Victorian Law Reform Commission Civil Justice Enquiry

Summary of draft civil justice reform proposals as at 6 September 2007
Second exposure draft for comment

Introduction

On 28 June 2007 the Commission released a document setting out a first round of draft reform proposals for public comment. The draft proposals in that exposure draft covered:

- Standards of conduct
- Disclosure of information and co-operation before civil proceedings are commenced
- Getting to the truth before trial (pre-trial oral examinations)
- Alternative dispute resolution
- Expert evidence
- Class actions and public interest remedies
- Litigation funding
- Costs

Since releasing the exposure draft the Commission has developed further draft proposals covering the following areas:

- Case management
- Self-represented litigants
- Vexatious litigants
- Interpreters
- Discovery
- Costs
- Confidentiality constraints on conferring with potential witnesses
- Ongoing review and civil justice reform.

Draft proposals on these topics are set out below. The Commission welcomes feedback in response to the draft proposals.

Explanatory note: The following summary of the present *draft* proposals and the explanatory information does not incorporate the detailed background papers and research on the topics in question completed and considered by the commission to date. It also does not seek to identify all of the relevant legal or policy considerations. This documentary material is voluminous and an edited version will be incorporated in the report due to be completed in March 2008 (following the extension of the original deadline granted by the Attorney-General on 3 September 2007). That report will also summarise the submissions received by the commission to date. For present purposes, comments are being sought on the specific proposals outlined below. Comments received by **Friday 28 September 2007** will be considered by the commission before the proposals are finalised.

Overview of draft proposals

In summary, the draft proposals encompass:

1. Case Management

    1.1 The possible expansion of the Individual Docket System.

    1.2 The introduction of more clearly delineated and specific powers to facilitate more proactive judicial case management.

    1.3 The introduction of more clearly delineated and specific powers to impose limits on the conduct of the proceeding, trial time, interlocutory hearings and oral and written submissions.

    1.4 Methods to enhance party compliance with procedural requirements and directions.

    1.5 Proposals for greater use of telephone directions hearings and technology generally.

    1.6 The use of 'case conferences' as an alternative to or to supplement directions hearings.

    1.7 The possible introduction of earlier and more determinate trial dates.

    1.8 Enhanced procedures for the earlier determination of disputes, including the introduction of a more liberal rule to facilitate the disposition of manifestly unmeritorious claims and defences.

    1.9 Additional mechanisms for controlling interlocutory disputes.

    1.10 The introduction of a power to make decisions without giving reasons, with the consent of the parties.

    1.11 A provision for making decisions on the papers.

    1.12 Enhanced 'preventive' control by expanding the power of the courts to refuse to accept or seal documents, including in respect of interlocutory applications.

2. Self-Represented Litigants

    2.1 Additional resources, funding and extension of the Supreme Court's Self-represented Litigants Co-ordinator program.

    2.2 Further investigation of the possible implementation of a formal court based pro bono referral scheme in the Supreme Court and County Court.

2.3 Provision for the appointment of a Special Master in cases involving self-represented litigants.

2.4 Additional resources to develop information and material for self-represented litigants and additional training for judicial officers and court staff.

2.5 The development of professional guidelines to assist lawyers in dealing with self-represented litigants.

2.6 Additional research on the extent of self-representation, the impact of self-represented litigants and the effectiveness of measures to assist self-represented litigants and to manage cases where at least one party is self-represented.

2.7 The development by courts of self-represented litigant management plans.

3. Vexatious Litigants

3.1 Additional research to ascertain the ambit of the problem of vexatious litigants and on the impact or effectiveness of orders declaring a person to be vexatious.

3.2 The extension of persons with standing to initiate applications for a vexatious proceedings order to include people other than the Attorney-General. Persons with standing should include the Victorian Government Solicitor, the Prothonotary of the Supreme Court, the Principal Registrar of the County Court and, with leave of the court (a) a party against whom another person has instituted or conducted vexatious proceedings or (b) as person who has a sufficient interest.

3.3 The liberalisation of the test for obtaining a vexatious proceedings order to encompass circumstances where a person has frequently instituted or conducted vexatious proceedings (broadly defined to include interlocutory applications and appeals) anywhere in Australia.

3.4 Extension of the categories of persons who may be subject to a vexatious proceedings order to include a person who acts in concert with a vexatious litigant.

3.5 The adoption of a statutory definition of vexatious proceedings.

3.6 The introduction of a provision setting out the types of orders the court may make to deal with a vexatious proceeding.

3.7 Provision for orders in respect of vexatious proceedings to extend to incorporated or other entities affiliated with a vexatious litigant.

3.8 Provisions for recording and notifying vexatious proceedings orders.

3.9 The introduction of an automatic stay of pending proceedings where an application for a vexatious proceedings order is made and a prohibition on the commencement of further proceedings pending the hearing, unless the court orders otherwise.

3.10 Provision to allow evidence on the basis of information and belief in support of an application for a vexatious proceedings order and a restriction on cross examination of deponents of affidavits unless leave of the court is obtained.

3.11 A provision that any proceedings commenced by a person the subject of a vexatious proceedings order, other than with leave of the court, are a nullity.

3.12 Provision for applications for leave to commence proceedings by a person the subject of a vexatious proceedings order to be dealt with on the papers.

3.13 Provision for the Prothonotary to have discretion to waive court fees and copying charges otherwise payable by an applicant for a vexatious proceedings order.

3.14 Conferral of power on each court and tribunal in Victoria (other than the Supreme Court) to make a vexatious proceedings order limited to proceedings within the jurisdiction of that court or tribunal. The Supreme Court should retain the power to make orders in respect of any court or tribunal in Victoria.

3.15 The Commission has also identified a number of other areas where further reform may be required.

4. Interpreters

4.1 The establishment of a fund to meet the cost of interpreters in civil proceedings in Victorian courts.

4.2 The introduction of a legislative provision conferring discretion on courts to recommend that it is in the interests of justice for payment to be made from the interpreting fund in appropriate cases.

4.3 Provision for recovery of interpreting costs from a losing party by way of costs order and provision for funds recouped to be reimbursed to the interpreting fund.

4.4 Provision for the use of 'accredited' interpreters.

4.5 Provision for the funding of telephone interpreter services in pro-bono cases.

4.6 The development of publicly available policies by courts in respect of the use of interpreters.

5. Discovery

5.1 Retention of the *Peruvian Guano* test, but with the introduction of provisions to allow the court to take an active part in discovery management.

5.2 Retention of discovery as of right, but subject to any directions or orders of the court to limit or refuse discovery.

5.3 Introduction of an obligation on parties to seek to reach agreement on discovery issues and to narrow discovery issues in dispute before being able to make an application for orders in respect of discovery.

5.4 Introduction of a new procedure to facilitate interim discovery orders to permit early access to 'Readily Identifiable Documents' without the necessity for such documents to be reviewed or categorised by the party in possession of such documents, but with safeguards to prevent waiver of privilege in respect of privileged documents.

5.5 Provision for the appointment of a Special Master to assist the parties and the court in relation to discovery in complex cases.

5.6 Introduction of more explicit and broad discovery management powers.

5.7 Introduction of an obligation on parties to disclose the identity of any litigation funder or insurer exercising any control or influence over the conduct of any party and provision for judicial discretion to order disclosure of funding or insurance arrangements.

5.8 Provision for a court to order disclosure of lists or indexes of documents compiled by or in the possession of a party (even if such lists or indexes may be privileged) but only to the extent that such lists or indexes contain 'objective' information about documents.

5.9 Submissions are sought on whether there is a need for a change in the existing laws or procedural rules relating to discovery to

facilitate use of documents produced by a party in one proceeding in other proceedings involving that party.

Provision for the court to order the establishment of document repositories to be used by parties in multi-party litigation.

5.10 Introduction of additional sanctions for discovery abuse.

5.11 Provision for the court to limit the costs chargeable or recoverable in respect of discovery.

5.12 Provision for limits to be imposed on the disclosure of copies of documents.

5.13 The publication of a short plain English explanation of disclosure obligations for distribution to litigants.

6. Costs & Fees

6.1 Introduction of a presumptive rule that interlocutory costs orders should not be taxed prior to the final determination of the case unless the court orders otherwise.

6.2 The commission has not adopted any proposal in relation to the removal of the present prohibition on charging proportionate (or percentage) fees in civil litigation. Arguments in favour and against the current prohibition are outlined and further submissions are sought. The present paper also outlines various safeguards and protections that could be adopted if the existing prohibition is removed.

6.3 Further submissions are also sought on the issue of whether proportionate or other types of fees should be recoverable in class action proceedings.

6.4 In cases where funding is provided by the (proposed) Justice Fund and the liability of the fund in respect of adverse costs is limited to an amount equivalent to the amount of funding provided to the assisted party, the assisted party would remain personally liable to meet any shortfall between the amount of an adverse costs order and the maximum liability of the Fund. Further submissions are sought on this issue, including in respect of other identified options which would (a) give the assisted party immunity from liability for adverse costs or (b) give the Fund standing to apply to the court for an order limiting the potential liability of the funded party for adverse costs.

7. Confidentiality Constraints on Conferring with Potential Witnesses

7.1 Identification of a number of options to overcome existing confidentiality constraints on conferring with potential witnesses with relevant information. These encompass:

(a) a statutory provision making it clear that relevant information may be provided in connection with litigation, prior to trial, notwithstanding any confidentiality constraint;

(b) legislative clarification of what amounts to an 'iniquity' so that information relevant to the existence or non existence of such 'iniquity' can be communicated and used for the purpose of litigation notwithstanding any confidentiality constraint;

(c) the introduction of a new procedure entitling a party to subpoena a person with relevant information, prior to trial, and providing a mechanism for conferring with such person, ex parte, to ascertain relevant information.

Submissions are sought in respect of these options for reform.

8 Ongoing Review and Civil justice Reform

8.1 Legislative provision for the constitution and operation of each court's rules committee.

8.2 Provision for rules committees to meet jointly when considering rules and procedures which apply in more than one jurisdiction.

8.3 A requirement that the power to make rules be exercised consistently with the courts' overriding purpose, that is, to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

8.4 A detailed review of the legislation and rules of civil procedure in all three courts to (a) achieve greater harmonisation; (b) simplify the structure and ordering of the rules; and (c) make greater use of plain English.

8.5 Further clarification of the circumstances in which practice notes and directions are made and consolidation and organisation of the content and publication of existing practice notes and directions.

8.6 Establishment of a new body, called the Civil Justice Council, with ongoing statutory responsibility for review and reform of the civil justice system to investigate ways to make the civil justice system more just, efficient and cost effective.

1. CASE MANAGEMENT

The Victorian courts have a long standing commitment to case management and have over the last decade introduced a series of reforms to assist with the just and efficient disposition of cases.

The Commission has developed draft proposals intended to assist the courts with case management by expanding upon and extending their current case management powers. Although the courts have extensive powers at present it is considered that some purpose will be served by setting out in detail various case management options and powers. It is hoped that the proposals will assist the courts in their ongoing efforts to reduce costs and delay.

1.1 Expansion of Individual Docket Systems

The drive for the expansion or extension of the individual docket system comes from various sources both within the courts and the profession, but it is not necessarily easily implemented. The Commission understands that the Supreme and County Courts have considered expanding the individual docket system previously. However, there are obvious problems in seeking to implement such a system given that:

- judges move across the civil and criminal jurisdictions;
- there is the potential for inconsistent workloads and work practices;
- the Supreme Court and the County Court appear to have a higher caseload than the Federal Court and much more diverse jurisdictions.

Despite these concerns, the Commission considers that there is merit in giving further consideration to the extension of the individual docket system in the Supreme and County Courts.

If the individual docket system is extended, the courts should determine the method of implementation.

Extending the individual docket system may require additional resources although the impact of the Commission's other proposals, for instance pre-action protocols, may bring about a reduction in the volume of cases.

The Commission notes that Crown Counsel[1] considered that the Supreme Court has effectively used Masters in specialist case management roles and that this has facilitated the efficient disposition of cases within the various specialist court lists. Similarly, we consider that an expansion of the individual docket system would need to encompass the involvement of Masters.

Any changes could be monitored or evaluated by the Chief Justice in the Supreme Court, the Chief Judge in the County Court and the (proposed) Civil Justice Council.

1 See Crown Counsel Victoria, *Review of Office of Master and Costs Office Report*, March 2007.

1.2 Active judicial case management

1.2.1 More clearly delineated and specific powers to actively case manage.

The Commission notes that the courts are and have been actively managing cases for many years.

The Commission considers that case management provisions could be embodied in legislation to mark their central importance in modern procedure and to ensure that no argument can be raised that case management orders and 'rules' are beyond power.

The Commission has drafted provisions giving the courts more clearly delineated powers to case manage pre-trial procedures and hearings (draft Sections X & Y are set out below). The draft provisions are drawn from rules and legislation in the Magistrates' and County Courts of Victoria, as well as the Federal Court Rules, the *Civil Procedure Act 2005* (NSW) (CPA), the *Uniform Civil Procedure Rules 2005* (NSW) and the UK Civil Procedure Rules.

The aim of legislative provisions of this nature is to provide a clear basis for active case management and to encourage judges to make greater use of their case management powers. The Magistrates' Court in its submission identified that the Overriding Objective in their rules contains specific provisions as to case management. Rule 1.22(2)(m) in the Magistrates' Court Rules enables the Court to actively manage a case by 'limiting the time for the hearing or other part of the case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.'

If the power to set such limits is considered appropriate, then the ability of the Court to make orders in that regard should be put beyond doubt by legislation. We consider that a legislative provision allowing for active case management and case management directions and orders in pre-trial procedures and at hearings would put the courts' powers to actively case manage beyond doubt.

Further, a clear and detailed set of powers may be useful in explaining to litigants, including those who are self-represented, the types of procedural orders the court may make.

The draft provisions aim to supplement existing rules and powers.

In addition, the extent to which certain provisions, procedures and orders in respect of 'case management' may impact on the right to a fair trial and/or be open to the contention that they are or may be incompatible with the provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is being considered.

The UK Civil Procedure Rules and the Magistrates' Court Rules provide that the court must further the overriding objective by actively managing cases. In the Magistrates' Court Rules, active case management is defined to include:

(a) encouraging the parties to co-operate with each other in the conduct of proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and a hearing and accordingly disposing summarily of the others;
(d) deciding the order in which the issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend court;
(k) making use of technology;
(l) giving directions to ensure that the hearing of a case proceeds quickly and efficiently;
(m) limiting the time for the hearing or other part of a case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness.[2]

This rule is substantially the same[3] as rule 1.4(2) of the UK Civil Procedure Rules. There is no equivalent rule in the County or Supreme Court Rules. We consider that a legislative provision allowing for active case management would put the courts' power to actively case manage beyond doubt.

1.2.2 Should there be an express provision for Judges to seek evidence from parties, witnesses and experts on matters relevant to the proceedings?

There is usually little controversy when judges seek to elucidate evidence from witnesses called by the parties. More controversial is the question of whether judicial officers should call persons as witnesses if the parties do not intend to call them. There appear to be divisions in judicial opinion as to whether such power exists at present. There will also no doubt be divided judicial views about whether and when to exercise any such power. The conferral of such a power would not necessarily involve any major shift from the court's role as independent arbiter in an 'adversarial' dispute (where it can draw adverse inferences from the failure of a party to call a witness) to one of an 'inquisitorial' nature.

The Commission believes this issue warrants further discussion. In the event that such a power is considered appropriate, there are ancillary issues to be considered in relation to how such a power would be exercised, including the mechanisms by which any additional witnesses would be called to give evidence.

2 Rule 1.22(2).
3 The UK rules do not include a subsection (m) and there are other minor variations.

Also, there are costs and resource issues to be considered. Bodies which presently have the power to call witnesses usually have resources to facilitate this process and often have independent counsel to assist in the conduct of the proceedings.

1.3 The imposition of limits on the conduct of the proceeding, trial time, interlocutory hearings and submissions

1.3.1 The draft proposals also encompass more clearly delineated and specific powers to impose limits on *trial* time, length of oral submissions and length of written submissions etc.

Set out below is a draft provision that specifies the various types of directions orders the court could make regarding the conduct of a hearing. The Magistrates' Court notes in its submission that its rule with respect to limiting the number of witnesses may be *ultra vires* because there is no specific legislative basis for making such a rule. To avoid this situation, we propose that the provision be incorporated in legislation.

This proposed section is based on of Section 62 of the NSW Civil Procedure Act and County Court Rule 47.06 with additional provisions based on other Australian legislation. The differences are identified.

There is no equivalent Rule 47.06 in the Supreme Court Rules. Rule 1.22(2)(m) of the Magistrates' Court Rules is not as extensive as County Court Rule 47.06 or NSW CPA Section 62. A compilation of Rule 47.06 together with Section 62, with further additions and amendments, we believe is therefore preferable:

Section X: 'Directions as to conduct of hearing'

(1) The court may, by order, give directions as to the conduct of any hearing, including directions as to the order in which evidence is to be given and addresses made.

(2) The court may, by order, give directions as to the order in which questions of fact are to be tried.

(3) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(4) Without limiting subsections (1), (2) and (3), the court may, by order, give any of the following directions at any time before or during a hearing:
   (a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,
   (b) a direction not allowing cross-examination of a particular witness, [4]

4 Similar to Family Court wording under Section 69ZX(2). See also WA Supreme Court Practice Notes.

(c) a direction limiting the number of witnesses (including expert witnesses) that a party may call,
(d) a direction limiting the number of documents that a party may tender in evidence,
(e) a direction limiting the time that may be taken in making any oral submissions,
(f) a direction that all or any part of any submissions be in writing,
(g) a direction limiting the length of written submissions,[5]
(h) a direction limiting the time that may be taken by a party in presenting his or her case,
(i) a direction limiting the time that may be taken by the hearing,
(j) a direction with respect to the place, time and mode of trial[6],
(k) a direction with respect to the giving of evidence at the hearing including whether evidence of witnesses in chief shall be given orally or by affidavit, or both,[7]
(l) a direction with respect to costs, including the proportions in which the parties are to bear any costs,[8]
(m) a direction with respect to the filing and exchange of signed statements of evidence of intended witnesses and their use in evidence at the hearing,[9]
(n) a direction with respect to the taking of evidence and receipt of submissions by video link, or audio link, or electronic communication, or such other means as the Court considers appropriate,[10]
(o) a direction that evidence of a particular fact or facts be given at the hearing:
    I. by statement on oath upon information and belief,
    II. by production of documents or entries in books,
    III. by copies of documents or entries; or
    IV. otherwise as the Court directs,[11]
(p) a direction that an agreed bundle of documents be prepared by the parties,[12]
(q) a direction that evidence in relation to a particular matter not be presented by a party,[13] or
(r) a direction that evidence of a particular kind not be presented by a party.[14]

(5) The discretion of a Judge to give any direction under subsection (1), (2) or (4) must be exercised having regard to the following matters in addition to any other relevant matter–
(a) the time, number or length limited must be reasonable;

5 Similar to Family Court wording under Section 69ZX(2). See also WA Supreme Court Practice Notes.
6 Similar to Federal Court wording under Order 10.1 FCR.
7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.
13 Similar to Family Court wording under Section 69ZX(2).
14 Ibid.

