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Maintenance and Champerty in Western Australia

Project 110: Discussion Paper

THE LAW REFORM COMMISSION *of* WESTERN AUSTRALIA

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1. INTRODUCTION

1.1 Terms of Reference

On 16 July 2018, the Attorney General asked the Law Reform Commission of Western Australia (Commission) to 'provide advice and make recommendations for consideration by the Government as to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia and any consequential amendments, including:

1. whether a statutory provision is required to preserve the rule that contracts giving effect to arrangements for maintenance and champerty are void and/or illegal as being contrary to public policy;

2. strategies for mitigating the adverse impacts, if any, of abolishing the torts; and

3. any other related matter'.

The Attorney General also observed that the Commission's Final Report on the present reference would operate as a supplementary report to the 2015 *Representative Proceedings* Report (Project 103).

1.2 Background to Reference – *Representative Proceedings* Report

In July 2011, the then Attorney General asked the Commission to examine and report on whether, and if so in what manner, the principles, practices and procedures pertaining to representative proceedings being commenced in the Supreme Court of Western Australia required reform.

Representative proceedings, also known as group proceedings or class actions, are proceedings in which a person (known as the representative party or representative plaintiff) brings an action on behalf of a class of persons (known as the class members or group members). Australia's first legislative representative proceedings regime, as distinct from a regime located in the rules of Court, was introduced in 1992 and can be found in Part IVA of the *Federal Court of Australia Act 1976* (Cth).

The Commission made seven recommendations in the final *Representative Proceedings* report, which was tabled in Parliament on 21 October 2015. Most of these related to the establishment of a legislative representative proceedings regime in Western Australia and the form that such a regime ought to take: the Commission ultimately recommended that Western

Australia legislate in similar terms to Part IVA of the *Federal Court of Australia Act 1976* (Cth), with several modifications.[1]

The seventh recommendation was: 'that, in conjunction with any implementation of the above recommendations, consideration be given by government to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia'.[2] The present reference is therefore an addendum to the previous reference; it takes up and considers one issue which was previously left undecided.

A Bill to adopt the Commission's other recommendations regarding the implementation of a legislative representative proceedings regime was introduced in the Western Australian Parliament on 26 June 2019.[3]

1.3 Definitions and scope of reference

The torts of maintenance and champerty can be traced back to the *Statute of Westminster the First* (3 Edw I c 25 and 28) of 1275,[4] statutes which were inherited by Western Australia from the United Kingdom.

Relevantly, the Commission was asked in 1978 to review the Imperial Acts in force in Western Australia at the time of its founding and to recommend which of these should be repealed and which should be re-enacted. In the final report in 1994, the Commission identified 3 Edward I chapters 25 and 28 as meriting repeal, and noted that champerty and maintenance remained torts at common law in Western Australia.[5]

Maintenance is defined as 'assistance or encouragement, by a person who has neither an interest in the litigation nor any other motive recognised as justifying the interference, to a party to litigation' and champerty as 'a particular form of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or

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1 The Commission recommended that: (1) Western Australia enact legislation to create a scheme in relation to the conduct of representative actions; (2) the legislative scheme be based on Part IVA of the *Federal Court of Australia Act 1976* (Cth); (3) Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) be retained; (4) the legislative scheme include a provision based on s 33T of Part IVA of the *Federal Court of Australia Act 1976* (Cth) but that it be expanded so that a Court may remove and substitute a representative party where it is in the interests of justice to do so; (5) a provision equivalent to s 158(2) of the Civil Procedure Act 2005 (NSW) be included in the legislative scheme; and (6) a provision equivalent to s 166(2) of the Civil Procedure Act 2005 (NSW) not be included in the legislative scheme. See Commission, *Project 103: Representative Proceedings* (2015), p. 12.

2 Commission, *Project 103: Representative Proceedings* (2015), p. 12.

3 See the Civil Procedure (Representative Proceedings) Bill 2019, which can be accessed at http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=53A69D743089CB82482584250017E4EE

4 ALRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report*, p. 51.

5 Commission, *United Kingdom Statutes in Force in Western Australia* (Project 75), Final Report, 1994, p. 17.

subject matter of the action'.[6] That is, maintenance takes place where a person finances litigation undertaken by another party, and champertous arrangements are those in which the maintainer is to receive a share of any of the damages ultimately awarded by the Court.[7]

These torts, which were also criminal offences for many centuries,[8] developed in response to the activities of corrupt nobles using the legal system for their own personal benefit. Briefly:

> From the time of Henry VI to the death of Richard III there was much disorder in the realm and the authority of the Crown seemed to have collapsed. Barons abused the law to their own ends and it was common for rich lords to profit from supporting litigation and fostering quarrels. Bribery, corruption and intimidation of judges and justices of the peace became widespread. Perjury was not a crime and thus for a price false evidence could easily be procured. The barons kept bands of retainers in their service which gave them the brute power necessary to protect their excesses. However with the strong monarchy of the Tudors the Courts began to denounce maintenance and gave the statutes prohibiting it a wide effect.[9]

The language used to define maintenance and champerty carries overtones of moral judgment; it is not simply the *funding* of an action that has been considered inappropriate, but the *meddling* or *stirring up* of such conflict: maintenance has been characterised as 'intermeddling with litigation in which the intermeddler has no concern',[10] while champerty was 'maintenance aggravated by an agreement to have a part of the thing in dispute'[11] or 'a species of maintenance; but…a particularly obnoxious form of it'.[12] A person who routinely meddled in the litigation of others was engaging in 'barretry' and was 'a common mover or stirrer up or maintainer of suits'.[13]

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6 *Halsbury's Laws of Australia*, Vol. 6, para. 110-7135 and 110-7140, cited in *In the matter of Movitor Pty Ltd (Receiver and Manager Appointed) (in liquidation) Sims, A M (Applicant)* (1996) 64 FCR 380 per Drummond J.

7 The degree of involvement of the maintainer in the litigation is also a relevant consideration. The Supreme Court of Queensland observed recently that 'in order for there to be a consideration of a finding of champerty then it must be not only a provision of funds in return for a percentage interest in the proceeds of the main litigation, but also an entitlement to become "involved" in the conduct of the litigation in the sense of having a degree of control in the litigation'; see *Murphy & Ors v Gladstone Ports Corporation Ltd* [2019] QSC 12 per Crow J at [28].

8 VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 16.

9 D. Reichel, 'The law of maintenance and champerty and the assignment of choses in action: *Trendtex Trading Corporation v Credit Suisse*' (1983) 11 *Sydney Law Review*, p. 166, accessed at http://classic.austlii.edu.au/au/journals/SydLawRw/1983/11.pdf, citing W. Windeyer, *Lectures on Legal History* (2nd ed., revised), 1957, at pp. 151-152.

10 *Neville v London Express Newspaper Ltd* [1919] AC at [368] and [382], cited in ALRC, *Integrity, Fairness and Efficiency,* p. 51.

11 *Wild v Simpson* [1919] 2 KB 544, 562, cited in ALRC, *Integrity, Fairness and Efficiency*, p. 51.

12 *Trendtex Trading Corporation v. Credit Suisse* [1980] 3 All E.R. 721 at 741 per Lord Denning, M.R., cited in Reichel, 'The law of maintenance and champerty and the assignment of choses in action: *Trendtex Trading Corporation v Credit Suisse*' (1983) 11 *Sydney Law Review*, p. 166.

13 *The Case of Barretry* (1588) (30 Eliz) 8 Rep 36; 77 ER 5, cited in ALRC, *Integrity, Fairness and Efficiency*, p. 51.

These torts are only actionable by a person who is caused special damage by the intermeddling[14] and neither of the torts is a defence to an action.[15] The public policy concern underlying the maintenance and champerty (as both torts and crimes) has been the concern that 'an unscrupulous funder might encourage the plaintiff to bring an unmeritorious claim or attempt to influence the proceedings for their own end' while at the same time 'the funder would assume no liability for costs if the claim failed, leaving the defendant with no recourse if the plaintiff is impecunious'.[16] The courts have also been concerned to protect vulnerable litigants, with Lord Atkin in *Wild v Simpson* observing: '…the offence of maintenance, apart from the interest of the public generally, is directed primarily, not at the client maintained, but at the other party to the litigation. He has the right to be free from litigation conducted by the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant'.[17]

It should be noted that only *unjustified* subsidisation of legal action will constitute maintenance,[18] as expressed in Lord Denning MR's definition of unlawful maintenance as 'improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse'.[19] Prohibitions on subsiding legal actions are not absolute and multiple exceptions have emerged. These include 'statutory exceptions; the provision of assistance out of motives of friendship, family relationships, charity or compassion; and the provision of assistance by landlords to tenants and by employers to employees' as well as exceptions in 'special fields like insurance, trade unions and trade associations and persons with a common interest'.[20]

These torts remain on foot in Queensland and the Northern Territory, as well as in Western Australia and some overseas jurisdictions such as New Zealand and Canada.

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14 *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 at [207].

