previously.

S Ct J 1 commented too that litigants "with a blindness to procedural reality" are both a problem and quite distressing for judges.

VCAT M 7 observed that sometimes with people in jail their vexatious behaviour can arise from nothing more complex than boredom. This is not a constructive usage of limited court resources, any more than the canvassing of purely theoretical issues under cover of litigation.

S Ct J 1 noted that "Some of these people are defendants who have become appellants. They don't leap into court themselves the first time."

Commonness of undeclared vexatious litigants in Victoria

There was a division of experience between Supreme and County Court judges, on the one hand, who identified a significant number of undeclared persons who would broadly fit the criteria for being classified as a "vexatious litigant" and Magistrates and members of VCAT, on the other hand, who stated that they saw very few of them.

669 where he said: "Any person whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

S Ct J 4 observed that “as an individual judge, you don’t come across the problem a lot. But the system does.” However, the issues that they raise particularly arise in the Practice Court: “I sometimes feel as though we’re running a psychological counselling service. I sometimes think it is good that they come to court and get angry, so they aren’t out there” causing other forms of trouble.

S Ct M 1 said that one vexatious litigant a week would come before a Master.

The Magistrates consulted expressed the view that, other than in the family violence division, vexatious litigants are comparatively rarely encountered in the Magistrates’ Court. For example, Mag 5 stated “We deal with so many cases and only a small proportion are vexatious.” Mag 3 explained: “Most of these people would go to higher courts because they are more suited to their case.” Mag 3 related how one litigant came before the Magistrates’ Court and “I pointed out the limits of our jurisdiction and he said, ‘Oh no! My case is worth millions!’”

VCAT members generally contended that the incidence and experience of vexatious litigants at VCAT is quite rare, even in guardianship, discrimination and planning cases where in principle there is a real potential for this kind of difficulty.

The significance of the vexatious litigant problem for Victoria’s courts and tribunals

Judges of the Supreme and County Courts (as well as staff⁹) tended to stress the existence of a cohort of undeclared vexatious litigants who are consuming problematic amounts of time and energy. S Ct J 2, for instance, maintained that all judges could identify at least half a dozen undeclared vexatious litigants who were causing difficulties. This was

⁹ See I Freckelton, *Vexatious Litigants: A Report on Consultation with Court and VCAT Staff*, 2008.

consistent with the accounts of Supreme Court and County Court staff.

By contrast, Magistrates¹⁰ and members of VCAT for the most part stated that in their experience the problem, to the extent it exists, is effectively managed by the processes in their jurisdiction and does not cause particularly onerous problems¹¹. However, Mag 1 commented that the Magistrates' Court does encounter vexatious litigants, who are unrepresented, and "magistrates cop a lot of abuse and this adds to stress levels".

S Ct J 1 observed that litigants who are in the broad category of "vexatious litigants" "destabilise the administration of justice". They "detract from the court's role in the community". An effect is that they have abused the system that is supposed to provide redress.

S Ct J 1 observed that an issue is that vexatious litigants may function in more than one court and may even cause difficulties in more than one list of the same court without judges being aware of the phenomenon outside their own cases.

S Ct J 2 and C Ct J 2 both pointed out that in a resource-stressed court environment the consequence of the conduct of vexatious litigants has consequences - others miss out. C Ct J 2 observed: "Resources are taken away from deserving litigants." To similar effect, S Ct J 2 stated: "The resources these people occupy outweigh the merits of their claim. In a resource-poor environment it becomes a matter of who is missing out. Vexatious conduct is very demanding of the time of both court staff and judges. These litigants ring many times each day. They drop in unannounced. They are verbally abusive and emotional. It is very stressful for staff to deal with these people. They won't allow staff to do their

¹⁰ See too Magistrates' Court submission:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL37%20-%20Magistrates%20Court.pdf>, viewed 29 September 2008.

¹¹ See too Submission of the Magistrates' Court:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL37%20-%20Magistrates%20Court.pdf>, viewed 4 September 2008.

job.”

S Ct M 1 noted that one of their staff had been abused and significantly distressed by such a litigant recently. C Ct J 1 agreed, stating that many staff do not have the skills to deal with vexatious litigants who can be harassing, time-consuming and threatening. “They are rare on the landscape but they cause ructions when they arrive. The amount put into their litigation can be ten times what it deserves.”

S Ct J 2 said that their associate still gets harassing telephone calls but that the facility to refer them to the Self-represented Litigants Co-ordinator is very helpful in deflecting them and managing what might be unrealistic expectations. S Ct J 3 agreed but noted that genuinely or floridly vexatious litigants tend not to accept help from such a source or from the Public Interest Law Clearing House (PILCH).

S Ct J 3 declined to evaluate the extent of the vexatious litigant problem but noted that dealing with either applications for declaration or for leave to bring proceedings after declaration is very time-consuming. S Ct J 3 contended that the issues posed by self-represented litigants are very important for the Supreme Court.

VCAT M 4 stated that that the problem of vexatious litigants is not serious for VCAT and emphasised that “dealing with difficult people is part of VCAT territory. On occasions too there can be a kernel of validity in the claims of a person who appears unwell or disordered. VCAT is the last place that people can come so I wouldn’t want to cut them off until they’ve come a number of times. They ought to get a hearing.” VCAT M 6 commented: “If you shut them down, they have nowhere else to go. You just deal with them.”

VCAT M 4 made the point too that “VCAT’s quick turnaround can cut matters off at the

socks and mean that people don't have time to stew about their grievances". VCAT M 5 also noted the potential to aggregate multiple actions and reduce the burden for a defendant and also promote efficiency. VCAT M 5 was equivocal in relation to a vexatious litigant power ("There's a huge chunk of me that says no, but there's a tiny chunk that says there are a few who need to be dealt with and the mechanisms to deal with them are not there") but emphasised: "We have a high tolerance level in this place." However, VCAT M5 acknowledged that at times "Registry staff tear their hair out and members are fed up." On occasions, when litigants have crossed the line and made threats, police will visit them to investigate whether they have committed a criminal offence. This tends to be an effective deterrent.

