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PILCH VIC

Public Interest Law Clearing House

**Joint Submission to the
Parliament of Victoria
Law Reform Committee**

Inquiry into Vexatious Litigants

27 June 2008

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

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About PILCH

PILCH is an independent, not-for-profit legal referral service. It seeks to meet the legal needs of community groups/not-for-profit organisations, and individuals from disadvantaged or marginalised backgrounds by facilitating their access to pro bono legal assistance from PILCH members. Its main role is to receive, assess and refer requests for pro bono legal assistance.

PILCH's objectives include to:

- (a) improve access to justice and the legal system for those who are disadvantaged or marginalised;
- (b) identify matters of public interest requiring legal assistance;
- (c) seek redress in matters of public interest for those who are disadvantaged or marginalised;
- (d) refer individuals, community groups and not for profit organisations to lawyers in private practice and to others in ancillary or related fields willing to provide their services without charge;
- (e) support community organisations to pursue the interests of the communities they seek to represent; and
- (f) encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

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Contents

1.	Introduction	1
2.	Executive Summary and Recommendations	1
2.1	Executive Summary	1
2.2	Recommendations	3
3.	A Human Rights Framework	7
4.	The Victorian Charter	9
4.1	Overview of the Victorian Charter	9
4.2	Relevance of the Victorian Charter to the Inquiry	9
4.3	Relevance of International and Comparative Jurisprudence	11
5.	Relevant Rights under the Charter to the Inquiry	13
5.1	The Right to a Fair Hearing	13
5.2	Recognition and Equality Before the Law	14
5.3	Equal Access to Courts	16
5.4	Limitations on the Right to a Fair Hearing	18
6.	Vexatious Litigants in Victoria	20
6.1	Introduction	20
6.2	Why Some People Become Vexatious Litigants	20
	(a) The Experience of Unfair Treatment or Injustice in the Legal System	21
	(b) Lack of Appropriate Legal Advice and Representation	21
	(c) The Court Process	22
	(d) Failures of internal complaint/grievance procedures	22
6.3	What are the Common Characteristics of Vexatious Litigants?	24
6.4	The Relationship between Mental Health and Vexatious Litigation	24
7.	Applying for a Declaration under Victoria’s Vexatious Litigant Laws	27
7.1	Who should have Standing?	27
	(a) The Current Position	27
	(b) Should Standing Include Other Persons?	27
7.2	Should only the Supreme Court have the Power to make a Vexatious Litigant Order? Should it be able to do so, on its own motion?	28
8.	Who is a Vexatious Litigant under Victoria’s Laws?	30
8.1	What Should be the Test be for Determining whether a Person is a Vexatious Litigant?	30
	(a) The Current Position	30

8.3	Should other criteria also be considered such as the way the person has conducted litigation and a person's motive for bringing a case?	31
9.	What Rights Should an Alleged Vexatious Litigant Have?	33
9.1	The right to free legal representation	33
9.2	What rights of appeal should a vexatious litigant have?	34
10.	The Power of the Courts to Control Vexatious Litigation	36
10.1	Should Conditions be Imposed on Vexatious Litigants?	36
11.	The Effect of a Vexatious Litigant Declaration	37
11.1	Should the Attorney-General, or any other people be notified when a vexatious litigant seeks leave? What rights should these people have?	37
11.2	Should Courts and Tribunals be able to decide Leave Applications on the papers?	37
12.	Other Ways to Respond to Vexatious Litigation	39
(a)	Continued Education and Training of Court Staff and Judicial Officers	41
(b)	Special Masters	41
(c)	Management Plans	42
(d)	Responses to Mental Health	42
(e)	Increased Funding for Advice and Representation	43
(d)	Increase Resources for Self-Represented Litigants	43

1. Introduction

1. The Victorian Parliament has asked the Law Reform Committee to inquire into and report on the effect of vexatious litigants on the justice system (**Inquiry**).
2. In April 2008, the Law Reform Committee released an Issues Paper that invited comment on the effectiveness of current legislative provisions in dealing with vexatious litigants and investigating ways which may better enable the courts to more effectively and efficiently perform their role while preserving the community's general right of access to Victorian courts.
3. There is a clear concern about the balance between providing access to the justice system and the demands placed upon this limited public resource. In this context, careful consideration must be given to any proposals for reform which may limit an individual's right to pursue a civil claim and their interaction with the rights set out in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.
4. The Public Interest Law Clearing House (**PILCH**) and the Human Rights Law Resource Centre (**HRLRC**) welcome the opportunity to provide this joint submission to the Inquiry.
5. The following submission considers the Committee's Issues Paper drawing from our experience as facilitators both of pro bono legal assistance and providing direct advice, advocacy and information to clients in need of free legal assistance.

2. Executive Summary and Recommendations

2.1 Executive Summary

6. PILCH and the HRLRC contend that the current provisions under section 21 of the *Supreme Court Act 1986 (Vic)* (the **Act**) for vexatious litigant orders in many respects strike the correct balance between the right to access the courts and the need to protect other parties and the justice system from vexatious litigation. We submit that careful consideration must be given to the serious consequences of a person being declared a vexatious litigant as they are restrained from bringing future legal proceedings and continuing with existing proceedings without leave of the court. The justice system and other parties also need to be protected from an abuse of process which arises from vexatious litigation. The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Charter**) provides for the balancing of these factors

through a human rights framework. Any consideration that is given to proposed reforms that relate to vexatious litigants must consider any limitation that is placed on the rights contained in the *Charter*, in particular the right to a fair hearing and the right of equality before the law.

7. Furthermore, inquiries into areas for potential law reform usually stem from identified failures of the system supported by comprehensive data and empirical research. However, no such evidence has been reported in relation to Victoria's vexatious litigant laws. This lack of evidence, combined with the fact that only fourteen people in Victoria have been declared vexatious litigants since 1928, suggests that these laws do not require reform.
8. Accordingly, any meaningful attempts to address the issue of vexatious litigants should focus on less restrictive means such as reforms to court case management and better early support for vulnerable litigants.
9. PILCH and the HRLRC suggest that the underlying issue of the vexatious litigant debate stems from the increase in self-represented litigants due in part to the restrictive legal aid guidelines based on insufficient funding in key areas for legal assistance. It is the provision of government funded legal advice at the initial stages of proceedings and even prior to their commencement, that can enable a potential difficult litigant to be more fully informed about the legal process, gain insight into their matter and why it may not succeed in court.
10. Finally, the provision of direct guidelines and continued training for judges and court staff in dealing with self-represented litigants and, in particular, those who have mental health issues is essential. Engaging with individuals with complex needs and a heightened or disproportionate sense of injustice is now a significant part of the court's role in the modern legal system and requires appropriate skill-based training.
11. The following submission focuses on the following issues:
 - (a) **Vexatious Litigants in Victoria** – This section analyses why people become vexatious litigants and the relationship between mental health and vexatious litigation.
 - (b) **Applying for a Declaration under Victoria's Vexatious Litigant Laws** – This section explores whether standing should be extended and if the Supreme Court should have the power to make a vexatious litigant order on its own motion.

- (c) **Who is a Vexatious Litigant under Victoria's Laws?** – This section examines the current test for vexatious litigants and whether it should be broadened. We also address the issue of whether the court should have the power to consider other criteria.
- (d) **What Rights Should a Vexatious Litigant Have?** –This section explores whether alleged vexatious litigants should have a right to free legal representation and what appeal rights a vexatious litigant should have.
- (e) **Powers of the Court to Control Vexatious Litigation** – This section examines what conditions, if any, the Court should be able to impose upon the right of a person to bring litigation.
- (f) **The Effect of a Vexatious Litigant Declaration** –This section deals with a number of issues ranging from whether the Attorney-General should be notified when a vexatious litigant seeks leave, through to whether Courts and Tribunals should be able to decide leave on the papers and what appeal rights a vexatious litigant should have if leave is refused.
- (g) **Other Ways to Respond to Vexatious Litigants** –This section provides a number of recommendations that provide a less restrictive means to dealing with vexatious litigation, as per *Charter* obligations.