(b) the direction must not prejudice the right of each party to a fair trial, and in particular, to a reasonable opportunity to adduce evidence and cross-examine witnesses;
(c) whether the case is complex or simple;
(d) the number of witnesses a party intends or seeks to call;
(e) the nature and extent of the evidence a party intends or seeks to adduce;
(f) the interests of other litigants in the Court;
(g) the importance of the proceeding as a whole or of any question in the proceeding,
(h) the need to place a reasonable limit on the time allowed for any hearing,
(i) the efficient administration of the court lists,
(j) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute,
(k) the court's estimate of the length of the hearing.

(6) At any time, the court may, by order, direct a solicitor or barrister for a party to give to the party and/or the court a memorandum stating:
(a) the estimated length of the trial, and the estimated costs and disbursements, and
(b) the estimated costs that the party would have to pay to any other party if they were unsuccessful at trial.

1.3.2 The draft proposals encompass more clearly delineated and specific powers to impose limits on the conduct of *pre-trial procedures*.

Set out below is a draft provision that specifies the types of directions orders the court could make as to pre-trial procedures. The provision is based on existing Victorian court rules, Section 61 of the NSW CPA, Rule 2.3 of the NSW Uniform Civil Procedure Rules and Order 10.1 of the Federal Court Rules.

Section Y: 'Directions as to practice and procedure generally'

(1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

(2) The list of directions in this section is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(3) Without prejudice to the generality of subsection (1) the Court may give such directions or make such orders as it considers appropriate with respect to:
(a) discovery and inspection of documents, including the filing of lists of documents; either generally or with respect to specific matters;
(b) interrogatories;
(c) inspections of real or personal property;
(d) admissions of fact or admissibility of documents;
(e) the filing of pleadings and the standing of affidavits as pleadings;

(f) the defining of the issues by pleadings or otherwise; including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;
(g) the provision of any essential particulars;
(h) the joinder of parties;
(i) the mode and sufficiency of service;
(j) amendments;
(k) counterclaims;
(l) the filing of affidavits;
(m) the provision of evidence in support of any application;
(n) a timetable for any matters to be dealt with, including a timetable for the conduct of any hearing;
(o) the filing of written submissions;
(p) costs;
(q) the use of assisted dispute resolution (including mediation) to assist in the conduct and resolution of all or part of the proceeding;
(r) the attendance of parties and/or legal practitioners before a Registrar/Master for a conference with a view to satisfying the Registrar/Master that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial;
(s) the attendance of parties and/or legal practitioners at a case management conference with a Judge or Registrar/Master to consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial, at which conference the Judge or Registrar/Master may give further directions;
(t) the taking of specified steps in relation to the proceedings;
(u) the time within which specified steps in the proceedings must be completed;
(v) the conduct of proceedings.

(4) If a party to whom such a direction has been given or against whom an order is made under subsection (1) or (2) fails to comply with the direction or order, the court may, by order, do any one or more of the following:
(a) dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
(b) strike out or limit any claim made by a plaintiff,
(c) strike out any defence filed by a defendant, and give judgment accordingly,
(d) strike out or amend any document filed by the party, either in whole or in part,
(e) strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
(f) direct the party to pay the whole or part of the costs of another party,
(g) make such other order or give such other direction as it considers appropriate.

(5) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given or order made by the court.

(6) The Court may revoke or vary any direction or order made under subsection (1) or (2).

1.4 Further methods to enhance party compliance with procedural requirements and directions

Submissions received by the Commission identified the need for greater sanctions for non-compliance with procedural requirements and court directions. Our proposed Section Y(4), above, expressly permits the court to impose costs and other sanctions for failure to comply with court directions and orders. This Section is also consistent with the sanctions for non-compliance with the proposed Overriding Obligations.

1.5 Greater use of telephone directions hearings and technology

The County Court could consider adopting the Supreme Court's approach to e-litigation. The Magistrates' Court may wish to consider adopting the Supreme Court's approach to e-litigation in more complex cases, including where there is a substantial portion of the discoverable material in electronic form.

There could be more use of telephone directions hearings to save the parties the time and the cost involved of legal practitioners attending a directions hearing.

In some jurisdictions parties have access to digital audio and video recordings of proceedings, as an alternative to written transcripts.[15] The recordings are converted to data that can be stored on a variety of media, including servers, CDs, DVDs, MP3s or memory sticks, and sent to the parties electronically. Such recordings could be made available in Victorian courts. If these recordings were to be made available to parties and their legal representatives, protocols prescribing their use and distribution would need to be developed to protect them from misuse.

The Commission is of the view that there should be further investigation of the feasibility of extending the use of technology, including the electronic lodgement of documents, access to court documents via court websites and 'online' facilities for the determination of interlocutory applications.

1.6 The use of case conferences and listing conferences as an alternative to directions hearings

Case management conferences could be used as an alternative to directions hearings.

15 For example, in the Australian Industrial Relations Commission.

In some lists in the County Court the Court may, in certain circumstances, order the parties to attend a case conference.[16] The parties themselves, or a representative of a corporate party with authority to settle the proceeding, must attend. The parties may be ordered in advance of the conference to file and serve a position paper of 2 or 3 pages discussing the issues of fact and law raised in the case, to set out in an affidavit the circumstances relevant to a disputed transaction, or to produce copies of relevant documents relating to issues of liability and/or quantum. The case conference is conducted by a judge in open court. The judge expects counsel to be familiar with the case and to be able to discuss the issues of fact and law which arise. The parties have the opportunity to retire to conduct private meetings. One of the objectives of the case conference is to facilitate settlement, or if this is not possible, to refine the issues and to determine the most appropriate interlocutory steps to bring the matter quickly to trial.[17]

We note that in the Court of Appeal, a directions hearing/case conference is now held to discuss the issues in the appeal; the estimated length of hearing; any reason why the appeal should be given priority; any reason why the appeal is unsuitable for mediation; and if a hearing date is to be fixed – the availability of counsel for the relevant period(s).[18] After hearing from the parties, the Master decides questions of urgency, determines the length of the hearing, orders mediation where appropriate, gives directions as to the contents of the appeal book and the time for filing of submissions and where possible, fixes the hearing date.[19]

Case conferences (or listing conferences) are also held in the Federal Court, Family Court and the Administrative Appeals Tribunal. We consider that less formal case conferences are a good alternative to formal directions hearings, or may be used in addition to directions hearings. It may be desirable for case management conferences to be held in mediation/conference rooms at court instead of in a court room.

When case management conferences are conducted, a case management information sheet as used in the UK's Technology and Construction Court could be sent to the parties by the courts prior to the conference.[20]

1.7 Earlier and more determinate trial dates

Further consideration should be given to means by which trial dates could be set earlier than at present.

A number of respondents to the Consultation Paper supported the setting of early trial dates. Earlier and more determinate trial dates are obviously in the

16 The Business List, Commercial and Miscellaneous Divisions and the Damages List Applications Division, General Division and Serious Injury Division – See Practice Note PNCI 5-2007.
17 See Practice Note PNCI 5-2007.
18 Supreme Court of Victoria Court of Appeal Practice Statement No. 1 of 2006.
19 Ibid.
20 The case management information sheet is Appendix A to the Technology & Construction Court Guide. See: www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part60.htm.

interests of all participants in the civil justice process. However, it is appreciated that there are many 'variables' over which the court does not have control and we are mindful that the overwhelming majority of cases do not proceed to trial. The courts are very mindful of these difficulties and have taken and are continuing to take various initiatives to achieve earlier and more determinate trial dates. The Supreme Court recently decided that in certain cases, trial dates are set after mediation and after witness statements and court books have been filed with the Court. This is set out in a practice note.[21]

Once a trial date is set, the courts should ensure that there are sufficient judicial resources available to hear the trial.

We understand that there is a balance to be struck between setting trial dates and accommodating the unpredictable factors that influence the availability of judicial officers to hear matters on a designated date. The Supreme Court practice note referred to above also sets out that at the conclusion of the time estimated for the trial, the trial judge will stop the trial and make arrangements for the resumption of the trial at a later date. We support this approach as it endeavours to make the parties responsible for trial estimates and it helps ensure that Judges are available to hear trials on the date set in circumstances where another trial has exceeded the time initially allocated.

It is the current practice of the County Court to set trial dates early in the proceeding. However, this still gives rise to problems. Once the trial date is set, proceedings need careful supervision to ensure that they are ready for trial. It is sensible to have the trial commence as soon as possible after the procedural steps have been completed.

1.8 Reform of procedures for the earlier determination of disputes, including the summary disposal of unmeritorious claims and defences

The Commission is considering whether there should be a liberalisation of the classic test for summary judgment. One option would be to replace the test based on there being 'no real question to be tried' with one based on there being 'no real prospect of success.'

There are competing arguments surrounding the use of the summary judgment procedure. On the one hand, an order for summary determination is regarded as exceptional. Arguably in many cases it is difficult to say confidently that a case is manifestly hopeless, particularly where there are disputed facts and/or law. It can raise concerns that a party is being 'shut out' and their case may not be fully or adequately ventilated. There are also concerns that summary determination may stifle development of the law. Accordingly it appears that at present summary judgment is seldom sought and summary judgment orders are seldom made.

21 See Practice Note No. 4 of 2006 - the procedures set out in the Practice Note only apply to certain cases.

On the other hand, there are arguments that the summary judgment procedure is too restrictive, that the applicable test should be liberalised and that the procedure should be used more frequently and flexibly to dispose of cases that are unmeritorious. It has also been noted that the common law standard for 'a court to grant summary judgment was set in the days before the importance of case flow management was established in Australian courts.'[22] Case flow management involves the court taking proactive steps before trial to identify the real issues in dispute and to determine the appropriate interlocutory timetable. A by product of effective case management should be to screen out unmeritorious cases prior to trial.

This divergence of attitude is borne out in different jurisdictions. A liberalised test applies in the United Kingdom, the Federal Court and Queensland. It was also the formulation of the test supported in *Going to Court* and in the *Federal Civil Justice Strategy Paper* and by the Australian Law Reform Commission and the Law Reform Commission of Western Australia.

In *Going to Court* it was noted:

> …the present law and judicial approaches towards the issue often combine to dissuade parties from pursuing the remedy except in rare circumstances. Summary judgment is seen as a primary tool of caseflow management in the United States court but in Australia it is rarely used and seldom successful. Indeed, in contrast to the United Kingdom and Australian court practice, the United States courts use summary judgment as a primary tool, available to both plaintiffs and defendants, to regulate court lists. Reformers in the civil procedure area such as Lord Woolf and commentators like Adrian Zuckerman, have brought attention to summary judgment procedures as a fertile area for change in the way our courts operate.[23]

One consideration is whether there is a real practical difference between the traditional test and the liberalised test. It is important to emphasise that all statutory provisions are subject to judicial interpretation. Even with a change in the test courts would still be likely to take a cautious approach.

In public interest or test cases, there may be value in obtaining a judicial determination even if it appears at the outset that there are no reasonable prospects of success. Also, in some cases an issue of law may not have been definitively resolved by appellate courts.

One important consideration is whether a change in the test *per se* would bring about a change in attitude and make parties more inclined to seek summary judgment and courts more inclined to summarily dismiss cases.

We are of the view that changing the test would signal a change in attitude, particularly where it is coupled with explicit case management objectives.

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22 Peter Sallmann and Richard Wright, *Going to Court,* 2000, 115.
23 Ibid, 114.

We also note that a proposed test of reasonable prospects of success is also compatible with the proposed new statement of 'overriding obligations' that imposes obligations on lawyers or parties not to commence or pursue proceedings without merit.

To reinforce a change of attitude to the summary judgment process, we propose that there should be in the rules of court a statement of an explicit case management objective along the lines of the objective stated in UK CPR Rule 1.4(2)(c). The objective should provide that the Court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

In keeping with this case management objective there should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.

We also propose that there should be a restatement and simplification of the Rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants based on the same test. The Magistrates' Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding.

Further, the limitations on categories of cases that are excluded from the procedure in the Supreme Court and the Magistrates' Court should be removed. The current list of exceptions appear to have a historical basis. The exceptions do not survive in the Federal Court or Queensland rules.

Residual discretion

In Victoria the court has a residual discretion to allow a matter to proceed if it is satisfied that 'there ought for some other reason be a trial.'[24]

The residual discretion is also available in Queensland where the court must be satisfied that 'there is no need for a trial of the claim or the part of the claim'[25]

The Woolf Report proposed a residual discretion in the court to allow a case to continue if there is a reason for the matter to proceed to trial. This would allow for a full hearing of the matter, for example, in cases of public interest. The discretion has been retained in UK CPR 24.02(c).

The retention of such a discretion was not, however, supported by the Law Reform Commission of Western Australia.[26]

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24 See *Supreme Court (General Civil Procedure) Rules* 2005 r 22.06(1)(b); *Magistrates' Court Civil Procedure Rules 1999* r10.13(1)(b).

25 *Uniform Civil Procedure Rules* 1999 (Qld) Rule 292 (2)(b) and 293(2)(b).

26 See Law Reform Commission of Western Australia, *Review of the criminal and civil justice system of Western Australia*, Final Report, September 1999, 113, [14.13].

On balance, we consider a discretion should be retained. There are many circumstances in which the nature and strength of a party's case may not be fully apparent at the outset of the litigation, before all relevant pre-trial steps, such as discovery, have been completed.

Further, as we propose that the limitation on categories of cases that are excluded from the procedure be removed, the retention of this discretion provides an important safeguard. It is also an important safeguard in matters where one party is self-represented and/or where the process is being used in an oppressive way by a more resourceful or powerful party.

Draft proposals:

1. The test for summary judgment in Victoria should be changed to provide that summary judgment can be obtained if the other party has 'no real prospect of success.'

2. There should be in the rules of court a statement of an explicit case management objective that the Court should decide promptly which issues need full investigation and trial and accordingly dispose summarily of the others.

3. There should be a discretion for the court to initiate the summary judgment procedure of its own motion where early disposal of a proceeding appears desirable.

4. There should be a restatement and simplification of the rule. In particular, it should be made clear that summary judgment may be obtained by both plaintiffs and defendants and the rules should be based on the same test. The Magistrates' Court rule should be extended to permit a defendant to apply for summary dismissal of the proceeding.

5. The limitations on categories of cases that are excluded from the procedure in the Supreme Court and the Magistrates' Court should be removed.

6. The court should retain a residual discretion to allow a matter to proceed to trial even if the applicable test is satisfied.

1.9 Methods for controlling interlocutory disputes

It is presently proposed that there should be additional measures to reduce the interlocutory steps in proceedings. This may be facilitated by:

- requiring parties to confer and encouraging parties seek to reach agreement on an issue before making an interlocutory application;
- more determinate costs consequences for unnecessary as well as unsuccessful applications;

- requiring certification of the merits of applications.

The proposed Overriding Obligations seek to limit and control interlocutory disputation. The above measures for controlling interlocutory disputes are provided as an illustration of how the overriding obligations could apply in practice.[27]

The Civil Justice Council could develop guidelines and education programs on appropriate ways of dealing with interlocutory disputes.

1.10 Power to make decisions without giving reasons

The Commission is considering whether, in certain circumstances, the courts should have the power to make decisions without giving reasons, unless the parties request reasons. A requirement that the court give reasons for decisions slows down the process and causes delay. Juries are not required to give reasons for their decisions. If the parties request reasons, a request should be made within a reasonable time.

The Commission is also considering the following issues:

- What types of decisions should be able to be delivered without reasons: interlocutory, final, applications for leave? There may be a distinction between decisions that finally determine a matter (which may require reasons as a matter of course) and those that are interlocutory.
- Is it possible to have 'limited' reasons in certain circumstances?
- If there is no requirement to give reasons unless the parties require it, will this impede the development of new law?
- In some jurisdictions, for certain matters, reasons are not required.[28]

1.11 Making decisions on the papers

At present, in a number of instances,[29] decisions may be made 'on the papers' without the necessity for oral argument. Giving decisions on the papers could reduce costs and delay. The Commission is considering the circumstances where this could be appropriate.

27 See part 5.4 in relation to interlocutory disputes about discovery.

28 For example: High Court special leave applications; County Court leave to proceed applications in serious injury matters; approval of infant compromises; and many County and Supreme Court Practice Court decisions on interlocutory applications.

29 For instance, if the Administrative Appeals Tribunal (AAT) is satisfied that the issues can be adequately determined without an oral hearing and the parties consent, the AAT may review the decision by considering the documents before it and without conducting a hearing – see s 34J *Administrative Appeals Tribunal Act 1975* (Cth). See also s 76 *Administrative Decisions Tribunal Act 1997;* ss 359 - 360 ss 424-425 *Migration Act 1958.*

1.12 Deterring or curtailing unnecessary litigation

The deterring or curtailing of unnecessary litigation is an objective of civil procedural reform. It also has particular application in relation to some self-represented litigants, specifically the small proportion of self-represented litigants who may be described as 'querulous' or 'vexatious', that is, 'litigants whose approach to advancing their cause or matters is irrational or obsessive.'[30] The Commission notes that it is important to distinguish between this group and the needs of the majority of self-represented litigants.

The Commission has developed a number of specific proposals designed to provide for greater court control of unnecessary litigation. These encompass:

- broadening preliminary control by expanding the court's power to refuse to seal or accept documents;
- improved procedures for the earlier determination of disputes, in particular the disposition of unmeritorious claims and defences (referred to above at 1.8);
- improved legislative provisions with respect to vexatious litigants or proceedings (discussed in part 3 below).

1.12.1 Refusing to seal or accept documents

Rule 27.06 of the *Supreme Court (General Civil Procedure) Rules 2005* allows preliminary control by granting the Prothonotary the power to refuse to seal an originating process without a direction of the Court where the Prothonotary considers that the form or contents of the document are irregular or an abuse of the process of the Court.

The power is not one to arbitrarily refuse to seal the document but a power to refuse it without the direction of the Court.[31]

Although there are no available figures about how often this power is exercised, anecdotally the process is most usually relied upon where the person seeking to issue the originating process is a self-represented litigant.[32] We understand from consultations that as a matter of practice the Prothonotary will generally refer the matter to the judge in the Practice Court.[33] The judge will either determine the matter in chambers or deal with the matter in open court.

The process under r 27.06 should properly be reserved for matters where there is clearly no possibility that the plaintiff will succeed.[34] It is nonetheless a useful tool

30 AIJA, *Forum on Self-Represented Litigants*, *Report,* 2005, 1.

31 Neil Williams, *Civil Procedure in Victoria,* Volume 1 [I 27.06.5]. See also Federal Court Order 46 Rule 7A.

32 Grant Lester and Simon Smith, 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On' 2006 13(1) *Psychiatry, Psychology and Law* 1, 18 and footnote 243.

