

## LAW REFORM ESSAY

# *When rights cause injustice: a critique of the Vexatious Proceedings Act 2008 (NSW)*

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### **1. Introduction**

For over 25 years, persons declared by the Supreme Court of NSW to be ‘vexatious litigants’ have been prevented from instituting any legal proceedings in a NSW court without leave.<sup>1</sup> During this period, however, only nine persons in NSW have ever been subject to a declaration, and under similar legislation around Australia there have only been 45 in total.<sup>2</sup> Such small numbers have been taken by some commentators to indicate the marginal impact of vexatious litigation in Australia,<sup>3</sup> in contrast for example to the United States.<sup>4</sup> The alternative view,<sup>5</sup> which has sparked a wave of reform across Australian jurisdictions including WA, NT, Queensland, NSW and now Victoria,<sup>6</sup> is that such numbers actually reflect the current inability of courts and aggrieved parties to take sufficient protection against persistent ‘wanton, and mischievous action’.<sup>7</sup>

The *Vexatious Proceedings Act* 2008 (NSW) (‘the Act’) is typical of the contemporary legislative response. It repeals the previous vexatious litigant statutory provision, the *Supreme Court Act* 1970 (NSW) s 84, and replaces it with

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1 *Supreme Court Act* 1970 (NSW) s 84, repealed by the *Vexatious Proceedings Act* 2008 (NSW).

2 Grant Lester and Simon Smith, ‘Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia’s Vexatious Litigant Sanction 75 Years On’ (2006) 13 *Psychiatry, Psychology and Law* 1 at 17.

3 Evidence to Law Reform Committee, Parliament of Victoria (‘Victorian Parliamentary Committee’), Melbourne, 6 August 2008, 2–3 (Simon Smith); Evidence to Victorian Parliamentary Committee, 13 August 2008, 2 (Mental Health Legal Centre), 2–3 (Federation of Community Legal Centres).

4 Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 4 (Simon Smith).

5 See Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 2–7 (Victorian Bar Council), 7 (Office of Public Prosecutions); Evidence to Victorian Parliamentary Committee, 13 August 2008, above n3 at 2 (Commonwealth Bank Group), 2 (Deputy Ombudsman of New South Wales), 2 (Wellington Shire Council).

6 *Vexatious Proceedings Restriction Act* 2002 (WA); *Vexatious Proceedings Act* 2007 (NT); *Vexatious Proceedings Act* 2005 (Qld); *Vexatious Proceedings Act* 2008 (NSW); and Victorian Law Reform Commission (‘VLRC’), *Civil Justice Review* Report No 14 (2008).

7 Lord Halsbury LC, United Kingdom, House of Lords, *Parliamentary Debates (Hansard)*, 14 July 1896 introducing the first United Kingdom legislation on this subject.

a new regime that is different in four main ways: first, the Act broadens the definition of 'vexatious litigant' beyond the traditional test; second, it enlarges the operation of a 'vexatious proceedings order' to prevent proceedings in tribunals as well as courts; third, it grants standing to a wider range of parties to apply for an order; and finally, it gives greater flexibility to the courts in both making and rescinding orders.<sup>8</sup>

Part Two of this paper addresses each of these changes in turn. Its object is to compare the previous legislation with the alterations pursuant to the new Act, with a view to highlighting not only their legal, but also their practical consequences. Parts Three and Four assess these outcomes against the aims of the law reform process. Part Three addresses the traditional aim of preventing scarce public resources from being expended in meaningless litigation. Part Four addresses the two further aims of protecting private individuals from frequent harassment and annoyance at the hands of vexatious litigants; and also the beneficial interests of vexatious litigants themselves.<sup>9</sup>

The focus of this paper is the competing rationales for vexatious proceedings reform within Australia. Within contemporary debate, waste of scarce public resources is perceived as the chief social ill caused by vexatious litigants. It has, therefore, guided and shaped new and proposed legislation, such as the NSW Act. This rationale, however, fundamentally fails to justify the further exclusion of already marginalised individuals. It also diminishes the probability of a vexatious proceedings order becoming easier to gain in practice. The alternative approach, suggested by this paper, is that reform should be re-orientated around the rights of aggrieved parties, and the interests of vexatious litigants themselves, which refocuses reform upon achieving justice *between* the parties.

This paper, therefore, proposes a different legislative model from the Act. It proposes that, although the threshold definition of a 'vexatious litigant' need not change, the discretionary basis upon which such an order is made, and the conditions contained within should. It is proposed that a vexatious proceedings order should not seek to label a *person* as vexatious, but rather specific *relationships* which have spawned the vexatious proceedings. In this way, the vexatious proceedings order becomes a far more flexible and targeted remedy that

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8 There are also other changes in the Act such as conferring comparable powers upon the Land and Environment Court and the Industrial Court (s 8(8), (9) respectively) and the ability to make orders against persons acting in concert with a declared vexatious litigant: s 8(1). They are not addressed specifically in this paper.

9 Although this article addresses NSW law reform, it draws chiefly upon submissions to the Victorian Parliamentary Committee, above n3, in order to illustrate the debate regarding these issues. This is because no corresponding inquiry or public debate was ever held within NSW prior to the Act: see Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 8 (Simon Smith). The issues, however, remain largely the same within both jurisdictions. The final report of the Victorian Parliamentary Committee has also now been published: see Victorian Parliamentary Committee, *Inquiry into Vexatious Litigants* (2008). Unfortunately, due to time restraints its conclusions have not been integrated within this paper. However, it should be noted that its proposed adoption of the graduated approach of the United Kingdom is far more consistent with the proposal of this article than the current NSW Act.

provides relief for aggrieved parties, rather than an instrument of the state used to exclude an individual from exercising a significant individual right.

## **2. *The Consequences of Reform: the Supreme Court Act 1970 (NSW) and the Vexatious Proceedings Act 2008 (NSW)***

### **A. *Definition of a Vexatious Litigant***

The traditional test for a ‘vexatious litigant’ was first laid down in the *Vexatious Actions Act 1896* (UK),<sup>10</sup> and was adopted almost unchanged by NSW in the *Supreme Court Act*. Section 84 defines a ‘vexatious litigant’ as ‘any person who habitually and persistently and without any reasonable ground institutes vexatious legal proceedings.’ There are three key elements to this test that are changed by the Act.