2.2 Recommendations

Recommendation 1:

Proposed reforms to the tests for vexatious litigants must be consistent with Australia's international human rights obligations and the Victorian *Charter*. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of access to the courts in Victoria are effectively protected.

Recommendation 2:

PILCH and the HRLRC recommend a very cautious approach to proposed extensions to standing laws. Standing should only be extended to the Victorian Government Solicitor and the Prothonotary/Registry if stringent safeguards are in place to ensure that these parties practice an impartial and independent approach. Any extension of standing to defendants and parties with 'sufficient' interest' must be subject to leave of the court.

Recommendation 3:

Given the serious consequences of vexatious litigant orders, PILCH and the HRLRC recommend that only the Supreme Court should have the power to declare a person a vexatious litigant.

Recommendation 4:

PILCH and the HRLRC recommend that the current test for declaring a litigant vexatious under section 21 of the *Supreme Court Act* (Vic) remain unchanged.

Recommendation 5:

PILCH and the HRLRC submit that in many cases a vulnerable litigant will require free legal representation to give effective and practical meaning to the right to a free hearing under the *Charter*. PILCH and the HRLRC recommend an increase in legal aid funding and funding for community legal centres to better support self-represented litigants who are unable to afford private legal representation.

Recommendation 6:

PILCH and the HRLRC recommend that the rights of appeal for those who are declared vexatious should be the same as appeal rights for other litigants.

Recommendation 7:

PILCH and the HRLRC recommend that the court should not have the power to impose a condition that any litigant that comes before the court **must** have legal representation.

Recommendation 8:

PILCH and the HRLRC recommend that any introduction of a notification requirement to the Attorney-General or any other person when a vexatious litigant seeks leave to appeal, should be treated with caution so as to not undermine procedural fairness.

Recommendation 9:

PILCH and the HRLRC recommend that any provision to allow the courts to impose conditions when leave is granted to a vexatious litigant such as an order that the litigant be able to provide a security for costs, should not be a blanket provision. Such conditions should only be allowed in exceptional circumstances and must be compatible with *Charter* obligations.

Recommendation 10:

PILCH and the HRLRC recommend that judges and court staff should receive comprehensive and ongoing training in relation to dealing with self-represented litigants, including those who have mental health issues, are difficult or vexatious.

Recommendation 11:

PILCH and the HRLRC recommend that Special Masters should be introduced to the courts to assist with increasing numbers of self-represented litigants. Special Masters would have a range of functions including meeting with the parties to narrow the issues in dispute and providing much needed guidance to self-represented litigants in relation to understanding court processes. This initiative should be undertaken in conjunction with management plans.

Recommendation 12:

PILCH and the HRLRC recommend an increase in the resources available to self-represented

litigants including an investigation into the feasibility of establishing self-help centres or self-represented litigant legal clinics at all major courts and tribunals.

3. A Human Rights Framework

12. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. They include equality before the law, the right to a fair trial and the right to be free from discrimination. Human rights are about the fair treatment of all people and they enable people to live lives of dignity and value.
13. The Inquiry raises issues that relate to Australia's international human rights obligations which require all arms of the federal system – including the Victorian Government (legislature, executive and judiciary) – to act to respect, protect and fulfil human rights.¹ At its most basic level, the Inquiry relates to the fundamental issue of access to justice. Access to justice is an essential aspect of both the right to a fair hearing and the right to equality before the law.
14. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:²
 - (a) a significant, but beneficial, impact on the development of policy;
 - (b) enhanced scrutiny, transparency and accountability in government;
 - (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
 - (d) 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';

¹ These obligations are found in a number of the major international human rights treaties to which Australia is a party, including the International Covenant on Civil and Political Rights (*ICCPR*). The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980.

² See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

- (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
 - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.
15. PILCH and the HRLRC submit that a human rights approach to the consideration of vexatious litigants and the Inquiry will ensure that Australia's international obligations are fulfilled and will also assist to develop laws and policies that will best promote effective administration of justice which achieves the appropriate balance with access to the courts and the right to a fair trial.

Recommendation 1:

Proposed reforms to the test for vexatious litigants must be consistent with Australia's international human rights obligations and the Victorian *Charter*. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of access to the courts in Victoria are effectively protected.

4. The Victorian *Charter*

4.1 Overview of the Victorian *Charter*

16. The Victorian *Charter* enshrines a body of civil and political rights derived from the International Covenant on Civil and Political Rights (**ICCPR**). The substantive rights recognised in the Victorian *Charter* include the fundamental rights to non-discrimination and equality before the law,³ and the right to a fair hearing.⁴
17. The Victorian *Charter* establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities'⁵) and the courts — is facilitated through a number of mechanisms including:
 - (a) public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process;
 - (b) so far as possible, those interpreting and applying legislation must do so consistently with human rights and with regard to relevant international, regional and comparative domestic jurisprudence.⁶
18. The Victorian *Charter* entered into full force on 1 January 2008.

4.2 Relevance of the Victorian *Charter* to the Inquiry

19. The following overarching principles should be considered in the interpretation and application of the Victorian *Charter* in conducting the Inquiry:

³ Victorian Charter, section 8.

⁴ Victorian Charter, section 24.

⁵ Victorian Charter, section 4 defines public authority.

⁶ Section 32(1) requires, as a matter of law, that a human rights consistent interpretation be adopted whenever it is possible to do so, regardless of whether there is any ambiguity and regardless of how the provision in question may have been previously interpreted and applied. *Victorian Charter* s 49(1). See, eg, *R v Offen* [2001] 2 All ER 154 which held that, in light of the interpretative requirement under the *Human Rights Act 1998* (UK), a decision made a year earlier in relation to the interpretation and application of a provision of the *Criminal (Sentences) Act 1977* was no longer good law. See also *Re S (Care Order: Implementation of Care Plan)* [2002] AC 291, 313.

- (a) Division 1 of Part 3 of the Victorian *Charter* requires that all new legislation introduced in Victoria be considered for its compatibility with the human rights set out in the Victorian *Charter*. Accordingly, in considering whether to reform the law regarding vexatious litigants, the Law Reform Committee should take into account the human rights set out in the Victorian *Charter* and their implication for the Inquiry.
- (b) Section 32(1) of the Victorian *Charter* states:
- So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- The purpose and effect of this provision is to require that any person or entity that interprets and applies legislation does so in a way that gives effect to human rights.
- (c) The human rights contained in the Victorian *Charter* are largely modelled on the civil and political rights enshrined in the *ICCPR*.⁷ There is a vast body of international and comparative jurisprudence that can and should be considered in the elucidation of the content and application of the Victorian *Charter*.
- (d) The Victorian *Charter* is founded on the principle that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom. Having regard to this, the rights should be interpreted broadly⁸ which ensures that a flexible and individualised approach is employed.
- (e) The rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.⁹ Consistently with the nature of human rights obligations articulated by the HRC (namely, that states have obligations to *respect, protect* and *fulfil* human rights)¹⁰ and the approach adopted

⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Many of these civil and political rights are also enshrined in regional human rights instruments (such as the *European Convention on Human Rights*) and domestic human rights instruments (such as the United Kingdom *Human Rights Act 1998*).

⁸ See, eg, UN Human Rights Committee, *General Comment No 6: The Right to Life* (1982) [5], available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

⁹ *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

¹⁰ See, eg, UN Human Rights Committee, *General Comment 3: Implementation at the National Level*, UN Doc HRI\GEN\1\Rev.1 (1981) available at <http://www.ohchr.org/english/bodies/hrc/comments.htm> in which the HRC stated:

by UK courts under the *Human Rights Act 1998* (UK) and the European Court of Human Rights under the *European Convention on Human Rights*,¹¹ rights may impose both negative and positive obligations on public authorities.

- (f) The Victorian *Charter* is a 'living document' which should be interpreted and applied in the context of contemporary and evolving values and standards.¹² The European Court of Human Rights has stated that:

The Convention is a living instrument which must be interpreted in light of present day conditions...the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires firmness in assessing breaches of the fundamental values of democratic societies.¹³

- (g) Recognising that human rights are interdependent and indivisible, the rights should be read so as to complement and reinforce each other.