VCAT M2, who had particular experience in the Guardianship List, stated that "there is no problem with people making repeated applications to the Guardianship List. On only a handful of occasions have cases been dismissed on the ground of abuse of process and the cases involved different individuals, not repeat players." However, s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) gives the Tribunal powers to deal with unmeritorious applications:

- (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion-
 - (a) is frivolous, vexatious, misconceived or lacking in substance; or
 - (b) is otherwise an abuse of process.
- (2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
- (3) The Tribunal's power to make an order under subsection (1) or (2) is exercisable by-
 - (a) the Tribunal as constituted for the proceeding; or
 - (b) a presidential member; or
 - (c) a member who is a legal practitioner.
- (4) An order under subsection (1) or (2) may be made on the application of a

party or on the Tribunal's own initiative.

(5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

VCAT M 3 emphasised that this provision is seldom used, especially in the planning area. VCAT M 2 stated that in 8 years “I can count on one hand” the number of cases that have been summarily dismissed for abuse of process. The same VCAT member stated: “There are so few of these cases that there is not an established process for dealing with them.”

The experience of the VCAT members was that generally when VCAT matters are dismissed, litigants tend not to try to re-litigate the same issue.

VCAT M 4 could see merit in a power “for a partial bar” against a litigant but not a full declaration of vexatious litigants power; there is no need for it.

VCAT M 2 stated that there are occasions when staff are instructed not to respond to particular litigants who write continually but do not supply any new material and simply to place new correspondence on their file.

Impact of vexatious litigants

There was a difference of experience between Supreme Court and County Court judges, on the one hand, and Magistrates and VCAT members on the other, the latter not identifying a major problem with either the incidence or impact of undeclared vexatious litigants. As Mag 5 put it, the Magistrates’ Court has a track record of being able to accommodate to difficult people.

Supreme Court and County Court judges, however, expressed concerns about the adverse emotional impact that vexatious litigants can cause. Some viewed the issue as an occupational health and safety matter. They were also cognisant of the unfairness upon defendants. The point was made by VCAT M 3 that not all defendants are financially positioned to cope with the costs that vexatious litigants can cause. They are not all banks, police, correctional facilities or tobacco companies. Some are entities with commercial vulnerabilities such as churches and unincorporated associations.

S Ct J 4 urged the need to identify the problem and understand its psychological causes with the assistance of mental health professionals, arguing that it was important not to look at the issue just through “legal eyes”. Another issue raised by the same judge was: “And if it wasn’t for the litigation, where would they be? If we make it too hard for them, will we create problems out in the community? That’s something that worries me.”

S Ct J 4 made the point that the impact of vexatious litigants is not just upon judges, but upon registry staff and also about upon judges’ associates – “They can be very rude and aggressive.”

S Ct M 1 made the point that on occasions a consequence of the vexatious strategies of some litigants is that attempts are made to join judges to appeals and to launch spurious appeals on the basis of alleged judicial bias. The same Master stated that such litigants can be threatening and frightening: “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.”

Mag 5 stated that in the Magistrates’ Court there are relatively few vexatious litigants but “They use up large amounts of court time and that is frustrating and annoying.” Mag 5 commented: “Vexatious litigants are difficult and can be violent and intimidating ... they always take time and energy and invoke frustration.”

VCAT members generally stated that vexatious litigants are not a major problem in their jurisdiction. The quality of people management skills on the part of those in the registry was identified as very helpful in dealing with them. It was also commented by VCAT members, and to some degree by Magistrates, that people with “issues” and high levels of expressed emotion are very common in the Magistrates’ Court and at VCAT. A consequence is that counter and telephone staff acquire skills in handling the challenges posed by such people. The attention of the Interviewer was also drawn to the fact that 90% of VCAT litigants are self-represented.

Adequacy of Victoria’s declaration system of vexatious litigants

The main point made by Supreme and County Court judges (by contrast with the situation in the Magistrates’ Court and VCAT) was that there is a significant cohort of undeclared vexatious litigants who are consuming unacceptable amounts of scarce court time and resources. As C Ct J 2 put it: “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.”

There was broad support for retention of a system which involves declaration of persons as unable to bring further litigation without leave. As C Ct J 1 put it, “there has to be a basis on which you say ‘enough’.” This led C Ct J 1 to comment that “we are just stuck with vexatious litigants. The vexatious litigant laws are the only way” to address the problem.

A number of judges in the Supreme and County Courts, as well as magistrates, lamented the absence of any central, shared system amongst the courts, a co-ordinated registry, that would enable ready identification of litigants who behave across jurisdictions in a vexatious way.

Alternative strategies for addressing the issues raised by vexatious litigants

The judges of the Supreme Court, the Master, and the County Court judges drew attention to the appointment of a person within the Supreme Court to assist self-represented litigants: the Self-represented Litigants Co-ordinator (“the Co-ordinator”). It was pointed out that, although the category of self-represented litigants is much broader than the category of vexatious litigants, most vexatious litigants are self-represented. The Co-ordinator enables such people to be given personal time, to have some of their concerns and distress alleviated and to be given information to enable them to frame their grievances, at least a percentage of the time, in ways which can be dealt with by the Court. There was a view amongst the Supreme Court judicial officers that this system was working well and was reducing, though not eliminating, the problem of vexatious litigants for the court.

There was general support from those interviewed for the creation of a comparable position for the Magistrates’ Court in Melbourne and for the County Court. Mag 4 stated: “The more qualified assistance that a litigant in person can access, the better.”

S Ct M 1 made the point that it is sometimes thought that it is unduly harsh to preclude litigants from bringing further litigation without being given leave. However, it can be a kindness to stop grossly unmeritorious litigation – “because they can lose their houses. They lose so much”. Part of the problem can be that because of their paranoia such litigants cannot trust people, including lawyers, and then make ill-considered decisions, to their own detriment. However, with vexatious litigants, 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 be oppressive, sometimes deliberately so from the point of view of the vexatious litigant who can regard the conflict as a battle “to the end”.

S Ct J 4 raised the option of the courts being able to identify litigants “with psychological issues which are impacting on their matter” and stay proceedings for a period of time to enable the litigant to receive psychological counselling.