33 Consultation with Bronwyn Hammond, Self-represented Litigants Co-ordinator, Supreme Court of Victoria, 26 July 2007.

34 *Little v Victoria* (SC(Vic), Gillard J, 17 June 1997, unreported; *Little v Victoria,* Gillard J, 18 July 1997).

for the Court to employ as a means of 'pre-emptive control'[35] or early intervention in matters which are an abuse of process. It is particularly useful where the judge determining the matter is able to hear it in open court and the person seeking to commence the proceeding has the benefit of hearing the judge's reasons.

We believe there is scope to extend the operation of r 27.06 to apply to applications as well as originating processes. This would give the Court the same power to reject interlocutory which are irregular or an abuse of process, before they are issued.

It is proposed that the operation of r 27.06(1) of the *Supreme Court (General Civil Procedure) Rules* 2005 be extended to apply to applications. It is also desirable that the rule specifically provide for the Court to have the option to determine the matter in open court.

Rules in similar terms apply in the County Court and the Magistrates' Court of Victoria.[36] It is proposed that amendments to similar effect are made to the Rules in these courts.

It is also proposed that to the extent that it is not already provided for in the Rules, such provisions be extended to apply to appeals or applications made in connection with appeals.

35 Lester and Smith, above note 32, 18.

36 See r 3.06 *Magistrates' Court Civil Procure Rules* 1999

2. SELF-REPRESENTED LITIGANTS

The Commission has considered the issue of self-represented litigants from two perspectives:

- improving access to the legal system, including through:
  - improved level of advice and support;
  - case management strategies;
  - provision of information, practical assistance and education.

- deterring or curtailing unnecessary litigation, including through:
  - broadening the preliminary control of the issuing of court documents;
  - improved summary resolution mechanisms;
  - improved legislative provisions dealing with vexatious litigants or proceedings.

We also highlight the need for further planning and research.

It is noted that issues related to the adequacy or otherwise of legal aid funding for civil legal proceedings are considered beyond the scope of this first stage of the reference, as is the issue of the allocation of available legal aid funds.

For the most part attempts have been made to identify common issues, needs and strategies rather than to deal with specific issues and needs in individual courts.

2.1 Improved level of advice and support

2.1.1 Self-Represented Litigants Co-ordinator

Improving the level of legal advice and support for self-represented litigants, including through the provision of additional duty lawyers and specially trained court staff such as self-represented litigants co-ordinators, is a theme that is repeated in published material and across submissions. Submissions from different sectors including the courts, community legal centres and from individuals and private law firms made suggestions with the underlying aim of addressing access to the legal system through adequate legal representation.

Consistently with this theme, in 2006 the Supreme Court of Victoria commenced a one year pilot program employing a Self-Represented Litigants Co-ordinator ('SRL Co-ordinator') based in the Supreme Court Registry.

The SRL Co-ordinator acts as the primary contact for self-represented litigants on a day to day basis, but does not provide legal advice. The system has been likened to a triage system.[37] The major tasks of the SRL Co-ordinator include:

37 Supreme Court of Victoria, submission in response to Consultation Paper.

(a) providing accurate and consistent procedural and practical advice to self-represented litigants, short of giving legal advice;

(b) assisting litigants to complete necessary forms and file documents;

(c) liaising with other court staff, including judges and associates, registry and Prothonotary staff and lower courts, in order to expedite self-represented litigants' proceedings;

(d) keeping statistics on self-represented litigants;

(e) monitoring best practice responses to self-represented litigants from other jurisdictions;

(f) providing referrals to other agencies including PILCH, VLA and community legal centres. The Co-ordinator also works to build relationships with other such agencies and, in particular, has developed a memorandum of understanding with PILCH.

Importantly the SRL Co-ordinator helps to manage the expectations of self-represented litigants before the Court by providing information about what the Court can and cannot do.[38]

Submissions and consultations have provided consistently favourable reports about the effectiveness of the appointment of the SRL Co-ordinator in the Supreme Court.

The Commission proposes that the Self-Represented Litigants Co-ordinator program in the Supreme Court of Victoria be resourced and funded on an ongoing basis. It is also proposed that the scope of the existing program be extended. For instance, additional positions should be resourced and funded in the County Court and the Magistrates' Court (initially in the Melbourne registries, with a view to extending services to suburban and regional registries).

We are also interested in views about whether there is a need for additional personnel to supplement the existing Supreme Court program.

2.1.2 Court based pro bono assistance and referral

Another strategy pursued by courts to assist self-represented litigants is the development of pro bono assistance or referral schemes. Models of court-based pro bono referral schemes range from formal pro bono referral schemes (for example, the Federal Court Legal Assistance Scheme established under Order 80 of the Federal Court Rules) to more informal arrangements.

38 *Australian Financial Review,* 16 June 2006 at p 57 (reference taken from National Pro Bono Resource Centre submission in response to Consultation Paper). See also Supreme Court of Victoria, submission in response to Consultation Paper.

Under the formal schemes, generally referrals are made by the Court to a Registrar who then refers a self-represented litigant to a barrister or solicitor for specified assistance. For example Order 80 rule 4 of the Federal Rules provides:

> The Court or a Judge may, if it is in the interests of the administration of justice, refer a litigant to the Registrar for referral to a legal practitioner on the Pro Bono Panel for legal assistance.

There are arguments for and against formal court based pro bono schemes. On the one hand, considerable legal work is already done on a pro bono basis by the Victorian legal profession, in particular, through PILCH and the pro bono schemes run by the professional bodies. It is possible that court based pro bono referral schemes would generally draw on the same pool of volunteer lawyers that already provide their services to other pro bono referral schemes. There is also a considerable degree of co-ordinated referral work that is done, in particular under the auspices of PILCH, and there is a need to ensure that services are not duplicated.

On the other hand, court based pro bono schemes have the potential to add another dimension to the assistance provided to self-represented people. Some lawyers who would not otherwise volunteer to provide their services to a pro bono referral scheme may be inclined to do so if the scheme is conducted by the court. Further, as is the case with the Federal Court Order 80 scheme, a court based scheme is not subject to a rigorous means and merits test and therefore may provide a stream-lined way of the court securing legal assistance for a party in relation to certain aspects of a proceeding.

The Commission proposes that the Civil Justice Council (referred to at the end of this paper), in conjunction with the Supreme Court and the County Court, investigate the possibility of implementation of a court based pro bono referral scheme (along the lines of the Order 80 scheme in the Federal Court) in each of those Courts.

2.1.3 Case management strategies / Special Masters

Court resourced strategies to address the issues posed by self-represented litigants have typically focussed on:

- the provision of referral, information and self help advice provided by court staff; or
- the deployment of judicial resources in the form of judges taking extra time to manage matters, to provide explanations of procedures and the rules of evidence or distil arguments put forward by self-represented litigants.

There are limitations to both these strategies. There are obvious difficulties in court personnel or judicial officers providing 'advice' or assistance to particular litigants. Apart from resource constraints, this may undermine judicial

impartiality or give rise to an application for disqualification on the grounds of reasonable apprehension of bias.

One option that warrants consideration is the appointment of a judicial officer of a lower-tier than a judge or a senior legal practitioner (referred to in this paper as a 'Special Master') to intensively case manage proceedings where one or more of the parties is without legal representation.

The court could appoint an independent person (for instance, a master of the court or senior legal practitioner) to actively involve him or herself in the pre-trial management of the case. The person would have the authority of having been appointed by the court. The Special Master could provide early intervention and an investigation of the issues in dispute, with the aim of adopting appropriate case management strategies and achieving early resolution of the dispute. The Special Master would have the power to report back to the court as to the future conduct of the proceeding. However, the Special Master would not hear evidence on oath and would not make findings of fact.

The Special Master could be involved with both parties, not just the self-represented litigant. We envisage that a Special Master may:

- meet the parties together. With the consent of the parties, the Special Master may also meet with the self-represented party privately;
- conduct meetings and/or hearings in a more informal manner than a usual court hearing;
- conduct interlocutory hearings in an inquisitorial style;
- explain the parties' duties pursuant to the overriding obligation and other relevant rules governing the conduct of civil litigation;
- investigate and help the parties to identify the dispositive legal issues in dispute;
- prepare a report to the court as to the recommended future conduct of the proceeding, in particular, about:
    - whether the matter involves an apparently unmeritorious claim deserving of a summary judgment application or other form of summary disposal. Subject to amendment to Rules, such applications may be brought on the court's own motion or by one of the parties;
    - whether the matter is potentially meritorious and deserving of pro bono assistance;
    - whether the matter is appropriate for early judicial intervention or mediation or some other form of ADR (such as early neutral evaluation).

The Special Master, with the agreement of the parties, may conduct meetings or hearings at a time and place convenient to the parties and not necessarily at the court.

The best candidate for the role of Special Master is one whose independence and neutrality cannot be reasonably questioned. It is also important that the person can communicate effectively with the parties. The court should make every effort to appoint a person acceptable to the parties. It is generally preferable to appoint a Special Master with the parties' consent.

The Commission proposes that in appropriate cases, the Supreme and County Courts should have the option of appointing a Special Master in matters where one or more of the parties is self-represented. A Special Master should be a judicial officer of a lower-tier than a judge, or a senior legal practitioner who will case manage proceedings in proactive manner in order to facilitate the appropriate disposition of the proceeding. It is proposed that the costs of any externally appointed Special Master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.

2.1.4 Provision of information and education

For self-represented litigants

Self-represented litigants typically encounter difficulties in the conduct of legal proceedings. They may have difficulty in identifying or formulating relevant legal issues, gathering and testing relevant evidence and gauging the strengths and weaknesses of their case. Self-represented litigants are also likely to struggle with substantive law, procedure and court practice.

These difficulties have the tendency to hamper and prolong court proceedings. As the Supreme Court has noted, they:

> …. also create a risk that meritorious claims brought by self-represented litigants may be obscured by, or fail because of, poor articulation, incoherence or procedural irregularity. [39]

While being constrained in the provision of substantive advice, Victorian courts have generally taken steps themselves to provide information and practical assistance to self-represented litigants. Indeed, in Victoria this has been one of the main focuses of court based assistance for self-represented litigants. Such measures are valuable, but do not take the place of face-to-face legal advice and representation. Nonetheless, the Commission is of the view that the provision of information, materials and practical assistance for self-represented litigants by courts is not only valuable but should be considered an integral part of the services provided.

The Commission recommends that courts at all levels be properly resourced to develop information and material for self-represented litigants and to enhance the delivery of resources of this kind, where possible, through technological solutions. Such resources should be considered an integral part of the services provided to court users.

39 Supreme Court of Victoria, submission in response to Consultation Paper.

In particular, it is proposed that an audio-visual aid be produced (possibly by or with the assistance of the Victoria Law Foundation) with the purpose of explaining in broad terms the processes of civil litigation. This resource could be made available on the courts' websites, as well as in court registries. It may help to reduce the time spent explaining the fundamental principles and procedures of the system to self-represented litigants and would also be valuable for represented litigants.

For judicial officers

It is the Commission's view that the attainment of 'court craft' skills to assist judicial officers at all levels to deal with self-represented litigants and to manage the matters in which they appear is invaluable. This involves not just retaining control of proceedings but appreciating the needs of self-represented litigants and developing an appropriate and acceptable approach. As Lord Woolf said:

> Courts and judges must be more responsive to the needs of litigants in person…In proceedings where litigants appear in person, judges at all levels should adopt a more interventionist approach to hold the ring and ensure the adequate presentation of the litigant's case. This new role will require adequate training.[40]

Focus on this aspect of the judicial role should be considered an integral part of ongoing training and education for judicial officers.

The Commission proposes that existing training programs for judicial officers addressing the needs of and the challenges posed by self-represented litigants be resourced to allow for the extension and further development of such programs to a greater number of judicial officers in Victoria each year. Where it is not already the case, programs should be extended to masters and court registrars. Such programs should be considered an integral part of ongoing training and education for judicial officers.

For court staff

It is essential that all court staff who come into contact with members of the public, including registry staff and judges' associates, are properly trained about the needs of and challenges posed by self-represented litigants.

To the extent that it is not already the case, it is proposed that courts of all levels should provide training for all court staff who come into contact with members of the public, including registry staff and judges' associates, about the needs of and challenges posed by self-represented litigants. In particular, training is required for court staff to develop strategies to help them:

- work with self-represented litigants;
- avert and manage difficult situations;

40 The Rt Honourable the Lord Woolf, *Access to Justice*, Interim Report (1995) Chapter 4 [20].

- provide accurate information about services and resources and, in particular, to distinguish between information and advice.

2.1.5 Development of ethical standards or professional obligations for lawyers in proceedings where one party is self-represented

The development of ethical guidelines for lawyers dealing with self-represented litigants has occurred overseas and more recently in other jurisdictions in Australia, in particular NSW.

The Commission proposes that the Law Institute of Victoria and the Victorian Bar also develop professional guidelines to assist solicitors and barristers in dealing with self-represented litigants to whom they are opposed. Guidelines could address issues such as protocols for communication, record keeping, conduct during negotiations and personal security issues. Guidelines would be of benefit both to practitioners and to self-represented litigants.

2.1.6 Research

It appears from published work and on the basis of submissions that there is a need for better data collection and qualitative research to assess the impact of self-represented litigants on the court system. Research would also form the basis for providing proper resourcing of the courts and making improvements for the support of such litigants.

The Commission proposes that programs should be put in place in all courts and properly resourced to provide:

- reliable data about the numbers of self-represented litigants and their levels of participation in the court system;
- analysis of data to assess the impact of self-represented litigants on the court system;
- qualitative research to assess the effectiveness of measures adopted to assist self-represented litigants and manage matters in the court system where at least one party is unrepresented.

Where appropriate, data collection should be a by-product of the Integrated Courts Management System or other existing systems. Analysis of the data and qualitative research should be undertaken or commissioned by the Civil Justice Council.

2.1.7 Self-Represented Litigants Management Plans

Self-represented litigants management plans are a form of strategic planning in the courts aimed at developing a well thought out strategy of assisting such litigants.

The issue of management plans for self-represented litigants was addressed in a Report from the Australian Institute of Judicial Administration (AIJA) in 2001.[41] The Report, *Litigants in Person Management Plans: Issues for Courts and Tribunals,* raised issues to be addressed in plans and noted that strategies require collaboration and cooperation with the legal profession, including law firms and practitioners, the Bar, legal aid, government departments in the justice sector and advice agencies.[42] The AIJA followed up on this report by organising a forum on self-represented litigants, attended by representatives of courts and tribunals across Australia, as well as observers including the National Pro Bono Resource Centre and legal aid representatives.

The Courts Strategic Directions Project recommended the development of such plans.

It would seem appropriate that courts consider such plans as an integral part of organisational planning so that measures put in place to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

The Commission proposes that courts at all levels should develop self-represented litigant management plans. Such plans should be considered an integral part of overall planning by the courts so that measures put in place to meet the challenges of self-represented litigants are well targeted and outcomes can be measured against identified aims and objectives.

41 See AIJA Report, *Litigants in Person Management Plans: Issues for Courts and Tribunals* available at http://www.aija.org.au/online/LIPREP1.pdf.

42 Ibid, 11-12.

3. VEXATIOUS LITIGANTS

3.1 Legislative provisions dealing with vexatious litigants

Self-represented litigants encompass a small subset of people labelled 'vexatious litigants' who demonstrate particular behaviour in pursuing litigation inappropriately in the courts. Such behaviour includes 'taking legal action without reasonable grounds, a repetition of arguments which have already been rejected, disregard for the court's practices and rulings, and persistent attempts to abuse the court's processes.'[43] Typically the vexatious litigant will pursue the same person or persons or cause repeatedly.

It has been noted that:

> Whilst it cannot by any means be said that all litigants in person are vexatious practically all vexatious litigants are litigants in person. No consideration of one can be undertaken without an understanding of the challenges presented by the other.[44]

While there are 'points in the litigation process where the court has the opportunity to control abuse of the process', as the 'ultimate point of control'[45] steps can be taken to have a litigant prevented from commencing or continuing legal proceedings. It is a mechanism that may be warranted only when all other controls and filters cease to be effective. Once declared vexatious, the person then requires leave of the court to institute or continue proceedings. This has the effect of removing the person from the court system.

While acknowledging that taking the step of declaring a person to be a vexatious litigant should be done sparingly and with utmost caution, it should be nonetheless be possible to take such a step efficiently and in a straightforward manner when necessary.

Victorian legislation

In Victoria legislation exists which allows for a person to be declared a vexatious litigant. The applicable provision is found in section 21 of the *Supreme Court Act*.[46]

Pursuant to section 21, before the Supreme Court can exercise its discretion to make such an order the threshold test must be met. The test for obtaining an order requires that there has been a level of recurrence and lack of reasonableness in the institution of legal proceedings. Specifically the test requires that a person has habitually and persistently without any reasonable grounds instituted vexatious legal proceedings. The legislation does not provide a definition of a 'vexatious legal proceeding'. If an order is made, a vexatious

43 *Vexatious Proceedings Bill 2005* (Qld), Explanatory notes, 1.
44 Claire Thompson, 'Vexatious litigants – Old phenomenon, modern methodology: A consideration of the Vexatious Proceedings Restriction Act 2002 (WA)' 2004 14 *JJA* 64, 69.
45 AIJA, *Forum on Self-Represented Litigants*, *Report,* 2005.
46 Previously in Victoria the *Supreme Court (Vexatious) Actions Act 1927* applied.

litigant cannot without leave of the court commence or continue proceedings in any court or tribunal in Victoria.

Limitations of the Victorian legislation and other issues

One of the major limitations of the existing Victorian provision is that an order may only be made on the application of the Attorney-General. No other parties may apply and the Court cannot make an order under s 21 of its own initiative.

On the one hand, having the Attorney-General as the party with standing arguably provides an appropriate protection and reduces the risk of the process being used oppressively by private parties. On the other hand, this is one of a number of explanations for the small number of orders that have been made.[47]

By comparison private litigants have different motivations which may prompt them to be more expeditious in making applications to protect their own interests.[48] However, they may face other obstacles. For instance, private litigants may not have the resources to bring an application. Or they may be loath to take assertive action for fear of inflaming ongoing disputation.

Other limitations of the existing provision include the inherent difficulties of satisfying all the requirements. For instance, it does not provide a statutory definition of 'proceedings' and interlocutory applications and appeals in such applications do not constitute the institution of proceedings for the purposes of the provision. Further, is not possible to take proceedings instituted in the High Court, Federal Court or interstate courts into consideration. There is also no statutory definition of a 'vexatious legal proceeding'.

There is also a problem with a delay from the commencement of the proceedings for an order declaring a person to be vexatious and the first return date, during which time the litigant may issue further proceedings without restraint.[49] It is not until the first return date that an interlocutory order for a stay of existing proceedings or a prohibition against the issuing of further proceedings can be made.