15 *Bandwill Pty Ltd v Spencer-Laitt* [2000] WASC 210 at [71], citing *Martell v Consett Iron Co Ltd* [1955] Ch 363.

16 ALRC, *Integrity, Fairness and Efficiency,* p. 59.

17 Atkin LJ in *Wild v Simpson* [1919] 2 KB 544 at 563, cited in *Clairs Keeley (A Firm) v Treacy & Ors* [2003] WASCA 299 per Templeman J at [62].

18 New Zealand Law Commission/ Te Aka Matua o te Ture, *Subsidising Litigation,* May 2001, p. 3.

19 Lord Denning went on to say that 'the common law rarely admits of any just cause or excuse' for champerty, for the 'common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law…' See *Re Trepca Mines Ltd (No 2)* [1963] 1 Ch 199, 217 and 219, cited in *Bandwill Pty Ltd v Spencer-Laitt* [2000] WASC 210 at [26]. However, see also the discussion of 'technical champerty' or 'lawful champerty' in *Bandwill Pty Ltd v Spencer-Laitt* [2000] WASC 210 per Templeman J at [45]-[46].

20 Callinan and Heydon JJ in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 at [253], citing, respectively, *Legal Profession Act 1987* (NSW), ss 186-187; *Corporations Act 2001* (Cth), s 477(1)(c); *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11 per Lord Coleridge CJ; *Harris v Brisco* (1886) 17 QBD 504 at 513 per Lord Esher MR, Bowen and Fry LJJ; *Alabaster v Harness* [1895] 1 QB 339 at 343 per Lord Esher MR; *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11 per Lord Coleridge CJ; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101; *Stevens v Keogh* (1946) 72 CLR 1; *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 386-387 per Danckwerts J.

The Terms of Reference for the present matter require the Commission to consider matters of public policy and strategy. Specifically, the Commission has been asked to consider:

- whether the torts of maintenance and champerty should be abolished;
- whether the law in relation to their operation should be otherwise modified;
- whether a statutory provision is required to preserve the rule that contracts giving effect to arrangements for maintenance and champerty are void and/or illegal as being contrary to public policy;
- strategies for mitigating the adverse impacts, if any, of abolishing the torts; and
- any other related matter.

Relevantly, the *Law Reform Commission Act 1972* (WA) also requires the Commission to examine the law to which a reference relates for the purposes of ascertaining and reporting whether that law —

a) is obsolete, unnecessary, incomplete or otherwise defective; or
b) ought to be changed so as to accord with modern conditions; or
c) contains anomalies; or
d) ought to be simplified, consolidated, codified, repealed or revised,

and, if appropriate, whether new or more effective methods for the administration of that law should be developed.[21]

Given the obvious relevance of maintenance and champerty to litigation funding, current debates surrounding regulation of the funders are also briefly considered.

1.4 Methodology

This Discussion Paper considers relevant case law, commentary and reports from Western Australia and other relevant jurisdictions in order to determine, to the extent possible, the impact of the torts of maintenance and champerty in contemporary Western Australia and the policy options open to government in relation to these torts.

Particular regard is had to two recent reports: the Victorian Law Reform Commission's report on *Access to Justice – Litigation Funding and Group Proceedings* (March 2018) (VLRC Report) and the Australian Law Reform Commission's report on *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (January 2019) (ALRC Report). These reports both have a considerably broader ambit than the current reference, but each examines issues relating to access to justice and litigation funding that are directly relevant to contemporary debates about the torts of maintenance and champerty.

[21] *Law Reform Commission Act 1972* (WA), s 11(4).

The Discussion Paper also poses questions about potential courses of action in order to elicit detailed responses from stakeholders.

1.5 Next steps

The Commission welcomes your submission and response.

Anyone interested in this review now has the opportunity to make a submission in response to this Discussion Paper, including those who may already have been approached by the Commission. A number of issues and questions are set out in this Discussion Paper to guide those wishing to make a submission. All submissions will be carefully considered.

The Commission may also seek to directly engage with relevant stakeholders prior to the finalisation of its recommendations in the Final Report.

The closing date for submissions is **Friday, 1 November 2019**.

Please send your submission to the following email address: lrcwa@justice.wa.gov.au

The Commission's preference is that submissions are emailed to the above address. However, submissions can be posted to:

> Law Reform Commission of Western Australia
> Level 23, David Malcolm Justice Centre
> 28 Barrack Street
> PERTH WA 6000
> Australia

Law reform is a public process. The Commission assumes that any submissions on or responses to this Discussion Paper are not confidential. The Commission may quote from or refer to your comments in whole or in part and may attribute them to you, although will usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, please clearly identify which information in your submission is confidential and the Commission will endeavour to protect that confidentiality, subject to the Commission's other legal obligations.

2. REASONS FOR REVIEW

2.1 *Representative Proceedings* Report

As noted at [1.2] above, the Commission's 2015 *Representative Proceedings* Report recommended, among other things, that government give consideration to 'whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia'. This recommendation emerged from the submissions provided in response to the *Representative Proceedings* reference. The Commission noted that 'a number of interested stakeholders' had raised the issue of maintenance and champerty in their submissions. For instance, the Law Council of Australia had observed that although these torts had been abolished in the Australian Capital Territory, New South Wales, South Australian, Victoria and the United Kingdom, their status was not clear-cut in Western Australia. The Law Society of Western Australia considered that it would be appropriate to expressly abolish the torts of maintenance and champerty in Western Australia in order to address the possibility of forum shopping.[22]

The Commission expressed the view that 'legislative abolition of the torts of maintenance and champerty or, at least, modification of the law in relation to their operation, may have merit' and that such a course of action would arguably be 'consistent with the objectives of enhancing access to justice and ensuring that Western Australia is utilised as an appropriate forum for proceedings'.[23] However, the Commission was conscious that this issue had not been generally canvassed in the Discussion Paper or submissions, and that a number of potentially competing policy considerations and views should be considered before a final decision was made. It had, therefore, not formed a final view on the issue.[24]

Notwithstanding the previously expressed view that abolition of or amendment to the torts of maintenance and champerty may have merit, the Commission maintains an open mind on these questions and welcomes submissions from all interested parties. In particular, the Commission is conscious that matters pertaining to access to justice and to the protection of parties from intermeddling in legal actions are of relevance to all Western Australians and would welcome submissions from outside the legal profession.

2.2 Maintenance and champerty – the contemporary context

2.2.1 Access to justice

A major impetus behind calls to abolish maintenance and champerty in Western Australia is to enhance access to justice, particularly in the context of representative proceedings, by removing an impediment to litigation funding.

[22] Commission, *Project 103: Representative Proceedings* (2015), p. 58.

[23] Ibid, p. 58.

[24] Ibid.

Litigation funding arrangements typically involve a third party with no interest in a legal proceeding agreeing to fund some or all of a party's costs arising from the action in return for a share of the proceeds should the action be successful.[25] Such arrangements are the subject of some debate at present and were considered at length in the recent reports by the ALRC and VLRC referred to above at [1.4].

For centuries, maintenance and champerty made the kinds of services offered by litigation funders unlawful,[26] and the torts have long been criticised as impediments which unfairly prevent impecunious litigants from accessing the Court system. As long ago as 1787, the English philosopher and jurist Jeremy Bentham wrote:

> Whether, in the barbarous age which gave birth to these barbarous precautions, whether, even under the zenith of feudal anarchy, such fettering regulations could have had reason on their side, is a question of curiosity rather than use. My notion is, that there never was a time, that there never could have been, or can be a time, when the pushing of suitors away from Court with one hand, while they are beckoned into it with another, would not be a policy equally faithless, inconsistent, and absurd.[27]

Bentham concluded that 'so long as the expense of seeking relief at law stands on its present footing, the purpose of seeking that relief will, of itself, independently of every other, afford a sufficient ground for allowing any man, or every man, to borrow money on any terms on which he can obtain it'.[28]

A series of cases has confirmed the legitimacy of litigation funding arrangements in Australia, and these cases are briefly discussed in Chapter 4 below. Most notably, in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*[29] ('*Fostif*') the High Court held (5-2) that third-party litigation funding arrangements, which involved a funder seeking out those who may have claims, and offering terms which not only gave the funder control of the litigation but also would yield significant profit for the funder, did not, either alone or in combination, constitute an abuse of process, or warrant condemnation as being contrary to public policy.[30] However, it should be noted that the Court's specific findings regarding the operation of maintenance and champerty do not apply to jurisdictions in which these torts still exist.

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25 ALRC, *Integrity, Fairness and Efficiency*, p. 49.

26 VLRC, *Access to Justice – Litigation Funding and Group Proceedings,* p. 16.

27 J. Bentham, *Defence of Usury, Shewing the Impolity of the Present Legal Restraints on the Terms of Pecuniary Bargains in a Series of Letters to a Friend. To Which is Added a Letter to Adam Smith, Esq; LL.D. on the Discouragements opposed by the above Restraints to the Progress of Inventive Industry,* D. Williams, 1788, pp. 158-159.