S Ct J 2 identified merit in applications for vexatious litigants to obtain leave to be able to bring further litigation to be able to be made “on the papers” with the affected party being given a proper opportunity to make submissions. This was put as a proposal to reduce the time-consuming nature of such hearings. Another suggestion from the same judge was that in all cases of application for vexatious litigant status the Prothonotary should be asked to provide a history of the litigant’s litigation history, preferably in all jurisdictions in Victoria, when that becomes possible: “it is important to have a proper sense of history”. S Ct J 1 also commented that judges often work in isolation and that it would be constructive for courts to improve awareness of and capacity for communication about related proceedings.

C Ct J 1 said that there was merit in getting litigants with vexatious tendencies quickly to trial, even if that is not what they want: “We have to create a platform from which a judge can behave like a judge.”¹² However, the down-side of this positive discrimination in favour of vexatious litigants was acknowledged by C Ct J 1 and others – it means that by bad behaviour the vexatious litigant is getting quicker access to justice than other litigants. There is an element of unfairness about this. On the other hand, speedy resolution of the litigation is generally what defendants to actions by vexatious plaintiffs would prefer.

C Ct J 1 said that it is worthwhile to attempt to apply the proposals of Dr Lester but there are litigants who will just not listen – “if you try to help them, they see that as a sign of

¹² See too the submission by Judge Misso:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL10%20-%20Judge%20Misso.pdf>, viewed 3 September 2008.

weakness.” It can be very difficult indeed to channel them back to what is relevant.

Another issue raised by a number of judges was the option of litigants being referred to VCAT’s guardianship list utilising s66 of the *Guardianship and Administration Act 1986* (Vic) which provides that:

(1) If in any civil proceedings before a Court the Court considers that a party may need to have a guardian or administrator or both appointed under this Act, the Court may refer the issue to the Tribunal for its determination.

(2) If a Court refers an issue to the Tribunal under subsection (1)-

(a) the referral is to be treated as if it were an application to the Tribunal for the making of a guardianship order or an administration order (as the case requires); and

(b) the prothonotary (in the case of a referral by the Supreme Court) or the principal registrar of the Court (in any other case) is to be taken to be the applicant.

It was pointed out that this occurred to one litigant from a County Court hearing and that the Court of Appeal found fault with the process by reason of her not having been afforded a sufficient opportunity to resist the proposed procedure: *Bahonko v Moorfields Community* [2008] VSCA 6. The complexity of such proceedings was highlighted by VCAT members. For instance in *SB (Guardianship)* [2007] VCAT 333 the applicant was the principal registrar of the Court but SB 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”.

VCAT M 2 stated that there is no clear authority from VCAT as yet about whether the existence of a personality disorder in a litigant can be a condition constituting “a disability” within the meaning of s46(1)(a)(i) of the *Guardianship and Administration Act 1986* (Vic) or for the purposes of s66.

S Ct J 2 observed that a body equivalent to Forensicare for criminal proceedings would be helpful for dealing with litigants in civil proceedings. To similar effect, C Ct J 2 lamented the difficulty of obtaining a diagnosis even where a litigant who is causing difficulties for a court may appear to be mentally ill and in need of a litigation guardian: “In some cases you think they can’t run their own claim but you can’t use the Guardianship Act. You are stuck between a rock and a hard place.”

By contrast, Magistrates and VCAT members emphasised the relative informality of their jurisdictions and the advantages of getting cases on quickly, without major cost repercussions, to enable even relatively unmeritorious cases to be determined promptly, thereby reducing the burden for defendants and the adverse consequences for unsuccessful litigants who may be vexatious. VCAT M 7 argued, “Generally, it is better simply to deal with them and make a decision.”

VCAT M 1 contended that active listening and setting of clear limits are often effective strategies in dealing with those displaying vexatious tendencies. Another strategy that is appropriate is referral of them for legal advice and adjournment to permit this. Drafting of clear written material by the courts, by way of brochures and for placement on the courts’ websites, to assist the “special needs” of the self-represented is also important; this can provide assistance for them in distinguishing between what is and is not relevant and reduce “challenging behaviours”. VCAT M 1 argued that courts and tribunals need to take a more “therapeutic” approach in engagement with litigants, particularly those who exhibit obsessive or distressed characteristics. While this means that there remains some role for a small number of people to be declared vexatious, this is a last resort and should be very rare as the stigmatisation of the labelling as vexatious is inherently counter-therapeutic. VCAT M 1 argued that rational, sensitive, well-organised lists are an important part of the strategy for dealing with querulous litigants – “effective case administration is one antidote”.

An aspect of vexatious litigant conduct is requests for subpoenas to be issued by courts to

CEOs of banks, mayors, Ministers, the Premier, the Prime Minister, Chief Commissioners, Archbishops and other prominent persons and entities. S Ct J 2 expressed the view that the current powers to decline to issue subpoenas are broadly satisfactory although extension of powers under Order 27.06 of the Supreme Court Rules (whereby the Prothonotary can decline to receive an originating process if he or she considers that a proceeding so commenced would be “irregular” or an “abuse of process”) may be constructive. C Ct J 2 suggested that litigants should be required to seek leave if they appear to be endeavouring to subpoena unreasonable numbers of witnesses or if their grounds for the issuing of subpoenas are tenuous.

Alternative dispute resolution was identified as a strategy that may be of some, but probably limited, effect with this cohort. VCAT M 4 stated: “We do try to use alternative dispute resolution. It doesn’t work with actual vexatious litigants, but it does work with self-represented litigants who are slightly problematic.”

Potential for other strategies for dealing with vexatious litigants

A number of participants urged the Committee to have regard to the United Kingdom regime which utilises both a vexatious litigant declaration system under s42 of the *Supreme Court Act 1981* (UK) and the making of “*limited*” (where a party has made 2 or more applications which are totally without merit), “*extended*” (where a party has persistently issued claims or made applications which are totally without merit)¹³ and “*general*” (where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended

¹³ See “Lloyds Wins Extended Civil Restraint Orders Against Former Names”: http://www.lloyds.com/News_Centre/Features_from_Lloyds/Lloyds_wins_extended_civil_restraint_orders_against_former_Names.htm, viewed 17 September 2008.

civil restraint order would not be sufficient or appropriate) civil restraint orders¹⁴ where a party makes applications of claims that are “without merit”.¹⁵

S Ct J 2 argued that this spectrum of responses has particular advantages in terms of flexibility.