The first element is the threshold criterion of ‘habitually and persistently’ instituting proceedings. ‘Habitually’ has been taken to mean that ‘the institution of such proceedings occurs as a matter of course, or almost automatically when the appropriate conditions (whatever they may be) exist’; and ‘persistently’ suggests ‘determination, and continuing in the face of difficulty or opposition, with a degree of stubbornness’.<sup>11</sup> In operation, this criterion has ensured that a high threshold must be met, excluding merely ‘frequent’ proceedings.<sup>12</sup> Section 8 of the *Act* explicitly rejects this criterion. A person who has merely ‘frequently instituted or conducted vexatious proceedings’ may qualify as a vexatious litigant. ‘Frequently’ means ‘at frequent or short intervals, often repeatedly; numerously’,<sup>13</sup> however, it is to be construed as a relative term,<sup>14</sup> and the court must look to the context of the litigation.<sup>15</sup> It is suggested that a useful approach is to follow Whelan J who, in interpreting the previous term ‘persistently’, adopted the principle of the New Zealand Court of Appeal that:

[a] litigant may be said to be persisting in litigating though the number of separate proceedings he or she brings is quite small if those proceedings clearly represent an attempt to re-litigate an issue already conclusively determined against that person, particularly if this is accompanied by extravagant or scandalous allegations which the litigant has no prospect of substantiating or justifying.<sup>16</sup>

In this way, just as the character of the litigation might inform a contextual reading

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10 See *Vexatious Actions Act 1896* (UK) s 1: ‘any person who has habitually and persistently instituted vexatious legal proceedings without reasonable ground’. Compare *Supreme Court Act 1970* (NSW) s 84, repealed by the *Vexatious Proceedings Act 2008* (NSW): ‘any person who habitually and persistently and without any reasonable ground institutes any proceedings’.

11 *Attorney-General v Wentworth* (1988) 14 NSWLR 481 (‘Wentworth’) at 492 (Roden J).

12 *Valassis v South Sydney City Council* (1996) 92 LGERA 275; *Wentworth* (1988) 14 NSWLR 481 at 492.

13 *National Australia Bank Ltd v Freeman* [2006] QSC 86 (‘Freeman’) at [30] (Muir J), citing the *Shorter Oxford English Dictionary*.

14 *Jones v Cusack* (1992) 109 ALR 303 (‘Cusack’) at 816.

15 *Freeman* [2006] QSC 86 at [30] (Muir J).

of ‘persistently’, a similar approach may be taken with ‘frequently’.

The second element is the definition of ‘vexatious’. In lieu of any definition under s 84, ‘vexatious’ was construed by Roden J in *Wentworth*.<sup>17</sup> His Honour stated three alternative bases upon which proceedings might be deemed vexatious, the first two being subjective in character and the last objective:

1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.
2. They are vexatious if they are brought for collateral purposes and not for the purpose of having the court adjudicate on the issues to which they give rise.
3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

The Act largely codifies these principles with some expansion.<sup>18</sup> The objective requirement now includes where the proceedings are ‘an abuse of process’ as well as when instituted ‘without reasonable ground.’<sup>19</sup> The subjective requirements now include the intention to ‘harass’, ‘delay’, ‘detriment’, or ‘another wrongful purpose’, and also apply to the conduct of proceedings as well as to the basis of their institution.<sup>20</sup> This latter alteration changes the position taken by Wheeler J in *Crown Solicitor for the State of Western Australia v Michael*,<sup>21</sup> where her Honour considered that a distinction should be made between an action which is vexatious, and an action which is conducted in a vexatious manner. Her Honour held that the mere ‘use of misconceived procedures, defects of pleading, placing of irrelevant material before the court, and so on’ could not engage the previous Act if there was some basis to the underlying claim.<sup>22</sup> Under the new Act, however, this distinction is no longer relevant. Conduct itself may qualify as vexatious.

The third element is the type of previous proceedings that can be taken into account. Pursuant to the *Supreme Court Act*, only previous proceedings instituted in the Supreme Court or an inferior court of NSW were relevant in determining whether the court had jurisdiction to make an order against a vexatious litigant.<sup>23</sup> The approach taken in NSW courts, however, has been to utilise the history of

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16 *Attorney-General (Vic) v Weston* [2004] VSC 314 at [21], citing *Brogden v Attorney-General* [2001] NZCA 208 at [21]. See also *Attorney-General v Collier* [2001] NZAR 137 at [36], [56]; *Hunters Hill Municipal Council v Pedler* [1976] 1 NSWLR 478 (‘*Pedler*’) at 487–8 (Yeldham J).

17 See *Wentworth* (1988) 14 NSWLR 481 at 491 (Roden J).

18 Act ss 6, 7.

19 Act s 6(a), (d).

20 Act s 6(b), (c).

21 (Unreported, Supreme Court of WA, Wheeler J, 30 July 1998) 32.

22 The later appeal in *Michael v Attorney-General (WA)* [2006] WASCA 123 at [5] discussing this part of Wheeler J’s decision with approval. The Full Court dismissed an appeal from Wheeler J’s decision, in *Attorney General v Michael* [1999] WASCA 181. See also *Re Vernazza* (1960) 1 QB 197 at 208; *Pedler* [1976] 1 NSWLR 478 at 485; *Ramsey v Skyring* (1999) 164 ALR 378 at 391; *Attorney-General (NSW) v Bhattacharya* [2003] NSWSC 1150 at [9] (Whealy J); *Attorney-General (NSW) v Betts* [2004] NSWSC 901 (‘*Betts*’) at [7] (Hoeben J).

other litigation in both tribunals and courts outside NSW jurisdiction when exercising the discretion of the court envisioned by the *Supreme Court Act*.<sup>24</sup> Sections 5 and 8 of the Act now ensure that all proceedings instituted within Australia, whether civil or criminal, and including interlocutory, are relevant to determining the jurisdiction of the court. In one respect, however, the Act does not go as far as the WA legislation, which provides that the court may make an order where it is satisfied that 'it is *likely* that the person will institute or conduct vexatious proceedings.'<sup>25</sup>

The combined purpose of these three elements is to make it easier for the court to determine a person to be vexatious litigant. In evaluating the Act, however, it is difficult to quantify the difference that changing 'habitually and persistently' to 'frequently' will have on decisions, other than that it should lower the threshold on the general spectrum of repeat of litigation. 'Frequently' has been the threshold in the ACT, Queensland and in the High Court for a number of years, but the jurisprudence has made little principled distinction between this threshold and the traditional test in other jurisdictions.<sup>26</sup>

The more controversial aspect of the Act is its removal of the distinction between vexatious actions and actions conducted in a vexatious matter. The operation of the Act envisions that where a person might have some underlying basis for action but that basis is obfuscated by procedural failings; *and* those failings are sufficient to result in no reasonable ground being properly disclosed or proceedings being conducted in a way so as to harass, annoy, delay or cause detriment; *then* such a person is liable to be subject to an order. This approach risks falling foul of the danger identified by the Federation of Community Legal Centres in its submission to the Victorian Parliamentary Committee, that 'vexatious litigants' may become equated with 'difficult complainants'.<sup>27</sup> The latter are people who are not necessarily vexatious but rather are difficult for legal and

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23 On interlocutory proceedings, see, for example, *Pedler* [1976] 1 NSWLR 478 at 488 (Yeldham J): 'While it is probably correct to say that interlocutory proceedings taken in the course of an action instituted by another person which is still current are not within the section, I think, without endeavouring to supply an exhaustive definition, that, where a final decision has been given, any attempt, whether by way of appeal or application to set it aside, or to set aside proceedings taken to enforce such decision, which is in substance an attempt to re-litigate what has already been decided, is the institution of legal proceedings. It is to the substance of the matter that regard must be had and not to its form'.