28 Ibid, pp. 166-167.

29 (2006) 229 CLR 386.

30 Ibid [88].

Private litigation funding is not the only option for an impecunious would-be claimant or claimants. Other possibilities include funding by the legal representative on a 'no win no fee' basis, under which the fee paid to the legal representative by a successful plaintiff is calculated by reference to the overall professional costs incurred, and not to the quantum of any settlement or judgment. In this way, 'no win no fee' arrangements avoid the tort of champerty while also adhering to the rule prohibiting lawyers from charging contingency fees. A series of recommendations has been made to lift this prohibition,[31] but no action has been taken to do so at the time of writing. It must be borne in mind that plaintiffs who enter into 'no win no fee' arrangements are still liable for costs,[32] and the Victorian Law Reform Commission has recently suggested that these arrangements are increasingly expensive and risky for the law firms themselves.[33] Plaintiffs may also take out adverse costs insurance, also known as after-the-event insurance, so that if a party's case is unsuccessful and they are required to pay the other side's costs, the insurer will cover these costs.[34] There are also some avenues to obtain legal aid funding for civil litigation, with a proportion of any settlement to be repaid if an action is successful, but these are limited.[35]

Notwithstanding these other possibilities, private funders play an increasingly significant role in litigation, particularly in the context of representative proceedings. In the absence of such assistance representative plaintiffs are vulnerable to potentially devastating adverse costs orders.[36] Australia's first legislative representative proceedings regime – Part IVA of the *Federal Court of Australia Act 1976* (Cth) – had its origins in a report of the Australian Law Reform Commission. However, the same report's recommendation that a public fund be

[31] The Productivity Commission's *Access to Justice Arrangements* Report recommended allowing contingency fee arrangements; see Productivity Commission, *Access to Justice Arrangements,* Inquiry Report No. 72, 5 September 2014, Vol 2, Recommendation 18.1, p. 329. More recently, the Australian Law Reform Commission has recommended that statutes regulating the legal profession should permit solicitors who are acting for the representative plaintiff in representative proceedings to enter into 'percentage-based fee agreements', with certain limitations; see ALRC, *Integrity, Fairness and Efficiency*, Recommendation 17. Similarly, the Victorian Law Reform Commission recommended that the Victorian Attorney-General propose to the Council of Attorneys General that the Council: (a) agree in principle that legal practitioners should be permitted to charge contingency fees subject to exceptions and regulation and (b) agree to a strategy to introduce the reform, including the preparation of draft model legislation that regulates the conditions on which contingency fees may be charged and maintains the current ban in areas where contingency fees would be inappropriate; see VLRC*, Access to Justice – Litigation Funding and Group Proceedings,* Recommendation 7.

[32] Under a 'no win no fee' arrangement, if the party's claim is unsuccessful they will not pay any legal fees, but they will still be liable for costs. The Productivity Commission has suggested that '[t]he term "no win no fee" can be somewhat misleading'; see Productivity Commission, *Access to Justice Arrangements,* Inquiry Report No. 72, 5 September 2014, Vol 2, p. 603.

[33] The VLRC observes that 'Few legal firms have the financial capacity to provide their services on a 'no win, no fee' basis in a class action. Where they do, the representative plaintiff will be relieved of paying their own legal costs if they lose but will remain liable for adverse costs and possibly disbursements'; see *VLRC, Access to Justice – Litigation Funding and Group Proceedings*, p. 14.

[34] If the party's case is successful, then ordinarily the cost of the insurance will be deducted from the compensation paid.

[35] In a Western Australian context, information on the Civil Litigation Assistance Scheme can be found at https://www.legalaid.wa.gov.au/get-legal-help/get-lawyer-run-your-case/civil-litigation-assistance-scheme.

[36] ALRC, *Integrity, Fairness and Efficiency*, p. 49.

established to protect representative plaintiffs from adverse costs orders was not adopted.[37] Professor Vincent Morabito, a leading authority on representative proceedings, access to justice and the regulation of litigation funders, has noted: 'In many circumstances, it would not be financially rational for aspiring class representatives to institute class actions, unless they were able to shift to others the liability for (a) the fees and disbursements of the class representative's lawyers; (b) any costs awarded to the defendants in the event of a loss for the class; and (c) any security for costs orders granted to the defendants'.[38]

In his decision in *Fostif*, Kirby J observed that litigation funding was often critical to representative proceedings and set out the circumstances peculiar to such actions:

> In considering accusations that the funding arrangements… amounted to an abuse of process, it is necessary to keep in mind the particular demands inherent in representative proceedings: the need to marshal effectively substantial resources; to gather voluminous evidence; to retain and pay competent counsel over a significant period; often to provide in advance substantial security for costs; to attend both to the general issues and to those particular to identified subcategories and individual cases; and to prove consequential losses usually with the evidence of several experts. In proceedings such as the present, faced with such daunting requirements, the ordinary tobacco retailer would commonly give up.[39]

Kirby J suggested that facilitating representative proceedings would necessitate 'less hostility to litigation funding under judicially supervised conditions', so that parties with legal claims in the same interest could 'be organised into one action rather than fobbed off with the theoretical (but practically unavailable) entitlement to bring a multitude of individual actions separately'.[40]

In the 2014 *Access to Justice* Report, the Productivity Commission noted that litigation funding 'can promote access to justice by providing finance for the prosecution of genuine claims by plaintiffs who would otherwise lack the resources to proceed'. The report conceded that as 'funders choose cases based on commercial viability, their involvement favours cases with relatively high costs, large payouts and low risk and is unlikely to improve access in relation to rights-based, non-monetary claims'. However, the Productivity Commission argued that 'the access benefits of litigation funding should not be underplayed, particularly in relation to complex matters where the initial costs of investigation and collecting expert evidence may be substantial and the defendant is well resourced'.[41]

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37 ALRC, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) rec 3.09, discussed in ALRC, *Integrity, Fairness and Efficiency,* p. 49.

38 V. Morabito, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(5) *Sydney Law Review,* p. 31.

39 *Fostif* (2006) 229 CLR 386 per Kirby J at [137].

40 Ibid per Kirby J at [142].

41 Productivity Commission, *Access to Justice Arrangements,* Inquiry Report No. 72, 5 September 2014, Vol 2, p. 607.

The recent reports by the ALRC and VLRC referred to above at [1.4] emphasised the limits of litigation funding in providing access to justice, with the ALRC also observing that class action regimes more generally 'are not a panacea'.[42] The VLRC noted that commercial litigation funding has inherent limitations created by the funder's need to make a profit: 'although they have supported claims for altruistic reasons, it would be unsustainable for them to give priority to public benefit over commercial considerations'.[43] The VLRC noted further that despite some exceptions, 'a claim for less than $1 million is unlikely to be funded by a commercial litigation funder'.[44] This baseline increases significantly when it comes to multi-party claims: the VLRC cited a submission from Maurice Blackburn Lawyers to the effect that it was almost impossible to obtain litigation funding for a class action involving claims of under $30 million.[45]

However, in the absence of the public fund recommended by the ALRC over two decades ago,[46] litigation funding does enable many claims to be brought that would otherwise not reach the Courts. Professor Morabito has observed on the basis of extensive research that while 'approximately 75 per cent of all the federal class actions filed to date, supported by funders, were either brought on behalf of shareholders or investors, most of these shareholder and investor class actions would probably not have been filed in the absence of litigation funders'.[47] Professor Morabito noted further that the 'support of litigation funders in these two categories of class actions has enabled a number of plaintiff law firms to run, on a no win, no fee basis, several class actions on behalf of vulnerable people'.[48]

In a submission to the Commission's *Representative Proceedings* project, the Law Society of Western Australia (Law Society) emphasised that 'litigation funders play a significant and important role in ensuring that claimants can actually utilise the [representative proceedings] legislative regime aimed at giving them greater access to justice' and that 'any attempt to improve Western Australia's perception as a representative proceedings "friendly" jurisdiction should occur with an eye on improving the environment in which litigation funders are expected to operate'.[49] In the Law Society's view, the status of maintenance and champerty in Western Australia were of particular relevance. The submission concluded:

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[42] ALRC, *Integrity, Fairness and Efficiency,* p. 237. The ALRC report also focused on other means of addressing wrongs affecting multiple people – it included a chapter on 'Regulatory Collective Redress' and recommended that Commonwealth regulators of consumer products and services (including financial and credit products and services) be equipped with regulatory redress powers; see ALRC, *Integrity, Fairness and Efficiency,* pp. 235-255.

[43] VLRC*, Access to Justice – Litigation Funding and Group Proceedings*, p. 22.

[44] Ibid.

[45] Ibid, p. 23.

[46] ALRC, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) rec 3.09, discussed in ALRC, *Integrity, Fairness and Efficiency,* p. 49.

[47] Professor Vincent Morabito, cited in 'Bankrolling Justice', *Lawyers Weekly,* 2 May 2018, accessed at https://www.lawyersweekly.com.au/biglaw/23154-bankrolling-justice.

[48] Ibid.