S Ct J 1 observed that the Supreme Court has a level of flexibility in dealing with difficult litigants, including its powers in relation to abuse of process. However, S Ct J 1 observed that courts are reluctant to order costs against such people. The same judge observed that “it’s easier for Tribunals procedurally to knock out vexatious claims” because of the simpler procedures that they have. S Ct J 2 agreed that costs orders were of little assistance, given the common impecuniosity of such litigants. Similarly, striking out matters as being an abuse of process is difficult and is not an effective deterrent to against the bringing of unmeritorious litigation. C Ct J 1 related an occasion when C Ct J 1 informed the opponent of an undeclared vexatious litigant that it was not proposed to order costs against them on the basis that it “would just fan the flames” of the litigant’s malcontent. S Ct M1 observed “You strike out their cases but they come back.”

S Ct J 3 identified merit in getting litigation involving a person with vexatious tendencies to a final hearing as soon as possible. That is a process utilised by the Court of Appeal, minimising focus upon (and potential for argument about) technical requirements of documentation. It is also important that if such a litigant loses, reasons with some prospect of being understood are provided.

In noting the potential for a fast-tracking system whereby litigants regarded as potentially vexatious are “case managed” by the one judge, getting the case to final hearing, as

¹⁴ See Practice Direction – Civil Restraint Orders: http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part03c.htm, viewed 29 September 2008. See too Supreme Court submission: <http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL34%20-%20Supreme%20Court.pdf>, viewed 24 September 2008.

¹⁵ See generally *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113; [2003] BPIR 1252.

recommended by Judge Misso in a written submission to the Committee¹⁶, S Ct J 1 identified advantages but commented that there are times when it is proper to strike a matter out, where the situation permits it: “Sometimes you have to be cruel to be kind. It’s not kind to these people to let it go on.”

S Ct J 4 made the point that while judges speak to each other, there is little empirical understanding of the phenomenon of the conduct of vexatious litigants – “that’s part of the problem”. S Ct J 3 identified the advantages of training in “court craft” in effective managing of persons with vexatious tendencies: “the Judicial College does some of this kind of education. We need to learn how to deal with people like this so as not to make it explosive.” C Ct J 1 agreed: “Both newer and senior judges need training, as do registry staff. We need to be forewarned and forearmed.” VCAT Members 4, 5 and 6 also emphasised the potential utility of further training.

A number of judges stressed the importance of listening actively but keeping a firm hand on proceedings, not cutting people off, but reinforcing to them what matters can be heard by the court and what is actually in dispute.

C Ct J 2 observed that at VCAT where strike-out options are not clear, cases tend to go to hearing: “The case may well fail but at least this provides a degree of closure.” Both C Ct J 1 and 2 suggested that a helpful strategy for the courts in the context of a particularly vexatious litigant may be to emulate procedures in VCAT to some extent and reduce interlocutory proceedings, not focussing on strike out applications, but simply getting the case on for trial, unless it has absolutely no merit or is not justiciable. Individual case management can be reasonably effective. However, the system is too often fragmented and is not good at identifying potentially vexatious litigants.

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<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL10%20-%20Judge%20Misso.pdf>, viewed 3 September 2008.

Mag 1 made the point that clear findings by courts and tribunals about when a case is unmeritorious can be very helpful for those who later have reason to deal with the same litigant, and even potentially provide evidence relevant to an application under s21 of the *Supreme Court Act 1986* (Vic).

VCAT M 7 recalled making a costs order against a vexatious litigant, now declared, but the litigant's response was simply to appeal the order for costs – little was accomplished save further proliferation of the litigation.

Another option raised by VCAT M 7 was preclusion of a litigant from bringing another action for a certain period of time, such as by s132H of the *Transport Act 1983*:

(1) If the licensing authority decides to refuse an application for accreditation, the licensing authority may determine that the applicant is disqualified from applying for accreditation of that kind under this Division for the period determined by the licensing authority.

(2) The period determined by the licensing authority under subsection (1) must not exceed 5 years

A number of interviewees identified the issue of court fee waivers to be significant in relation to vexatious litigants. S Ct J 2, for instance, noted that “Many litigants make affidavits saying that they have no assets (which often is not true) and so litigation costs them nothing. There is no risk and no cost.” Moreover, “once a decision is made to waive costs, it cannot be revoked”. S Ct J 2 suggested that “it would be helpful if judges had a power in legislation to revoke a fee waiver if someone is declared to be vexatious.”

Sup Ct M 1 also expressed concern about waiver of fees and identified merit in “tightening up fee waivers as some people who apply for them have plenty of assets”. VCAT M 4 noted that because people can gain fee exemptions reasonably readily at VCAT, there are some who bring multiple applications. This can lead to abuse.

Need for reform to Victoria’s laws in relation to vexatious litigants

Most respondents identified the need for reform of the current Victorian vexatious litigant laws. As identified above, a number of interviewees identified merit in the United Kingdom initiative.

S Ct J 1 preferred the expression “frequent bringing of unmeritorious claims” to terminology involving the nomenclature of vexatiousness.¹⁷ C Ct J 2 recommended the test be “frequently brought litigation without reasonable grounds”. Mag 2, Mag 3 and Mag 4 were of the same view. VCAT members similarly preferred such a formulation.

S Ct J 3 emphasised that the jurisdiction under s21 of the *Supreme Court Act* is “an extraordinary jurisdiction to be exercised sparingly by the Supreme Court”.