24 *Betts* [2004] NSWSC 901 at [5] (Hoeben J).

25 *Vexatious Proceedings Restriction Act 2002* (WA) s 4(1)(b). This was not replicated in the Model Vexatious Proceedings Bill 2004 as formulated by the Standing Committee of Attorneys-General: see VLRC, 'Helping Litigants with Problems and Hindering Problem Litigants', above n6 at 594.

26 The relevant rules are *Supreme Court Act 1933* (ACT) s 67A; *High Court Rules 2004* (Cth) r 6.06.1; *Vexatious Proceedings Act 2005* (Qld) s 6 and its predecessor *Vexatious Litigants Act 1981* (Qld) s 3. *Lohe v Gunter* [2003] QSC 150 at [32] (Holmes J) provides an example of indistinguishable treatment across jurisdictions, citing High Court and NSW Supreme Court case law without distinction including *Wentworth* (1988) 14 NSWLR 481; *Jones v Skyring* (1992) 66 ALJR 810; *Cusack* (1992) 109 ALR 303; *Attorney-General (NSW) v West* (Unreported, Supreme Court of NSW, Newman J, 19 Nov 1992).

administrative systems to handle. This difficulty is often manifested in unconventional practice of process and procedure.

Under s 84 of the *Supreme Court Act* an incentive existed, even if not always acted upon, for both the court and opposing parties to help ameliorate procedural failings of vexatious litigants. Alternative dispute resolution is an example.<sup>28</sup> To act otherwise would simply prolong effort and expense on all sides. The Act, however, now changes this incentive structure. By making procedural failings a reason to exclude a litigant from the courts, there is now an incentive for opposing parties to perpetuate such difficulties and then use them as a basis to gain a vexatious proceedings order. There is also the prospect that certain complainants, who are ‘difficult’ through no fault of their own (for example, self-represented litigants who suffer from mental illness), risk being excluded from the court system because of these disadvantages, rather than on the merit of their claim.

### ***B. The Operation of the Vexatious Proceedings Order***

An order made under s 84 could only restrain a vexatious litigant from instituting proceedings in any court within NSW jurisdiction.<sup>29</sup> This left both the Federal courts and the administrative tribunal system open for vexatious litigants to pursue their claims, though excluded from NSW courts.<sup>30</sup>

Vexatious litigation within the Federal jurisdiction is clearly the sole responsibility of the Federal arms of government. The implementation of a nationally consistent approach to vexatious litigants, however, could more efficiently prevent ‘forum-shopping’ and collateral litigation.<sup>31</sup> This appears to have been one of the objectives of the Standing Committee of Attorneys-General in drafting the Model Bill, which is the basis for the Act.<sup>32</sup> An issue that may arise,

27 Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 2 (Federation of Community Legal Centres). See also Submission to Victorian Parliamentary Committee, Melbourne, 7 July 2008, 3–4 (Federation of Community Legal Centres).

28 Evidence to Victorian Parliamentary Committee, 6 August 2008, id at 7 (Federation of Community Legal Centres).

29 *Betts* [2004] NSWSC 901 at [3]. This is in contrast to the position in New Zealand where, in equivalent legislation, ‘inferior court’ has been taken to include tribunals: see, Michael Taggart and Jenny Klosser, ‘Controlling Persistently Vexatious Litigants’ in Michael Groves (ed), *Law and Government in Australia* (2005) 200 at 285.

30 Subject to these courts’ own rules: see *Federal Court Rules* (Cth) O 21, r 2; *High Court Rules* 2004 (Cth) r 6.06.1. Presently the Administrative Decisions Tribunal (‘ADT’) is restricted to utilising its power under the *Administrative Decisions Tribunal Act 1997* (NSW) s 88, to award costs against a litigant in ‘special circumstances’. See *Alessa Pty Ltd v Total & Universal Pty Ltd* [2001] NSWADT 150 at [5] (Donald B): ‘The meaning of “special circumstances” has been considered in a number of decisions of this Tribunal. Descriptions of such circumstances range from “circumstances which take the matter out of the ordinary course”, to circumstances where the claims “lacked any conceivable merit in fact or law”, the purpose of a costs order in those circumstances being described as a measure to prevent “the gross abuse of the legislation by frivolous and vexatious and misconceived proceedings”’.

31 Submission to VLRC, Melbourne, 2008 (Law Institute of Victoria) in VLRC, above n6 at 596. However, see Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 6 (Simon Smith).

32 Explanatory Memorandum accompanying the Vexatious Proceedings Bill 2008 (NSW) at 2.

however, in implementing legislation similar to the NSW Act in federal jurisdictions is the interaction between the effective privative clauses in ss 4(c) and 14(6) of the Act and the inherent jurisdiction of the High Court pursuant to s 75 of the *Constitution*.<sup>33</sup> A possible solution is that the court may simply expand its own inherent jurisdiction in a manner akin to the UK development in *Ebert v Venvil*,<sup>34</sup> *Bhamjee v Forsdick (No 2)*<sup>35</sup> and *Mahajan v Department of Constitutional Affairs*.<sup>36</sup> However, this has previously been explicitly rejected by the High Court.<sup>37</sup>

Aside from this hypothetical, a very specific issue does arise with respect to family law litigation. The Family Court, anecdotally,<sup>38</sup> has more vexatious litigants than any other jurisdiction in the country.<sup>39</sup> If, however, such a litigant were instituting collateral proceedings in NSW, the closed court rules of the Family Court would restrict the ability of the NSW court to take previous Federal Family Court litigation into account.<sup>40</sup> Resolving this issue would be particularly important if NSW enacted legislation similar to the Victorian *Family Violence Protection Act*.<sup>41</sup>

The expansion of vexatious proceedings orders, by the Act, to address proceedings in tribunals is potentially the most important development for public agencies in NSW. Many commentators have questioned why so few parties have previously sought orders under s 84.<sup>42</sup> It is suggested that the present exclusion of tribunals from the scope of the legislation has given public agencies little motivation to seek orders that merely restrict litigants in the courts.<sup>43</sup> This is

33 *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476 at 482–94 (Gleeson CJ), 504–7 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

34 [2000] Ch 484.

35 [2004] 1 WLR 88.

36 [2004] EWCA Civ 946.