[49] Law Society of Western Australia, Submission, 'Representative Proceedings', Commission Discussion Paper 103, February 2013, p. 8. Accessed at https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/submission-law-reform-commission-representative-proceedings-may-2013.pdf.

> In NSW, Victoria, South Australia and the ACT, where the crimes and torts of maintenance and champerty have been abolished by legislation, litigation funders can comfortably finance representative proceedings without uncertainty and without exposure to a risk that the proceeding will be stayed for an abuse of process…the possibility of forum shopping being driven by a litigation funder will continue to exist while maintenance and champerty remain a tort in Western Australia but not in other jurisdictions. One of the Society's members has advised of firsthand experience of a litigation funder opting to commence representative proceedings in NSW, rather than Western Australia (to which a closer nexus lay), due to the uncertainty that results from maintenance and champerty continuing to be a tort in Western Australia (and the opposing clarity of the position in NSW).[50]

Ultimately the Law Society considered that the torts of maintenance and champerty ought to be expressly abolished by Parliament at the time legislation to introduce a representative proceedings regime based on the federal scheme was passed in order 'to ensure that Western Australia is on an equal footing with the other States'.[51]

While the broad thrust of contemporary opinion appears to align with the Law Society's view as set out above, counter-arguments must also be acknowledged. There will be those who contend that the presence of the torts of maintenance and champerty in the legal landscape properly encourages caution and restraint on the part of litigation funders – as well as discouraging third parties which might seek to foment litigation for ulterior motives. With respect to litigation funding in particular, there are concerns about the management of possible conflicts of interest, past situations in which plaintiffs have failed to benefit from a successful claim owing to the need to expend damages payments on legal and litigation funders' fees,[52] and the minimal regulation to which the industry is subject.

One judicial commentator has observed that although the High Court has ensured that the 'big picture is settled' with respect to litigation funding, this process has been 'not without disquiet'.[53] This disquiet is evident in the dissenting judgment by Heydon J in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*,[54] in which the majority held that it was not an abuse of process for a company to fund proceedings taken by an insolvent plaintiff without indemnifying the plaintiff for its costs in the event that it was unsuccessful. The majority

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50 Law Society of Western Australia, Submission, 'Representative Proceedings', p. 9.

51 Ibid. In the alternative the Law Society suggested: 'If the Commission is not minded to give consideration to or to deal with these issues as part of the present reference, the Society suggests that the Commission consider requesting a further reference from the Attorney-General in relation to this issue'.

52 For example, following the case of *Fitzgerald & Anor v CBL Insurance Ltd (No. 2)* [2015] VSC 176 all of the estimated $5 million that was to be paid to workers under the insurance claim was paid to settle solicitors' fees, fees paid to senior legal counsel and other professional fees. The largest payment, totalling almost $1.85 million, was made to a litigation funder. See L. Wood, 'Bringing litigation funders out from the background', 24 October 2017, accessed at https://www2.monash.edu/impact/articles/litigation-funding-vince-morabito/.

53 R. Barrett, 'Judicial views on litigation funding', Speech, INSOL International Annual Regional Conference Singapore, 15 March 2011, pp. 1 and 3, accessed at http://www.austlii.edu.au/au/journals/NSWJSchol/2011/7.pdf.

54 (2009) 239 CLR 75.

observed: 'The proposition that those who fund another's litigation must put the party funded in a position to meet any adverse costs order is too broad a proposition to be accepted'.[55] This reasoning was strongly countered by Heydon J, who contended: 'It is true that not every unfair and unjust outcome signifies an abuse of process. But the unfair and unjust outcome of these proceedings for the defendant was generated by an abuse of process: the maintaining of litigation a primary purpose of which was the gaining of a very large "success fee" for the funder without any effective indemnity from the funder for the plaintiff's liability to the defendant'.[56]

There is substantial disquiet, too, in the minority judgment by Callinan and Heydon JJ in *Fostif*. Their Honours contended: 'Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the Courts. They can readily be controlled, not only by professional associations but by the Court'.[57] Their Honours argued that litigation funders 'do not owe the same ethical duties' and 'play more shadowy roles than lawyers…Their role is not revealed on the Court file. Their appearance is not announced in open Court. No doubt sanctions for contempt of Court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners'.[58] Their Honours concluded:

> the function of Court proceedings is to provide a means of quelling real and active controversies that have arisen between persons who are unfortunate enough to have fallen into disputes with each other and that exist independently of and anterior to the commencement of the proceedings. The purpose of Court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the Court with the motive, not of resolving the disputes justly, but of making very large profits…public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially.[59]

This judgment expressed, as Professor Morabito notes, 'an extremely hostile characterisation of litigation funders',[60] as well as scepticism about representative proceedings more broadly.

[55] Ibid per French CJ, Gummow, Hayne and Crennan JJ at [43].

[56] Ibid per Heydon J at [112].

[57] *Fostif* (2006) 229 CLR 386 per Callinan and Heydon JJ at [266].

[58] Ibid.

[59] Ibid.

[60] V. Morabito, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29(5) *Sydney Law Review,* pp. 38-39.

For Jason Betts, a Partner at HSF, whether litigation funders create meaningful access to justice is one of the 'most controversial questions in the legal profession at this time'.[61] Indeed, for Justice Patrick Keane, the very phrase 'access to justice' has 'become an effective password allowing incursions upon the administration of justice which would, in the past, have been repulsed by the Courts'; in a 2009 speech His Honour singled out 'the commercial funding of large scale litigation by arrangements which give the funder a piece of the action and indeed control over the prosecution of the litigation' for particular critique.[62]

This Discussion Paper considers the differing perspectives on maintenance and champerty in the context of contemporary trends in litigation, including the involvement of funders.

2.2.2 The broader relevance of maintenance and champerty

It would be counterproductive for this Discussion Paper to focus too narrowly on litigation funding itself, as the torts of maintenance and champerty have wider relevance: they capture litigation which has been funded in order to inconvenience or oppress another person or to provide an indirect benefit for a third party.

The torts are little-used, and as such it is difficult to find examples of such conduct. However, such cases do occasionally arise. One of the rare situations in which the tort of maintenance was established, and the finding upheld on appeal, was the case of *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd*[63] in which it was held that that defendant had stirred up litigation between subcontractors and the plaintiff with the goal of causing financial loss to the plaintiff; even procuring the plaintiff's winding up so as to prevent prosecution of the plaintiff's claim against the defendant for damages for breach of contract. The relevant parts of the judgment can be briefly summarised as follows:

- the mere loan of a sum of money, which the lender knows will be used to finance litigation, does not by itself constitute maintenance as there 'must also be an intermeddling or a stirring up of litigation', however there was 'evidence aplenty' of such activity;[64]

- another necessary element of maintenance is that the maintainer's interference must be 'officious', that is, that there must be an 'absence on the part of the alleged maintainer of any legal justification for such interference by him';[65]

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61 Jason Betts, cited in 'Bankrolling Justice', *Lawyers Weekly,* 2 May 2018, accessed at https://www.lawyersweekly.com.au/biglaw/23154-bankrolling-justice.

62 P. A. Keane, 'Access to Justice and other Shibboleths', Paper presented at the JCA Colloquium in Melbourne, 10 October 2009, accessed at http://jca.asn.au/wp-content/uploads/2013/11/2009AccesstoJustice.pdf.

63 [1982] 2 Qd R 413.

64 *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1982] 2 Qd R 413 at 429 citing *Wiegand v. Huberman* (1979) 108 D.L.R. (3d.) 450.

65 Ibid at 429.

- the defendant's conduct 'went well beyond any legitimate and genuine interest' which the defendant had and the 'manifest object of the whole arrangement was to embarrass the plaintiff financially and if possible to procure its winding up and so prevent prosecution of the plaintiff's claim in this action for damages for breach of contract';[66] and

- 'an action for maintenance will not lie in the absence of proof of special damage', which was satisfied in this case.[67]

As the above case demonstrates, the possibility for legal actions to be funded by third parties purely to settle a grudge may seem far-fetched, yet it should not be overlooked.[68]

It is important to bear in mind that the torts at least provide a recourse for defendants who become the targets of such litigation. A 1994 New South Wales Law Reform Commission (NSWLRC) Discussion Paper on *Barratry, Maintenance and Champerty* in 1994 discussed this precise issue, observing that in the absence of a tort of maintenance, a defendant faced with malicious litigation funded by a third party has a higher evidentiary bar to meet in establishing the tort of abuse of process.[69] The NSWLRC speculated: 'Presumably, where a party brings an action for a proper purpose, but is maintained in that action by another with an ulterior purpose, no cause of action will lie'.[70] It is arguable that this outcome is appropriate: if Party A has a legitimate claim against Party B, why should Party A's source of funding disqualify it from prosecuting its claim?