Role of the Attorney-General in bringing applications for declaration of vexatious litigant status in the Supreme Court

Concern was expressed by many of the respondents in relation to the current role of the Attorney-General in having the exclusive power to initiate applications in the Supreme Court for a person to be declared a vexatious litigant. The concern took the form of being troubled at the only person being able to bring an application for a party to be declared vexatious being the Attorney-General and the fact that only a very modest number of applications have ever been brought, including within the past two decades. In addition,

¹⁷ Rule 6.06 of the *High Court Rules 1994* (Cth) provides that: “6.06.1 Upon the application of a Law Officer, the Australian Government Solicitor, or the Principal Registrar, the Court or a Justice, if satisfied that a person, alone or in concert with any other, frequently and without reasonable ground has instituted or has attempted to institute vexatious legal proceedings may, having given that person an opportunity to be heard, order that he or she shall not, without the leave of the Court or a Justice, commence any proceeding or make any application in the original or the appellate jurisdiction of the Court.”

the process is 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.

C Ct J 2 stated that the Attorney-General is unlikely to be aware of the extent of the problem and suggested that this should be addressed by a time and motion study which could quantify the extent of the problem.

Mag 2 and Mag 4 made the point that broadening the category of persons beyond the Attorney-General has the added advantage of taking away a perceived politicisation of the role.

S Ct J 2 expressed frustration that there was no clear system for bringing relevant matters to the attention of the Attorney-General. On a number of occasions S Ct J 2 has outlined a litigant's litigation history in the judgment. In one case, S Ct J 2 was specifically asked by the defendant to mention the plaintiff's behaviour in the judgment. It is not clear whether the defendants in matters in which their interests have been adversely affected by the conduct of undeclared vexatious litigants have sought to bring the issue to the Attorney-General's attention.

Standing for others to apply for declaration

The Interviewer was informed that most judges of the Supreme Court agreed that there should be an opportunity for a defendant or a person or entity adversely affected by ongoing conduct of a litigant to be able to apply for a declaration that the litigant is a "vexatious litigant".¹⁸ S Ct J 3 observed that "vexatious behaviour is much more likely to be immediately apparent to that person" – costs penalties would act as a sufficient

¹⁸ See too Supreme Court submission:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL34%20-%20Supreme%20Court.pdf>, viewed 24 September 2008.

deterrent to speculative actions being brought.

S Ct J 1 observed that “The Attorney-General has been reluctant to act. The Attorney has only taken action in clear-cut cases” and commented that “Standing to apply for orders should be broadened. Other affected parties should have the right to apply for a declaration.”

S Ct J 2 expressed the view that any person “directly involved” in litigation should be entitled to apply for another party to be declared vexatious if the relevant criteria are established. However, S Ct J 2 acknowledged that the Attorney-General, because of his or her unique role, has to deal with tensions between protecting the system of justice and also maintaining access to justice when deciding whether or not to make an application for a declaration.

S Ct J 3 suggested that there was merit in the Chief Justice being able to refer names: the fact of its being the Chief Justice would go some way to getting around the perception that it was a act done in a personal capacity rather than on behalf of the court. S Ct J 4 maintained that having the Attorney-General as the sole person able to initiate applications for litigants to be declared vexatious is too restrictive, noting that very few such applications had been made in the past two decades. However, S Ct J 4 observed that logistically it could be difficult for defendants to bring such applications in many instances because they would not have access to the undeclared vexatious litigant’s litigation profile unless the defendant is a body such as a bank or government entity that might have reason to be aware of the litigant’s activities from prior litigation involvement with him or her.

S Ct J 4 raised the option of having such proceedings brought by the Prothonotary of the Supreme Court or by the Victorian Government Solicitor or the Secretary of the Department of Justice and made the following suggestions if the categories of potential

applicant were broadened:

- *Prima facie*, cost penalties should apply when a defendant fails in an application for a plaintiff to be declared vexatious;
- There should be a requirement for leave to be obtained for any application for a declaration that a plaintiff should be declared vexatious; and
- The criteria for vexatiousness may need to be tightened.

C Ct J 1 observed that there is a risk too that applications for vexatious litigant declaration will become just another litigation strategy with the potential for abuse. This was also emphasised by VCAT M 2 who observed: “you risk shifting this the other way – allowing it to be used as a weapon.”

C Ct J 2, though, questioned whether the current system permitted the Attorney-General to have any real idea of the extent of the problems posed by a given vexatious litigant.

Mag 4 was strongly of the view that anyone adversely affected by the conduct of a litigant should have standing to bring an application for them to be declared vexatious. Mag 2 agreed.

Potential for declaration of vexatious litigant status outside the Supreme Court

There was a mixture of views in relation to the utility of changing the law so that jurisdictions outside the Supreme Court could be able to declare litigants vexatious in their jurisdiction. A view was that the declaratory role was archetypally the responsibility of the Supreme Court as the superior court with responsibility for supervising all courts

and tribunals in the State.¹⁹ The pragmatic point, though, was made by some participants that many vexatious litigants, upon being so declared by the Magistrates' Court, the County Court or VCAT, would exercise their appeal rights, resulting in the decision making its way into either the Supreme Court or the Court of Appeal (from the County Court or a judicial member of VCAT), thereby achieving little in reposing the jurisdiction outside the Supreme Court.

S Ct J 2 was of the view that VCAT should be able to declare one of its litigants vexatious but acknowledged two difficulties with this position: the likelihood of an almost reflexive appeal to the Supreme Court/Court of Appeal and the risk of some degree of forum shopping by such a litigant.

S Ct J 4 was in favour of enabling the County Court, the Magistrates' Court and VCAT to make vexatious litigant declarations for their own courts, suspecting that outside the Supreme Court there may be a feeling of powerlessness in face of the conduct of vexatious litigants in light of the relative rarity of applications by the Attorney-General to the Supreme Court.

The more traditional position was supported by C Ct J 1 who stated: "the essence of vexatious litigation is using the court system for a purpose for which it was not intended. It is the responsibility for the superior court in the state to protect the system."

Mag 1 emphasised that if, other than in relation to intervention order proceedings (see below), the Magistrates' Court is to be given power to declare litigants in the court to be vexatious, it should be only the Chief Magistrate who is able to exercise such a power.

¹⁹ See too Supreme Court submission:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL34%20-%20Supreme%20Court.pdf>, viewed 24 September 2008.