Also the legislation does not specify the type of evidence that may be relied on to prove the application or the manner in which the evidence is to be given. For instance, it is not clear from the legislation whether evidence of 'information and belief' is acceptable. Currently in Victoria, the practice is generally for evidence to be given on affidavit sworn by a solicitor for the applicant. The deponent may then be exposed to lengthy cross-examination by the respondent.

The legislation requires the Attorney-General to cause a copy of any order made to be published in the Government Gazette.[50] There is no other requirement

47 Lester and Smith, above note 32, 18. In Victoria between 1930 and 2007 a relatively small number of 14 litigants have been declared vexatious.

48 Thompson, above note 44, 77 citing John Dewar et al, 'Self Representing Litigants: A Queensland Perspective' 2002 23 *QL* 65 at 68.

49 Consultation with VGSO and Department of Justice, 17 July 2006.

50 *Supreme Court Act 1986,* s 21(5).

regarding notification to other interested parties, for instance the courts. This means that an order may be made but not come to the attention of those who may need the benefit of it, or who are required to practically enforce it, such as court registry staff.[51]

An issue also arises where a person who has been declared vexatious makes repeated applications for leave to commence proceedings.

Finally, in consultation the issue of court fees was also raised. It was pointed out that in bringing contempt proceedings the Attorney-General is exempt from payment of court fees.[52] This is not the case in proceedings relating to vexatious litigants. However, in such matters the volume of material to be collated and copied from court files is generally voluminous. Hence, it was suggested that consideration be given to providing an exemption for court and photocopying fees in such matters.

Legislative developments

Through the forum of the Standing Committee of Attorneys General (SCAG), the Commonwealth, State and Territory governments have been reviewing the legal and policy issues associated with vexatious litigants. Accordingly, a *Model Vexatious Proceedings Bill 2004* (the Model Bill) has been developed.[53] The Model Bill apparently builds on the Western Australian *Vexatious Proceedings Restriction Act 2002* (WA Act), which implemented the recommendations made by the Western Australian Law Reform Commission arising from its *Review of the Criminal and Civil Justice System.*[54]

In 2005 Queensland also enacted new legislation to prohibit or limit actions brought by vexatious litigants (Queensland Act).[55] The Queensland Act also specifically provides powers in relation to persons acting in concert with vexatious litigants. It appears that the Queensland Act largely gives effect to the Model Bill. It also has similarities with the WA Act. For instance, both Acts include the same definition of 'vexatious proceedings' as those:

(a) which are an abuse of the process of a court or a tribunal;
(b) instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose;
(c) instituted or pursued without reasonable ground; or
(d) conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.

The WA Act and the Queensland Act also include same the definition of 'proceeding' as follows:

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51 It is noted that the NSW Supreme Court website now publishes a list of persons declared to be vexatious litigants and the terms of orders made: www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_vexlitstable.
52 Consultation VGSO and Department of Justice, 17 July 2007.
53 *Vexatious Proceedings Bill 2004*, Consultation draft.
54 Thompson, above note 44, 77-78. See also Chief Justice Diana Bryant, 'Self Represented and Vexatious Litigants in the Family Court of Australia', Monash University, Prato, Italy, July 2006.
55 *Vexatious Proceedings Act 2005* (Qld).

(a) any cause, matter, action, suit, proceeding, trial, complaint or inquiry of any kind within the jurisdiction of any court or tribunal; and
(b) any proceeding, including any interlocutory proceeding, taken in connection with or incidental to a proceeding pending before a court or tribunal; and
(c) any calling into question of a decision, whether or not a final decision, of a court or tribunal, and whether by appeal, challenge, review or in another way.[56]

The WA Act provides that an order may be made by the Court on its own motion or on the application of

- the Attorney General; or
- the Principal Registrar of the Supreme Court or the Principal Registrar of the District Court; or,

with the leave of the Court,

- a person against whom another person has instituted or conducted vexatious proceedings, or
- a person who has a sufficient interest in the matter.

The categories of person with standing to make application under Queensland Act are substantially the same as the WA Act, but also include the Crown solicitor.[57] However, in the Queensland Act there is no requirement that a person against whom another person has instituted or conducted vexatious proceedings or a person with sufficient interest obtain leave of the Court before bringing the application.

There are some other points of difference between the WA Act and the Queensland Act. In particular, pursuant to the Queensland Act:

- the Court must be satisfied that a person has 'frequently' instituted or conducted vexatious proceedings in Australia or has acted in concert with such a person;[58]
- for the purpose of establishing the above requirement, the Court can have regard to proceedings commenced in any Australian court or tribunal;[59]
- among the orders available to the Court is a provision that the Court may make 'any other order …[it] considers appropriate in relation to the person'.[60] The notes to this provision in the Queensland Act provide the following examples of the 'other order' that may be made:

56 *Vexatious Proceedings Act 2002* (WA), s 3; *Vexatious Proceedings Act 2005* (Qld), s 3, schedule.
57 *Vexatious Proceedings Act 2002* (WA), s 4(2); *Vexatious Proceedings Act 2005* (Qld), s 5.
58 *Vexatious Proceedings Act 2005* (Qld), s 6(1).
59 *Vexatious Proceedings Act 2005* (Qld), s 6(5).
60 *Vexatious Proceedings Act 2005* (Qld), s 6(2)(c).

- an order directing that the person may only file documents by mail
- an order to give security for costs
- an order for costs.[61]

- the registrar of the Court must arrange for a copy of the order to be

  - published in the gazette within 14 days
  - entered in a publicly available register kept in the registry of the Court.

  The registrar may also arrange for details of the order to be published in another way, for example, on the Court's website.[62]

In early 2007, a *Vexatious Proceedings Act 2007* was also enacted in the Northern Territory. It is in substantially the same terms as the Queensland Act.

3.2 Proposals for reform

The Commission notes that the Victorian Parliament Law Reform Committee is also currently inquiring as to the effect of vexatious litigants on the justice system. The Committee is due to report no later than 30 September 2008. Nonetheless the Commission believes it is desirable that it provide proposals based on its research and invite comment with a view to giving momentum to this issue, particularly in light of legislative developments in other jurisdictions.

Proposals for comment are as follows:

Research

It is important that some empirical research be undertaken to ascertain the ambit of the problem of 'vexatious' litigants, not limited to those who may be subject to an order under existing provisions. Research identifying the impact of vexatious litigants on the courts would also be valuable and, in particular, considering the impact or effectiveness of the making of orders declaring a person to be vexatious.

Standing

The Commission is of the view that the categories of persons who should have standing to bring an application are in need of change. It is proposed that the Victorian Government Solicitor be included in addition to the Attorney-General as a public officer with standing to bring an application.

The Commission is not of the view that it is necessary or desirable to provide that the Court of its own initiative may bring an application (as provided in the

61 *Vexatious Proceedings Act 2005* (Qld), s 6(2)(c), notes. We were told in consultations that in Victoria the Attorney General generally does not seek costs on applications in relation to vexatious litigants: Consultation with VGSO and Department of Justice, 18 July 2007.

62 *Vexatious Proceedings Act 2005* (Qld), s 9(2).

Queensland Act). Rather it is proposed that the legislation empower the court to refer a matter to the Prothonotary or Registrar for action.

It is also proposed that the parties who have standing to make an application be widened to include, not only the Attorney-General and the Victorian Government Solicitor, but also:

- the Prothonotary of the Supreme Court or the Principal Registrar of the County Court; or,

with the leave of the Court,

- a person against whom another person has instituted or conducted vexatious proceedings, or
- a person who has a sufficient interest in the matter.

The addition of defendants and persons with 'sufficient interest' would allow those most affected by the conduct of vexatious litigants to take some action. The requirement that private litigants are entitled to do so only with leave of the Court builds in an appropriate protection against misuse of the process.

The Commission also acknowledges that for a range of reasons initiating an application may not be possible or desirable for a private litigant. A person may nonetheless have insights into the behaviour or activities of a particular litigant that may provide an appropriate foundation for a public officer to make an application. The Commission therefore considers it desirable that a procedure or protocol should be developed to assist private litigants who cannot or do not wish to bring proceedings themselves to request that proceedings be commenced by an appropriate public officer.

Adoption in Victoria of legislative reforms in other States

The Commission is also of the view that, subject to some variations, a number of legislative developments in other jurisdictions should be taken up in Victoria to streamline and simplify the process of obtaining a vexatious proceedings order.

The Commission proposes that the following reforms (which are largely in place in the Queensland Act and the WA Act) should be introduced:

- the liberalisation of the requisite test to reflect a test along the lines of that contained in the Queensland Act, namely, that where a person has **'frequently' instituted or conducted vexatious proceedings in Australia** the court may make orders prohibiting or limiting the right of a person to take or continue legal action;

- the situation where a person has **acted in concert** with a vexatious litigant should be provided for. It should be possible for the court to make an order prohibiting and limiting the right of a person acting in concert with a vexatious litigant to take or continue a legal action. The amended

legislation should also prevent a vexatious litigant from acting in concert with, or directing another person to bring legal proceedings that are the subject of the order against the vexatious litigant. Such provisions appear in the Queensland Act;

- the introduction of a statutory definition of '**vexatious proceedings**' along the lines of the definition in the Queensland Act and the WA Act;

- the extension of the Court's power to allow it to have regard to **'proceedings' broadly defined, including interlocutory and appellate proceedings** (as in the definition in the Queensland Act and the WA Act) as well as **proceedings in any Australian court or tribunal** (as is the case in the Queensland Act);

- a provision setting out the types of orders the Court may make, including orders staying existing proceedings and prohibiting the institution of proceedings and '**any other order the Court considers appropriate**' (as in the Queensland Act). The last of these options envisages that orders restraining certain conduct or costs orders could be made;

- a provision specifically allowing the Court to **extend orders to encompass corporate entities or incorporated associations** affiliated with the litigant the subject of the order. There is currently no such provision in the Queensland or Western Australian Act;

- a provision requiring that in addition to the gazetting of any order made, the Prothonotary of the Supreme Court be required to enter any order made in a **register** at the Court **which may be made available on request**. Unlike the under Queensland Act, it is not proposed that the Prothonotary have broad discretion to publish the details of any order. Rather it is proposed that the legislation require the Prothonotary to **notify the heads of all jurisdictions in Victoria and the Principal Registrars in all jurisdictions in Victoria** of any order made. Should the Prothonotary also notify any other person with a sufficient interest in the matter?

Vexatious proceedings orders in other courts and tribunals

Traditionally legislative powers in relation to vexatious litigants have been conferred on and exercised by the Supreme Court only. This reflects the seriousness of the potential curtailment of rights and gravity of the orders that may be made. There is no change to this approach in the Queensland Act and the WA Act. These Acts give the Supreme Court in each of those States the power to make orders that have effect in any court or tribunal in those States.

The Commission is presently of the view that it may be desirable for there to be a broadening of this approach to allow each of the courts in Victoria and VCAT to make vexatious proceedings orders in respect of proceedings in that particular court or tribunal.

In favour of this proposal is the potential for each of the courts or tribunals to control abuses of the processes in their own jurisdictions. It would also obviate the need to bring proceedings in the Supreme Court, particularly where the activities of a litigant have been focussed in another jurisdiction.

Conversely, however, is the argument that the orders made by courts or tribunals other than the Supreme Court would necessarily be limited in scope. This may result in matters being dealt with in a piecemeal way or the need for multiple applications. For instance, where an application is brought in one court, the activities of a litigant in another jurisdiction may be overlooked. It is also foreseeable that where a litigant's activities are curtailed in one court he or she may simply shift activity to another jurisdiction, which would in due course require another application.

Conferring jurisdiction on all courts in Victoria and VCAT would also be a divergence from the move to nationally consistent legislation.

Having weighed up these considerations it is proposed that each of the courts and tribunals in Victoria (other than the Supreme Court) should have express power to make a vexatious proceedings order limited to proceedings within the jurisdiction of that court or tribunal. The Supreme Court would retain the power to make orders in respect of any court or tribunal in Victoria.

Additional proposals for reform

It is proposed that the legislation provide that, once an application for a vexatious proceedings order is made, there is an automatic stay in relation to pending proceedings and a prohibition on the commencement of further proceedings pending the hearing unless the Court orders otherwise.

The Commission also proposes that the legislation provide that evidence in support of the application should be on affidavit and may be provided on the basis of 'information and belief'. Cross examination on affidavit evidence should only be allowed with leave of the Court.

It is further proposed that if, despite the making of a vexatious proceedings order, proceedings are commenced by the person the subject of the order, such proceedings should be a nullity.

To circumvent the problem of vexatious litigants absorbing court time by making repeated applications for leave to commence proceedings, we propose that the legislation should also provide that, unless the court otherwise orders, such applications should be determined on the papers without the need for a formal oral hearing.

It is also proposed that provision be made for the Prothonotary or Registrar to have the discretion to waive court fees and photocopying and other charges otherwise payable by the applicant in proceedings for orders in relation to a vexatious litigant.

3.3 Matters for further consideration

Criminal prosecutions

On the basis of consultations, it appears that there is a problem with some litigants bringing private prosecutions for criminal offences against public officials.[63] Unless a statutory provision restricts the categories of persons who can lay a private information, any person can lay an information for either a summary or indictable offence. Some of these prosecutions are what would be described in the civil matters as frivolous, vexatious or an abuse of process of the court. Once the prosecutions are issued they create considerable intrusion into the role of public officers and require considerable resources to bring about a resolution.

In civil matters issued in the Supreme Court, the Prothonotary may refuse to accept an originating process without the direction of the Court where he or she considers that the form or its contents would be irregular or an abuse of the process of the Court.[64] No equivalent rule exists in relation to private criminal proceedings. One way in which to bring about a resolution is for the DPP to take over the proceedings and, if appropriate, withdraw or discontinue the charges.[65] This process, nonetheless, involves substantial cost and considerable inconvenience.

In NSW, the Registrar can refuse to accept vexatious criminal proceedings.[66] Consideration should be given to making legislative provision for such a power in Victorian criminal legislation. A proposal of this sort is beyond the scope of our current review of the civil justice system.

Mental health issues

Consultations and academic literature have raised the relationship between mental health issues and the 'vexatious' or inappropriate use of legal proceedings exhibited by some litigants as a consequence.[67]

The issues that warrant further consideration include:

- the appointment of a litigation guardian and/or a guardian or administrator or both in appropriate cases; and
- incorporating strategies in the vexatious proceedings regime which specifically take into account mental health issues in the management of or assistance for those litigants who engage in inappropriate or 'vexatious' use of litigation.

63 See for example *Attorney-General for the State of Victoria v Shaw* [2007] VSC 148.
64 *Supreme Court (General Civil Procedure) Rules 2005,* r 27.06. See further discussion below.
65 See *Public Prosecutions Act 1994* (Vic), s 22(1)(b)(ii) and s 27.
66 See *Criminal Procedure Act 1986* (NSW) ss 49, 174.
67 Consultation with VGSO and Department of Justice, 17 July 2007. See also, Thompson, above note 44, 69-70; Lester and Smith, above note 32, 1.

As to the first issue, not all litigants who exhibit behaviour which involves inappropriate or vexatious use of litigation are under a disability and would qualify for the appointment of a litigation guardian. However, there may be circumstances where it is appropriate.

Mechanisms currently exist in Victoria for the appointment of a litigation guardian in circumstances where a person is under a disability and has an inability to manage his or her affairs in relation to a proceeding.[68] Otherwise there is no test provided in the Rules for determining whether the person is capable of managing his or her affairs. Further:

> The cases do not consider the level of mental capacity required to be a 'competent' litigant in person but it cannot be less than that required to instruct a solicitor. It should be greater because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.[69]

A litigation guardian stands in the place of a party to a proceeding. Except where he or she is a lawyer, a litigation guardian usually will have to employ a lawyer to be an advocate.[70] The role of litigation guardian is a potentially onerous task, requiring a person to assume full power and authority as a party in the proceeding and exposing him or her to adverse costs orders. A litigation guardian can be any person who is not him or herself under a disability and has no interest in a matter which is adverse to the person he or she represents. In practice, a litigation guardian must be willing to act in the role and will often be a friend or family member.

It is important that where a litigant displays the requisite criteria, a litigation guardian is appointed rather than allowing him or her to proceed unrepresented. Failure to do so may render any decision subject to being overturned on appeal.[71]

The issue also arises as to the proper process to be followed in relation to the appointment of a litigation guardian and/or a guardian or administrator (or both) under the *Guardianship and Administration Board Act 1986*.[72] An administrator is entitled to 'bring and defend legal actions' on behalf of the represented person[73] but there is no such provision for guardians in relation to litigation that is not to do with a person's estate. A guardian appointed under the *Guardianship and Administration Board Act 1986* may have to be appointed the represented person's litigation guardian in order to act in litigation.

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68 See generally *Supreme Court (General Civil Procedure) Rules,* Order 15. See also s 66(1) of the *Guardianship and Administration Board Act 1986* that provides that if in any civil proceedings before a Court the Court considers that a party may need to have a guardian or administrator or both appointed, the Court may refer the issue to VCAT for its determination.

69 *Murphy v Doman* [2003] NSWCA 249 at [35].

70 *Supreme Court (General Civil Procedure) Rules,* Rule 15.02(3).

71 See for example *Murphy v Doman* [2003] NSWCA 249.

72 See *Guardianship and Administration Board Act 1986* (Vic), s 66(1) that provides if in any civil proceedings before a Court the Court considers that a party may need to have a guardian or administrator or both appointed, the Court may refer the issue to VCAT for its determination..

73 *Guardianship and Administration Board Act 1986* (Vic), s 58B(2)(l).

It is foreseeable that the litigant concerned may not acquiesce or consent to such an appointment. Indeed in consultations we were informed of one recent matter that had proceeded in both the County and Supreme Courts where the process for the appointment of a guardian and/or administrator has been the subject of appeal by the litigant against whom the order was sought to be made.[74] It is therefore critical that a proper process is followed in relation to such matters and that the litigant in question is accorded procedural fairness and natural justice, including a right to be heard.

With particular reference to litigants who engage in inappropriate or 'vexatious' use of litigation, the matters that require input from interested parties and further consideration include:

- identifying matters where the appointment of a litigation guardian and/or guardian or administrator (or both) may be appropriate;
- the proper process to be followed by parties and courts in initiating the appointment of a litigation guardian and/or guardian or administrator (or both);
- the effectiveness of the process for the appointment of litigation guardians in Victoria, particularly in restraining inappropriate or vexatious conduct.

It is proposed to recommend that these matters be given further consideration by the Victorian Parliament Law Reform Committee.