The NSWLRC acknowledged that 'the public interest is better served by the facilitation of a genuine cause of action with potential to enforce rights than by punishing a maintainer for impure motives and consequently extinguishing such an action for lack of funds'.[71] However, it cautioned that the impact of maintained litigation on defendants should be borne in mind:

> a defendant against whom a maintained action is brought may be put to unnecessary expense defending the action brought against it by a plaintiff assisted by a "deep pocket". Injustice may occur if lack of funds leads to capitulation by the defendant. Of course the same scenario is

66 Ibid at 430.

67 Ibid at 431.

68 Venturing far beyond the jurisdiction of Western Australia, one striking example of litigation funded by a third party took place in Florida in 2016, when a popular North American blog, Gawker, was successfully sued by Terry Bollea, (retired professional wrestler Hulk Hogan) for publishing a sex tape featuring him. Gawker's losses were such that it went bankrupt and ceased publishing. The lawsuit was funded by Peter Thiel, a Silicon Valley billionaire who was alleged to have a grudge against the website. Although there was widespread condemnation of Gawker, the case led to some disquiet about the dangers inherent in allowing individuals with deep pockets to fund litigation– and, in particular, to silence critical media voices. See for instance J. Goldsmith, 'Peter Thiel settles with the ghost of Gawker Media', *Forbes*,25 April 2018, and R. Levick, 'Billionaires Club: The Peter Thiel-Gawker Debacle Has Troubling Repercussions For Press Freedoms', *Forbes*, 1 June 2016.

69 NSWLRC, Discussion Paper 36 (1994) *Barratry, Maintenance and Champerty*, [2.53].

70 Ibid.

71 Ibid.

> possible without a maintainer: parties in litigation may be financial unequals. Maintenance of an action in these circumstances is indicative of the much wider problem of potential denial of justice, already referred to above, brought about by the differing financial means of the parties. The potential for injustice, however, is exacerbated by the maintainer's lack of automatic accountability for costs, let alone damages, in the event of a victory by the other side.[72]

Relevantly, a 2001 report by the New Zealand Law Commission, which recommended that these torts *not* be abolished, observed: 'New Zealand lacks the unruly barons of late medieval England to whose misbehaviour the rule of public policy on which the torts of maintenance and champerty are founded was a reaction. But New Zealand commerce does not lack unruly corporations prepared to employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be'.[73]

As previously acknowledged, the prospect of third parties surreptitiously funding lawsuits in order to cause harm to a disliked entity or individual may appear remote. However, in considering the operation of the torts of maintenance and champerty it must be borne in mind that litigation may be used oppressively or with ulterior motives.

[72] Ibid.

[73] New Zealand Law Commission/ Te Aka Matua o te Ture (NZLC), *Subsidising Litigation,* 2001, p. 10.

3. THE LAW IN WESTERN AUSTRALIA

Maintenance and champerty are no longer crimes in Western Australia; they were not included in the *Criminal Code*, which was introduced to be a comprehensive statement of criminal law and replaces the common law.[74] In its previous reference on Imperial legislation which was in force in Western Australia at the time the colony was founded, mentioned briefly above at [1.3], the Commission recommended that chapters 25 and 28 of the *Statute of Westminster the First* should be repealed, noting: 'While tortious liability for maintenance and champerty still exists at common law, it is not a criminal offence in Western Australia'.[75]

As in Queensland and the Northern Territory, no legislation has been passed to abolish the torts of maintenance and champerty in Western Australia. There is judicial authority to the effect that there is 'no doubt that the tort of maintenance and champerty remains part of the law of Western Australia'.[76]

In *Fostif,* three of the judges making up the majority characterised the (unsuccessful) appellants' submissions as conflating the propositions that, first, the relevant funding arrangements constituted maintenance or champerty and that, secondly, for the maintainer to institute and continue proceedings, in the name of or on behalf of plaintiffs, was an abuse of process which could be avoided only by ordering a stay of the proceedings. Their Honours observed that the second of the above propositions 'assumed that maintenance and champerty give rise to public policy questions beyond those that would be relevant when considering the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement'.[77] Their Honours found that in jurisdictions where the torts of maintenance and champerty had been abolished by statute 'the premise for the second proposition identified is not valid' and stated that it was 'neither necessary nor appropriate to decide what would be the position in those jurisdictions where maintenance and champerty may remain as torts, perhaps even crimes'.[78]

Western Australia is not faced with a choice between retaining the torts of maintenance and champerty and allowing for litigation funding: funders can and do operate in this state, albeit under constraints. Further, as noted above at [2.2.2] maintenance and champerty have wider relevance beyond the issue of litigation funding. The question is, rather, about the kind of legal landscape in which litigation funding takes place. It has been suggested that the present

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[74] Section 4 provides, in part: 'No person shall be liable to be tried or punished in Western Australia as for an offence, except under the express provisions of the Code, or some other statute law of Western Australia, or under the express provisions of some statute of the Commonwealth of Australia, or of the United Kingdom which is expressly applied to Western Australia…'; see *Criminal Code* (WA), section 4.

[75] Commission, *United Kingdom Statutes in Force in Western Australia* (Project 75), Final Report, 1994, p. 17.

[76] *Chandler v Water Corporation* [2004] WASC 95 at [36]. This authority, of course, predates the High Court decision in *Fostif* (2006) 229 CLR 386, but see also *Freeman v Kellerberrin Farmers Cooperative Company Ltd* [2008] WASC 182 at [32]-[35].

[77] *Fostif* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [84].

[78] Ibid at [85].

situation results in a lack of clarity for litigation funders, rendering Western Australia a less attractive jurisdiction for representative proceedings and – critically – inhibiting access to justice. However, others will consider that the lack of a hard-and-fast rule on litigation funding is beneficial as it allows for scrutiny by the Court of each plaintiff's individual circumstances. As the Western Australian Court of Appeal has previously observed:

> It is acceptable for the litigation to be pursued by plaintiffs who, although funded by a third party, are acting in their own interests in the pursuit of justice in their respective causes, and are so acting on the advice of independent solicitors. It is *not* acceptable for the litigation to be pursued in such a way that the interests of the plaintiffs are subservient to those of the funder. That would be an abuse of process.[79]

The above observation was made during the course of a series of legal actions (known as *Clairs Keely Nos. 1, 2 and 3)* involving an underlying proceeding brought by investors suing to recover money lost as a result of what was termed the 'WA finance brokers scandal'. Many hundreds of plaintiffs entered into a funding agreement with a funder, a term of which required the plaintiffs to instruct a particular law firm to act for them in their individual actions. The funder had entered into a fee agreement with the law firm. Importantly, this fee agreement had not been disclosed to the plaintiffs. A defendant sought to stay proceedings, not by grounding their claim in the tort of maintenance but by arguing that the funding arrangements were champertous and offensive to public policy, and therefore constituted an abuse of process.[80]

The application for a stay was rejected by the Supreme Court at first instance, but was upheld on appeal in *Clairs Keeley No 1*. The applicants did not base their claim in tort but argued that the funding agreement was contrary to public policy. Pullin J (expressing the view of the majority) found as follows:

> the mere fact that proceedings are financed by third parties with no interest in the outcome, other than repayment and profit from the litigation, is not itself sufficient to invoke the jurisdiction of the Courts. The Court must be careful not to use its power to stay proceedings which will deny access to justice to a party who has sought to fund bona fide proceedings in a way which may be contrary to public policy, unless that which has been done amounts to an abuse of the Court's own process… The question to be answered is whether the Court's process is affected or threatened by the present arrangement, which provides for the maintenance of the respondents' litigation and for the division of spoils.[81]

The findings of the Court of Appeal which contributed to the initial and subsequent determination (in *Clairs Keeley Nos 1 and No 2*) that the proceeding constituted an abuse of process included:

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[79] *Clairs Keeley (A Firm) v Treacy & Ors* [2004] (No 2) WASCA 277 per Steytler, Templeman and McKechnie JJ at [71].

[80] Pullin J noted that 'The appellant relies not on the existence of the tort of maintenance and champerty but on the ground that the champertous arrangement in this case involves a risk to the administration of justice'; see *Clairs Keeley (A Firm) v Treacy & Ors* (No 1) [2003] WASCA 299 per Pullin J at [185].

[81] Ibid at [189].

- the funder had no interest other than to profit from the dispute;
- the share of the proceeds to be taken by the funder was seen as significant;
- the funding agreement operated as a de facto assignment to the funder of the plaintiffs' cause of action;
- the litigation was being pursued in such a way that the interests of the plaintiffs were subservient to those of the funder;
- the plaintiffs' solicitor was not sufficiently independent of the funder or alive to the possibility of abuse or conflict between the plaintiffs and the funder;
- the fee agreement negotiated between the funder and the lawyers placed their interests in conflict with those of their clients.[82]

Following some changes to the arrangements between the plaintiffs, their lawyers, and the litigation funder, the plaintiffs applied to the Court to lift the stay. The Court declined to do so but its decision, in *Clairs Keeley No 2,* emphasised that it *would* have lifted the stay had it been satisfied that the solicitor for the funded parties was sufficiently independent and alive to the potential conflict of interest between its clients and the funder and that the plaintiffs had made a fully informed decision to proceed with the funder and the law firm.[83] It is also noteworthy that the Court in *Clairs Keeley No. 2* took a more favourable view of litigation funding arrangements.[84] Noting that the funder in that case 'continue[d] to exercise a degree of control', the Court observed:

> However, that will be inevitable in the case of any litigation funding of this kind. Without some degree of control the risk would be too great for the funder to undertake the funding, especially when the litigation is protracted, complex and expensive. If litigation funders were to be discouraged, by denying them some measure of control sufficient to protect their investment, the number of oppressive or unmeritorious claims and defences might be reduced, but at the risk of preventing access to justice, or equal access to justice, by many others with genuine claims or defences and no other means of advancing, or effectively advancing, them.[85]

The stay remained in place until, in *Clairs Keeley No. 3,*[86] the plaintiffs, the funder and the law firm were finally able to satisfy the Court of Appeal that the proceedings no longer constituted an abuse of process. The plaintiffs having been properly informed of all relevant matters,[87] the stay was lifted.