37 In *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311 at 318–9, the Court (Barwick CJ, McTiernan and Walsh JJ) held that a court has no inherent jurisdiction to restrain a person from *commencing new proceedings* against any person without leave of the court but that a court does have inherent jurisdiction to restrain a person from *making unwarranted and vexatious applications* in an action which is pending in the court, without the leave of the court. See also *Jones v Skyring* (1992) 109 ALR 303 at [38] (Toohey J); *Attorney-General (Vic) v Kay* [2006] VSC 9; *Attorney-General (Vic) v Kay* [2006] VSC 11.

38 See Lester and Smith, above n2 at 17. The *Family Law Act 1975* (Cth) s 121 effectively prohibits publication of its list, thus inhibiting research. However, note that in Evidence to the Parliamentary Committee, 6 August 2008, above n3 at 3 (Simon Smith), Smith states that ‘the current family law court has three times the number of vexatious litigant orders than the other ten superior courts combined, in a third of the time’.

39 The nature of the subject matter also creates unique challenges, as for example, the litigants may be using the court system to circumvent other out of court orders. See Evidence to Victorian Parliamentary Committee, 13 August 2008, above n3 at 3 (Women’s Legal Service Victoria).

40 *Family Law Act 1975* (Cth) s 121; *Family Law Rules 2004* (Cth) r 24.13.

41 *Family Violence Protection Act 2008* (Vic) ss 188–200.

42 For example see, Evidence to Victorian Parliamentary Committee, 13 August 2008, above n3 at 6 (Federation of Community Legal Centres), 7 (Public Interest Law Clearing House).

43 Litigation against the University of New South Wales provides a good example: see the 70 or so cases of Michael McGuirk (*McGuirk v University of New South Wales* [2008] NSWADT 11 being the latest).

particularly relevant in the era of persistent Freedom of Information ('FoI') applications.<sup>44</sup> The Act will not stop vexatious FoI applications but it will prevent proceedings being taken by vexatious litigants in the ADT on the basis of such applications.<sup>45</sup> NSW could, however, follow Queensland and Victoria in implementing specific vexatious FoI legislation.<sup>46</sup>

### C. *Standing*

Section 84 permitted both the Attorney-General and any aggrieved person against whom vexatious proceedings have been habitually and persistently instituted to make an application for a vexatious proceedings order from the court.<sup>47</sup> The Act expands standing beyond these two agents. It grants power to the court to make an order of its own motion, as well as at the application of the Solicitor-General, the appropriate registrar for the court and any person who has a 'sufficient interest in the matter.'<sup>48</sup>

The standing of an aggrieved person to make an application to the court has been criticised by a number of community advocacy groups in their submissions both to the Victorian Law Reform Commission and Victorian Parliamentary Committee. It is feared that such standing might be used as a 'procedural weapon',<sup>49</sup> both in operation and as a threat. There is no evidence of such practices in those jurisdictions, such as NSW,<sup>50</sup> which have granted standing to parties previously, although this does not mean the practice might not develop in conjunction with other changes in the Act. There is *prima facie* good reason, however, to expand standing beyond the Attorney-General because of both existing workload and potential conflicts of interest.<sup>51</sup> If the test for 'vexatious litigant' is applied appropriately it is unlikely that any non-vexatious litigant could be subject to such an order, and it is suggested that applications to declare a litigant vexatious which themselves are vexatious should lead to significant cost orders. This leaves the threat of a vexatious litigant order as a possible 'procedural

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44 Two FoI applicants have been responsible for 30 per cent of the decisions by the ADT in its FoI jurisdiction: see Evidence to Victorian Parliamentary Committee, above n3 at 3 (Deputy Ombudsman).

45 Unless, of course, leave is granted pursuant to the Act s 16.

46 *Freedom of Information and Other Legislation Amendment Act 2005* (Qld) s 48, replacing *Freedom of Information Act 1992* (Qld) ss 96A, 96B. This provision is part of Queensland's greater regulation of FoI, including its institution of an 'Information Commissioner'. The NSW Parliament has specifically rejected proposals to also institute an Information Commissioner. See David Watson, *Freedom of Information Act 1989: Background and Practice* (2002) at 35.

47 *Supreme Court Act 1970* (NSW) s 84(1), (2), repealed by the *Vexatious Proceedings Act 2008* (NSW).

48 Act s 8(4).

49 Submission to VLRC, Melbourne, 2008 (Consumer Action Law Centre) in VLRC, above n6, at 596; Evidence to Victorian Parliamentary Committee, above n3, at 5 (Federation of Community Legal Centres), 2 (Mental Health Legal Centre), 4-5 (Public Interest Law Clearing House), 9 (Simon Smith).

50 *Supreme Court Act 1970* (NSW) s 84(2), repealed by the *Vexatious Proceedings Act 2008* (NSW).

51 See Evidence to Victorian Parliamentary Committee, above n3 at 2 (Victorian Bar Council).

weapon'. This threat, however, is unlikely to be any greater than a threat to refer the matter to the Attorney-General.

Section 8(4)(e), which grants standing to any person, with leave of the court,<sup>52</sup> who has 'sufficient interest', is of uncertain application. Clare Thompson has suggested that it should be interpreted to mean 'person aggrieved' in the common law sense: someone with a sufficient 'special interest' that is more than a 'mere intellectual or emotional concern' and affects the applicant's interest differently to that of the ordinary member of the public.<sup>53</sup> This interpretation falls foul of conflating the standing that a person has to bring proceedings against public institutions in administrative or constitutional law matters with proceedings against a private individual.<sup>54</sup> It is suggested that a better analogy is with the *locus standi* principles for a private application for an equitable injunction against a public nuisance. In that case, a private individual can only bring proceedings (a) where the defendant's behaviour involves the infringement of some private right of the applicant's; or (b) where, although no private right is infringed, the defendant causes some 'special damage' to the defendant.<sup>55</sup> This tighter interpretation might exclude more peripheral 'special interests' but allow, for example, third parties whose rights are being frustrated by continuing proceedings (creditors, for instance) or family members whose joint property is at risk from costs orders, to bring an application.

#### D. Greater Flexibility

Section 84 envisioned very specific orders being made against vexatious litigants to prevent the institution of any future proceedings and the discontinuance of any current proceedings.<sup>56</sup> The blanket prevention on instituting proceedings without leave meant that *any* action under s 84 became a very 'serious thing'.<sup>57</sup> As a correlative, it also meant that '[i]t [was] extremely rare ... to use the power, whether under the inherent power or under [statute]'.<sup>58</sup> The very strength of a vexatious proceedings order, therefore, may have been another reason why so few declarations have been made during the past, despite anecdotal evidence of many unrestrained vexatious litigants.

The character of vexatious proceedings orders as *ad hominem* declarations about the litigant, and not their litigation *per se*, also amplifies their seriousness.

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52 Act s 8(5).

53 Clare Thompson, 'Vexatious litigants — Old phenomenon, modern methodology: A consideration of the *Vexatious Proceedings Restriction Act 2002 (WA)*' (2004) 14 *JJA* 64 at 79–80.