20. PILCH and the HRLRC also emphasise the importance of a human rights approach to conducting the Inquiry and drafting responses to the questions posed. As the Law Reform Committee will be aware, pursuant to Division 1 of Part 3 of the Victorian *Charter*, any Bill to give effect to changes to the current test will have to be accompanied by a Statement of Compatibility and reviewed by the Scrutiny of Acts and Regulations Committee for compatibility with the Victorian *Charter*.

4.3 Relevance of International and Comparative Jurisprudence

21. Section 32(2) of the Victorian *Charter* states that:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

22. The Explanatory Memorandum to the Victorian *Charter* suggests that decisions of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and United Nations treaty monitoring bodies (including HRC)

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the *Covenant* is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

¹¹ See, eg, *Marckx v Belgium* (1979) 2 EHRR 330; *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Airey v Ireland* (1979) 2 EHRR 305; *Plattform Artze fur das Leben v Austria* (1988) 13 EHRR 204.

¹² *Tyrer v United Kingdom* (1978) 2 EHRR 1, 10.

¹³ *Selmouni v France* (2000) 29 EHRR 403, [101].

will be particularly relevant.¹⁴ Judgments of domestic and foreign courts, particularly the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom, may also be relevant.¹⁵

23. The rights to equality before the law and a fair trial under the Victorian *Charter* mirror provisions in other jurisdictions, although the wording used varies slightly.

¹⁴ Explanatory Memorandum, *Victorian Charter of Human Rights and Responsibilities Bill 2006* (Vic) 23.

¹⁵ *Ibid.*

5. Relevant Rights under the *Charter* to the Inquiry

5.1 The Right to a Fair Hearing

24. The right to a 'fair hearing' is recognised in section 24 of the *Charter*, which provides that:
- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
 - (2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.
 - (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.
25. The concept of a fair hearing contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. At the very least, the minimum basic elements of the right to a fair hearing which are particularly relevant to the Inquiry can be said to be:
- a) equal access to, and equality before, the courts;
 - b) the right to legal advice and representation;
 - c) the right to procedural fairness;
 - d) the right to a trial without undue delay; and
 - e) certain rights in respect of self-represented litigants.
26. It is notable that while many of these elements may also arise under the common law, section 24 of the *Charter* provides for 'a positive right to a fair trial, rather than the right not to be tried unfairly as the common law provides'.¹⁶ It is also notable that many of these aspects of the right are protected by effective administration of the court processes. PILCH and the HRLRC recognise that the Inquiry seeks to assess the appropriate balance between access to justice and effective administration of such justice. This is dealt with in more detail below in regards to permissible limitations.

¹⁶ *R v Griffin* [2007] ACTCA 6 (5 April 2007), [4] – [6] (Higgins CJ, Gray and Madgwick JJ).

5.2 Recognition and Equality Before the Law

27. Discrimination is at the heart of virtually all human rights violations. The right to equality and freedom from discrimination are basic human rights.¹⁷ The Preamble to the Victorian *Charter* recognises that human rights belong to all people in the Victorian community without discrimination and that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.
28. Reflecting the importance of international norms, section 8 of the *Charter* sets out a range of equality rights. Specifically, it provides that every person:
- (a) has the right to recognition as a person before the law;¹⁸
 - (b) has the right to enjoy his or her human rights without discrimination;¹⁹ and
 - (c) is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.²⁰
29. Section 8(4) further states that measures taken to assist disadvantaged groups because of discrimination do not themselves amount to discrimination. The purpose of this provision is to recognise that substantive equality is not necessarily achieved by treating everyone equally, and that special measures may be required to achieve equality for some groups in the community.²¹ It is clear that the Courts may be required to provide additional services to some classes of litigants to ensure that all litigants are able to access justice and pursue their claims.

¹⁷The right to equality and freedom from discrimination is an integral component of the international human rights normative framework and is entrenched in both the *ICCPR* and *ICESCR*. See also, HRC General Comment 18 (Thirty-seventh session, 1989): Non-discrimination, A/45/40 vol. I (1990) 173, [1] available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

¹⁸ Section 8(1), modelled on art 16 of the *ICCPR*, above n 7.

¹⁹ Section 8(2), modelled on art 2(1) of the *ICCPR*, above n 7.

²⁰ Section 8(3), modelled on art 26 of the *ICCPR*, above n 7. For HRC jurisprudence on the right to non-discrimination and equality before the law, see HRC, *General Comment 18: Non-Discrimination* (1989), available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>. See also <http://www.bayefsky.com/bytheme.php/id/856>.

²¹ This provision is modelled on s 19(2) of the *New Zealand New Zealand Bill of Rights Act 1990* (NZ).

30. The definition of ‘discrimination’ in the *Charter* has the same meaning as provided in the *Equal Opportunity Act 1995* (Vic).²² Thus, for the purpose of the *Charter*, discrimination is less favourable treatment on the grounds of a ‘protected attribute’, or the imposition of an unreasonable requirement condition or practice with which people with a particular attribute may have difficulty complying. ‘Protected attributes’ include impairment (such as mental illness or other disability).
31. Having regard to comparative and international law regarding the right to equality and non-discrimination, the likely interpretations and applications of section 8 seem to include the following:
- (a) First, pursuant to section 8(2), it is unlawful to discriminate against a person in any area that falls within the wide ‘ambit’ of a relevant human right even though there may not be any violation of that right.²³ The application of section 8(2) does not presuppose a breach of any of the *Charter*’s substantive provisions. A measure which itself conforms with the other human rights in the *Charter* may nevertheless violate section 8(2) if it is discriminatory.
 - (b) Second, pursuant to section 8(3), there is an immediate obligation on the government and public authorities to ensure that legislation, policies and programs prohibit discrimination and are themselves non-discriminatory.
 - (c) Third, pursuant to sections 8(2) and (4), read together, there may be a further substantive obligation on the government and public authorities to take positive steps and adopt special measures to address the needs of people experiencing disadvantage so as to enable them to realise all of their rights and freedoms.²⁴

²² The accompanying note to the definition of discrimination in s 3(1) of the *Charter* notes that s 6 of the *Equal Opportunity Act 1995* (Vic) lists a number of attributes in respect of which discrimination is prohibited. Some of these attributes are listed in the note, however this list is not exhaustive. Therefore, it will be necessary to refer to the *Equal Opportunity Act 1995* (Vic) when interpreting the meaning of discrimination in the *Charter*.

²³ Looking at the equivalent provision of the *Human Rights Act 1998* (UK), the Court of Appeal considered that four questions should be asked:

1. Do the facts fall within the ambit of one of more of the substantive provisions?
2. If so, was there different treatment as between the complainant and other comparators?
3. Were the comparators in an analogous situation to the complainant?
4. If so, did the differential treatment pursue a legitimate aim and bear a reasonable relationship of proportionality to the aim?: *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [20]; [2003] 1 WLR 617, 625.

²⁴ HRC, *General Comment 18*, above n 20. See also *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 278; *Lovelace v Ontario* [2000] 1 SCR 950.

Having regard to international jurisprudence, these steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources.²⁵

5.3 Equal Access to Courts

32. Of particular relevance to the issue of whether Victoria's vexatious litigant laws require reform is Article 14 of the ICCPR, which has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to the justice system. The administration of justice must 'effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.²⁶ This is inherently linked with notions of equality before the courts and may raise issues of discrimination.
33. Courts have determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.²⁷ However, this right is not unlimited and courts have generally recognised that there are some groups that may be excluded from the court process. In addition to litigants who bring cases without merit (that is, vexatious litigants),²⁸ these groups include bankrupts, minors, people who fall outside a reasonable time-limit or limitation period for bringing a case,²⁹ and other groups where there is a legitimate interest in restricting their rights of access to a court, provided the limitation is not more restrictive than necessary.³⁰
34. It is important to note, however, that the right to a fair hearing is a fundamental human right which must not be limited in the mere interests of 'practicality and convenience'.³¹ Limitations on the right to equal access to courts are discussed in further detail below.

²⁵ CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights*, above n **Error! Bookmark not defined.**, [11]. See also *Eldridge v British Columbia (Attorney General)* [1997] 2 SCR 624.