This series of decisions from the early 2000s demonstrates that litigation funding arrangements are not automatically deemed an abuse of process in Western Australia; rather

[82] Ibid at [141], [201]-[205] and [209].

[83] *Clairs Keeley (A Firm) v Treacy & Ors* (No 2) [2004] WASCA 277 per Steytler, Templeman and McKechnie JJ at [133]

[84] Ibid at [71]-[74].

[85] Ibid at [124].

[86] *Clairs Keeley (A Firm) v Treacy & Ors* (No 3) [2005] WASCA 86.

[87] Ibid at [22]-[25] and [60].

there is oversight of the parameters in which such arrangements operate. It may also be argued, however, that the present situation causes substantial uncertainty for parties to litigation and that it is inefficient to have the Courts expend their time and resources on performing this function given that they are not best placed to inquire into contractual arrangements between plaintiffs and third parties.

Relevantly, in *Fostif* the majority observed that 'to ask whether the bargain struck between a funder and intended litigant is "fair" assumes that there is some ascertainable objective standard against which fairness is to be measured and that the Courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity' and concluded that '[n]either assumption is well founded.'[88] The Court's approach in *Clairs Keeley No 2* has also been characterised as 'judicial paternalism'.[89]

[88] *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [92]. See also VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, pp. 17-18.

[89] In the New South Wales Court of Appeal's decision in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (which was subsequently appealed to the High Court), Mason P commented: 'Judicial hostility to a funder's "control" over litigation appears to be bottomed in the proposition that excessive control is tantamount to an assignment of a bare right to litigate, although there are statements suggestive of judicial concern for the economic interests of the "controlled" litigant per se (eg *Clairs Keeley* (No 2) at [125]). I have already indicated my doubts about such judicial paternalism in the present context'; see *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 per Mason P at [137].

4. APPROACHES IN OTHER JURISDICTIONS

4.1 United Kingdom

In 1967 the United Kingdom legislated to abolish criminal and tortious liability for maintenance and champerty. Nevertheless, section 14(2) of the *Criminal Law Act 1967* (UK) provided: 'The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal'.[90]

Over 30 years later, in the decision of the Court of Appeal in *R (Factortame) v Secretary of State for Transport (No 8)*[91], it was held that only those funding arrangements that tended to 'undermine the ends of justice' should fall foul of the prohibition on maintenance and champerty.

Section 14(2) of the *Criminal Law Act 1967* (UK), was subsequently considered by Jackson LJ in his 2009 *Review of Civil Litigation Costs: Final Report* (the Jackson Report). He concluded that there was no need to repeal the section, thereby abolishing the common law doctrines for all purposes, given that the 'law of maintenance and champerty has a wider impact, which goes beyond third party litigation funding'.[92] Total abolition could therefore 'have unforeseen and adverse consequences' and 'such a drastic step' was 'not necessary in order to protect the legitimate interests of third party funders'.[93] The Jackson Report instead recommended that 'a satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up'.[94] The *Code of Conduct for Litigation Funders*[95] was published by the Civil Justice Council in 2011, seeks to ensure that the conduct of litigation funders does not result in a litigation funding agreement (LFA) being set aside as champertous.

4.2 Canada

In Canada, champerty is prohibited at common law, and has been codified in Ontario by *An Act Respecting Champerty* R.S.O. (1897) (the Champerty Act), which states that:

(1) Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
(2) All champertous agreements are forbidden, and invalid.

[90] *Criminal Law Act 1967* (UK) s 14(2).

[91] [2003] QB 381, 400.

[92] The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs – Final Report* (2009), p. 124.

[93] Ibid.

[94] Ibid.

[95] Ministry of Justice (UK), Civil Justice Council, *Code of Conduct for Litigation Funders* (January 2018).

Maintenance and champerty were removed from the *Criminal Code* in 1953. However, the Champerty Act is still in force and maintenance and champerty remain as torts.

The legitimacy of third-party funding agreements in Canada was confirmed by a decision of the Ontario Court of Appeal which found that the interests of justice can be served by allowing third parties to fund litigation The Ontario Court of Appeal held that a determination of the proposed agreement as champertous depended on the outcome of the litigation. In making this finding, the Court of Appeal observed, among other things, that a person's motive is a proper consideration, and indeed, determinative of the question of whether conduct or an arrangement constitutes maintenance or champerty. Maintenance is 'directed against those who, for an *improper motive*, often described as *wanton or officious intermeddling*, become involved with disputes (litigation) of others in which the maintainer has *no interest whatsoever*' [emphasis added].[96]

The Court of Appeal also observed that the Courts have shaped the rules relating to maintenance and champerty to accommodate changing circumstances and the current requirements for the proper administration of justice. Whether a particular litigation funding agreement is champertous is a fact-dependent determination, requiring the Court to inquire into the circumstances and the terms of the agreement, and this inquiry depends in part on the 'reasonableness and fairness' of the agreement.[97]

Specifically in the context of class actions, in *Houle v St Jude Medical Inc,*[98] the Ontario Superior Court of Justice confirmed that 'deciding whether to approve a [third party funding agreement] will depend upon the particular circumstances of each case'.[99] It held, however, that the Court must be satisfied of at least four criteria to approve a funding agreement:

1. the agreement must be necessary in order to provide access to justice;
2. the access to justice facilitated by the third party funding agreement must be substantively meaningful;
3. the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and
4. the third party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching and champertous.

96 *McIntyre Estate v Ontario (Attorney General)* [2002] 218 DLR (4th) 193 at [26].

97 Ibid at [32], [79], [80].

98 2017 ONSC 5129 (Ontario Superior Court of Justice) (an appeal from the decision was quashed, 2018 ONCA 88 (Court of Appeal for Ontario)).

99 Ibid [72].

4.3 New Zealand

In the 2013 case of *Waterhouse v Contractors Bonding Ltd*, the Supreme Court of New Zealand affirmed maintenance and champerty as still existing torts in New Zealand.[100] Their scope is however inevitably affected by how the relevant public policy considerations are viewed in contemporary society. The Supreme Court of New Zealand has noted, for instance, that although 'control of litigation by a third party has long been a concern of the Courts', in the context of modern litigation funding 'some measure of control is inevitable to enable a litigation funder to protect its investment'.[101]

The Supreme Court of New Zealand also agreed with the High Court of Australia's finding in *Fostif* that it was not the Court's role to 'assess the fairness of any bargain between a funder and a plaintiff'.[102] It concluded: 'A stay on the grounds of abuse of process should only be granted where there has been a manifestation of an abuse of process on traditional grounds or where the funding arrangement effectively constitutes the assignment of a cause of action to a third party in circumstances where such an assignment is not permissible'.[103] These findings were upheld in *PriceWaterhouseCoopers v Walker and Ors* [2017] NZSC 151.

4.4 Australia

As in the United Kingdom, some Australian jurisdictions have expressly abolished maintenance and champerty both as crimes and torts. Victoria was the first state to do so.[104] New South Wales followed in 1993,[105] as did other jurisdictions.[106] Again, similarly to the legislation in the United Kingdom, most statutory provisions were expressed:

> not [to] affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act.[107]

In Victoria, maintenance and champerty were abolished as torts by the *Abolition of Obsolete Offences Act 1969* (Vic), but abolition was accompanied by a provision in the same terms as section 14(2) of the *Criminal Law Act 1967* (UK).

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[100] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89

[101] Ibid at [45] and [46].

[102] Ibid at [48].

[103] Ibid at [76(e)].

[104] *Crimes Act 1958* (Vic) s 322A; *Wrongs Act 1958* (Vic) s 32(2).

[105] *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), subsequently repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW). The abolition of the tort is preserved by Sch 2 of the *Civil Liability Act 2002* (NSW) and of the crime by Sch 3 to the *Crimes Act 1900* (NSW)

[106] *Civil Wrongs Act 2002* (ACT) s 221; *Criminal Law Consolidation Act 1935* (SA) sch 11; *Civil Liability Act 2002* (Tas) s 28E. The torts have not been abolished in Queensland, Western Australia or the Northern Territory.