54 The traditional test for standing in public matters is laid down in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 527 (Gibbs CJ).

55 See Roderick P Meagher, J Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) at 721, 745.

56 *Supreme Court Act 1970 (NSW)* s 84(1), (2), repealed by the *Vexatious Proceedings Act 2008 (NSW)*. The discretionary nature of the order, and ability to 'rescind or vary' under s 84(3), do allow for some flexibility.

57 *Re Attorney-General (Cth); Ex parte Skyring* (1996) 135 ALR 29 at 31–2 (Kirby J).

58 *Ibid.*

In many ways, this aspect goes to the heart of the reservations about vexatious litigant legislation, past and future. The argument is that the orders further alienate those already marginalised, who are more likely to be vexatious litigants, even as they seek to function outside courtrooms.<sup>59</sup> For example, as the spokesman for the Mental Health Legal Centre stated to the Victorian Parliamentary Committee, the public declaration of people as vexatious litigants could compound the existing difficulties faced by the mentally ill when seeking help from administrative officers such as the Health Services Commissioner.<sup>60</sup> Further, the psychological consequences of being excluded from the court can be dramatic. Existing research, although not yet verified, suggests that up to 25 per cent of declared litigants take their own lives.<sup>61</sup>

Many commentators have utilised these arguments as a basis to reject reform of vexatious litigant legislation. This is especially the case for those who attribute the pre-existing marginalisation and problems of self-represented litigants to failings in the legal and administrative systems themselves.<sup>62</sup> In some ways, this criticism of the Act is valid. It does, on its face, perpetuate the *ad hominem* character of a vexatious proceedings order both in its criteria and in its operation. The entire history of a litigant's proceedings against any person is used against him or her to demonstrate that they are fundamentally a vexatious person. This approach seeks to protect the entire legal system from vexatious litigation, rather than an individual aggrieved party. The two specific orders outlined by the Act are a blanket stay and a blanket prohibition on all proceedings.<sup>63</sup> This is coupled with a mandatory requirement that any order be gazetted and recorded in a publicly available register.<sup>64</sup> This approach ensures that a vexatious proceedings order remains a very serious measure both for the court and the litigant.

Section 8(7)(c), however, does grant the Supreme Court, in the alternative, power to declare 'any other order that the court considers appropriate in relation to the person'. Such an order may possibly be used to strengthen any order made under s 8(7)(a) or (7)(b) such as excluding litigants from court premises or from acting as McKenzie friends.<sup>65</sup> Alternatively, this power could be used to formulate a more graduated approach to vexatious litigants, as in the UK. The judicial adoption of 'limited', 'extended' and 'general' civil restraint orders which extend

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59 Evidence to Victorian Parliamentary Committee, 13 August 2008, above n3 at 9 (Federation of Community Legal Centres).

60 Evidence to the Parliamentary Committee, above n3, at 3 (Mental Health Legal Centre).

61 Evidence to the Parliamentary Committee, above n3, at 1 (Victorian Institute of Forensic Mental Health) (Grant Lester).

62 Evidence to the Victorian Parliamentary Committee, 8 August 2008, above n3 at 3 (Simon Smith), 3 (Federation of Community Legal Centres); *id* at 4 (Mental Health Legal Centre), 2–4 (Public Interest Law Clearing House).

63 Act s 8(7)(a), (7)(b).

64 Act s 11(2), (3).

65 *McKenzie v McKenzie* [1971] P 33. See Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 5 (Victorian Institute of Forensic Mental Health). In the UK, it was held in *Ex parte Purvis* [2001] EWHC 827 (Admin), approved in *Attorney-General v Purvis* [2003] EWHC 3190 (Admin), that civil restraint orders could be applied to McKenzie friends.

the prohibition on further litigation to specific proceedings, related issues or parties, and finally all proceedings respectively, could ameliorate the bluntness of more blanket orders. This has gained some support from the current critics of the Model Bill.<sup>66</sup>

### 3. *The Current Aim of Legislation: interest rei publicae ut sit finis litium*<sup>67</sup>

There are two social evils which vexatious litigant legislation traditionally purports to address. The first is the waste of ‘scarce and valuable judicial resources ... on barren and misconceived litigation, to the detriment of other litigants with real cases to try.’<sup>68</sup> The second is the harassment of litigants’ opponents by ‘the worry and expense’ of vexatious litigation.<sup>69</sup> The emphasis in the current policy discourse of both law reform bodies, and also in judicial decisions, however, has been upon the first rationale.<sup>70</sup> As EM Heenan J stated in *Granich Partners v Yap*:

This is an area where relief should be given not merely because another private litigant is being inconvenienced or harassed but also because important public resources of time and attention of the court are being, or may be, diverted by inappropriate claims, to the disadvantage not only of the court but to other litigants whose causes may be delayed by the time needed to deal with vexatious proceedings.<sup>71</sup>

This rationale is also pre-eminent in the UK.<sup>72</sup> The reason for this emphasis lies in the historical roots of vexatious litigant legislation. Many statutes, in particular the first statutes in both the UK and Australia, were passed in order to address problems created by an individual litigant. In the UK, the *Vexatious*

66 See for example, Evidence to Victorian Parliamentary Committee, above n3 at 3 (Federation of Community Legal Centres).

67 ‘It is in society’s interest that there be an end to litigation’: a principle of equity that demonstrating that the courts ‘appreciate the damage involved in the fruitless multiplication of litigation’: see above n54 at 708. Primarily, it has been applied in cases concerning the re-litigation of criminal proceedings. See *R v Carroll* (2002) 213 CLR 635 at [86] (Gaudron and Gummow JJ), *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at [41] (Gummow and Hayne JJ); *Gilham v The Queen* (2007) 178 A Crim R 72 at [8]–[24] (Spigelman CJ).

68 *Attorney-General v Ebert (No 1)* [2005] BPIR 1029 (‘*Ebert*’) at [50] (Laws LJ). Silber J concurred at [61].

69 *Attorney-General v Jones* [1990] 1 WLR 859 at 865C (Staughton LJ).

70 Western Australian Law Reform Commission, *Civil and Criminal Justice System* Report No 92 (1999) at 161–6 is an exception. However, as Clare Thompson notes, above n53 at 83–4, the early jurisprudence on the new Western Australian provisions refocuses their operation upon the public interest.

71 [2003] WASC 206 at [31].

72 See *Ebert* [2005] BPIR 1029 at [50], cited in *Bhamjee v Forsdick* [2004] 1 WLR 88 at [9] (Lord Phillips of Worth Matravers MR): ‘Mr Ebert’s vexatious proceedings have ... been very damaging to the public interest: quite aside from the oppression they have inflicted on his adversaries ... The real vice here, apart from the vexing of Mr Ebert’s opponents, is that scarce and valuable judicial resources have been extravagantly wasted on barren and misconceived litigation, to the detriment of other litigants with real cases to try’. Silber J, concurring, referred in *Ebert* at [61] to ‘a totally unjustified use of judicial time’.