²⁶ HRC, *General Comment No 32: Article 14 Concerning the Right to Equality before Courts and Tribunals and to a Fair Trial*, (2006), [2] available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>. See also *Raymond v Honey* [1983] 1 AC 1.

²⁷ Department for Constitutional Affairs, *Human Rights: Human Lives* (2006), available at www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf.

²⁸ See, eg, *Ashingdane v United Kingdom* (1985) 7 EHRR 528, [58]; *M v United Kingdom* (1987) 52 DR 269, 270; *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [20].

²⁹ *Stubbings v United Kingdom* (1996) 23 EHRR 213.

³⁰ See generally Department for Constitutional Affairs, *Human Rights: Human Lives* (2006) 20.

³¹ *R v McBride* [2007] ACTSC 8 (13 February 2007).

35. Equal access to courts has also been linked to the notion of equality before the courts. In *Olo Bahamonde v Equatorial Guinea*, the UN Human Rights Committee stated that 'a situation in which an individual's attempts to seize the competent jurisdictions of their grievances are systematically frustrated runs counter to the guarantees of Article 14(1)'.³²
36. According to the HRC's recent General Comment on art 14 of the ICCPR, availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.³³
37. In *Golder v United Kingdom*,³⁴ the applicant, a prisoner, was denied access to his solicitor to discuss the prospect of bringing a civil suit. This was held to violate his right to a fair hearing because although not preventing him from bringing a proceeding altogether, it did prevent him from commencing it at that time. The European Court held that the convention presupposes the right of access to the courts just as it presupposes the existence of the courts themselves.³⁵
38. In *Airey v Ireland*,³⁶ the European Court held that fulfilment of a duty under the European Convention of Human Rights (**ECHR**) requires positive action by the state and thus it is a positive duty to ensure effective access to the courts. Likewise, in its Concluding Observations on Norway, the HRC noted that civil proceedings are serious enough to warrant an entitlement to legal aid when they concern the attempted enforcement of a right protected by the ICCPR.³⁷

³² *Olo Bahamonde v Equatorial Guinea*, HRC, UN Doc CCPR/C/49/D/468/1991, [9.4].

³³ *General Comment 32*, above n 26, [3].

³⁴ 4451/70 [1975] ECHR 1 (21 February 1975).

³⁵ *Ibid.*

³⁶ 6289/73 [1979] ECHR 3 (9 October 1979).

³⁷ *Concluding Observation on Norway*, UN Doc CCPR/C/79/Add. 112(1999). This was particularly so in the context of the discriminatory impact of high legal costs and the absence of legal aid on Sami protection of traditional livelihood from competing land uses.

5.4 Limitations on the Right to a Fair Hearing

39. The right to a fair hearing is not absolute. However, it is well established that any limitation on the right must be in pursuit of a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.³⁸ Any limitations must be based upon reasonable and objective grounds.³⁹ Furthermore, they should not impair the 'essence' of the right to a fair hearing.⁴⁰
40. Determination of what is proportionate is heavily dependent on the individual circumstances of the case. In ensuring equal and uninhibited access to justice, courts have to balance the interests of individuals with the need to manage case load and avoid unnecessary delays. The avoidance of delay is, in itself, part of ensuring better access to justice for genuine litigants.⁴¹ While restrictions impacting on the right to a fair hearing are allowed in some cases, courts have acknowledged that a restrictive interpretation of the right to a fair hearing should not be taken.⁴²
41. In *R v HM Attorney General, ex parte Andy Covey*,⁴³ the UK High Court made it clear that the process of declaring someone a vexatious litigant was not necessarily an unjustified interference with their right of access to the court. Restriction of a vexatious litigant was required for legitimate protection of the legal process as well as those against whom the respondent may decide to litigate in the future. The court held that exclusion was the only proper course in the circumstances and it did not amount to a denial of the respondent's access to a court under article 6 of the ECHR. The European Court's jurisprudence recognises the need for the reasonable and

³⁸ *Tinnelly & Ors v UK*, 20390/92 [1998] ECHR 56 (10 July 1998); *Ashingdane v United Kingdom* (1985) 7 EHRR 528, [57]; *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [20], [55]-[56].

³⁹ *Kavanagh v Ireland*, UN Doc CCPR/C/71/D/819/1998; *Gangadin v Netherlands*, UN Doc CCPR/C/89/D/1451/2006 (4 April 2007), [4.2].

⁴⁰ *Ashingdane v United Kingdom* (1985) 7 EHRR 528, [57]; *Seal v Chief Constable of South Wales Police* [2007] UKHL 31, [56]. See also *R v McBride* [2007] ACTSC 8 (13 February 2007) in which the ACT Supreme Court held that 'issues of practicality and convenience must give way to the overwhelming interest, now recognised by the *Human Rights Act 2004*, that every accused must be afforded a fair trial'.

⁴¹ Sir Anthony Clarke, *Vexatious Litigants and Access to Justice: Past, Present and Future*, First Keynote Address, Conference on Vexatious Litigants (30 June 2006) available at www.judiciary.gov.uk/publications_media/speeches/2006/sp300606.htm.

⁴² *Moreira de Asevedo v Portugal*, 11296/84 [1990] ECHR 26 (23 October 1990).

⁴³ [2001] EWCA Civ 254.

proportionate ordering by the court of its processes, including the requirement of a filter in some cases to ensure that the court processes are properly used.⁴⁴

⁴⁴ Rosalind English, *Human Rights Update* (2000) One Crown Office Row, available at www.humanrights.org.uk/374/.

6. Vexatious Litigants in Victoria

6.1 Introduction

Any potential reform of Victoria's vexatious litigant laws must be done with application to the international and domestic human rights framework described above. The following section analyses a number of reasons as to why litigants become vexatious and discusses alternative means of balancing an individual's right to access to justice and access of the court system with the desirability of preventing litigation that is unmeritorious and vexatious. A human rights framework for law reform requires that if less restrictive measures can be adopted to pursue the legitimate aim of reform, then these avenues must be approached first.

6.2 Why Some People Become Vexatious Litigants

Research shows that there is often a strong link between vexatious litigants and behavioural disorders.⁴⁵ 'Querulous paranoia' is a term often used to describe the behaviour of vexatious litigants and is a constellation of behaviours and attitudes, which may or may not arise secondary to a major mental disorder, and may or may not be characterised by delusional phenomena. However, it appears that prior to becoming heavily absorbed in the pursuit of their grievances, vexatious litigants are often functional individuals, with families and friends and without obvious antisocial traits.⁴⁶

Research into vexatious litigants in Australia conducted by Simon Smith supports this psychiatric analysis of vexatious litigant behaviour. The matter of Constance May Bienvenu is one case in point. Constance Bienvenu had a stable and unremarkable upbringing and adulthood with steady employment and appears to have been happily married. The development of 'querulous paranoia' only occurred once she was involved in litigation against the RSPCA.⁴⁷

Research also indicated that the 'querulous behaviour' of vexatious litigants is often a reaction to external factors originating in the complaint processes of public bodies and other organisations and the court system as outlined below.

⁴⁶ Ibid 343

⁴⁷ Simon Smith, Constance Bienvenu: Animal Welfare Activist to Vexatious Litigant, *Legal History* (2007) Vol 11 at 35

42. The key factors contributing to individuals becoming vexatious litigants are:
- (a) experience of unfair treatment or Injustice in the legal system;
 - (b) lack of appropriate legal advice and representation at the initial stage;
 - (c) the court process; and
 - (d) the failure of internal complaint/grievance procedures within organisations and public bodies.

(a) The Experience of Unfair Treatment or Injustice in the Legal System

43. In some of the cases that inform our submission, the litigant in question has invariably experienced an instance of injustice or unfair treatment in the legal system. There may have been a denial of some form of procedural fairness and the right to have the complexity of the proceedings explained to them in a meaningful way. By way of example, a court may make an order that has failed to take into consideration the litigant's relevant particular circumstances and interests. It is this initial perception of injustice that fuels the mistrust, anger and hostility towards the legal system often felt by vexatious litigants and creates a stubborn determination to revisit matters that are no longer relevant, have already been determined,⁴⁸ or are out of time to revisit. Denial of procedural fairness can also provide the impetus for litigants to initiate unmeritorious applications against various persons, organisations, and public figures who they believe are part of a conspiracy against them.