In relation to the second category of issues, we also note that some academic literature suggests that there may be a correlation between the conduct of some vexatious litigants and a psychiatric disorder or mental illness and that psychiatric assistance should be one of the methods employed to deal with the problem. We also draw attention to the following observation:

> ….courts are not equipped to provide this type of assistance and it is clear from the legislation ….that there is no power to make orders requiring a litigant to undergo some type of psychiatric assessment or treatment either as a result of being declared vexatious, or as a prerequisite to commencing further litigation following an order being made declaring them vexatious. Perhaps this is something for a future Law Reform Commission to consider.[75]

In keeping with these observations the Commission proposes that this aspect of the issue of the relationship between vexatious legal proceedings and mental illness and the legal mechanisms for addressing this issue also be put on the agenda for consideration by the Victorian Parliament Law Reform Committee.

74 Consultation with VGSO and Department of Justice, 17 July 2007.
75 Thompson, above note 44, 70.

Preventing the conduct of a claim unless a party is legally represented

Another issue that warrants input from interested parties or further consideration is the possibility of providing the Court with a power to prevent the pursuance of a claim unless a party is legally represented.

It has been suggested that in certain circumstances where it appears to the court that a litigant is pursuing a claim or defence that appears vexatious or without any merit, the Court should be given the power to make an order (similar to the present situation in relation to corporations) that the claim or defence cannot be pursued on behalf of the person except by a legal practitioner with a practising certificate.

The engagement of a legal practitioner may assist to distil the meritorious dimensions of the claim from otherwise overwhelmingly irrelevant material or vexatious conduct. The legal practitioner would also be subject to the overriding obligation, ethical standards and, if necessary, appropriate disciplinary sanctions.

The policy rationale in favour of such a proposal is the need to ensure that cases are conducted efficiently and with regard to the real issues.

Arguments against the proposal include:

- it restricts access to justice;
- it offends against the principle of the right to appear in person;
- it is potentially inconsistent with the provision in the *Charter of Human Rights and Responsibilities Act* 2006 providing for a right to a fair hearing;[76]
- it imposes an unreasonable financial burden on persons of limited means.

76 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 24.

4. INTERPRETERS

The lack of interpreting services by Victorian courts in civil matters is a matter that has been raised in submissions as requiring 'urgent redress'.[77] Indeed the need for the provision of interpreters in civil proceedings for litigants who require it was addressed in a number of submissions, particularly in the context of barriers to access to justice.[78]

A language barrier or hearing impairment may fundamentally impact on the basic communication required between a litigant and the court, affecting access to court services and the efficient and proper disposition of court business. The situation is compounded when a party is self-represented particularly because he or she is impecunious.

As a matter of long standing practice, in criminal proceedings interpreters are provided by the Crown. There are also a number of legislative provisions which are directed to guaranteeing interpreters in such proceedings.[79]

The position in civil proceedings is different. There are no specific legislative requirements for the provision of interpreters in such proceedings. Generally, it is considered the responsibility of parties and their legal representatives to provide interpreters when required and the court plays no role in organising such assistance. We understand that in the Supreme Court of Victoria, in some circumstances, a judge may make an order that an interpreter is arranged by the court. However, this occurs on an ad hoc and discretionary basis.

In June 2006 the Department of Justice published a Language Services Policy and Guidelines for Working with Interpreters and Translators.[80] The Policy refers to relevant legislation[81] and sets out the following minimum standards for the Department of Justice:

> Clients who are not able to communicate through written or spoken English should be given access to professional interpreting and translating services:
>
> - when required to make significant decisions concerning their lives; or
> - where essential information needs to be communicated to inform decision making.'[82]

It would appear that the current position in civil proceedings is inconsistent with this policy.

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77 PILCH, submission in response to Consultation Paper.

78 Submissions of the Federation of Community Legal Centres, Fitzroy Legal Service, Human Rights Law Resource Centre, National Pro Bono Resource Centre, PILCH, Springvale Legal Service.

79 See s 40 *Magistrates' Court Act 1989* (Vic), s 526 *Children, Youth and Families Act 2005* (Vic), s 25(2) *Charter of Human Rights and Responsibilities Act 2006* (Vic).

80 Department of Justice, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, June 2006, available at www.justice.vic.gov.au.

81 *Crimes Act 1958* (Vic) s 464D, *Magistrates' Court Act 1989* (Vic) s 40, *Children, Youth and Families Act 2005* (Vic) s 525 and *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 63.

82 Department of Justice, *Language Services Policy and Guidelines for Working with Interpreters and Translators*, June 2006, available at www.justice.vic.gov.au, 7.

Accordingly, we consider that it is desirable for provision to be made for interpreting services in civil proceedings in Victorian courts. Proper resources need to be made available to achieve this end. The Commission is interested in possible funding options. One model for consideration and input from interested parties is the establishment of an 'interpreting fund'. This option and additional proposals for reform are as follows:

1. A fund be established ('the interpreting fund') which may be drawn on to fund interpreters in civil proceedings in Victorian Courts in appropriate cases (as provided for in paragraph 2 below).

2. Legislative provision be made conferring on Victorian courts the discretion to recommend that it is in the interests of justice for payment to be made from the interpreting fund for interpreting services in civil proceedings for litigants who require it. In exercising the discretion the court should be able to take into account:

   (a) the means of the litigant;
   (b) the capacity of the litigant to obtain an interpreter
   (c) the nature and complexity of the proceeding; and
   (d) any other matter that the court considers appropriate.

3. In so far as the existing rules do not so provide, there should be, subject to judicial discretion in relation to costs, provision for an order that such services should be the subject of a party–party costs order and any funds recovered should be reimbursed to the interpreting fund.

4. The legislation should provide a definition of interpreter along the following lines: *'interpreter' means an interpreter accredited with the National Accreditation Authority for Translators and Interpreters Limited*.

5. The Department of Justice provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis through a Victorian pro bono referral scheme.

6. All Victorian Courts develop detailed policies about the provision of interpreters and such policies be made publicly available.

5. DISCOVERY

5.1 Background

Discovery is an essential tool of litigation. It is a critical element of fact-finding, truth seeking and decision making processes.[83]

Despite the integral role of discovery in our adversarial system of justice, the discovery process has become a hugely contested area, particularly in complex civil litigation. The Commission has received many detailed submissions cataloguing problems with the discovery processes in Victoria. For example, the Victorian Bar refers to anecdotal evidence which suggests that discovery is one of the most expensive steps in the interlocutory process and questions whether in all cases the expenditure incurred is justified.[84]

In formulating the proposals set out below, the Commission has considered the reform suggestions made in the submissions it has received, as well as the reforms which have been adopted elsewhere in Australia and overseas. The feedback the Commission has received overwhelmingly suggests that there is little consensus as to a preferred test for discovery. It is also apparent that in less complex and smaller disputes discovery may not be problematic.

There is no simple solution to the vexed issue of discovery in civil litigation. The Commission believes that judicial flexibility is important and that the discovery process is able to be moulded to suit the particular circumstances of a case. It is also important that parties take greater initiative in resolving discovery issues.

5.2 The ambit of discoverable documents

The rules of court in Victoria generally follow the 'train of inquiry' test developed in the 1882 *Peruvian Guano* case. In that case Brett LJ stated that:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of those two consequences…[85]

It is the inclusion of the documents which are indirectly relevant which is most problematic.

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83 Camille Cameron and Jonathan Liberman, 'Destruction of documents before proceedings commence – what is the court to do?' (2003) 27 *Melbourne University Law Review* 273, 274.

84 Victorian Bar Submission in response to Consultation Paper, 43.

85 *Compagnie Financiere Commerciale Du Pacifque v Peruvian Guano Co* (1882) 11 QBD 55, 63.

In the Supreme Court discoverable documents comprise 'all documents which are or have been in that party's possession relating to any question raised by the pleadings'[86] A notice for discovery may be served where a proceeding has been commenced by writ and the pleadings have closed.[87] A 'question' means 'any question in issue, or matter for determination for the Court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of the proceeding by the Court by any party or by any person not a party who has a sufficient interest.'[88]

Rule 29.05 of the Supreme Court Rules provides that discovery of documents may be ordered by way of categories or classes of documents. The submission from the Supreme Court suggest that discovery by way of categories has not been adopted as a general practice.[89]

In the Magistrates' Court the right to discovery is generally automatic and made by way of notice. Leave is required in proceedings under either the *Accident Compensation Act 1995* (Vic) or the *Workers Compensation Act 1958* (Vic).[90] Discoverable documents comprise 'all documents which are of have been in that party's possession relating to the proceeding.'[91] This test also extends to documents of direct and indirect relevance. A modified form of discovery is allowed for claims greater than $5,000 that are referred to the Court's arbitration (small claims) process.[92]

In contrast, leave is required to serve a notice for discovery in the County Court.[93] In the County Court an application for discovery must specify the documents or class of documents to be discovered.

The Commission has considered whether the test for discoverability should be narrowed in Victoria. Options for reform drawn from models in other jurisdictions and the submissions include the following:

- Narrowing the test to documents of *direct relevance* to questions in the proceeding or to an issue in the pleadings (as opposed to requiring discovery of documents 'relating to any questions raised by the pleadings.')

  Similarly narrow tests exist in the Supreme Court in Queensland[94] and in South Australia.[95] The Western Australian Law Reform Commission

86 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Rule 29.02.
87 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Rule 29.01 and 29.02.
88 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Rule 1.13.
89 Supreme Court of Victoria submission in response to Consultation Paper, 38.
90 Magistrates' Court submission in response to Consultation Paper, 19.
91 *Magistrates' Court Civil Procedure Rules 1999* (Vic) Rule 11.02.
92 Rule 21.05 of *Magistrates' Court Civil Procedure Rules 1999* (Vic) provides for a simplified form of discovery. Instead of an affidavit of documents, a list of documents is exchanged 14 days before the pre-hearing conference or the arbitration. A list of documents must identify each document that supports the claim, defence or counterclaim or is injurious to that claim, defence or counterclaim.
93 *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) Rule 34A.17.
94 *Uniform Civil Procedure Rules 1999* (Qld) Rule 211. The test is documents 'directly relevant to an allegation or issue in the pleadings or an issue in the proceedings.'

recommended a test requiring discovery of documents that are 'directly relevant to the issues in dispute.'[96]

- Alternatively, a narrow test could be framed along the lines of:

  a) the test in the Federal Court where discoverable documents are those on which a party relies, which adversely affect a party's case or documents that support or adversely affect another party's case;[97] or

  b) the test in New South Wales where discovery is generally limited to classes or categories of documents and will only be ordered of a document if it is relevant to a fact in issue.[98]

- Narrowing the test to discovery of documents which can be linked to a material fact pleaded in the statement of claim and which is in dispute.[99]

- Narrowing the test to 'direct relevance', while empowering the court to order further discovery if the court is satisfied that 'compliance with such an order would not unreasonably delay the expeditious disposal of the proceeding' and 'the cost of compliance would not be disproportionate to what is at stake in the proceeding'.[100]

- Implementing the Lord Woolf approach of permitting 'standard discovery' as of right and 'extra discovery' if the litigant can satisfy the court that it is necessary. Standard discovery comprises those documents 'a party relies upon and documents adverse to a party's case or documents that support another party's case. Extra discovery refers to other relevant documents that tell the story of the case and train of inquiry documents.[101]

- Retaining the *Peruvian Guano* test but introducing express provisions requiring that the court takes an active role in discovery management.[102]

- Limiting discovery of documents to (a) those which a party intends to rely upon and (b) those which are inimical to the case sought to be relied upon.

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95 *Supreme Court Civil Rules 2006 (SA)* Rule 136. The test is documents 'directly relevant to an issue raised in the pleadings.'

96 Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia*, 1999, Recommendation 82, 352.

97 Federal Court Rules Order 15 Rule 2.

98 *Uniform Civil Procedure Rules 2005* (NSW) Rule 21.2.

99 This is similar to rule 187.1(2) of the Alberta Rules of Court which requires an affidavit disclosing 'relevant and material' records. A question or record is relevant and material only if the record could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings; or to ascertain evidence that could be reasonably be expected to significantly help determine one or more of the issues raised in the pleadings (Rule 186.1(a) and (b)).

100 New Zealand Law Commission, *General Discovery*, Report 78, 28 February 2002, [9].

101 The Rt Honourable the Lord Woolf, *Access to Justice*, Interim Report (1995) Chapter 21 [18 to 26].

102 This approach is similar to that of Hong Kong: see Chief Justice's Working Party on Civil Justice Reform Hong Kong, *Civil Justice Reform Final Report,* March 2004, Recommendation 80.

5.2.1 Arguments in support of a narrower test for discovery

- The *Peruvian Guano* or train of inquiry test means that the scope of discovery is considerably broad. The main concerns with a broad discovery test are that it enables parties to:

    - make excessive discovery demands;
    - discover excessive numbers of documents;
    - withhold key documents until the final stages of a proceeding or to hide key documents amongst mountains of other discovered material.

  These tactics are employed to wear down opponents, delay trials and exert leverage for settlement. The time and costs involved in reading, analyzing, digesting, copying and indexing large numbers of documents can be disproportionate to the value of subject matter in dispute.

- Technological change has led to a proliferation of the number and type of documents being created in ordinary life and in business. Documents are easily created and exchanged and communications are occurring 24 hours a day with the use of e-mail, laptops and 'Blackberrys'. At the same time, civil litigation disputes have become more complex. The proliferation of documents and increase in the number of issues pleaded in civil claims has meant that discovery has become more complex, time consuming and costly. The test for discoverability should seek to limit the documents to be disclosed.

- Lawyers take their discovery obligations seriously and if there is doubt about the relevance of a document it is often discovered. Under the *Peruvian Guano* test a discovered document may refer to other documents. It is usual practice to then seek discovery of the additional documents referred to because they may lead to a relevant train of inquiry. The more conscientiously discovery obligations are carried out, the more expensive the process becomes.

- The breadth of the train of inquiry test means that it is often easier, cheaper and safer to disclose documents in their entirety rather than to closely analyse the documents to identify those relating specifically to issues in dispute. In addition, para-legals and support staff are often enlisted to sort through documents and formulate lists. Without detailed technical knowledge of the issues in dispute or an understanding of the test for discovery a conservative approach to discovery is usually taken.

- Ultimately, although the scope of discovery is vast, the proportion of discovered documents actually relevant or fundamental to a dispute are comparatively few. The majority of discovered documents are not used at trial and do not appear in Court books or tender bundles.

- Anecdotal evidence suggests that a narrower test facilitates cultural and ethical change. This is so even if a narrower test is interpreted broadly by the Court so that in practice it encompasses documents of indirect and direct relevance. A narrower test assists by focusing participants on the role of discovery in the wider litigation. It also assists to narrow issues and encourage careful and proportionate discovery.

5.2.2 Arguments against narrowing the test for discovery

- The *Peruvian Guano* test is a broad test. Any attempt to limit the test may result in the loss of important information.

- One of the difficulties in having a 'narrower' test for discoverable documents or in limiting discovery to categories of documents is that this usually still requires the review, culling and categorization of all potentially relevant documents to select the sub-set. This is usually the most expensive part of the discovery process and such expense is not necessarily reduced, or substantially reduced, by merely limiting the ambit of the sub-set of documents ultimately discovered.

- Narrowing the test requires greater reliance on the integrity of the parties. A narrower test requires a subjective assessment of whether a document is 'relevant' to an issue in the pleadings and may be used as a tool to withhold documents.

- A narrower test may lead to increased number of discovery disputes or more interlocutory applications.

- In some fact situations a wide discovery test may be preferred in order to assist a party to prove its case, for example where the other party holds most of the documents relevant to the issues in dispute.

- Ordering discovery of categories of documents is problematic because:

    - there is a potential for dispute about appropriate categories and which documents fall within those categories;
    - it may still require the parties to review all documents within their possession, custody or control to determine whether they fall within the specified categories;
    - at the time categories are set parties may not be aware of significant issues in the case which can lead to later applications for further categories of discovery;
    - categories are not likely to be helpful if they merely reflect the issues raised by the pleadings.

- General discovery avoids the potential for unsatisfactory settlements based on limited disclosure of relevant documents.

- A wide interpretation of a narrow test of direct relevance may not result in any practical difference to the scope of discovery.

- Problems are likely to exist whether the test for discovery is broad or narrow.

The Commission recommends that rather than addressing discovery problems by narrowing the threshold test, reforms should instead focus on increasing judicial case management of the discovery process, clearly articulating and increasing sanctions for discovery abuse and encouraging the parties reach agreement on discovery issues.

Draft proposal:

It is proposed that the *Peruvian Guano* test be retained and that express provisions should be introduced to enable the court to take an active role in discovery case management.

5.3 Should discovery be as of a right or only with leave of the Court?

Options for reform include the following:

- Discovery as of right, subject to the court's power to limit this right where appropriate.
- Limit discovery as of right to certain categories and/or provide for informal discovery
- Discovery with the leave of the Court.

Draft proposal:

It is proposed that discovery should be available as of a right subject to any directions of the Court.

5.4 The obligation to confer to try to resolve discovery issues

Draft proposal:

It is proposed that parties be required to seek to reach agreement on discovery issues and to narrow any issues in a discovery dispute before making an interlocutory application.

Requiring formal confirmation of conferral prior to the issue of interlocutory process as a precondition for obtaining relief ensures that the practice is followed and reinforces a culture of using the court as a final resort.

While an informal expectation in Victoria, in some jurisdictions the requirement to certify bona fide attempts to confer before initiating an interlocutory

application is set out in the Rules. For example, in Rule 59.09 of the *Rules of the Supreme Court 1971* (WA) provides that:

> No order shall be made in chambers unless the application was filed with a memorandum stating–
> (a) that the parties have conferred to try to resolve the matters giving rise to the application; and
> (b) the matters remain in issue between the parties.

Rule 37 of the *US Federal Rules of Civil Procedure* takes this a step further by not only requiring, in certain situations, certification of the applicant's good faith conferral or attempt to confer in an effort to resolve the issue without court action, but this is also backed up by explicit costs consequences for both lawyer and client.

The proposed Overriding Obligations go some way towards preventing a situation in which one party can forestall an application by the other by refusing to confer, as good faith attempts to resolve the dispute by agreement will be required. However, there should be a separate requirement that the parties confer prior to the issuing of any interlocutory application (including in respect of discovery) to determine whether the dispute could be resolved or whether the issues in dispute could be narrowed.

The newly introduced Practice Note in New South Wales in connection with discovery in cases in the Supreme Court Equity Division-Commercial List and Technology and Construction List[103] sets out the responsibilities of practitioners and the aspects of discovery which they are expected to 'meet to agree upon'. It also sets out in detail the matters which practitioners are expected to have knowledge of at any hearing in relation to discovery. This provides a useful model which could be adopted in Victoria.

Some of the issues the Court may expect practitioners to have met and agreed upon in relation to discovery include:

- the extent of probable disclosure and how it is to be made;
- any issues concerning the preservation and production of discoverable documents including electronically stored information;
- any problems reasonably expected to arise in connection with the discovery of electronically stored information, including difficulty in the recovery of data;
- the probable or anticipated number of categories of documents;
- the volume of documents likely to be discovered;
- whether documents contain any privileged or confidential material and how this material should be dealt with.