*Proceedings Act 1896* (UK) was introduced to deal with the activities of Alexander Chaffers. By the early 1890s he had initiated some 48 proceedings against, for instance, the then Prince of Wales, the Archbishop of Canterbury, the Speaker of the House of Commons, the clerk of the House of Commons, the trustees of the British Library, the Lord Chancellor and numerous judges.<sup>73</sup> The first Australian legislation, the *Supreme Court (Vexatious Actions) Amendment Act 1927* (Vic), specifically targeted Robert Millane who had by that stage persistently instituted proceedings against, *inter alia*, Melbourne City Council, the Lord Mayor, the Police, the Minister for Public Works, the Treasurer, the Attorney-General, the Tramways Board, the Patents Office and the Shire of Heidelberg.<sup>74</sup> These litigants represented the apotheosis of the ‘vexatious litigant’ — they instituted a plethora of baseless claims against a multitude of public officials and organisations. By excluding Chaffers and Millane, the relevant statutory provisions were attempts to protect the public interest, rather than the interests of any one specific party.

Contemporary examples of ‘vexatious litigants’, however, do not necessarily replicate this type. Most are seeking to address a particular problem with a particular party. This leads to a torrent of proceedings against this party. Other parties only become targeted when they are drawn into this central dispute.<sup>75</sup>

As discussed above in Part One (D), the structure of both the current and proposed legislation still targets the traditional vexatious litigant type, rather than the type illustrated by contemporary examples. The problem with this emphasis is that it draws the law reform debate into a particular normative matrix. On the one hand, proponents of broader legislative reforms, such as the NSW Act, champion a collective, public interest; and on the other hand, opponents can characterise their arguments as the defence of an important *individual* right — the right of access to the courts.

This normative matrix leaves proponents of reform vulnerable, however, for two reasons: first, it makes the scale of current vexatious litigation relevant to the debate; and secondly, the collective interest of the system must be weighed against the perceived partial responsibility of that system for ‘creating’ vexatious litigants in the first place. The implicit argument of Simon Smith, the Federation of Community Legal Centres, the Mental Health Legal Centre, the Public Interest Law Clearing House and the Human Rights Law Resource Centre to the Victorian Parliamentary Committee is that (a) there is little evidence about vexatious litigants, and what evidence does exist indicates that they are a relatively small

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73 Anthony Clarke MR, ‘Vexatious litigants & access to justice: past, present, future’ (Paper presented at the Conference on Vexatious Litigants, Italy, 30 June 2006) at [6].

74 Evidence to Victorian Parliamentary Committee, 8 August 2008, above n3, 4–10 (Simon Smith).

75 See the litigation of Michael McGuirk, above n43, with the primary defendant being the University of New South Wales, and collateral litigation including *McGuirk v Independent Commissioner Against Corruption* [2006] NSWADT 19; *McGuirk v NSW Ombudsman (No 3)* [2008] NSWADT 242; *McGuirk v Commissioner of Police, New South Wales Police* [2008] NSWADT 72; *McGuirk (No 2) v Deputy Director General, Cabinet Office (NSW)* [2007] NSWADT 301.

problem; (b) the problems of self-represented litigants generally are at least exacerbated, if not caused, by the legal system's deficiencies; (c) the costs, both economic and social, of attempting to exclude litigants from the court system are very high, and the prospects of their effectiveness low; therefore (d) vexatious litigants, or at least those not excluded by the existing high threshold, are a small but bearable price that society has incurred for itself and should be willing to tolerate for the sake of certain democratic values.<sup>76</sup> As Simon Smith states:

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.<sup>77</sup>

Fundamentally, the debate on these grounds is stymied, as it is in the Victorian Parliamentary Committee, without reliable data, which could partially quantify the cost and scale of vexatious litigation. No such data currently exists.<sup>78</sup> Without the data it is impossible to engage in any legitimate balancing process because the weight to be given to the public interest is inextricably determined by the extent of vexatious litigation. Further, in Charter jurisdictions such as Victoria, especial concern must be taken to justify legislation in the face of protected rights such the right to a fair hearing.<sup>79</sup>

#### ***4. Private Justice and Personal Interest: A New Legislative Approach, an Old Equitable Approach***

The alternative approach, proposed in this paper, is to re-orientate the law reform debate in two ways: first, to refocus upon the rights of the parties aggrieved by vexatious litigation; and second, to introduce an analysis not only of the rights of the vexatious litigant but also of their own beneficial interests. The concomitant legislative proposal, therefore, shifts the operation of a vexatious proceedings order to work against a vexatious relationship rather than the litigant themselves. Further, this paper argues that the court's discretion should be guided by general principles of injunctive relief — namely the equitable aim of achieving 'justice between the parties',<sup>80</sup> rather than some uncertain pursuit of the public interest.<sup>81</sup> This in fact returns the jurisprudential basis for action against vexatious litigants back to its basis prior to the legislative reforms of the late 19<sup>th</sup> Century.

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<sup>76</sup> Evidence to the Victorian Parliamentary Committee, above n3.

<sup>77</sup> Evidence to the Victorian Parliamentary Committee, above n3 at 6 (Simon Smith).

<sup>78</sup> See Evidence to Victorian Parliamentary Committee, above n3 at 8 (Simon Smith): 'It was a mystery to me, that [Model] bill. ... 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'.

<sup>79</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 7, 8. See also, Evidence to the Victorian Parliamentary Committee, above n3 at 2 (Victorian Equal Opportunity and Human Rights Commission), at 2 (Public Interest Law Clearing House).

<sup>80</sup> *Cardile v Led Builders Pty Ltd* (1999) 198 CLR 380 at 409 (Gaudron, McHugh, Gummow and Callinan JJ).

### A. *Justice Between the Parties*

To refocus upon the rights of the parties aggrieved by vexatious litigation is to address Simon Smith's own fundamental assumption that 'the primary function of the court system is to resolve disputes between citizens'.<sup>82</sup> Anecdotal evidence is sufficient to establish that there are numerous persons and organisations that expend disproportionate time and resources defending against undeclared vexatious litigants, especially in tribunals.<sup>83</sup> This evidence brings into relief the right of defendants to be free from unwarranted harassment — both economic and personal. The law should seek to protect this right even if it only affects a small proportion of litigants. As Michael Board MP stated in the Western Australian Parliamentary Debate on the *Vexatious Proceedings Restriction Act 2002* (WA):

Although this Bill may not affect large numbers of people in Western Australia, it affects the quality of life of the people who are affected. People on the receiving end of vexatious litigation, and who are constantly abused and accused by people using the legal system, find themselves in intolerable situations ... This costs many of them tens of thousands of dollars to defend themselves, with no effect other than to occupy the time of the court and to benefit certain individuals who want to use the system to gain some strange satisfaction from persecuting their neighbours under the umbrella of the law ... Hopefully as a result of this Bill, some protection can be provided for the *real innocent parties — the victims of vexatious litigation*.<sup>84</sup> [emphasis added.]