44. In the case of Constance Bienvenu, the judge's focus on narrow legal points and not the underlying dispute created a sense of frustration and mistrust. This was further exacerbated by the judge's exercise of his discretion to award full costs against Ms Bienvenu. Arguably had the outcome been different, a major focus of Ms Bienvenu's continuing grievance would have been eliminated.⁴⁹

(b) Lack of Appropriate Legal Advice and Representation

45. The experience of PILCH and the HRLRC is that in many instances vexatious litigants have not had access to legal advice and representation in the initial stages of legal

⁴⁸ For a discussion of these issues generally: *Attorney-General for the State of Victoria v Kay* [1999] VSC 30

⁴⁹ Simon Smith, *Constance May Bienvenu: Animal Welfare Activist to Vexatious Litigant*, *Legal History* (2007) Vol 11, p61.

proceedings. This had led to erroneous or inflated perceptions of the merit of their matter and a lack of understanding about the court process.

46. Lack of access to advice and representation is often due to insufficient legal aid funding and the limited resources of the community legal sector. In the absence of early advice and assistance some litigants have come to regret their initial legal decisions and attempted to reopen matters that have been finalised. As discussed above, access to a fair hearing is a fundamental human right and is contained within section 24 of the *Charter*. Practical experience shows that for this right to be meaningful an individual must have access to the basic components that comprise this right including the right to legal advice and representation.

(c) The Court Process

47. The complexity of the court processes can also aggravate a vulnerable litigant's sense of injustice and trigger vexatious behaviours. Research reveals patterns amongst self-represented litigants such as incorrect use of forms, misdirection of correspondence containing formal submissions or requests, and wrongly framed requests for relief, particularly judicial review. Vulnerable litigants may also bring applications that are misguided and have difficulty articulating their case. This creates a risk that meritorious claims brought by self-represented litigants may be obscured by, or fail because of poor articulation.⁵⁰ This reliance on form and the adversarial system can create barriers for judges to attempt to ensure fair treatment of litigants in person and to appropriately guide them.

(d) Failures of internal complaint/grievance procedures

48. Another factor that can contribute to an individual becoming a vexatious litigant is the often valid sense of unfairness they feel towards an organisation's failure to properly handle their grievance. In a case study cited by Paul Mullen and Grant Lester in their report on vexatious litigants,⁵¹ a man in his late 40s made a complaint to the local bank manager over the manner in which mortgage documents had been prepared. Although

⁵⁰ Victorian Law Reform Commission Civil Justice Review Report p565-566 referring to Supreme Court of Victoria, Perception Or Reality: Project Report, Self-Represented Litigants Co-ordinator 2006-2007(internal report only made available to the commission by the Chief Justice).

⁵¹ Paul E Mullen and Grant Lester, Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour, *Behavioural Sciences Law* 24: 333-349 (2006) Wiley InterScience at 338

the irregularities were to his advantage there were grounds for him to be concerned. During this period he was experiencing financial problems and marital difficulties. The bank manager rejected his complaint. He then approached the Banking Ombudsman who was unable to provide a satisfactory resolution of the matter. He then stopped paying the mortgage and initiated civil action.

49. The use of a human rights framework when organisations and the legal profession respond to individuals in relation to their complaint or grievance has 'therapeutic' advantages. Often, an individual's *perception* of fairness is far more important than any result they are seeking to achieve. Responding to such individuals using a human rights framework ensures that an individual feels as though they have been heard and assists them to understand what they can realistically expect from the system they are dealing with. Such an approach provides the individual with valuable insight into their matter and can ensure that they do not perceive that litigation is a necessary option or the only option for them.
50. The experience in the United Kingdom following the introduction of the *Human Rights Act 1998* (UK) has demonstrated that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:⁵²
- (a) increased levels of 'consumer' satisfaction as a result of more participatory and empowering processes;
 - (b) more individualised, flexible and responsive public services;
 - (c) the language and ideas of rights can be used to secure positive changes to individual circumstances.

In other words, a human rights approach provides mechanisms for a less litigious and less reactive framework that is more focused on individuals. This serves to address some of the underlying, systemic causes of human rights violations, rather than react in a limited, ad hoc way.

51. The therapeutic advantages of a human rights framework to respond to complaints raised by individuals highlights the importance of the obligation in section 38(1) of the *Charter* for public authorities to act compatibly with human rights and to give proper

⁵² See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

consideration to human rights when making decisions. By acting compatibly with this obligation, public authorities will make sure that existing complaints and grievance procedures are tailored to the needs of individuals and ensure that their particular issues are listened to and acted upon. This will result in fairer and more effective complaints and grievance procedures and will decrease the likelihood of individuals becoming vexatious litigants.

6.3 What are the Common Characteristics of Vexatious Litigants?

52. The common characteristics of vexatious litigants based on our experience and research include a lack of insight into the unmeritorious nature of the proceedings they bring to court, an inability by some to accept legal advice, and an almost obsessive need to keep returning to court seeking 'justice' after being rebuffed time and again.⁵³ Vexatious litigants are also prone to creating an illusory web of conspiracy against them comprised of public figures, the judiciary, and any organisation or individual who they have come into conflict with. Some also have unrealistic expectations of the legal system and at times seek redress that is grossly disproportionate to their grievance.
53. Whilst the Inquiry seeks to establish the common characteristics of vexatious litigants to assist with the examination of whether there is a need for law reform in this area, we submit that it is crucial to also note the differences amongst these litigants. A human rights framework requires that laws are flexible to allow for an individualised approach rather than one that is general and simplistic. Such a framework safeguards individuals with meritorious claims from being denied access to the legal system and would prevent other reforms to vexatious litigant laws that are not proportionate to the legitimate aims of this inquiry.

6.4 The Relationship between Mental Health and Vexatious Litigation

54. Many vexatious litigants have at one stage been self-represented litigants. It is extremely important not to conflate self-represented litigation with vexatious litigation, nor assume that all litigants without representation will have claims that are unmeritorious or exhibit other forms of vexatious behaviour. It is of concern that reforms to vexatious litigant laws may capture self-represented litigants with matters that are meritorious but due to lack of sophistication and clarity in pursuing their legal claims are branded vexatious and prevented access to the court system.

⁵³ Simon Smith, as above n 52, 61

55. Self-represented litigants with mental health issues are particularly vulnerable to premature and erroneous classifications of vexatiousness. We have identified two key aspects to consider when examining the relationship between mental health and vexatious litigation. Firstly, the court approach to persons with mental health issues needs to be examined as there is a danger that self-represented litigants are being wrongly viewed as vexatious by some members of the judiciary. Secondly, the failure of courts and tribunals to advise self-represented litigants who have a mental illness that they have no legal cause of action can later fuel vexatious litigation.
56. Whilst many courts deal appropriately with litigants who have mental health issues, concern remains that some members of the judiciary and court staff have a tendency to prematurely view persons with mental health issues and disabilities as vexatious particularly where they have previously been involved in legal action. According to a recent report of The Disability Council of New South Wales⁵⁴ people with disabilities felt that assumptions made by the courts did not take into account the difficulties they face in trying to exercise their rights.⁵⁵ For example, in a recent report by the Law and Justice Foundation of New South Wales, a director from the Social Security Appeals Tribunal referred to an appeal where a man who had been seeking an internal review at Centrelink for a failed activity test breach, was wrongly labelled as 'vexatious', when in fact he had a valid complaint.⁵⁶
57. The report also outline that where people with a mental illness have legitimate complaints, perceptions that they are being vexatious prevent them from being taken seriously by the legal system. This is compounded by the fact that the justice system perceives the ability to communicate as directly reflecting a person's credibility.⁵⁷ In the interests of according self-represented litigants with a mental health issue/illness a fair hearing, this issue must be highlighted to the judiciary and court staff so that they will display greater sensitivity and objectivity when dealing with these litigants.

⁵⁴ Disability Council of NSW (Disability Council), 'A Question of Justice: Access to Participation for People with Disabilities in Contact with the Justice System', Disability Council, Sydney, 2003, at 63.