[107] *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 6. This saving provision survives in s 2, sch 2 of the *Civil Liability Act 2002* (NSW).

The legislative history in New South Wales is similar. The torts were abolished by the *Maintenance, Champerty and Barratry Abolition Act 1993*. Again, section 6 of that statute is in the same terms as section 14(2) of the *Criminal Law Act 1967* (UK).

In South Australia the torts were abolished in 1993. There is a similar reservation relating to illegal contracts and a further reservation of 'any rule of law relating to misconduct on the part of a legal practitioner who is party to or concerned in a champertous contract or arrangement'.[108] It is not clear whether the tort is to that extent preserved.

In the Australian Capital Territory, the torts were abolished by section 221 of the *Civil Law (Wrongs) Act 2002* (ACT) and they were abolished as crimes at common law under section 68 of the *Law Reform (Miscellaneous Provisions) Act 1955* (now repealed). Section 221 states that the abolition of the torts and crimes of champerty shall not affect 'any rule of law about the illegality or avoidance of contracts that are tainted with maintenance, or are champertous'.

In Tasmania, the torts were abolished by the *Justice and Related Legislation (Miscellaneous Amendments) Act 2015* which introduced section 28E(ba) and (bb) into the *Civil Liability Act 2002* (Tas) abolishing maintenance and champerty as actions at common law. The purpose was so that uniform national rules could be introduced in relation to litigation funders.[109]

A series of Court cases has also considered the legitimacy of litigation funding in Australia. In 1996 the Federal Court found in *Movitor Pty Ltd (receivers and manager appointed) (in liq) v Sims (Re Movitor)*[110] that a liquidator may enter into a contract of insurance under which they are provided with funds to bring actions for the benefit of the insolvency administration they are appointed to control, and that such contracts are not void as constituting champerty or maintenance. Following this decision, commercial litigation funders began operating in Australia to provide funding to insolvency practitioners.[111]

[108] *Criminal Law Consolidation Act 1935* (SA) Schedule 11, para 3(2)(c).

[109] The Second Reading Speech advised, relevantly: 'The Chief Justice has requested that the *Civil Liability Act 2002* be amended to abolish the common law torts of 'maintenance' and 'champerty' so that the uniform national rules can be introduced in relation to litigation funders…The torts prevent a person providing financial support to another for the purpose of litigation, which for historical reasons was seen as undesirable. A committee of the Council of Chief Justices working towards standardising the rules of practice and procedure in all the Australian superior Courts wishes to introduce standard rules in relation to litigation funders…The Law Council of Australia supports the availability of litigation funding, with appropriate safeguards - the proposed rules of Court being standardised by a committee of the Council of Chief Justices - on the basis that it improves access to Justice. This bill makes the requested amendments to the *Civil Liability Act*', W. Hodgman, 18 August 2915, House of Assembly, Tasmania.

[110] (1996) 64 FCR 380.

[111] ALRC, *Integrity, Fairness and Efficiency,* p. 59.

Subsequently, in *Fostif* the High Court held (5-2) that litigation funding did not constitute an abuse of process.[112] The Court made it clear that questions of maintenance and champerty are not to be regarded as always legally irrelevant in Australia, even in those states where both the crime and the tort have been abolished. However, the Court also found that litigation funding arrangements did not 'warrant condemnation as being contrary to public policy or leading to any abuse of process'.[113] The Court in *Fostif* was called upon to determine a dispute that arose in New South Wales under its legislation and accordingly it was not required, and declined, to make findings in relation to the status of the torts of maintenance and champerty in the jurisdictions where the torts had not been statutorily abolished.[114]

[112] (2006) 229 CLR 386 at [88].

[113] *Fostif* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [88].

[114] Ibid at [85], with Gummow, Hayne and Crennan JJ observing that, 'It is neither necessary nor appropriate to decide what would be the position in those jurisdictions where maintenance and champerty remain as torts, perhaps even crimes'.

5. THE WAY FORWARD FOR WESTERN AUSTRALIA

5.1 Should the torts of maintenance and champerty be abolished?

The major question underpinning this Discussion Paper is whether maintenance and champerty remain necessary or are, in the words used in the *Law Reform Commission Act 1972* (WA) 'obsolete, unnecessary, incomplete or otherwise defective'.[115]

In determining the appropriateness of abolition, there is another key question to resolve, being: what would be lost, if the torts of maintenance and champerty no longer existed? Would there be situations in which an injustice could not be remedied, by reason of their absence? It is difficult to assess the torts' efficacy given that they are rarely invoked. One could speculate that their very existence deterred parties from meddling in or stirring up litigation; or it could be that they are truly dormant.

A 2001 report by the New Zealand Law Commission (NZLC Report) conceded that there was 'no reported New Zealand case of a successful claim in tort founded on maintenance or champerty' but concluded that 'this does not establish that the tort fails by its very existence to function as a deterrent.'[116]

The NSWLRC Discussion Paper cited at [2.2.2] above was released shortly after the relevant crimes and torts were abolished in New South Wales.[117] The NSWLRC observed: 'Given the paucity of civil actions for maintenance, and the small likelihood of being awarded compensation even where maintenance was proved, it is no wonder that calls for the abolition of the tort on the grounds of obsolescence were common'.[118] It also noted that the 'considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time' such that the 'social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice'.[119]

However, the NSWLRC stated its belief that 'in abolishing the crimes, and in particular the torts, of maintenance and champerty, some of the legal implications may have been overlooked'.[120] These implications included policy questions regarding the prohibition on contingency fees for lawyers, the degree to which speculation in litigation ought to be

[115] *Law Reform Commission Act 1972* (WA), s 11(4)(a).

[116] NZLC, *Subsidising Litigation,* p. 11.

[117] *Maintenance and Champerty Abolition Act 1993* (NSW).

[118] NSWLRC, Discussion Paper 36 (1994) *Barratry, Maintenance and Champerty*, [2.15].

[119] Ibid at [2.55].

[120] Ibid at [2.15].

permitted, and possible difficulties in securing a remedy for a defendant, litigation against whom has been funded by a third party with deep pockets.[121]

The NZLC Report referred to above suggested that a 'logical corollary of the conclusion that there can still be situations for which the torts of maintenance and champerty provide redress is that if those torts did not exist it would be necessary to invent them'.[122] Citing *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413, the case discussed briefly above at [2.2.2], the NZLC speculated that if the facts of that case arose in a jurisdiction where maintenance had been abolished, 'the recourse of the opponent would be to the protean and amorphous tort of abuse of process'.[123] The NZLC concluded that it would be 'more efficient to preserve the more precisely developed torts of maintenance and champerty than to abandon those torts in favour of providing a remedy by developing the tort of abuse of process'.[124]

It is however not universally agreed that maintenance and champerty are 'precisely developed'. To the contrary, many commentators, judicial and otherwise, have suggested that these torts are uncertain, vague, and riddled with exemptions.

For instance, in *Fostif,* Gummow, Hayne and Crennan JJ observed that section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW)[125] preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. They concluded that by abolishing these torts (and crimes), 'any wider rule of public policy (wider, that is, than the particular rule or rules of law preserved by s 6) lost *whatever narrow and insecure footing remained* for such a rule' [emphasis added].[126] Their Honours also approvingly cited Fletcher Moulton LJ who contended as long ago as 1908 that the law of maintenance and champerty suffered 'from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day' and that it was 'far easier to say what is not maintenance than to say what is maintenance'.[127]

[121] Ibid at [2.19] – [2.54].

[122] NZLC, *Subsidising Litigation,* 2001, p. 11.

[123] Ibid.

[124] Ibid.

[125] This Act was later repealed and transferred to *Crimes Act 1900* (NSW) cl 5, Schedule 3 and *Civil Liability Act 2002* (NSW) cl 2, Schedule 2.

[126] *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [86].

[127] *British Cash and Parcel Conveyors Limited v Lamson Store Service Company Limited* [1908] 1 KB 1006 at 1013 and 1014, cited in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [86].

IMF Bentham is a litigation funder that operates both internationally and across Australia – in jurisdictions that have abolished the torts of maintenance and champerty and in those, like Western Australia, which have not. Its Executive Director, Hugh McLernon, characterises these torts as a 'blot on the statute book', citing their interference with freedom of contract and frustration of access to justice. McLernon considers however that in contemporary Western Australia these ancient torts no longer have any impact on litigation and simply lie dormant. He observes that the torts have always been amorphous in nature as they are based on the subjective concept of 'public policy', and concludes that in the modern era, public policy has decisively shifted in favour of assisting impecunious persons wronged by another to bring legal actions seeking compensation. [128]

Question 1
Should Western Australia abolish the torts of maintenance and champerty?

5.2 Should the torts of maintenance and champerty be preserved via statute?

One possible course of action open to Western Australia is to specifically provide via statute that litigation funding arrangements *do not* constitute an abuse of process while leaving the torts of maintenance and champerty in place as a bar against litigation funded for improper purposes by unscrupulous third parties.