This approach also implies that the relevant right of the vexatious litigant is deflated: it is not a general right of access to justice that is being balanced, but the specific right to pursue a particular defendant through the justice system.

A re-orientation around achieving 'justice between the parties' is more consistent with the traditional approach of courts in exercising two related powers: first, the inherent jurisdiction of courts to prevent an abuse of process; and secondly, the power of courts to grant injunctive relief in pursuit of that aim. As Lord Woolf MR shows in *Ebert v Venvil*,<sup>85</sup> the statutory jurisdiction over vexatious litigants developed out of the court's earlier use of its inherent jurisdiction to control the conduct of such litigants.<sup>86</sup> Further, the Master of the Rolls states:

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81 See *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 287–9, cited in *Cardile*, above n80 at 421 (Kirby J): 'it must be a judicial discretion proceeding upon grounds that are defined or definable, ascertained or ascertainable, and governed accordingly'. Kirby J further states at 421 that '[i]t does not mean a court is wholly at liberty to invent, and then apply, rules according to whim or uncontrolled perceptions of "justice" or "fairness"'.

82 Evidence to Victorian Parliamentary Committee, 6 August 2008, above n3 at 2 (Simon Smith).

83 See above n43.

84 Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 April 2002 at 9816.

85 [2000] Ch 484 at 495–6, following *Bhamjee (No 2)*, above n72 at [14] (Lord Phillips of Worth Matravers MR).

86 Id at 496–7, citing Sir Isaac Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23 at 44.

[T]he inherent power of a court by summary process to stay or dismiss an action is not confined to closed categories of cases, of which vexatious suits is one illustration but is a power which is exercisable in any situation where the requirements of justice demand but not where there is no such requirement.<sup>87</sup>

The exercise of such a power comes by way of injunctive relief although it appears to have been a power of all courts, both in common law and equity, even pre-Judicature.<sup>88</sup> In exercising this inherent jurisdiction, the demands of the 'requirements of justice' generally make justice between the parties a priority rather than considerations of public interest. This was the position of the majority in *Queensland v JL Holdings* (1996) 189 CLR 146. In that case, although considerations beyond the scope of the instant matter were relevant under contemporary case management principles, those considerations could not act so as to supplant the achievement of justice between the parties.<sup>89</sup>

This position has been somewhat obscured in the contemporary UK jurisprudence. The courts there have attempted to justify a common law adaptation of civil proceedings orders by preferring the public interest in protecting the *court system* generally from unmerited litigation, to the interests of *individual litigants*.<sup>90</sup> This approach is not only inconsistent with the Australian approach to inherent jurisdiction, it is also inconsistent with the general principles behind injunctive relief. When granting interlocutory relief, such as an injunction, the court should 'grant the minimum relief necessary to do justice between the parties'.<sup>91</sup> The court's discretion is to be (a) directed by the circumstances of the parties' relationship, and (b) limited to being a proportional response. In contrast to contemporary English jurisprudence, this is in fact the original approach of the courts before the 1896 statutory provision.<sup>92</sup>

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87 Ibid.

88 See *Cocker v Tempest* (1840-41) 7 M&W 502 at 503-4; 151 ER 864 (Alderson B): 'The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion.'

89 See *Queensland v JL Holdings* (1996) 189 CLR 146 at 154 (Dawson, Gaudron and McHugh JJ): 'It ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.'

90 *Jones*, above n69 at 865C; *Attorney-General v Barker* [2000] 1 FLR 759 at 764 (Bingham CJ); *Ebert*, above n68 at [50] (Laws LJ), [61] (Silber J); *Forsdick (No 2)*, above n72 at [8]-[9] (Lord Phillips).

91 *Cardile*, above n77 at 409 (Gaudron, McHugh, Gummow and Callinan JJ). See *Commonwealth v Verwayen* (1990) 170 CLR 394 at 411; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 595; see also *Giumelli v Giumelli* (1999) 196 CLR 101 at [10]; *Frijo v Culhaci* (Unreported, Supreme Court of New South Wales Court of Appeal, Mason P, Sheller JA, Sheppard AJA, 17 July 1998) 12. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404 (Mason CJ and Wilson J) cited the statement of Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179 at 198, that the court should determine what was 'the minimum equity to do justice to the plaintiff'.

92 See William Kerr, *A Treatise on the Law and Practice of Injunctions* (1<sup>st</sup> ed, 1867) at 134ff.

This paper proposes, in adopting this alternative rationale, that the new vexatious proceedings legislation should be amended to inhere these two aspects of traditional injunctive relief. Even if the test for jurisdiction is left as it is in the Act, it is submitted that the discretionary power to make orders should be adjusted in the following two ways.

First, legislation should direct the court to take into account a number of factors, for example the personal cost, both economic and emotional, to the aggrieved party; whether this cost is 'proportionate to the importance and complexity of the subject matter';<sup>93</sup> the economic ability of the aggrieved party to continue litigation; attempts made at alternative dispute resolution; compliance with general case management principles;<sup>94</sup> conduct amounting to 'unfairness';<sup>95</sup> and whether the aggrieved party has acted in good faith.

Second, the provision detailing the vexatious proceedings order should provide for a more flexible and targeted remedy. The default orders should be akin to 'limited' or 'extended' civil proceedings orders in the sense of discontinuing and preventing litigation against a specific party, and possibly other agents collaterally involved in those proceedings.<sup>96</sup>

There are two added advantages to adopting legislation with this approach. First, it is suggested that it would both increase the likelihood of vexatious proceedings orders being made and decrease the collateral damage to the vexatious litigant's rights, social status and mental health. This is because the order is no longer as 'serious' a step as before, in that it does not exclude litigants from the courts entirely, nor does it label them as people inherently unsuitable to the court process.

Second, utilising this rationale for vexatious litigant legislation would also correlate more accurately with its probable operation. As vexatious litigants such as *Skyring*, *Yap* and *Kay* demonstrate,<sup>97</sup> a vexatious proceedings order does not necessarily stop the litigant as they continue to institute proceedings by way of appeal of the order itself, as well as leave applications pursuant to the order. In this way, the orders rarely protect the public from further expenditure of judicial time and resources. The orders do, however, eliminate the need for the aggrieved party to be represented and even be notified of future proceedings. In this way, the public 'cost of democracy' is truly borne by the public justice system alone, and not by the individual aggrieved parties.

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93 *Civil Procedure Act 2005* (NSW) s 60.

94 See *Civil Procedure Act 2005* (NSW) ss 56–60.

95 *Longman v R* (1989) 168 CLR 79.