Mag 5 stated: “The Court has a capacity to accommodate difficult people and we know that’s what we have to do. I don’t think we’d often want to be declaring people vexatious.” This was consistent with the general approach of the Magistrates who were interviewed.

VCAT members had a variety of opinions about whether VCAT would benefit from receiving a power itself to declare litigants vexatious. For the most part the view expressed was that s75 of the VCAT legislation (see above) is sufficient to deal with litigation that is unmeritorious. However, VCAT M 2 did not oppose the notion in principle for VCAT but emphasised that such a power should only be exercisable by a judicial member: “It’s not something that we need to do today or tomorrow, but we may be thankful for this power in the future.”

Family Violence Protection Bill 2008 (Vic)

The attention of the Interviewer was drawn to cl 189(1) of the *Family Violence Protection Bill 2008 (Vic)* which creates a power in the President of the Children’s Court and the Chief Magistrate and a Deputy Chief Magistrate, upon application from the Attorney-General or a person against whom complaints or applications have been made under the Act for an order declaring a person to be a “vexatious litigant”. When it is a person other than the Attorney-General who applies for such an order, leave must be obtained and may only be granted if the magistrate is satisfied there is evidence that there is merit in the application; and the making of the application would not be an abuse of process. Under cl 193 a 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 “the person has habitually, persistently and without any reasonable ground instituted proceedings under this Act against the same person”. The examples given under the legislation are where the person has persistently and without any reasonable grounds done any of the following:

- made applications for family violence intervention orders against the same family member;
- applied for the variation of a family violence intervention order made against a family member;
- applied for the revocation of a family violence intervention order made against the person;
- appealed against the making of a family violence intervention order, or the conditions of the order, made against the person.

Such an order has the effect that the vexatious litigant cannot without leave of the court make an application for a family violence intervention order, or the variation, revocation or extension of a family violence intervention order, in relation to a person stated in the order or the person's children.

The Interviewer was given to understand by magistrates that the principal reason, according to their understanding, for the proposed vexatious litigant regime in this division of the Magistrates' Court was to enable it to deal effectively with serial and unmeritorious applications for variation of existing orders. The provision has its origins in recommendations of the Law Reform Commission:²⁰

89. The Chief Magistrate and delegates of the Chief Magistrate should have the power to declare a person involved in family violence proceedings a vexatious litigant and therefore require that the person seek leave of the court before making any further intervention order applications.

90. The Chief Magistrate or a delegate should be able to declare a person a vexatious litigant if the litigant has habitually, persistently and without any reasonable ground instituted applications under the Act.

91. The power to declare a person a vexatious litigant should be exercised on application from the person subject to the potentially vexatious proceedings, or the Attorney-General or on the court's own motion.

²⁰ Law Reform Commission of Victoria, *Family Violence*, Recommendations: <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Family+Violence/LAWREFORM+-+Family+Violence+-+Recommendations>, viewed 4 September 2008.

92. Before making a declaration that a litigant is vexatious, the court should provide the person with an opportunity to be heard. The court should also provide the person with an opportunity to obtain legal representation for the hearing.

93. A declaration that a person is a vexatious litigant may be reviewed by the Supreme Court on a point of law.

94. A vexatious litigant may apply to any Magistrates' Court for leave to issue an intervention order application. An application for leave to apply should be heard as soon as possible.

Mag 5 stated that in the family violence jurisdiction serial unmeritorious applications have been problematic for some years. They arise both from applicants for orders and also from applicants seeking variation of orders. Recently Mag 5 encountered an intellectually disabled woman who had made 15 previous applications for orders but the Magistrate did not have any information about the outcomes of these previous applications. Mag 5 stated that "There are not a lot of vexatious litigants in the family violence jurisdiction but they have a big impact. They are difficult and can be violent and intimidating. They take time and energy and invoke frustration. Some are quite cold and calculating. Often people use the law to try to contact or see a person or to try to inconvenience them through repeated applications or applications for variations."

Mag 5 acknowledged that the provision was inconsistent with the principle of the courts being accessible but defended the rationale for the provision, stating that magistrates would be "incredibly careful; we will be circumspect around exercising this power". Mag 5 supported the proposals from the Law Reform Commission, stating that the procedures under s21 of the *Supreme Court Act 1986* (Vic) have been too cumbersome and have not effectively protected persons in the family violence jurisdiction of the Magistrates' Court.

Anomalously, the provisions do not extend into the stalking area, although the considerations for their application would be just the same. Mag 1 and Mag 5 argued that the stalking provisions, which are currently being reviewed, should incorporate a similar

provision.²¹

Mag 5 noted that under the provisions in the Bill an appeal lies to the County Court, which should reduce the potential for the provisions to be used as a further form of harassment.

Vexatious litigants in the criminal context: Private prosecutions

A number of Magistrates drew attention to the control mechanism which exists in relation to the institution of private prosecutions.²² Section 22(1)(b)(ii) of the *Public Prosecutions Act 1994* (Vic) provides that a function of the Director of Public Prosecutions is:

to take over and conduct any proceedings in respect of any summary or indictable offence, other than proceedings in respect of an indictable offence that are consequent on a finding of a grand jury under section 354 of the Crimes Act 1958.

Strictly, this does not empower; it just articulates a function.

Section 25 provides that:

(1) Subject to this Act, the Director has the same power to enter a nolle prosequi in criminal proceedings as the Director appointed under the *Director of Public Prosecutions Act 1982* had immediately before the commencement of section 52.

(2) Nothing in this Act affects or takes away from the power of the Attorney-General to enter a nolle prosequi in criminal proceedings.

Magistrates stated that these provisions had been relied upon to curtail private prosecutions instituted by persons who may have been vexatious litigants. Mag 1

²¹ See also Submission of the Magistrates' Court:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL37%20-%20Magistrates%20Court.pdf>, viewed 4 September 2008.

²² See too submission by J Rapke QC, Director of Public Prosecutions:
<http://www.parliament.vic.gov.au/LAWREFORM/inquiries/Vexatious%20Litigants/submissions/VL22%20-%20Vic%20Public%20Prosecutions.pdf>, viewed 5 September 2008.

commented that when this first happened, “I was outraged. There was a private prosecution charging police with assault. The DPP took it over and struck it out. There was no notice to the other person.” Mag 5 argued that a decision to take over a prosecution and terminate it should be reviewable.