⁵⁵ Ibid 63

⁵⁶ Maria Karras, Emily McCarron, Abigail Gray & Sam Ardasinski, 'On the edge of justice: the legal needs of people with a mental illness in NSW', Law and Justice Foundation of New South Wales, 2006, at 147.

⁵⁷ Disability Council, as above n65, 12

58. In situations where a self-represented litigant has a mental illness and there is no basis for their legal action it is imperative that the court or tribunal informs the individual in a sensitive but firm manner and at a level adapted to their understanding that there is no merit to the proceeding and dismiss it. Unfortunately, this has not always been the case. In our experience, rather than discuss the merits of the matter with the self-represented litigant some judges have informed these individuals that if they can obtain certain types of evidence (which they will never be able to obtain) they will then be able to bring their matter back to court. This is particularly a problematic where litigants suffer from delusions.
59. In light of these concerns, rather than a reform of laws that may increase the number of litigants that are declared vexatious, members of the judiciary and court staff should be required to undergo comprehensive mental health training to assist in dealing more appropriately with self-represented litigants with mental health issues. This recommendation is discussed in more detail later in this submission.

7. Applying for a Declaration under Victoria's Vexatious Litigant Laws

7.1 Who should have Standing?

(a) The Current Position

60. Victorian law provides that only the State Attorney-General can apply to the Supreme Court under section 21 of the *Supreme Court Act* to have a person declared a vexatious litigant. If an individual or organisation has been a defendant in proceedings brought by the alleged vexatious litigant, or believes that they have a 'sufficient interest' they must approach the Attorney-General and request that an application is made to the Court to have the person declared a vexatious litigant.
61. Upon receipt of such a request, the Attorney-General will seek legal advice from the Victorian Government Solicitor's office, as to whether the criteria of the vexatious litigant laws are satisfied before instituting legal proceedings.

(b) Should Standing Include Other Persons?

62. PILCH and the HRLRC recommend a very cautious approach to the extension of standing laws.
63. Notwithstanding recent amendments to other states vexatious litigants laws and proposed developments in the Model Vexatious Proceedings Bill 2004⁵⁸, PILCH and the HRLRC are of the view that an extension of standing to the Victorian Government Solicitor and the prothonotary/registry as suggested by the Inquiry, should only occur if these parties practice an impartial and independent approach.
64. Any extension of standing to parties to the litigation and those with 'sufficient interest' should be subject to leave of the court as there is no guarantee that persons with 'sufficient interest' or defendants will make applications in good faith. This is particularly relevant in matters where the vexatious litigant has initiated legal proceedings in response to the defendant treating them with malice or vindictiveness. The impartiality of the Attorney-General and Victorian Government Solicitor provides for a fairer application process as would the leave requirement for parties.

⁵⁸ The model bill was created out a joint Commonwealth, State and Territory review of the legal and policy issues associated with vexatious litigants through the Standing Committee of the Attorneys-General.

65. Stringent guidelines and standards must accompany any extension of standing rules. The broader social and personal implications of declaring someone to be a vexatious litigant support a cautious approach. Traditional media coverage of vexatious litigants is somewhat merciless and unforgiving. Headlines such as '*Nuisances in Court: Judges Get Tough on Serial Pests*'⁵⁹ and '*Annoying Litigant is Back*'⁶⁰ can have a severe impact on an individual's reputation and position in the community.
66. The legal position internationally also endorses a cautious approach. At present England, Wales, Northern Ireland and Scotland's vexatious litigant laws provide that only the Attorney General and Lord Advocate respectively can make an application to their superior court for a vexatious litigant order to be made.⁶¹

7.2 Should only the Supreme Court have the Power to make a Vexatious Litigant Order? Should it be able to do so, on its own Motion?

67. Given the serious nature of vexatious litigant orders and their consequences in restricting an individual's access to the courts, it is imperative that only a superior court, namely the Supreme Court, should have the power to make such an order.
68. PILCH and the HRLRC do not support any move to allow the Supreme Court to make such an order on its own motion. There is a lack of empirical evidence to illustrate any need for such a significant power to be granted. This is evidenced by the fact that despite such a provision being provided for in Queensland under section 6(3) of the *Queensland Vexatious Proceedings Act 2005*, so far the court has not had the need to make use of this power.
69. The lack of any empirical evidence to support extending the Supreme Court's power may raise concerns with the limitations analysis required by section 7 of the *Charter*. As discussed previously, section 7 of the *Charter* requires that any limitation on a right must be in pursuit of a legitimate aim and must be proportionate to that aim. Any limitations must be based upon reasonable and objective grounds. In the absence of empirical evidence to support further limiting the right of access to the justice system, it

⁵⁹ Michael Perry, *The Sydney Morning Herald*, May 27, 2004.

⁶⁰ Fergus Shiel, *The Age*, April 10, 2006.

⁶¹ England and Wales: Section 42, Supreme Court Act 1981, Northern Ireland: Section 32 Judicature (Northern Ireland) Act 1978.

is difficult to determine how such a limitation may be justified as reasonable and proportionate.

70. Furthermore, any limitation on a human right may only be justified where there is no less restrictive means reasonably available to deal with the issue of vexatious litigants. As discussed in further detail in the last section of this submission, and identified throughout this submission, PILCH and the HRLRC consider that there are other strategies and programs that may be undertaken to balance the rights of vexatious litigants and the operation of a fair and efficient civil justice system.

Recommendation 2:

PILCH and the HRLRC recommend a very cautious approach to proposed extensions to standing laws. Standing should only be extended to the Victorian Government Solicitor and the Prothonotary/Registry if stringent safeguards are in place to ensure that these parties practice an impartial and independent approach. Any extension of standing to defendants and parties with 'sufficient' interest' must be subject to leave of the court.

Recommendation 3:

Given the serious consequences of vexatious litigant orders, PILCH and the HRLRC recommend that only the Supreme Court should have the power to declare a person a vexatious litigant.

8. Who is a Vexatious Litigant under Victoria's Laws?

8.1 What Should be the Test be for Determining whether a Person is a Vexatious Litigant?

(a) The Current Position

71. At present the Supreme Court must refer to the criteria outlined in section 21 of the *Supreme Court Act 1986 (Vic)* to ascertain whether a vexatious litigant order should be made against an individual. In considering whether to make the order, the Supreme Court will be guided by section 7(2) of the *Charter* as to the permissibility of limitations on human rights. PILCH and the HRLRC consider that interpreting section 21 consistently with the *Charter* will ensure the appropriate balance between access to the courts and efficient administration of justice.
72. The current test is whether a person has habitually and persistently and without any reasonable ground instituted proceedings (whether civil or criminal) in the Court.⁶²
73. Habitually is taken to mean that the person appears to have commenced such proceedings as a matter of course.⁶³ Persistently suggests determination and an element of stubbornness.⁶⁴ Finally, 'without reasonable grounds' is satisfied if the proceedings are revealed to be hopeless but will have independent operation, where for example, the proceedings are instituted for an improper purpose.⁶⁵
74. At present the law ensures that the Court undertakes a rigorous examination of any vexatious litigant order application brought before it. The terms 'habitually' and 'persistently' capture the essence of the vexatious nature of the proceedings being brought.
75. The use of the term 'frequent' proceedings should not replace 'habitually' and 'persistently' as it is too general and open to interpretation. It lacks clarity and does not properly describe the vexatious nature of the litigation that has taken place. For example, one could argue that corporations who frequently bring matters to court could

⁶² S21(2) (a)-(c) Supreme Court Act

⁶³ AG v Weston [2004]314 paras20-23

⁶⁴ Weston paras20, 21 and 23. Brogden v AG [2001]NZAR 2001

⁶⁵ Weston paras 22 and 23; AG v Wentworth [1988] 14 NSWLR 431, 492-3

be viewed as a 'frequent' litigator for the purposes of vexatious litigant laws. By broadening the test there is the added risk that self-represented litigants with a legitimate claim will be declared vexatious, particularly where they may repeatedly return to court on the same issue due to a lack of knowledge or understanding of the correct form and procedures.

8.2 Should other criteria also be considered such as the way the person has conducted litigation and a person's motive for bringing a case?