96 *Grepe v Loam* (1887) 37 Ch D 168 at 169 (Lindley J); *Ebert v Venvil*, above n82.

97 See the recent litigation of *Skyring v Federal Commissioner of Taxation* (2007) 244 ALR 505 (having been declared a vexatious litigant in the Federal Court in *Ramsey v Skyring* (1999) 164 ALR 378); *Yap v Granich Partners* [2008] FCA 1380 (having been declared a vexatious litigant in the Federal Court in *Granich & Associates v Yap* [2004] FCA 1567); and *Attorney-General (Vic) v Kay* [2006] VSC 9 (having been declared a vexatious litigant in *Attorney-General (Vic) v Kay* [1999] VSC 30).

### ***B. The Interests of the Vexatious Litigant***

The second point around which law reform might be re-orientated is more controversial and is not necessary to support the first. It is, however, important. There is an assumption in the current debate, by virtually all sides, that the interests of the vexatious litigant are best protected by attempting to preserve their right to litigate as far as possible. There are three key ways in which this might not be the case: legally, financially, and mentally.

First, the threshold for gaining leave to institute proceedings is low for vexatious litigants — the court must merely be satisfied that the proceedings are not an abuse of process and that there is a *prima facie* ground for the proceedings.<sup>98</sup> This may even be lower than that required of an advocate generally under the *Legal Profession Act*.<sup>99</sup> In light of the continual failure of the litigant's arguments prior to being declared vexatious, a period outside of the adversarial context where they might seek advice and refinement can only help any legal merit in their action. Further, without an opposing party present at leave applications, courts may be able to take a more inquisitorial approach in helping the vexatious litigant get to the 'underlying basis' of their claims.<sup>100</sup>

Second, the vexatious litigant is generally self-represented. In that case, the financial cost of litigation for the self-represented litigant is not normally large, although there may be a large opportunity cost in the time spent preparing and running matters. However, the cost rises significantly once courts and potentially, but rarely, tribunals,<sup>101</sup> begin to award costs orders.<sup>102</sup> A relatively early intervention through a vexatious proceedings order might limit the financial and personal risks to the litigant themselves and their family.

Finally, there is research that links vexatiousness with a personality spectrum culminating in what is commonly termed 'Querulous Paranoia' or 'de Clerambault syndrome'.<sup>103</sup> It is uncertain, however, as to what role this medical characterisation of vexatious litigants can play in law reform. Putting aside the reliability of the psychiatric research itself, although this has been questioned,<sup>104</sup> it is difficult to integrate the medical discourse with the traditional rights analysis of current law reform bodies. This is for the very clear reason that, as a matter of principle, the mental disabilities of a person should not in any way adversely affect their rights. The *right* to justice should be the same for everyone.

On this basis, proposals that look to constrain the rights of citizens based upon the medical assessment of their querulousness, rather than upon a legal assessment of their vexatiousness, are *prima facie* discriminatory. The implication is that

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98 *Supreme Court Act 1970* (NSW) s 84(4), repealed by the *Vexatious Proceedings Act 2008* (NSW); Act s 16(4).

99 *Legal Profession Act 2004* (NSW) s 347.

100 See *Michael*, above n21 at 32.

101 See above n30.

102 For example, *Paramasivam v University of New South Wales* [2006] NSWSC 1189 at [72]–[79].

103 Alan Murdie, 'Vexatious Litigants and de Clerambault Syndrome' (2002) 152 *New Law Journal* 61.

104 R Pal, 'In Defence of Complainants' (2004) 185 *British Journal of Psychiatry* 175–6.

vexatious behaviour by someone who is not clinically querulous is legally different to the same behaviour by someone who does suffer from the paranoia. Consequently, the work of psychiatrists such as Grant Lester and Paul Mullen has only informed the current debate in two areas: first, in understanding who, if anyone, bears the responsibility for 'creating' vexatious litigants; and second, how effective certain sanctions and/or treatment might be in stopping those litigants.<sup>105</sup>

Law reform must prefer a rights-based analysis for fear of making paternalistic assumptions about the good of private individuals. A medical discourse about the *impact* of persistent litigation upon the mental health of all vexatious litigants (querulous or not), however, rather than an emphasis upon declaring some litigants specifically 'mentally ill', might buttress the desirability of more accessible vexatious proceedings orders for all parties affected by vexatious litigation, especially if placed within a framework of help and support for litigants after being declared.

It is admitted, however, that even if the benefits accrued to the vexatious litigant (legal, financial and medical) might be one of the best outcomes of vexatious litigant legislation, especially if it helps curtail the purported 25 per cent suicide rate, it should not be a primary consideration in determining their rights because it is a more fundamental principle that the courts treat all litigants equally before the law.

## 5. Conclusion

THE CHAIR: [I]nstitutions and organisations at the top end where costs are running over \$1 million in some instances, where the law and the courts are being used as a tool for an attack ... they are the kinds of things we are hearing ...

Ms HILTON: The sorts of situations that you are describing I would say are fairly vexatious and I am not sure why the current laws have not been used in the way that they could currently be to declare that person vexatious.<sup>106</sup>

There is an underlying mystery in the current law reform debate, if vexatious litigants are a problem (however large or small), as to why there are so few attempts to have them declared. This paper has suggested that a core reason *inter alia* for why courts have been reluctant to grant orders, and why aggrieved parties do not seek them, is that the existing laws have ensured that any vexatious proceedings order is a very serious measure and hence, necessarily, rare. The new NSW Act in fact amplifies this seriousness, particularly through its publicity condition.<sup>107</sup> Although the Act purports to make it easier to gain a vexatious proceedings order, the power to grant an order is still discretionary. On this basis, the courts are likely to retain Kirby J's position, that the seriousness of the measure should entail its rarity.

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105 See Evidence to Victorian Parliamentary Committee, above n3.

106 Evidence to Victorian Parliamentary Committee, 13 August 2008, above n3 at 7 (Public Interest Law Clearing House).

107 Act s 11.

This paper has argued, however, that if legislation is introduced that first, refashions orders to address vexatious relationships; and second provides for a more flexible and targeted remedy, then it is more likely that courts will grant relief to aggrieved parties. This re-orientation focuses the law around achieving justice between the parties. This rationale is fundamentally a more coherent basis upon which to found reform. It avoids balancing the collective interest against a private right; it is more consistent with the common law approach to abuse of process; and it is more consistent with the practical outcome of an order — that litigation will probably not stop but the aggrieved party will no longer have to appear in proceedings.

Vexatious litigants are a legitimate ‘cost of democracy’. It is the submission of this paper, however, that there is no good reason why this cost should be borne by those individuals and organisations unlucky enough to be victim to vexatious proceedings but rather should be borne by the public as a whole. The current Act when put into practice, however, runs the risk of perpetuating this unequal distribution of cost and, therefore, should be amended.