Appeal mechanisms from declarations of vexatious litigant status

The view generally expressed was that the appeal mechanisms for those few persons declared to be vexatious applicants and wanting to appeal their status worked fairly and effectively.

Applications for leave to commence litigation by declared vexatious litigants

The Interviewer was referred to the decision of McDonald J in *Lindsey v Attorney-General for the State of Victoria* [2002] VSC 96 permitting a declared vexatious litigant to be allowed to sue under s93 of the *Transport Accident Act 1986* (Vic) in relation to a transport accident. It was suggested that this was an example of the system working flexibly and fairly – not unduly denying access to justice.

Similarly, the Interviewer was referred to the fact that Mr Kay, a declared vexatious litigant, was granted leave by Williams J leave to commence proceedings in the Magistrates' Court of Victoria for the variation or revocation of the order staying his right to commence proceedings. By contrast, in *Kay v McIntosh* [2003] VSC 373 Byrne J refused another application for leave.

S Ct J 2 suggested that leave applications should be able to be heard “on the papers” as leave applications often take a considerable amount of time to hear.

Rights to representation for declared vexatious litigants

The view generally expressed by all interviewees was that vexatious litigants should be afforded the same rights to representation as other litigants. However, a percentage of vexatious litigants cannot find a legal practitioner prepared to argue their case or argue their case in the way that the litigant wants it argued. In addition, some vexatious litigants do not want to be legally represented – they prefer to be able to argue their case themselves, whether because they do not trust a lawyer to do it on their behalf, or because they derive gratification from the argumentation process itself.

The Charter of Human Rights and Responsibilities Act 2005 (Vic)

There was general agreement that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) would tend to make declarations of vexatious litigant status more difficult. However, interviewees tended not to refer to specific provisions, eg the right to freedom and equality before the law (s8), the right to freedom of expression (s15) or the right to a fair hearing (s24).

S Ct J 4 maintained that the current system is “not draconian” in terms of access to justice – “the door isn’t shut; it’s just harder to open.” A benefit of the current system is that the barrier to declaration is high and that is how it should be. VCAT M 1 noted the importance of s7(2) of the Charter which provides that:

(2) A human right may be subject under law only 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.

S Ct J 3 described the vexatious litigant declaration system as “draconian” and only to be used sparingly but did not believe that it was inconsistent with the Charter – “there are competing rights: each person has a right of access but if some litigants are taking all the court time, it reduces the access of other litigants.”

C Ct J 1 feared that the Charter would be “a bit of a monster” in relation to vexatious litigants in that it may make declarations even more difficult for the Attorney-General to obtain and vexatious litigants are likely to mount strained arguments on the basis of it as another part of their litigation armoury.

VCAT M 1 made the point that access to justice has two aspects – for the litigant wanting to bring an action but also for the defendant, a right not to be harassed and victimised by the bringing of unmeritorious action.

Mutual recognition of declarations of vexatious litigants

There was general agreement that should there be consistency of vexatious litigant declaration schemes around Australia, it would be appropriate for there to be reciprocity of recognition. C Ct J 2 observed that “Nationally consistent vexatious litigants legislation would be terrific.”

S Ct J 2 observed that many litigants “bounce between the Supreme Court and the Federal Court”. S Ct J 3 expressed the view that if a court of co-ordinate jurisdiction has declared a person to be a vexatious litigant, then a Victorian Court should be able to preclude their suing without first obtaining leave. S Ct M 1 commented that it makes no sense that a person can be declared a vexatious litigant interstate “and we know nothing about it” and they can cause the same problems again in Victoria.

Conclusions

It is apparent from the diverse responses of those interviewed that there is little consistency of views on the part of judges, magistrates and VCAT members about a number of issues before the Law Reform Committee in relation to vexatious litigants. The point was made strongly by a number of interviewees, though, that it is important not to conflate the term “vexatious litigant” with “self-represented litigant” or “mentally unwell litigant”. Such an approach would be conceptually unsound and would risk perpetrating real unfairness. Some interviewees preferred to use the terms “persistent litigant” and “querulous litigant”.

It was also stressed that there are comparatively few vexatious litigants, whether declared or undeclared. The view expressed was that more such litigants are encountered in the Supreme Court than elsewhere with a lesser number to be found in the County Court. There are comparatively few in the Magistrates’ Court and in VCAT.

However, such persons consume disproportionate amounts of resources and time for the Supreme Court and the County Court, as well as their staff. Magistrates and VCAT members felt that the speed with which matters come to trial in their jurisdictions assisted significantly in addressing the difficulties which might otherwise arise from vexatious litigants. Within the Supreme Court, judges felt that the Self-represented Litigants Co-ordinator provided an important service, which also to some extent impacts upon the

activities of undeclared vexatious litigants. There was some support amongst County Court judges for the creation of a similar office within their court. However, it would not be practicable in the Magistrates' Court, save perhaps at Melbourne, and would not be needed at VCAT.

A concern was expressed by some interviewees that relatively little is still known about the phenomenon of vexatious litigation and what psychiatric or psychological factors lead to the disruptive conduct by vexatious litigants. This makes the development of responsive strategies problematic in terms of a sound evidence base. The potential role of VCAT under s66 of the *Guardianship and Administration Act 1986 (Vic)* was referred to by a number of interviewees but its practicability was questioned as a solution to vexatious litigants who may have "just" a personality disorder. It was recognised by many interviewees that further training of judicial officers, tribunal members and court and tribunal staff about management of unusually persistent or distressed litigants would be advantageous.

Interviewees identified a number of characteristics of vexatious litigants which were consistent and went beyond being "difficult to manage". Individual 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. This poses questions about positive discrimination in favour of vexatious litigants but, it was said, is often appreciated by defendants as it brings to conclusion litigation that may not have a great deal of merit. Some interviewees regarded the best solution to the challenges posed by vexatious litigants and particularly distressed litigants to be non-legislative - sophisticated and patient court management by judges, magistrates and Tribunal members of litigants' levels of distress and misunderstandings about legal process.