76. PILCH and the HRLRC are concerned that the mandate of the court to consider other criteria, such as the way a person has conducted litigation or their motive for bringing a case, when assessing whether a person should have a vexatious litigant order made against them may raise issues under the *Charter* and, in particular, the rights to equality before the law and to non-discrimination enshrined in section 8 of the *Charter*.
77. Firstly, under such proposals a litigant may be discriminated against where they are unable to articulate their case clearly and effectively to the court as a result of distress, a mental health issue and/or a lack of understanding of the court process. Their conduct should not undermine their right to have a fair hearing. A determination should be based on the substance of their matter. Any criteria that has the potential to exclude individuals from the court process on the basis of factors such as mental health issues, disability or any inability to understand the court process raises concerns with section 8 of the *Charter*.
78. The right to a fair hearing may also be jeopardised if the court had the power to consider a person's motive for bringing a case, as this can be difficult to determine objectively.
79. PILCH and the HRLRC contend that at present there is no justification for allowing the court to consider other criteria such as those raised above, particularly in light of the fact that the courts already have inherent powers to deal with proceedings that amount to an abuse of process. In *Guss v Magistrates' Court of Victoria & Anor*,⁶⁶ Justice Batt refers to the binding principle that all courts have control of their own proceedings and may devise a practice for regulating those proceedings that is not inconsistent with or completely covered by their governing Act. A court also has the power to prevent an

⁶⁶ *Guss v Magistrates' Court of Victoria & Anor* [1998] 2 V.R.113 at 120. See also Rule 23 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic)

abuse of its process in circumstances where repeated applications are brought on the same material.

80. Furthermore, significant control of persistent litigators appears to already be occurring in the courts. Court registrars now have the power to refuse litigant documents that are irregular or represent an abuse of process.

Recommendation 4:

PILCH and the HRLRC recommend that the current test for declaring a litigant vexatious under section 21 of the *Supreme Court Act* (Vic) remain unchanged.

9. What Rights Should an Alleged Vexatious Litigant Have?

9.1 The Right to Free Legal Representation

81. While the right to a fair hearing under the *Charter* does not definitively prescribe a right to free legal representation, there will be some instances where free legal representation is required to give effective and practical meaning to the right. The right to a fair hearing requires the court system to be accessible to everyone, which may itself entail the provision of legal aid. Availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.⁶⁷
82. In *P C and S v UK*,⁶⁸ the European Court held that the failure to provide an applicant with a lawyer was a violation because, in the circumstances, legal representation was deemed to be indispensable. Lack of legal representation prevented the party from putting forward their case effectively because of the complexity, high emotional content and serious consequences of the proceedings. This case has particular relevance for individuals who may potentially be declared a vexatious litigant because:
- (a) as discussed earlier in this submission, proceedings brought by such individuals are usually based on a sense of injustice or unfair treatment;
 - (b) many vulnerable litigants have difficulties with the complexity of the court process which can trigger vexatious behaviours; and
 - (c) there are serious consequences of a person being declared a vexatious litigant, as they are restrained from bringing or taking part in future legal proceedings,
83. In considering the question of legal representation, PILCH and the HRLRC note that the right of access to a lawyer is not absolute and may be subject to restriction provided that those restrictions pursue a legitimate aim and are proportionate. It may be acceptable to impose conditions on the grant of legal aid based on the financial situation of the applicant or on the prospects of their success in the proceedings. It is not incumbent upon the state to seek, through public funds, to ensure total equality of arms as long as each side is afforded a reasonable opportunity to present their case under conditions that do not put them at a substantial disadvantage.

⁶⁷ *Draft General Comment 32*, above n 7, [3].

⁶⁸ 56547/00 [2002] ECHR 604 (16 July 2002).

84. International and comparative jurisprudence indicates that an individual's access to the justice system should not be prejudiced by reason of his or her inability to afford the cost of independent advice or legal representation. Indeed, in this respect, PILCH and the HRLRC submit that any failure to provide legal aid to those who may otherwise be unable to access legal representation is likely to contribute to significant inefficiencies and additional costs in the civil justice system.
85. Furthermore, increased legal aid funding for self-represented litigants who are unable to afford private representation would assist the potential litigant to understand why litigation may not be appropriate. A litigant may also receive useful advice and instruction as to how to articulate their case more clearly to the court. Legal representation through increased legal aid funding would also enable alleged vexatious litigants to narrow the issues in dispute so that only points of relevance are put to the court.

Recommendation 5:

PILCH and the HRLRC submit that in many cases a vulnerable litigant will require free legal representation to give effective and practical meaning to the right to a free hearing under the *Charter*. PILCH and the HRLRC recommend an increase in legal aid funding and funding for community legal centres to better support self-represented litigants who are unable to afford private legal representation.

9.2 What rights of appeal should a vexatious litigant have?

At present, an individual who is declared a vexatious litigant must seek leave to initiate legal proceedings or continue existing proceedings. As referred to above, the requirement to seek leave may place a significant restriction on the rights of vexatious litigants to access the courts.

86. PILCH and the HRLRC consider that the rights of appeal for those who are declared vexatious should be the same as appeal rights for other litigants. In light of the small number of vexatious litigants, as well as the lack of empirical evidence to suggest that their current rights to seek leave to appeal are problematic, the status quo should remain.

Recommendation 6:

PILCH and the HRLRC recommend that the rights of appeal for those who are declared vexatious should be the same as appeal rights for other litigants.

10. The Power of the Courts to Control Vexatious Litigation

10.1 Should Conditions be Imposed on Vexatious Litigants?

87. The Inquiry questions whether a court should be able to impose a condition that a person can only bring a proceeding if they have legal representation. PILCH and the HRLRC submit that such a condition would unjustifiably prevent access to the courts of hundreds of self-represented litigants who may have meritorious matters.
88. We further submit that such a condition is in possible breach of the *Charter*. The *Charter* provides that equal access to, and equality before the courts are protected rights that can only be limited in certain circumstances. As stated earlier in this submission, Article 14 of the ICCPR has been interpreted to signify that all persons must be granted, without discrimination, the right of access to the justice system. Access to the courts cannot be limited merely due to interests of 'practicality and convenience.'
89. Similar considerations apply in relation to a court having the power to prevent a person from entering court premises. A person should only be prevented from entering court premises if they pose a real security risk. A human rights framework requires that rigorous safeguards be in place for determining whether a person poses a security risk as not all vexatious litigants are violent or prone to violence.

Recommendation 7:

PILCH and the HRLRC recommend that the court should not have the power to impose a condition that any litigant that comes before the court **must** have legal representation.

11. The Effect of a Vexatious Litigant Declaration

11.1 Should the Attorney-General, or any other people be notified when a vexatious litigant seeks leave? What rights should these people have?

90. At present there is no legislative requirement that the Attorney-General or any other person be notified when a vexatious litigant seeks leave from the court to initiate or continue with existing litigation. Leave applications are heard *ex parte* unless the court is of the view that the Attorney-General should be represented. It would appear that this situation need not be altered for there is no empirical evidence to suggest that leave is generously given. There is a high onus placed on a vexatious litigant when he or she applies to the judge for leave and whilst the ingenuity of these litigants can from time to time lead to the pursuit of futile appeals, the court already has the power to cause notice of the application to the Attorney-General.⁶⁹
91. Further, a statutory requirement for the court to always notify the Attorney-General or other parties could lead to a denial of procedural fairness created by undue reliance on previous vexatious proceedings.

11.2 Should Courts and Tribunals be able to decide Leave Applications on the papers?

92. At present, Victorian courts and tribunals must decide leave applications by way of oral hearing. Deciding a leave application on the papers means there is no oral argument put by the applicant and therefore it is difficult for them to feel that they have been fully heard.
93. Any attempts to implement a process whereby leave applications are decided on the papers may amount to a possible breach of section 24 of the *Charter* under to the right to a fair hearing. Procedural fairness will arguably be undermined as the court would not be able to assist the litigant as to the points of relevance and to properly ascertain whether they have any meritorious arguments to make in the application. Only an oral hearing can ensure that their right to be heard is meaningful in any way. It would appear that such a measure is clearly not proportionate to the aims of the reforms of vexatious litigant laws.
94. Finally, the fact that the vexatious litigant would feel that they have not been fully heard would further entrench their sense of grievance and their experience of unfairness in

⁶⁹ See *Becker v Teale* [1971] 3 All E. R. 715 at 716

the legal system that may have contributed to them becoming vexatious in the first instance.