If discovery issues remain in dispute it is proposed that the parties file a joint memorandum to the Court identifying:

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103 Supreme Court NSW, Practice Note SC Eq 3, *Supreme Court Equity Division – Commercial List and Technology Construction List,* 30 July, 2007, [27 to 32].

- areas of agreement on proposed discovery;
- areas of disagreement, and
- respective best estimates of the cost of discovery.

5.5 Interim discovery orders

In some circumstances it is possible for a party in possession of documents to generically describe or define such documents, or sub sets of documents ('Readily Identifiable Documents'), without having to conduct a search or to examine the individual documents. Depending on the nature of the documents and the issues in dispute it may be highly likely that many of such documents will be relevant to the litigation.

For example: in a building dispute there may be certain readily identifiable folders containing correspondence and communications between the supervising architect and the builder. In a drug product liability case, there may be certain readily identifiable folders or files in the possession of the drug company containing reports of known or suspected adverse drug reactions. In many other types of dispute there are likely to be analogous 'Readily Identifiable Documents'.

It is considered that there would be utility in a procedure which would provide for interim orders for access to Readily Identifiable Documents so as:

- to facilitate access to documents relatively promptly;
- to avoid the party in possession of such documents having to incur time and expense in reviewing such documents prior to the determination of what documents should be produced by way of discovery;
- to transfer the cost of initially reviewing such documents to the party seeking such documents; and
- to avoid the necessity for the party in possession of such documents having to prepare a list of such documents.

An interim order for access to categories of 'Readily Identifiable Documents' would be without prejudice to such further orders as may be appropriate in relation to discovery generally.

Also, there would need to be limited access, initially to lawyers for a party, with appropriate safeguards to prevent use of documents that may be privileged otherwise confidential.

Subject to certain safeguards outlined below, it is proposed that the Court be able to order a party to make available for inspection all documents that it has within an identified category/or class of documents regardless of whether they are relevant to the proceedings. The receiving party would sort through the documents and extract and identify those that it considers important to its case. The Commission believes that in appropriate situations this approach may assist to reduce excessive discovery costs which both parties currently incur in the

process of reviewing, sorting and listing documents for an affidavit of documents.

The Commission notes that an analogous procedure appears to have been introduced to facilitate production of electronic documents in the New South Wales Supreme Court Equity Division-Commercial List and Technology and Construction List.[104]

In these lists there is also a requirement that the parties meet to agree upon (amongst other things) whether electronically stored information is to be discovered on an agreed without prejudice basis without the need to go through the information in detail to categorise it into privileged and non-privileged information and without prejudice to an entitlement to subsequently claim privilege.

Draft proposal:

In order to reduce costs and delays arising out of discovery of documents it is proposed that the Court may order a party (the first party) to provide any other party (the other party) (or an appropriately qualified independent person nominated by the other party and approved by the court) with access to ALL documents in the first party's possession, custody or control that fall within a general category or general description (regardless of whether some such documents are not relevant to the issues in dispute in the proceedings or do not fall within the description of documents that may be the subject of an order for discovery) where:

a) the documents are able to be identified by general description or fall within a category of documents where such category or description is approved by the court;
b) the documents are able to be identified and located without an unreasonable burden or unreasonable cost to the first party;
c) the costs to the first party of differentiating documents within such general category or description which are (i) relevant or (ii) irrelevant to the issues in dispute between the parties are in the opinion of the court [excessive or disproportionate];
d) access to irrelevant documents is not likely to give rise to any substantial prejudice to the first party which is not able to be prevented by way of court order or agreement between the parties.

Where an order is made for access pursuant to this section other than for the purpose of the proceedings, the other party may not copy, reproduce, make a record of or otherwise use, either in connection with the proceedings or in any other way, documents or information examined as a result of such access.[105]

104 See Supreme Court NSW, Practice Note SC Eq 3, *Supreme Court Equity Division – Commercial List and Technology Construction List,* 30 July, 2007, [29.4 to 29.4.2].

As is the case with the new NSW procedure there is a need to make provision for any disclosure under this provision to be without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged. In other words, disclosure pursuant to this provision does not give rise to waiver of privilege.

5.6 Referee and Special Master Assistance to the Court

It is proposed that there be provision for an independent person to be appointed by the Court to assist the Court in the case management of discovery issues in complex cases. It is envisaged that the independent person would:

- provide court supervised intervention in the discovery aspect of the dispute;
- actively endeavour to case manage and assist in the resolution of any dispute between the parties in relation to discovery; and/or
- investigate and report to the court on any issue in relation to discovery.

The Commission envisages the appointment of a judicial officer (of a lower-tier than a judge) or a senior legal practitioner (for the purpose of this paper, to be referred to as a 'Special Master') to intensively manage all aspects of discovery. Preferably the appointee would have experience or expertise in the areas that are the subject of the litigation. In some cases special expertise may be desirable, for example, in matters involving electronic discovery.

The appointment of Special Masters in complex commercial disputes and class actions is discussed elsewhere in the context of alternative dispute resolution. It is also considered an option in matters where one or more of the parties to a dispute is self-represented (see above).

The proposed adaptation of the role of Special Master to the management of discovery would incorporate elements of the United States model, the existing role of court masters and the role of a special referee under Order 50 of the *Supreme Court (General Civil Procedure) Rules 2005*.

The appointment of a Special Master in relation to discovery may be appropriate where, for instance:

- the matter is of some complexity;
- the financial stakes justify imposing the expense on the parties;
- the amount of activity required has the potential to absorb a disproportionate amount of judge time;
- the effective and adequate management of discovery is beyond the proper scope of the judicial role; and/or
- it is an appropriate use of resources likely to bring about the resolution of issues.

It is envisaged that the appointment would be of an independent person (for instance, a master of the court or senior legal practitioner) to actively involve him

or herself in the case. The person would have the authority of a court appointment and would be involved with all parties. In appropriate cases the Special Master may make determinations and give rulings, for instance, on issues of privilege. It is envisaged that the Special Master would adopt appropriate case management strategies and make directions.

Specifically we envisage that a Special Master may:

- conduct meetings and/or hearings in a more informal manner than a usual court hearing;
- explain the parties' duties pursuant to the overriding obligation and other relevant rules governing the conduct of discovery;
- investigate and help the parties to identify appropriate strategies in relation to the management of discovery;
- hear and determine interim applications in relation to discovery, such as applications for further and better discovery, questions of privilege, applications to confine the ambit of discovery etc
- prepare a report to the court;
- facilitate discussion between the parties in relation to electronic discovery, determine technical disputes, and report to the Court as to the progress of the collection, processing and exchange of electronic data.

The Special Master, with the agreement of the parties, may conduct meetings or hearings at a time and place convenient to the parties and not necessarily at the court. It is generally preferable to appoint a Special Master with the parties' consent, and either to permit the parties to agree on the selection or to make the appointment from a list submitted by the parties (or a court panel).

Our proposal would see the court adopting an interventionist approach to discovery, without compromising judicial objectivity and independence.

Draft proposal:

The Rules of Court should be amended to provide that in appropriate cases the court may appoint a Special Master to manage discovery. A Special Master should be a judicial officer (of a lower-tier than a judge) or a senior legal practitioner who will actively case manage the discovery aspect of a proceeding. The Special Master may make directions, give rulings and determine applications.

In the United States the costs of special Masters are borne by the parties. Experienced practitioners or academics who are appointed by the court as Special Masters are usually paid at commercial rates. Such an arrangement might be appropriate where the parties are able to afford such costs.

It is also proposed that the costs of any externally appointed Special Master should be at the discretion of the court and, on an interim basis, may be ordered to be costs in the cause.

5.7 Judicial management of discovery

Draft proposal:

It is proposed that the current case management powers of the Court in relation to discovery should be made explicit and broadened.

The Commission proposes the introduction of more clearly delineated and specific powers to facilitate proactive judicial case management in relation to discovery. The Commission believes that increased judicial management of the disclosure process combined with new obligations on parties to meet to agree upon discovery issues and the use of Special Masters will greatly assist in keeping the scope of disclosure focused and reduce delay and costs.

The Court should be empowered tailor an appropriate disclosure regime to the facts of a particular case. It is proposed that the Court be given explicit and broad case management powers to widen or narrow the scope of disclosure as it sees fit.[106]

Based on discovery case management provisions that are set out in the Rules of the Supreme Court of Western Australia and Supreme Court Civil Rules in South Australia some of the specific case management directions the Commission proposes that the Court be given include the discretion to:

a) relieve a party from the obligation to provide disclosure;
b) limit the obligation of disclosure to:
    i. classes of documents as specified by the Court; or
    ii. documents relevant to a specified matter in question or all matters in question.
c) order that disclosure occur in separate stages;
d) relieve a party from the obligation to provide disclosure of:
    i. documents that have been filed in the action;
    ii. communications between the parties' lawyers or notes of such communications;
    iii. correspondence between a party and the party's lawyer or notes of oral communications between a party and the party's lawyer;
    iv. opinions of counsel;
    v. copies of documents that have been disclosed or are not required to be disclosed.
e) expand a party's obligation to provide disclosure;
f) modify or regulate disclosure or documents in some other way;
g) order that a list of documents to be indexed or arranged in a particular way;
h) require disclosure to be provided by a certain time;

106 Similar to the approach in Hong Kong. The Commission recognises that the Court currently has the power to limit discovery under r 29.05 (Supreme Court Rules), however we suggest that a broader rule be introduced specifying (non-exclusively) the ways in which case management could occur.

i) relieve a party of the obligation to provide an affidavit verifying a list of documents;
j) make orders as to which parties are to be given documents by any specified party;
k) require the party disclosing documents to:
   i. provide facilities (including copying and computerised facilities) for the inspection and copying of the documents;
   ii. make available a person who is able to explain the way the documents are arranged and help locate and identify particular documents or classes of documents.
l) make any other direction that the Court deems appropriate.

The Commission notes that the Court may order that parties do not need to make discovery of documents which have already been provided to the relevant parties through:

- the proposed Overriding Obligation;
- informal discovery;
- compliance with any pre-action protocols;
- oral examinations;
- preliminary discovery;
- interim discovery.

Directions of the Court would be able to be made on application or at any time of its own motion.

The exercise of the Court's discretion should be consistent with a party's right to a fair trial and not prejudice the right to the reasonable opportunity to adduce evidence and cross-examine witnesses.

5.8 Disclosure of funding, financing and insurance arrangements

There are various proposals under consideration at present in Australia in relation to the regulation of commercial litigation funders. One proposal is to require disclosure of funding agreements. Some commercial litigation funders (e.g. IMF) make disclosure at present. Given that the presently proposed Overriding Obligations extend to litigation funders who exercise any control or influence over the funded party in litigation there is a need for disclosure of the litigation funding arrangements. Similarly, the proposed Overriding Objectives extend to insurers who exercise control or influence over the insured party in the course of the proceeding. Accordingly, there is a corresponding need for disclosure of insurance arrangements.

In North American jurisdictions insurance arrangements are discoverable in any event. In the recent decision of *Harcourt v FEF Griffin*[107] the Queens Bench Division of the High Court has held that disclosure of insurance details may be ordered where a claimant is able to demonstrate that there is some real basis for

107 *Harcourt v FEF Griffin (Representatives of Pegasus Gymnastics Club) and others* [2007] EWHC 1500 (QB).

suggesting that the disclosure is necessary, in order to determine whether further litigation will be useful or simply a waste of time.

Draft proposal:

Parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding.

The Court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.

5.9 Discovery of lists and indexes

In preparation for or in apprehension of litigation parties or their solicitors often create indexes or lists of documents that may be relevant to proceedings. Such lists or indexes may be excluded from disclosure on discovery because they are privileged. In the normal course of trial preparation these lists may eventually be refined and used as the basis for a final list of documents verified by an affidavit.

The Commission believes that in appropriate cases it would be helpful for a party to have early access to such lists or indexes as may be in the possession of another party. This may prompt a party to narrow the issues in its case, provide a level playing field and expedite discovery. Access should extend to draft lists as well as final lists. The Commission believes that if the recommendation excludes draft lists there may be scope for parties to avoid complying with the obligation by only creating draft lists or indexes.

There are a number of cases in the United States that have considered the issue of disclosure of lists/ indexes of documents created in preparation for proceedings. In the United States a party may withhold documents from disclosure where they have been created as a result of an attorney's activities for pending/anticipated litigation. In a number of United States cases courts have ordered that access should be given to lists and indexes notwithstanding that these incorporate 'work product' information. However, access is usually only granted in respect of 'objective' information that is contained in indexes and lists and where the requesting party can show a substantial need and undue hardship. The Courts have prevented disclosure of 'work product' documents to the extent that they contain subjective comments, opinions and theories of lawyers as to the value of a document or the strategy behind a document's selection.[108]

108 See for example: *Beverly Scovish, Administratrix v The Upjohn Company Et Al*, No. 526520 Conn Super (1995); *Cynthia Sue Hense, Appellant v G.D.Searle & Co, Appellee*, 452 N.W.2d 440, Iowa Sup (1990); *R.J.Reynolds Tobacco Company Et Al v Minnesota Et Al*, 517 U.S 1222(1996) and Minn App (1995) CX- 95-2536. See also Rule 26(b)(3) of the US Federal Rules of Civil Procedure which provides that trial preparation materials may be disclosed upon showing that the seeking party has a substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering such discovery the Court shall protect mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

Draft proposal:

The Court should be given discretion to require the disclosure of all lists and indexes of documents in a party's possession, custody or control, even if such lists and indexes may be privileged, but only to the extent that those lists and indexes contain 'objective' information about the documents encompassed by the lists, including information such as date, subject matter, author, recipient, etc.

There should not be a ground for withholding such lists or indexes on the basis that disclosure of the identity of the documents selected for inclusion on the list or index indicates or sheds light on the thought processes or selection processes involved.

5.10 Use of discovered documents in other litigation

Obvious problems arise in cases where there may be multiple claims arising out of the same, similar or related circumstances against the same defendant and where separate discovery obligations may arise in each case. At present a party's discovered documents in one case cannot normally be used for any purpose other than the litigation in which they are discovered.

In some circumstances documents produced in one case may be used in another proceeding although this usually requires either consent of the party who produced the documents or an application to the court in which the documents were discovered for release from the implied undertaking to the court that the documents would only be used for the purpose of that litigation.

The *Dust Diseases Tribunal Act NSW 1989* and the Dust Disease Tribunal Rules provide for certain material obtained in proceedings before the Tribunal by discovery or interrogatories to be used in later proceedings before the Tribunal, whether or not the proceedings are between the same parties.[109] Pursuant to the Dust Disease Tribunal Rules the Tribunal may direct a party which has given discovery in earlier proceedings to give discovery in later proceedings by relying on any list or affidavit given in respect of discovery in earlier proceedings.[110]

However, different problems arise where the proceedings are in different courts. Although a party in later proceedings may be aware that the other party in such proceedings has given discovery in earlier proceedings the party may not be aware of the scope or nature of that discovery. Moreover, the documents produced to another party in earlier proceedings may no longer be in the possession of that party.

109 *Dust Disease Tribunal Act 1989* (NSW) s 25.
110 *Dust Disease Tribunal Rules* (NSW) Rule 7.

Draft proposal:

The Commission is interested in submissions in relation to whether there is a need for a change in the existing laws or procedural rules relating to discovery in order to facilitate use of documents produced by a party in one proceeding in other proceedings involving that party in order to reduce costs and delay.

In situations where there may be a likelihood of multiple claims involving a party who has given discovery in one proceeding, it may be desirable to put in place a mechanism to facilitate access by other parties to relevant documents on an ongoing basis, so as to avoid duplicative discovery in multiple proceedings.

One way to achieve this would be through the establishment of document repositories. In the United States, courts have ordered parties to house documents in repositories so that they are easily accessible to other parties in multiparty litigation.[111] A 'document repository acts as a shared facility for the copying, collection, storage, and dissemination of non-privileged documents related to the litigation'.[112] In some instances, document repositories for use in future litigation have been established as part of the terms of settlement of litigation.

A document repository may be useful where there is or there is likely to be analogous litigation involving the same party. The Court may order the party to establish a document repository in the first case or any subsequent case. A party would be able to apply to the Court to be given access to, to make a copy of, or to be provided with a copy of any document in the repository. In the United States courts usually require a party seeking access to documents in a repository to enter into a 'protective order' to prevent use of the documents for any purpose other than the litigation in question.

If a party objects to creating the repository or producing documents contained therein, United States courts may issue an order directing creation or production.[113]

Such a procedure would relieve a party from the obligation of giving discovery in every case and thereby 'substantially reduce the expense and burden of document production and inspection'.[114] This would also avoid delays arising out of discovery obligations.

Draft proposal:

There should be legislative powers for courts to order the creation of document repositories to be used by parties in multi-party litigation.

111 The Court is empowered to do this under r 26(c)(2) of the US Federal Rules of Civil Procedure.

112 Charles S.McGowan, Jr & Calvin C Favard Jr, 'Symposium: Class Actions in the Gulf South and Beyond' (2006) 80 *Tulane Law Review*, II (E).

113 Judge Stanley Marcus, Judge John G. Koeltl, Judge J. Frederick Motz, Sheila Birnbaum, Judge Lee H. Rosenthal, Frank A. Ray, Judge Fern M. Smith (eds), *Manual for Complex Litigation*, Fourth edition, 76 (Section 11.44).

114 Ibid, 75.

5.11 The use of oral examinations in connection with discovery

It is perhaps important to point out that the proposed pre-trial oral examination process (as set out in the exposure draft dated 28 June 2007) could be used, as it is used in the United States, to ascertain information about the existence, location and organisation of documents that may be discoverable.

5.12 Abuse of discovery and sanctions

Under the proposed Overriding Obligation parties have an obligation to act in good faith with sanctions for non-compliance. In addition to these penalty provisions and the rules currently in existence, it is proposed that additional sanctions be introduced for abuse of discovery.

The Commission believes that the following additional sanctions for abuse of discovery should be considered:

- Contempt of Court;
- Costs orders including indemnity cost orders and cost orders against solicitors;
- Compensation for financial or other loss;
- A presumption in favour of an adjournment to proceedings with costs of that adjournment to be borne by the party that has abused its discovery obligations;
- Revocation or suspension of the right to initiate or continue an examination for discovery where a party fails to disclose a document that should have been disclosed;[115]
- Preventing a party from taking steps in the proceeding;
- Drawing an adverse inference from the refusal to produce or delay in producing a document;[116]
- Empowering the court to order that certain facts are taken to as established for the purposes of litigation;[117]
- Compelling a party to produce an affidavit stating whether a document is in its possession or what has become of it;
- Where parties deliberately delay the production of documents beneficial to their case or detrimental to the other party, the Court may prohibit or limit the use of the specific documents in evidence.[118]
- Cross-examination on an affidavit of documents if it is likely that the party is misinterpreting its disclosure obligations or is failing to disclose discoverable documents;

115 This proposal was advanced by the Alberta Law Reform Institute, 'Document Discovery and Examination for Discovery', Consultation Memorandum No. 12.2, October 2002, [60].