It was generally acknowledged that the test for declaration of a "vexatious litigant" under s21 of the *Supreme Court Act 1986 (Vic)* is anachronistic and difficult to interpret. It

needs to be amended so that it is more modern and is on the basis of “frequent” bringing of actions “without good cause” or “without merit”. This would not necessarily liberalise the threshold for bring such applications. A number of interviewees queried whether the stigmatising descriptor “vexatious” should be retained. There was a significant level of support for importing the graded system of categorisation of litigants under the *Supreme Court Act 1981* (UK) system of “civil restraint orders”. This provides flexibility in responsiveness and is a contemporary approach to the problem.

The role of the Attorney-General in respect of applications for declaration of vexatious litigant status was controversial. It was contended by a number of judicial officers that too few applications had been made and that the process is too cumbersome. This raised an issue which divided interviewees: whether persons other than the Attorney-General (ie defendants or “persons affected”) should be given standing to apply for litigants to be declared “vexatious” or whether the role of applicant should remain that of the Attorney-General alone. The majority of interviewees was in favour of expanding the category of potential applicants.

The *Family Violence Protection Bill 2008* (Vic) will introduce into the Magistrates’ Court a limited regime for persons to be declared “vexatious” within one division of the Court. This is as a result of recommendations from the Law Reform Commission because of problems experienced in relation to both serial applications for intervention orders and for variations to intervention orders which have been brought on some occasions without merit and for collateral reasons. Magistrates were generally in favour of this development but were concerned that it does not yet apply to stalking scenarios which can give rise to a significant incidence of vexatious litigation. However, judicial officers in all courts and members of VCAT were divided about the question of whether courts and VCAT should be given a specific provision to declare litigants vexatious within their own jurisdiction. A slender majority perceived some advantage in such a step, although it was felt that it would be rarely availed of and would accomplish comparatively little. This was because such a step is prima facie an encroachment upon litigants’ rights of access to justice and so would only be invoked in the face of relatively extraordinary conduct, that it is

inconsistent with principles of therapeutic jurisprudence, and that it is likely simply to prompt further appellate litigation. Another perspective expressed was that the Supreme Court is the appropriate forum for so serious an order to be made as the Supreme Court has general supervisory responsibility for the operation of courts throughout Victoria.

It was generally thought that a “vexatious litigant” regime, provided it was not excessively expanded in scope and provided it has proper scope for appeals and for the application of leave by declared persons to bring further actions (where merit is established) is consistent with the spirit of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Appendix One

QUESTIONS FOR JUDICIAL OFFICER AND VCAT INTERVIEWEES

- 1. Recognising the terms of reference of the Law Reform Committee, what is your view of the distinctions and/or associations between “difficult”, “unusually persistent” “querulous”, “mentally ill”, “self-represented” and “vexatious” litigants?**
- 2. Should the term “vexatious litigant” be retained in Victoria’s legislation?**
- 3. What should be the test in Victoria for declaration of a person to be a “vexatious litigant”?**
- 4. What in your experience are the profile/common characteristics of vexatious litigants?**
- 5. What do you think is the relationship, if any, between mental illnesses/personality disorders and vexatious litigants.**
- 6. What in your experience causes or exacerbates the behaviour of vexatious litigants?**
- 7. How common are vexatious litigants in Victoria’s courts and tribunals?**
- 8. How significant a problem are vexatious litigants for Victoria’s courts and tribunals?**
- 9. How often do judicial officers and court employees deal with vexatious litigants?**
- 10. Are vexatious litigants more common in some types of disputes/divisions of the court/tribunal than others?**
- 11. Are they becoming more common and/or a bigger problem?**
- 12. What effects in terms of costs and other impacts do vexatious litigants have upon courts, judicial officers and court staff?**
- 13. Do vexatious litigants have indirect effects upon others, such as parties to proceedings and persons/entities associated with parties?**
- 14. Have you encountered particular instances of litigation brought by a person who might be described as a “vexatious litigant”?**
- 15. Does Victoria’s definition of vexatious litigants adequately catch those who are causing difficulties to the court/tribunal system through engaging in repeated unmeritorious litigation?**
- 16. Are Victoria’s laws in relation to vexatious litigation litigants adequate for their purpose?**
- 17. Are Victoria’s laws in relation to vexatious litigation litigants being sufficiently invoked/applied?**
- 18. What strategies (including specific orders, striking out of actions, imposition of costs and referral for assessment/counselling) have been developed/have been implemented in your court/tribunal to address the issues raised by**

vexatious litigants?

- 19. Have they been successful? In what way?**
- 20. Have they been evaluated? If so, how?**
- 21. Are there other strategies which could usefully be considered?**
- 22. Are Victoria's laws in relation to vexatious litigation litigants in need of reform? If so, how do you think they could be improved?**
- 23. Should the Attorney-General be the only person able to be able to apply for a person to be declared a vexatious litigant? Should others, including parties to litigation have that role?**
- 24. Should courts and tribunals have the power to impose conditions upon a person's right to institute litigation, when they have not been declared vexatious?**
- 25. Should courts/tribunals other than the Supreme Court have the power to declare a person a vexatious litigant? If so, what criteria and procedures should be employed so as to assure consistency of approach? What role, if any, should the Attorney-General have?**
- 26. What appeal mechanisms should exist for declarations of vexatious litigant status?**
- 27. How effective is the process of permitting declared vexatious litigants to apply for leave to commence litigation?**
- 28. Are you of the view that this option of application for leave has proved problematic and/ or been abused?**
- 29. What rights to representation should declared vexatious litigants have?**
- 30. How do you anticipate the *Charter of Human Rights and Responsibilities Act 2005 (Vic)* to impact upon the vexatious litigant provision in s21 of the *Supreme Court Act 1986 (Vic)*?**
- 31. If a person is declared a vexatious litigant in Australia outside Victoria what impact, if any, should that have upon their entitlement to institute litigation in Victoria?**
- 32. Are there mechanisms/laws/legal processes that can be used to reduce the adverse impact of vexatious litigants other than their being so declared, without unreasonably limiting access to the courts?**