95. Similarly, Courts and tribunals should be restrained from attaching onerous conditions to vexatious leave applications such as an order that the litigant be able to provide security for likely costs for the defendant. It could be argued that such a measure discriminates between vexatious litigants and only allows those with means to pursue their claims. If such a situation were to occur, it would undermine the important principle of equality before the law, and further entrench a vexatious litigant's sense of injustice. The same *Charter* considerations discussed in relation to the right to a fair hearing and equal access to the courts apply.

Recommendation 8:

PILCH and the HRLRC recommend that any introduction of a notification requirement to the Attorney-General or any other person when a vexatious litigant seeks leave to appeal, should be treated with caution so as to not undermine procedural fairness.

Recommendation 9:

PILCH and the HRLRC recommend that any provision to allow the courts to impose conditions when leave is granted to a vexatious litigant such as an order that the litigant be able to provide a security for costs, should not be a blanket provision. Such conditions should only be allowed in exceptional circumstances and must be compatible with *Charter* obligations.

12. Other Ways to Respond to Vexatious Litigation

96. There are a number of measures that can be employed when dealing with vexatious litigants that would maintain the balance between the rights of an individual to access the justice system and the need for courts to efficiently and effectively perform their role. PILCH and the HRLRC submit that the measures suggested below satisfy *Charter* requirements to investigate and implement less restrictive measures to the legitimate aim of dealing more effectively with vexatious litigation.
97. Such measures include:
- continued training and education of court staff and judicial officers;
 - the appointment of Special Masters;
 - the introduction of management plans in the courts' strategic management of cases;
 - more legal assistance to help determine in the initial stages of a matter whether it has merit; and
 - improved resources for self represented litigants.

Such initiatives are not new. In 1994 a comprehensive review of the civil justice system in the United Kingdom was conducted. The subsequent report proposed the introduction of a system where the courts would take greater responsibility for the progress of litigation.⁷⁰ The report also identified that problems with the system arose due to the uncontrolled nature of the litigation process and the lack of clear judicial case management and simplification of procedural rules.

This position is supported by the Victorian Law Reform Commission's recent Civil Justice Review Report (**VLRC report**) which acknowledges that a significant group of users of the

⁷⁰ Lord Woolf, *Access to justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (Lord Chancellor's Dept. London, 1995); Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO London 1996); Lord Woolf, *Access to justice draft civil proceedings rules* (HMSO London 1996). See also Human Rights Law Resource Centre submission to the Victorian Law Reform Commission Civil Justice Review 'The Right to a Fair Hearing: The Relevance of the Charter of Human Rights and Responsibilities Act 2006 (Vic) to Civil Justice, December 2006, at 23

Victorian Court system are self-represented.⁷¹ It also recognises that the courts are under an obligation to assist litigants without legal representation to ensure them a fair trial. This obligation is said to extend not only to controlling proceedings but appreciating the needs of self-represented litigants and developing an appropriate and acceptable approach⁷² PILCH supports the VLRC report in this regard and supports Recommendations 108-113 of the VRLC report.⁷³

Outlined below are a number of initiatives in lieu of proposed reforms to existing vexatious litigant laws that would improve the efficiency and efficacy of the court process while ensuring an individual's right to a fair hearing:

(a) Continued Education and Training of Court Staff and Judicial Officers

98. The courts have a responsibility to ensure a fair hearing to self-represented litigants. PILCH and the HRLRC submit that as vexatious litigants are in the main self-represented they should be afforded the same rights as other self-represented litigants. However, self-represented litigants also have particular needs that court staff and the judiciary must be trained to respond to when managing their expectations and providing them with the necessary guidance.
99. PILCH and the HRLRC recommend that court staff and judicial officers undergo comprehensive and regular training to better equip them to understand and respond appropriately to vulnerable and vexatious litigants. Such training should encompass an understanding of the nature of a vexatious litigant, an appreciation that at some point they may have had a valid grievance, and the provision of guidelines and training on how to set achievable expectations of the court system.
100. In addition, training for judges and court staff on mental health issues is also crucial to ensure that litigants who have a mental illness receive a fair hearing and are provided the opportunity to fully understand the court process where possible.

(b) Special Masters

101. The introduction of Special Masters with specific training in dealing with self-represented litigants is also recommended. This would allow for the provision of a court based procedural initiative that can deal with issues that arise in a timely manner,

⁷¹ At 581

⁷² *ibid*

⁷³ *Ibid* 582

setting a realistic path for the self-represented litigant and ensuring that expectations are managed early in the process.

102. Early ongoing case management by a Special Master may result in a reduction in the incidents of inappropriate proceedings or applications being brought by a self-represented litigant and reduce the risk of a litigant becoming vexatious. In addition, this would overcome the difficulty faced by judges in an adversarial system in ensuring a fair hearing for self-represented litigants and providing them with the guidance needed. A Special Master would not face the same constraints and would be able to narrow the issues in dispute for a litigant and provide them with the necessary insight as to what, if any, aspect of their matter has merit.
103. PILCH and the HRLRC submit that Special Masters should be part of the court's process and does not agree with the VRLC report that they should assist the court only where appropriate or that the court should retain a broad discretion in relation to the recoverability of the costs of an external special master.⁷⁴

(c) Management Plans

104. PILCH and the HRLRC support the VRLC report's recommendation in respect of management plans.⁷⁵ As noted in the report, such plans should be part of the courts' organisational planning to meet the needs of self-represented litigants. The plans could result in early identification of potentially vexatious litigants and could refer matters to the Special Master as discussed above. As noted by Paul Mullen and Grant Lester:

*'What is almost never done is to make clear what cannot occur particularly in the all important areas of the querulous of retribution and vindication. A far clearer emphasis on the limitations on the power of courts and agencies at the outset might be worth trying.'*⁷⁶

⁷⁴ Ibid 580.

⁷⁵ At 582

⁷⁶ Paul E Mullen, Grant Lester, as above n58, 333-349

(d) Responses to mental health issues

PILCH and the HRLRC submit that a referral by the court of a vexatious litigant to a mental health service should only occur where the litigant has engaged in violence or is in immediate danger of self-harm or harm to others arising from their mental health issues.

(e) Increase Legal Aid Funding for Advice and Representation

PILCH and the HRLRC contend that the state government should review legal aid guidelines, and increase legal aid funding particularly for initial advice to self-represented and vulnerable litigants. Where there is merit, additional funding should be made available for representation. Research and experience demonstrates that early professional advice and ongoing support reduces the risk of vexatious litigation.

(f) Increase Resources for Self-Represented Litigants

105. Finally, PILCH and the HRLRC strongly recommend increasing legal resources at courts, tribunals, and within the community for self-represented litigants. An increase of resources would ease both the frustration of judges and self-represented litigants in situations where the litigants cannot clearly articulate their case nor understand or come to grips with the way in which the legal system operates.

PILCH and the HRLRC submit that the feasibility of a legal clinic for self-represented litigants to be located at all major courts and tribunals should be investigated. Such a clinic should be resourced to offer a triage form of legal assistance as well as materials in plain English describing court procedures, legal terminology and form completing requirements. Similar service models in the UK and more recently Queensland have been very successful in increasing the ability of self-represented litigants to clearly articulate their claims.

Recommendation 10:

PILCH and the HRLRC recommend that judges and court staff should receive comprehensive and ongoing training in relation to dealing with self represented litigants, including those who have mental health issues, are difficult or vexatious.

Recommendation 11:

PILCH and the HRLRC recommend that Special Masters should be introduced to the courts to assist with increasing numbers of self-represented litigants. Special Masters would have a range of functions including meeting with the parties to narrow the issues in dispute and providing much needed guidance to self-represented litigants in relation to understanding court processes. This initiative should be undertaken in conjunction with management plans.

Recommendation 12:

PILCH and the HRLRC recommend an increase in the resources available to self-represented litigants including an investigation into the feasibility of establishing self-help centres or self-represented litigant legal clinics at all major courts and tribunals.