116 See *Evidence (Document Unavailability) Act 2006* (Vic) s 89B(2)(a) and Professor Peter Sallmann (Crown Counsel), *Report on Document Destruction and Civil Litigation in Victoria*, May 2004, 17-20.

117 US Federal Rules of Civil Procedure Rule 37(b)(2)(a). See also the *Evidence (Document Unavailability) Act 2006* (Vic) Section 89B(2)(b) and Professor Peter Sallmann (Crown Counsel), *Report on Document Destruction and Civil Litigation in Victoria*, May 2004, 17-20.

118 This is also in effect in Alberta see Alberta Law Reform Institute, 'Document Discovery and Examination for Discovery', *Consultation Memorandum No. 12.2*, October 2002, [60].

- Ability to apply for judgment against a defaulting party – breach by defendant means claim allowed; breach by plaintiff means claim denied;
- Disciplinary action against solicitors who provide advice in relation to the abuse of discovery or who are in possession of undisclosed relevant material.

5.13 Limiting the costs of discovery

The Commission proposes that the courts in Victoria be given the power to limit the commercial costs incurred in connection with discovery by ordering that the costs able to be charged to clients and/or able to be recovered from another party by way of costs orders be limited to the actual cost to the law practice of such work.

The Commission has consulted with a number of practitioners about how discovery costs are charged at present. Practices clearly vary between law practices, between clients and between different categories of litigation. In some instances, clerks or law students may be engaged to assist in connection with document review. They may be paid at a relatively low hourly rate (e.g. $30 per hour) but charged to clients at significantly higher hourly rates (e.g. between $150 and $250 per hour). It has been suggested that this is one of the major reasons for the very large costs associated with discovery. In other instances, junior counsel or others may be engaged to assist at a rate which is passed on to the client without any 'mark up.' The Commission's present proposal would not affect the latter practice but would empower the court to prevent the former practice. However, similar to the Commission's earlier proposals in relation to photocopying charges (as set out in the exposure draft dated 28 June 2007), the firm would be allowed to recover some reasonable component for overheads.

Draft proposal:

In order to reduce the costs of discovery, the Court should have discretion to make orders limiting the costs able to be (a) charged by a law practice to a client or (b) recovered by a party from another party, to costs which represent the actual cost to the law practice of carrying out such work as may be necessary in relation to discovery (with a reasonable allowance for overheads but excluding a mark up or profit component being added to such actual costs and reasonable allowance for overheads) or otherwise as the Court sees fit.

The newly introduced Practice Note in New South Wales in connection with discovery in cases in the Supreme Court Equity Division-Commercial List and Technology and Construction List provides that for the purpose of ensuring the most cost efficient method of discovery is adopted by the parties, the Court may on application or on its own motion limit the amount of costs that are to be recovered by any party.[119]

119 Supreme Court NSW, Practice Note SC Eq 3, *Supreme Court Equity Division – Commercial List and Technology Construction List,* 30 July, 2007, [32].

The Commission is also of the view that there would be utility in making express provision for the courts to make orders limiting the amount of costs that may be recoverable on a party-party basis, similar to the provisions contained in Order 62A of the Federal Court Rules. Although of broader relevance than discovery, such power could be exercised to place limits on recoverable party-party costs in connection with discovery.

5.14 Copies of documents

Draft proposal:

Provision should be made for the limitation on the disclosure of copies of documents.

A copy should only be required to be disclosed if the additional copy contains no information, mark or obliteration or other information that is likely to affect the outcome of the proceedings.

5.15 Disclosure obligations

Draft proposal:

A short plain English explanation of disclosure obligations be prepared by the Legal Services Commissioner (or other appropriate entity). This could be provided to the parties and circulated to employees/agents who are asked to assist in the discovery process.

The explanation should set out the sanctions for breach of the obligations. It has also been suggested that parties should perhaps be required to sign a copy of the obligations and return them to the Court when filing their affidavits of documents.

5.16 Other issues

The Commission has received detailed submissions in relation to a number of other discovery concerns and some additional suggested reforms. Some of the additional concerns that are not dealt with in the Commission's draft proposals outlined above include:

- Concerns about the abuse of privilege in the discovery process.

  There is a concern that privilege is sometimes claimed unnecessarily and broadly to conceal documents and frustrate the discovery process. The Commission believes that the proposal outlined above in relation to Special Masters/Referees should greatly assist the Court to manage privilege issues and disputes. This issue may warrant further consideration.

- Concerns about the processes for non-party discovery.

  It has been suggested that the process for obtaining discovery from non-parties is cumbersome, slow and costly. Problems have been identified in relation to the processes for production, objection and inspection of subpoenaed documents. In particular, the Commission has received several submissions raising concerns with the process of obtaining discovery from medical practitioners.

- Concerns have been raised about imprecise pleadings and the consequent impact on discovery.

- Concerns have also been raised about electronic discovery. The Commission has proposed (in relation to case management previously) that the County Court could consider adopting the Supreme Court's approach to e-litigation and the Magistrates' Court also consider this in more complex cases.

Given the scope of issues being considered in this phase of the reference, these particular concerns and suggestions are likely to need to be considered in the second phase of the review.

6. COSTS & FEES

6.1 Taxation of interlocutory costs orders

It has been suggested to the Commission that the present process for the 'routine' taxation of interlocutory costs orders is expensive to the parties, unduly burdensome to the court and in many cases ultimately a waste of time because most cases are settled on terms whereby the interlocutory costs orders are either waived or are otherwise irrelevant to the terms of settlement. Also, it would appear that the practice in Victoria for the routine taxation of interlocutory costs orders is different to the 'normal' practice in other jurisdictions, including New South Wales and the Federal Court. Moreover, enforcement can be a problem for impecunious parties and can be used as a strategic forensic weapon by deep pocketed parties.

On the other hand, the fact that such orders are normally enforceable during the interlocutory stages can be advantageous, including in terms of curtailing inappropriate interlocutory behaviour.

On balance, the Commission is provisionally of the view that such costs orders should not be 'routinely' taxed during the interlocutory stages of the case although the court should retain discretion to make orders for enforcement of costs orders in appropriate cases.

Draft proposal:

The presumptive rule should be that interlocutory costs orders are not to be taxed prior to the final determination of the case unless the court orders otherwise.

6.2 Proportionate fees in civil litigation generally

At present, the *Legal Profession Act 2004* (Vic) prohibits a law practice from entering into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.[120]

The legislation envisages that this prohibition does not apply to the extent that the costs agreement adopts an applicable scale of costs.[121]

A number of the arguments in favour and against allowing the charging of legal fees proportionate to the amount in dispute are set out below.

This matter has also been previously considered by the Law Reform Commission of Victoria (the previous incarnation of the VLRC). A previous discussion paper

120 Section 3.4.29 (1) (b) *Legal Profession Act 2004* (Vic). Contravention renders a law practice liable to a penalty of 120 penalty units.

121 Section 3.4.29 (2) *Legal Profession Act 2004* (Vic).

reviewed the arguments for and against allowing proportionate fees and the then Commission's views were that the weight of the arguments was in favour of allowing such fees.[122] After considering responses to the discussion paper the Commission recommended that the statutory prohibition on charging proportionate fees should be removed. It was apparently envisaged that the Law Institute and the Bar Council would make rules in relation to 'contingent fees'[123] and proposed that both such bodies would be subject to the *Trade Practices Act*.

Arguments in favour of retaining the prohibition on proportionate fees:

Arguments in favour of retaining the prohibition on proportionate fees include the following:

- Fees should properly reflect the nature and extent of the legal services provided;
- Lawyers should not have a proportionate pecuniary interest in the outcome of litigation;
- Where lawyers have a proportionate pecuniary interest in the outcome of litigation this may give rise to the pursuit of unmeritorious claims in the interests of a financial return for the lawyers;
- Where lawyers have a proportionate financial interest in the outcome of litigation this may result in ethical standards being undermined with a view to achieving a favourable outcome;
- Where lawyers have a proportionate pecuniary interest in the outcome this has a negative impact on community perceptions of the professional role of lawyers generally, on the fiduciary obligation to clients in particular, and on lawyers' duties to the court;
- It is a hallmark of a profession for remuneration to be based on fee for service arrangements;
- There is potential for windfall profits, and scope for 'cherry-picking' in high value cases;
- If lawyers are entitled to a proportionate share of the outcome this may drive up the value of settlements or judgments and reduce incentives to alternative dispute resolution;
- The absence of proportionate fees has not been shown to lead to a denial of access to justice;
- The prospect of large proportionate fees may encourage lawyers to engage in more extensive advertising and 'ambulance chasing.'

In so far as proportionate fees are proposed as a solution to the problems of open-ended hourly billing practices, an alternative solution would be to address that problem directly. This could be done by a variety of means, including event-based charges, regulating hourly rates or cost-capping.[124]

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122 Law Reform Commission of Victoria report No 47 *Access to the law: restrictions on legal practice* (May 1992). The Division at that time comprised David St L Kelly (Chairman), Ted Wright (Commissioner-in-charge), Mr Norman O'Bryan, Mr Frank Paton, Mr Robert Richter QC, Mr Gary Sullivan, Ms Jude Wallace and Dr Philip Williams.

123 As proposed by the Commission in its earlier discussion paper in July 1991.

124 Although the Commission has formulated a number of draft proposals to limit costs in certain areas, we have not to date engaged in a comprehensive review of legal fees and charges.

Arguments in favour of abolishing the prohibition on proportionate fees:

The historical prohibition on lawyers charging proportionate fees is arguably anomalous in the light of recent developments:

- The *Legal Profession Act 2004* (Vic) has been recently amended to permit lawyers to charge proportionate fees in other areas of (non litigious) legal work;
- The historical concern about lawyers having an 'interest' in the outcome of legal proceedings and the concern about potential conflicts arising out of this has been superseded by the contemporary fact that in some areas of civil litigation (particularly personal injuries litigation) cases are conducted on the basis that the lawyers will only be paid if the case is successful and will be paid out of the proceeds of the litigation;
- From empirical research on legal costs carried out by the Commission, based on data supplied by a number of law firms, it would appear that at present the fees charged by law firms in many cases comprise a significantly higher percentage of the amount in issue than is likely to be the case where fees are capped at a specified proportion of the amount in dispute;
- In present civil litigation virtually every person and entity other than a law practice is able to charge a fee calculated as a proportion of the amount in dispute. This is now routinely done by commercial litigation funders,[125] some accounting firms providing assistance in connection with litigation, liquidators and companies providing services in connection with litigation;[126]
- The present open ended nature of fee charging practices by lawyers often results in fees which (a) are disproportionate to the amount in dispute, (b) are impossible to estimate or quantify in advance, (c) provide an incentive for inefficiency, over-servicing, and/or fraudulent billing practices and a disincentive to early resolution of the dispute;
- The prohibition on proportionate fees by lawyers runs contrary to the goal of 'proportionality' which has become accepted as a goal of civil justice reform;
- In practice many if not most clients would prefer the option of a proportionate fee as it provides certainty/determinacy and ensures that ultimately the client is the beneficiary of the (successful) litigation regardless of how long and protracted the litigation is;
- At present there is no prohibition on charging a fixed lump sum fee for the provision of legal services. Any such fee will in fact be a proportion of the amount in dispute or the amount recovered even if it is not purportedly calculated on a percentage basis;

125 Endorsed by the High Court, by majority, in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58.

126 Including companies established by the partners of law firms where the partners are the directors of the companies providing the litigation 'support' services and where the principal place of business of the company is the office of the law firm which the directors are partners of.

- In a number of areas of litigation at present fees are limited by or calculated by express reference to the amount recovered in the litigation;[127]
- The Legal Profession Act 2004 expressly contemplates that legal fees may be calculated by reference to the amount of any award or settlement in so far as a costs agreement adopts an applicable 'scale of costs.'[128]

6.2.1 Safeguards and protections?

In considering whether or not the existing prohibition should be retained it is necessary to consider what safeguards and protections, if any, would be appropriate in the event that proportionate fees were to be permitted.

Safeguards, in addition to the fee review mechanisms presently available under the Legal Profession Act 2004, may be necessary to protect the interests of clients, to avoid 'cherry-picking' and to provide for appropriate adjustment in the event of changes in circumstances during the conduct of proceedings.

Various safeguards and protections have been suggested to the Commission in the course of the civil justice enquiry. These include the following:

- A requirement that the client be given a *choice*, in all cases where the law practice is prepared to act on the basis of a proportionate fee agreement, between a 'proportionate' fee and the 'customary' fee and retainer arrangements;
- Regulation of proportionate fee and retainer arrangements by the Law Society and/or Bar Council and/or Legal Services Commissioner;
- A requirement that the court approve of or at least have a right to vary any proportionate fee and retainer arrangement;
- A requirement that the client obtain independent advice as to the 'reasonableness' of the proposed proportionate fee, or at least be advised of the right to obtain independent legal advice;[129]
- A requirement that clients obtain more than one 'quote' for the provision of legal services where a proportionate fee is proposed;
- A cooling off period for a specified number of days after any proportionate fee agreement is entered into;[130]
- Giving jurisdiction to the Legal Services Commissioner to vary unreasonable arrangements in circumstances where at the conclusion of the case the amount of the fee is unconscionable e.g. in the light of changing circumstances (e.g. a case may commence where everything is disputed but liability may thereafter be admitted);

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127 See e.g. Order 26 rule 2 *Magistrates' Court Civil Procedure Rules* and Appendix A to the rules.

128 *Legal Profession Act 2004* (Vic) s 3.4.29 (2).

129 Section 3.4.27 (3) (d) of the *Legal Profession Act 2004* (Vic) requires conditional costs agreements to incorporate reference to the clients right to seek independent legal advice before entering into an agreement.

130 Section 3.4.27 (3) (e) of the *Legal Profession Act 2004* (Vic) provides for a cooling off period of not less than 5 clear business days following a conditional costs agreement during which the client may terminate the agreement.

- A prescribed upper limit on the proportion which the fee may bear to the amount recovered, or a sliding scale providing for a decrease in percentage above certain monetary limits;
- There is already a common law[131] and statutory requirement[132] in 'no win no fee ' cases that the lawyer be satisfied about the 'merit' of the client's case and this is also dealt with in relation to the present draft proposals in relation to Overriding Obligations;
- A requirement that where a proportionate fee agreement is entered into the law practice should also maintain records of the actual work carried out and the time incurred so that this may be taken into consideration in any subsequent dispute about the reasonableness of the fee charged under the proportionate fee agreement.

6.2.2 Dealing with party-party costs

It is also necessary to consider how party-party costs awards would operate if proportionate fees were to be allowed and costs were recovered by the party to the proportionate fee agreement.

One option is as follows: in any case where the successful party has entered into a proportionate fee arrangement the fee and retainer agreement would need to specify, at the outset of the litigation, how any costs recovered are to be treated.[133]

There are obvious difficulties inherent in any attempt to prescribe how such party-party costs should be treated. In some cases it may not be inappropriate for a firm to have a 'relatively low' proportionate fee with an entitlement to retain any costs recovered. In other cases, where there is a 'relatively high' proportionate fee it may be appropriate for the client to be paid the full amount of any party-party fees recovered.

The position in relation to out of pocket expenses and disbursements may depend on who advances such costs in the course of the litigation. Where they are advanced by the client then clearly the client should receive any such expenses that are recovered. Similarly, where they are funded by the law firm it may be appropriate for the law firm to retain any amount recovered in respect of such expenses.

Requests for further submissions: The Commission has not adopted a position in relation to proportionate fees. Further submissions are sought on (a) whether the existing statutory prohibition should be removed; (b) if so; what safeguards and

131 See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.

132 Section 3.4.28 (4) of the *Legal Profession Act 2004* (Vic) provides that where a conditional fee agreement provides for an uplift fee the law practice must have 'a reasonable belief that a successful outcome of the matter is reasonably likely.'

133 In Ontario legislation provides that a contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement unless the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of 'exceptional circumstances.' See *Solicitors Act*, RSO 1990, c S15.

protections, if any, should be adopted; and (c) how party-party costs should be dealt with if proportionate fees are permitted.

6.3 Proportionate or other types of fees in class action proceedings

Apart from the issue of proportionate fees in ordinary civil litigation it necessary to consider whether it may be desirable to permit proportionate or other types of fees to be recovered in class action litigation.

It has been suggested to the Commission that there is a need for reform in relation to class actions for a number of reasons, including the following:

- Class action proceedings are often expensive, protracted and involve substantial risks for (a) the representative party (who is at risk of having to pay any adverse costs order), (b) law firms (who often conduct the case on a 'no win no fee' basis but who also have to advance substantial out-of-pocket expenses to meet the costs of witnesses, counsel, the costs of notice, etc) and (c) litigation funders (who not only meet some or all of the costs of conducting the proceedings but also usually assume a contractual obligation to meet any adverse costs awarded against the funded party plus any order for security for costs);
- The high financial risks for representative parties is said to make it difficult to find persons or entities prepared to take on such risks. The statutory regime places all of the risks of adverse costs on the representative party given that the class members have statutory immunity from adverse costs orders;
- The high financial risks for law firms means that very few firms have either the willingness or the resources to act in class action proceedings, particularly given that if the case is successful there is no additional 'up side', apart from the 'normal' mechanisms for the recovery of legal fees and expenses that apply in traditional *inter-partes* litigation;
- Although commercial litigation funders are able to charge a fee calculated as a proportion of the amount recovered by assisted parties (who contractually consent) there is no mechanism at present for the funder to obtain a return from class members who have not entered into litigation funding arrangements.[134] This has led to a situation whereby funders, for obvious commercial reasons, are only prepared to provide financial assistance to those who enter into litigation funding agreements. This has given rise to several arguably undesirable consequences. First, much time and effort is required to be expended in 'signing up' class members. Secondly, the group members on whose behalf the proceedings are brought are limited to those who have executed litigation funding agreements. This has had the effect of restricting the class to those who in effect agree to participate contrary to

134 Except in so far as the legislation provides that where there is a short fall between the solicitor client costs of the successful representative party and the amount of party- party costs recovered from the unsuccessful party the court may order that the shortfall be met out of any monies payable to the class members as a result of any judgment. The legislation does not expressly extend to settlements and there is only provision for the recovery of the actual costs incurred in conducting the litigation.

the policy objective of class action legislation to facilitate larger 'opt out' classes. This has received adverse judicial comment;[135]

- The issue of legal fees in class action proceedings is different from the position in ordinary litigation in part because where there is an 'opt out' class, most of the class members will usually not be parties to any fee or funding agreement and may obtain the benefit of the litigation without any risk or cost;[136]
- Class action proceedings are also different from most other civil litigation given that any settlement is required to be approved by the court and this includes approval of fees and expenses;
- In class action proceedings in both Canada and the United States courts are also required to approve fee arrangements and payments out of any settlement or judgment monies. However, in all jurisdictions there is provision for recovery, subject to judicial approval, or more than just the legal costs incurred in conducting the litigation in order to (a) provide compensation for the risks involved, (b) to provide an adequate incentive for lawyers to take on the conduct of such proceedings and (c) to ensure that the beneficiaries of the litigation contribute to the costs rather than remain 'free riders'. Importantly, lawyers conducting class actions in the United States and Canada do not contract to provide legal services on a proportionate basis but courts have discretion (either under statutory provisions or based on principles developed by the courts)[137] to allow payment, out of any fund created by judgment or settlement, of amounts which may exceed the actual legal costs and expenses incurred in conducting the litigation. Such fees may be allowed (a) as a proportion of the recovery, (b) based on the actual legal fees and expenses increased by a multiplier (the lodestar method) or (c) based on some combination of these methodologies. Often information on the actual quantum of fees, bases on hourly rates, is used as a yardstick in determining the reasonableness of the fees awarded at the conclusion of the case. This is done at an open hearing at which any interested person, including class members, may appear, make submissions and object;
- In England and Wales, the Civil Justice Council has recently recommended that consideration should be given to the introduction of proportionate fees on a regulated basis, along similar lines to those permitted in

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135 See e.g. the decision of Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 and the decision of Hanson J in *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449. Finkelstein J came to a different view in the recent decision in *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061.

136 Other than the possible cost, referred to above, of having to contribute, out of any judgment sum, to any shortfall between the solicitor client costs of the representative party and the amount of costs recovered on a party-party basis.

137 For example, in the United States courts have recognised that a litigant or lawyer who recovers a 'common fund' for the benefit of other persons is entitled to reasonable legal fees from the fund as a whole. The common fund doctrine reflects the traditional practice of equity courts. The doctrine also rests on the perception that persons who obtain the benefit of the litigation without contributing to its costs are unjustly enriched at the successful litigant's expense. The courts jurisdiction over the fund permits it to spread the fees proportionately among the beneficiaries: see e.g. the decision of the United States Supreme Court in *Boeing Co v Van Gemert* 444 US 472 (1980).

Ontario,[138] particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.[139]

Request for further submissions: The Commission has not adopted any position in relation to proportionate or other types of fees in class action proceedings. Further submissions are sought on this issue.

6.4 The liability for costs of the assisted party in cases assisted by the Justice Fund

In the earlier exposure draft the Commission outlined a proposed new litigation funding mechanism: the Justice Fund. The Commission has received, and is presently considering, various submissions made in response to that proposal. That proposal envisaged (a) placing a limit on the liability of the proposed fund in respect of adverse costs orders made against the party assisted by the fund and (b) leaving the party assisted by the fund liable to meet any shortfall between the total amount of an adverse costs order and the capped liability of the fund.

One difficulty with limiting the liability of the fund in respect of an adverse costs order (as presently proposed) is that the successful party who obtains a costs order for costs against a funded party may not recover all of the costs from the fund. That would leave the assisted party liable to meet the shortfall. It has been contended that many persons would not agree to be a representative party in class action proceedings in view of such potential liability (even though such liability exists at present) except in commercially funded cases where the commercial litigation funder assumes an unlimited liability to meet any adverse costs order.

Other options include:

- Giving the assisted party immunity from liability for adverse costs;[140]
- Giving the proposed Justice Fund standing to apply to the court in which funded proceedings are pending for an order limiting the potential liability of the funded party for adverse party-party costs.[141]

Request for submissions: The Commission has not formed a view about whether there should be a departure from the previously expressed position that the fund assisted party would remain liable for any shortfall between the capped liability of the proposed fund and the total amount of party-party costs ordered against an unsuccessful fund assisted party. Further submissions are sought on this issue.

138 See *Solicitors Act*, RSO 1990, c. S. 15.
139 Recommendation 11: *Improved Access to Justice-Funding Options & Proportionate Costs, The Future Funding of Litigation-Alternative Funding Structures*, Civil Justice Council, June 2007.
140 See e.g. *Legal Aid Commission Act 1979* (NSW) s 47.
141 See e.g. Order 62A *Federal Court Rules*.

7. CONFIDENTIALITY CONSTRAINTS ON CONFERRING WITH PEOPLE WITH RELEVANT INFORMATION

The Commission has received expressions of concern that in a number of major current and recently completed cases lawyers acting for a party have been prevented from obtaining information from persons, including potential witnesses, because of confidentiality constraints arising out of contractual agreements, implied confidentiality obligations arising out of present or former employment or otherwise arising in equity.

As illustrated by the decision in the *Burton* case,[142] except where the information reveals an iniquity (the ambit of which was expressed to be limited by Campbell J),[143] a lawyer cannot obtain *confidential* information from a witness or potential witness, even with that person's consent, except by obtaining evidence from that witness in the witness box. This has a substantial effect on the proper administration of justice.

Every employee or ex-employee owes an obligation of confidence to his or her employer. Senior employees are likely to have signed confidentiality agreements. Given this difficulty, a court cannot be confident that evidence that reveals the truth is before it. Where such information is adverse to the interests of the employer or former employer it is unlikely that such person will be called as a witness by that party.

The Commission has been informed in submissions, and in the course of consultations, that in a number of major cases against large corporations lawyers acting for the victims of an alleged large civil wrong have received threats that legal action may be taken against them if they seek to confer with or take witness statements from any employee or former employee of the company which is a party to the proceedings.

At present, any employee or former employee can be required to give evidence at trial, notwithstanding any confidentiality obligation. However, it is clearly highly undesirable, and accordingly almost never done, to call a witness on an important issue 'cold' (that is without having taken a proof of evidence). Insofar as relevant evidence is not able to be obtained and placed before the court this raises an important issue in relation to the proper administration of justice.

142 *AG Australia Holdings Ltd v Burton & Anor* (2002) 58 NSWLR 464 (Campbell J).

143 There appears to be some difference of legal opinion as to whether (a) there is a 'public interest' defence to disclosure of confidential information, (b) in the case of an 'iniquity' on the part of the person claiming breach of confidentiality the duty of confidence simply does not arise, or (c) the existence of an 'iniquity' is simply a factor able to be taken into account in equity when deciding whether or not to grant discretionary remedies: see Robert Dean *The Law of Trade Secrets and Personal Secrets*, 2nd edition Lawbook Company 2002 at 274. In *Australian Football League & Anor v The Age Company Ltd* [2006] VSC 308 Kellam J reviewed the present Australian law in relation to the 'Iniquity Rule' [at 57-71]. See also *McCabe v British American Tobacco Australia Services Limited* [2007] VSC 216 (Byrne J).

Whilst proper confidentiality constraints should be maintained, and if necessary enforced, a litigant should be able to adduce all relevant evidence and to do so in a trial not prejudiced unnecessarily by extra costs, delays and adjournments. Further, if justice is to be properly administered, the courts are entitled to expect that relevant evidence has not been excluded.

It has been submitted to the Commission that in some instances large corporations are using confidentiality agreements, ostensibly designed to protect trade secrets and commercially confidential information, to prevent present or former employees from revealing serious misconduct.

The role of oral examinations

Oral examinations will be invaluable where a present or former employee has information about a serious civil wrong by the employer and through a compulsory process can be forced to disclose the information. However, if the employee is still well disposed to, under pressure from, or awaiting monies from, the employer, it has been suggested that such disclosure is likely to be reluctantly given and that the minimum possible information will be provided.

Protection for witnesses outside the oral examination process

It has been submitted to the Commission that in each of a number of important cases arising out of alleged corporate misconduct, there has been a former senior employee prepared to provide a witness statement about the misconduct who was unable to do so because the employer asserted that doing so would conflict with express or implied obligations of confidence arising out of the contract of employment. Where such persons voluntarily agree to provide relevant information it has been suggested to the Commission that it is not necessarily appropriate for this to be required to be done through the oral examination process.

The taking of a detailed statement from such a witness in complex, large litigation can take many weeks of time even when done in a lawyer's office rather than in an oral examination process. It would involve extra expense, time, and difficulty if such voluntary statements are required to be taken in a formal oral examination involving all relevant parties.

Apart from the questions of efficiency and cost, arguably such a statement will also be taken much more effectively, if not taken in the 'adversarial' context of an oral examination.

It has also been suggested that there is also likely to be greater candour if the person is permitted to communicate without the former employer, or employer's legal representative, looking on, interjecting and having the answers recorded for later cross-examination.

The defendant is likely to be given advance notice of any evidence proposed to be called from the person in question as any witness statement will usually be required to be exchanged well before any hearing, and any cross examination can occur when or if the witness is later called. Additionally, the other party would have the opportunity to orally examine the person before trial.

Draft proposals:

Options for reform include:

(a) A statutory provision making it clear that relevant information may be provided in connection with litigation, prior to trial, notwithstanding any confidentiality constraint that might otherwise prevent the disclosure or use of such information;

(b) Legislative clarification of what amounts to an 'iniquity' so that information relevant to the existence or non-existence of such 'iniquity' can be communicated and used for the purpose of litigation notwithstanding any confidentiality constraint;

(c) The introduction of a new provision entitling a party to subpoena a person with relevant information, prior to trial, and providing a mechanism for conferring with such person, *ex parte*, to ascertain relevant information.

Each of these options is intended to be applicable only to persons who may be subject to confidentiality constraints but who, but for such constraints, would voluntarily disclose the information sought. This includes persons who may only agree to voluntarily disclose information provided that they are compensated for the time involved.

None of the options is intended to be applicable to persons who (independently of any confidentiality constraint) are not prepared to voluntarily disclose information.

The Commission's proposed procedure in relation to oral examinations would be able to be used in respect of persons who were not 'co-operative'.

Each of the draft options would address the present confidentiality 'problem' with 'consenting' former or current employee witnesses or potential witnesses, particularly in large civil litigation, would complement the proposed new oral examination regime and, in some circumstances, would be of more practical benefit than the proposed new oral examination deposition regime.

The Commission seeks further submissions on (a) the question of whether or not confidentiality constraints are at present preventing relevant evidence from being obtained in civil litigation and (b) if so, what reforms, if any, should be implemented.

8. ONGOING REVIEW AND CIVIL JUSTICE REFORM

Our terms of reference ask us to have regard to the aims of the *Attorney-General's Justice Statement: New directions for the Victorian Justice System 2004-2014*, and in particular the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions.

The Attorney-General's Justice Statement identified the following potential areas for procedural reform (among others):

- Reform the processes for commencing litigation. This may include common commencement forms between jurisdictions and the inclusion of the plaintiff's statement of the claim with the originating process.
- Greater harmony between the rules of all three Victorian court jurisdictions should be the goal, provided that they did not encumber the lower jurisdictions with processes more appropriate to more complex litigation.

Our terms of reference also ask us to identify the process by which the courts, the legal profession and other stakeholders may be fully involved in any further detailed review of the rules of procedure.

The commission has developed some draft proposals relating to:

- The rule-making process;
- The simplification and modernisation of court rules; and
- Mechanisms for ongoing reform of the civil justice system.

8.1 The rule-making process

The rules that govern civil procedure in Victorian courts are made by the courts themselves as subordinate legislation. Each court delegates its rule-making power to a rules committee which then makes recommendations to the judges or magistrates for any rule change. The legislation does not prescribe who the members of the rules committees should be, or how their deliberations should be conducted. During the course of our consultations concerns have been expressed about the inefficiencies inherent in having three separate committees considering amendments and reforms to identical, or substantially similar, rules.

Although it would be desirable in principle to have a single rules committee to review and amend rules in all three courts, as is the case in New South Wales, Queensland and the ACT, because each court deals with discrete practice areas, the commission believes it makes sense to retain separate rules committees (subject to the proposals below).

The courts' governing legislation should make provision for the constitution and operation of each court's rules committee. The Chair of each rules committee could be made an ex-officio member of each other committee entitled to attend

the other committees' meetings. This would provide for increased communication between the three jurisdictions.

In some jurisdictions provision is made for the appointment of consumer or non-legal representatives. For example, the Civil Procedure Rules Committee established in England to make rules of court governing the practice and procedure in the civil division of the Court of Appeal, the High Court and the county courts (*Civil Procedure Act 1997*) comprises representatives of not only the courts and the profession, but also a consumer affairs member and a lay advice member. Given the proposal for broad representation on the Civil Justice Council (see below), we do not consider any need to recommend such a provision in relation to the rules committees.

The rules committees should meet jointly when considering rules and procedures which apply in more than one jurisdiction. This may involve a joint meeting of two or three rules committees.

The Commission notes that the UK Civil Procedure Rules Committee (referred to above) has recently resolved to conduct open public meetings and to allow people to ask questions and make contributions at their meetings. In the USA meetings of the Federal rules committees are open to the public and widely announced. In so far as this does not happen at present, the rules committees may wish to consider whether it would be useful to them, and more transparent, if meetings were open to be attended by non-members with a relevant interest.

The power to make rules should be exercised consistently with the courts' overriding purpose,[144] that is, to facilitate the just efficient, timely and cost effective resolution of the real issues in dispute in each matter.

8.2 The simplification, modernisation and harmonisation of court rules

Other jurisdictions in Australia have recently undertaken major reviews of their court rules in order to achieve greater simplification, modernisation and harmonisation. New South Wales, Queensland and the ACT now have a single set of rules that apply in all courts.[145] In 2006 a new set of rules came into effect in South Australia.[146]

The commission is not persuaded that a uniform set of rules is required in Victoria, but does believe that steps should be taken to achieve a greater level of harmonisation between the rules of each court. The Magistrates' Court is already in the process of re-formulating its rules to align them with the rules of the Supreme and County Courts. Harmonisation should not compromise the procedures adopted in particular courts or subject areas to achieve specific objectives, for example the procedures for dealing with small claims in the Magistrates' Court.

144 As proposed in the Exposure Draft dated 28 June 2007, 15-17.
145 *Uniform Civil Procedure Rules 2005* (NSW), *Uniform Civil Procedure Rules 1999* (Qld), *Courts Procedures Rules 2006* (ACT).
146 *Supreme Court Civil Rules 2006* (SA).

Draft proposals:

The legislation and rules of civil procedure in all three courts should therefore be reviewed to:

- achieve greater harmonisation between courts, including standardisation of the terminology used to describe procedural steps, and standardisation of court forms. In particular there should be one form for commencing proceedings and one for making interlocutory applications;
- simplify the structure and ordering of the rules;
- make greater use of plain English.

Each court should clarify the circumstances in which practice notes and directions are made, and consolidate and organise the content and publication of existing practice notes and directions.

8.3 Ongoing reform

Review and reform of the civil justice system is a complex undertaking, and must balance the rights and interests of a diverse range of participants, including litigants large, small and self-represented, the legal profession, government and the courts. Reform initiatives may have unforeseen consequences, or may require modification in light of practical experience. They should therefore be subject to ongoing review and evaluation to ensure their objectives are being met. The collection of relevant data is also required to inform the reform process.

The commission proposes the establishment of a new body to carry out these responsibilities. Similar bodies exist in different forms in England (the Civil Justice Council),[147] Canada (Canadian Forum on Civil Justice),[148] the USA (the Judicial Conference and its standing and advisory committees)[149] and, in a more limited capacity, New South Wales (Civil Procedure Working Party).[150] The English Civil Justice Council, established in accordance with the recommendations of Lord Woolf, plays a pivotal role in the development of civil justice policy. It brings all stakeholders together to debate possible reforms and attempts to reach agreement, often through mediation, on particular initiatives that are then presented to the courts and government for implementation.

Draft proposals:

A new body, called the Civil Justice Council, with ongoing statutory responsibility for review and reform of the civil justice system should be established. Its purpose would be to investigate ways to make the civil justice system more just, efficient, and cost effective.

147 See: www.civiljusticecouncil.gov.uk.
148 See: www.cfcj-fcjc.org.
149 See: www. www.uscourts.gov/judconf.html.
150 See: www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_aboutus.

The Civil Justice Council would have the following functions:

- To monitor the operation of the civil justice system generally
- To identify areas in need of reform
- To conduct or commission research
- To bring together various stakeholder groups with a view to reaching agreement on reform proposals, including through the use of mediation and other methods
- To recommend reforms, including amendments to statutory provisions and rules governing the civil justice system
- To assist in the education of the community about developments in all aspects of the civil justice system

The Civil Justice Council should also assist in the implementation of the reforms proposed by the Victorian Law Reform Commission and monitor the impact of such reforms, which may include:

- Developing specific pre-action protocols for each relevant area (for example, commercial disputes, building disputes, medical negligence, general personal injury, etc).
- Monitoring the operation of the protocols and general standard of pre-action conduct so that any modifications considered necessary in the light of practical experience can be implemented.
- Overseeing and developing further the operation of pre-trial examinations, including:
  - developing a general code of conduct in respect of examination conduct;
  - developing codes of practice to govern the use of pre–trial examinations in particular litigation contexts;
  - overseeing the establishment of education and training programmes to assist practitioners and other interested parties to develop good examination practices; and
  - reviewing the provisions relating to pre–trial examinations after twelve months of operation, with a view to assessing their effectiveness and costs consequences, and considering possible changes to the existing scheme. The Council should also consider and make recommendation upon the question of whether or not pre–trial examinations should be permissible in matters within the jurisdiction of the Magistrate's Court, and if so, whether any modifications to the general scheme are required in relation to such matters.
- Constituting a specialist Costs Council to oversee and monitor issues to do with legal costs.
- Reviewing ADR processes in all three courts.
- Scrutinising the operation of the Justice Fund.
- Assisting in a review of the rules of civil procedure.

The Civil Justice Council should comprise members from a broad range of participants in the civil justice system and stakeholder groups, including:

- Members of the judiciary
- Members of the legal profession
- Public servants concerned with the administration of the courts
- Persons with experience in and knowledge of consumer affairs
- Persons with experience and expertise relevant to particular types of litigation (for example businesses, insurers, self-represented litigants or plaintiffs).

The chair and members of the Civil Justice Council should be appointed by the Attorney-General after calling for nominations from the courts and relevant stakeholder groups.

Members of the Civil Justice Council would be appointed for their expertise and experience, and not necessarily as representatives of the entities/organisations for which they work.

Members of the Civil Justice Council would serve in an honorary capacity but would be reimbursed for expenses etc. There would be a secretariat comprising a chief executive officer and support staff.

The Civil Justice Council should be able to co-opt people to form committees to focus on specific areas under review.

The Civil Justice Council should be entitled to an allocation of funds from the Justice Fund to assist it to carry out its functions.

COMMENTS AND SUGGESTIONS

The commission is seeking comments and suggestions concerning the matters referred to above. These should be submitted to: Victorian Law Reform Commission, GPO Box 4637 Melbourne Victoria 3000; or DX 144 Melbourne Victoria; or **law.reform@lawreform.vic.gov.au**. Comments should be submitted by no later than **28 September 2007**.