Care would of course have to be taken not to create further ambiguities in this area of the law. Queensland is another jurisdiction that has not abolished the torts of maintenance and champerty. Its legislative representative proceedings regime contains a provision to the effect that that the mere fact of a litigation funding agreement is not sufficient cause to discontinue proceedings. Specifically, section 103K(2)(b) of the *Civil Proceedings Act 2011* (Qld) provides: 'it is not inappropriate for claims to be pursued by way of a proceeding under this part merely because the persons identified as group members for the proceeding…are aggregated together for a particular purpose including, for example, a litigation funding arrangement'.[129]

The Supreme Court of Queensland has recently rejected an argument that section 103K(2)(b) of the *Civil Proceedings Act 2011* (Qld) 'impliedly abolishes the torts of maintenance and champerty as they are common law rights and cannot be abolished, other than by the clear words of a statute'.[130] The Court noted that it was however difficult to determine the 'meaning and effect' of this section,[131] observing:

[128] Discussion with Mr Hugh McLernon, 9 July 2019.

[129] *Civil Proceedings Act 2011* (Qld), s 103K(2)(b).

[130] *Murphy & Ors v Gladstone Ports Corporation Ltd* [2019] QSC 12 per Crow J at [37] - (also note *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228).

[131] Ibid at [33].

> It is curious that the same section as s 103K(2)(b) in Queensland was included in the New South Wales equivalent of the *Civil Proceedings Act*,[132] when New South Wales had, in 1993, abolished the torts of maintenance and champerty. It cannot be presumed that the Queensland parliament has overlooked these legislative provisions in adopting the New South Wales equivalent and enacting s 103K(2)(b), yet there is no obvious logical reason to simply follow the New South Wales provisions in circumstances where New South Wales has expressly abolished maintenance and champerty.[133]

There is a lack of clarity as to the meaning of a provision in the terms of section 103K(2)(b) in a jurisdiction in which maintenance and champerty remain on foot as torts. It is therefore not suggested that this section be replicated in Western Australia.

However, it would be possible to craft a more specific provision which preserves the torts but provides that they do not forbid litigation funding arrangements. Such a provision would modify the law in regards to the operation of maintenance and champerty by firmly establishing that litigation funding arrangements constitute an exemption to these torts. It would still however preserve the torts' existence.

Question 2
Should Western Australia legislate to clarify that the mere fact of a funding agreement does not constitute an abuse of process, while otherwise leaving the torts of champerty and maintenance in place?

An alternative, and simpler, approach would be for Western Australia to follow the path taken in the United Kingdom as well as other Australian jurisdictions and abolish the torts of maintenance and champerty while preserving 'any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal'. For instance, the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW),[134] which was considered in *Fostif,* provides at section 4 that 'An action in tort no longer lies on account of conduct known as maintenance (including champerty)'.[135] Section 6 provides: 'This Act does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act'.[136]

This approach leaves open the possibility of contracts to fund another's legal action being found to be invalid as an abuse of process while making it clear that the mere fact of having a third party funding the action will not be invalid on this basis. In the words of the majority in

[132] See *Civil Procedure Act 2005* (NSW) section 166(2)(b).

[133] *Murphy & Ors v Gladstone Ports Corporation Ltd* [2019] QSC 12 per Crow J at [36].

[134] This Act was subsequently repealed and the relevant provisions are now contained in the *Crimes Act 1900* (NSW) cl 5, Schedule 3 and the *Civil Liability Act 2002* (NSW) cl 2, Schedule 2.

[135] *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), s 4.

[136] Ibid, s 6.

Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd, the 'abolition of the offences and torts did not preclude the possibility that non-party funding of legal actions for reward or otherwise might give rise to an abuse of process. But to acknowledge that possibility is not to hold non-party funding of a litigant for reward to be an abuse of the process of the Court'.[137]

This approach has been subject to some critique. The NZLC Report concluded: 'No great simplification of the law is achieved by following the English, Victoria, New South Wales and South Australian examples…of abolishing the torts while preserving the underlying public policy issues in their application to contract legality'.[138]

However, a proviso in the form of that adopted in the United Kingdom and equivalent Australian jurisdictions would have the advantage of having a body of case law behind it which clarifies its meaning and operation.

Question 3
Should Western Australia abolish the torts of maintenance and champerty while preserving 'any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal'?

As a further alternative course of action, if it is considered that there is merit in retaining the torts of maintenance and champerty, Western Australian could codify them to provide clarity as to their ambit. As noted above at [4.2], champerty has been codified in Ontario, Canada in rather archaic language; the relevant legislation provides that 'champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains'.[139]

Western Australia could legislate to clarify the scope of the torts in a contemporary context, including setting out the exemptions that have emerged in the case law. This could however be a difficult endeavour as it would require a series of policy decisions on the torts' precise appropriate scope.

Question 4
Should Western Australia attempt to codify the torts of maintenance and champerty, in the interests of clarity?

[137] *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75 per French CJ, Gummow, Hayne and Crennan JJ at [26].

[138] NZLC, *Subsidising Litigation,* p. 11.

[139] *An Act Respecting Champerty RSO 1897,* s 1.

Finally, Western Australia could simply take no action, and preserve the torts of maintenance and champerty by leaving the status quo in place. This approach could be followed if it were concluded that the rationale for the existence of maintenance and champerty remains sound and that it has not been demonstrated that the torts cause sufficient inconvenience to legislate for their abolition.

The Commission welcomes submissions as to the present impact of the torts of maintenance and champerty in order to assess whether a recommendation should be made to abolish or to retain these torts.

Question 5
Should Western Australia leave the torts of maintenance and champerty as they are?

5.3 Possible adverse impacts of abolition

Given the difficulty of measuring the torts' current impact, predicting the likely consequences of their abolition is challenging.

It is *possible* that if maintenance and champerty cease to exist, unscrupulous persons will fund litigation against those for whom they bear grudges. Whether this eventuality is *likely* is another matter, and as discussed at [5.3.1] below it seems *unlikely* that such actions would be funded with impunity.

Equally, it is *possible* that litigation funders will operate more freely, representative and other proceedings will increase in number, and more persons wronged by the actions of others will obtain access to justice and, ultimately, compensation. Additional consequences may flow from these impacts: possible pressure on the Court system, increases to insurance premiums, and the human cost of litigation in the form of stress, anxiety and financial loss on the part of both plaintiffs and defendants.

With respect to this latter consequence, it must be noted that defenders of the torts of maintenance and champerty often emphasise that litigation carries a social and personal cost. For instance, in their dissenting judgment in *Fostif*, Callinan and Heydon JJ referred to 'normal' litigation taking place between 'persons who are unfortunate enough to have fallen into disputes with each other'. [140] Others take a different perspective. IMF Bentham's Executive Director Hugh McLernon has argued:

[140] *Fostif* (2006) 229 CLR 386 at [266] per Callinan and Heydon JJ. Similarly, in the speech cited in this Discussion Paper at [2.2.1], Justice Keane quoted Learned Hand's famous observation that a lawsuit is to be dreaded 'beyond almost anything else short of sickness and death'. Justice Keane then expressed doubt as to whether 'this view – that litigation is a necessary evil – still commands general assent'; see Keane, 'Access to Justice and other Shibboleths', p. 31.

> In a perfect world all who have suffered serious loss by the wrongful act of others will have access to the Courts to enforce their cause of action…This is the proper level of litigation in any society...Of course the actual level in our society is well below this proper level because a large number of potential litigants cannot afford access to, or the risks of, justice and therefore do not always seek to enforce their causes of action even those sounding in debt. If funding is provided to some of those persons and if litigation increases then it simply increases towards what is this proper level.[141]

The Commission acknowledges both of these viewpoints. It is true to say that litigation is not to be viewed as a net positive and that access to justice comes with costs, both financial and otherwise. However, uncompensated wrongs also have consequences, although these may be less visible to the Court system, and the fact that persons with legitimate claims are prevented from bringing them due to their lack of means remains a concern.

5.3.1 Strategies to mitigate the impacts of abolition

It may be argued that strategies to mitigate any adverse impacts of abolition are already in place in the form of the Court's own inherent powers, in concert with legal practitioners' ethical obligations and other legal doctrines.

The Supreme Court of Western Australia has an inherent power to control its own processes,[142] and can take action where it considers that litigation before it may represent an abuse of process. The ambit of abuse of process was considered at length by the High Court in *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd.* The majority's conclusions on this issue can be summarised as follows:

- the Courts in the United Kingdom and Australia have taken 'no narrow view' on what constitutes an abuse of process;[143]

- certain categories of conduct attracting the intervention of the Courts, which emerged during the 19th and 20th centuries, included:

    a) proceedings which involve a deception on the Court, or are fictitious or constitute a mere sham;
    b) proceedings where the process of the Court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
    c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;

[141] H. McLernon, 'In support of professional litigation funding', February 2005, p. 14, accessed at https://www.imf.com.au/docs/default-source/site-documents/42867.

[142] Order 1, rule 3A of the *Rules of the Supreme Court 1971* (WA) provides: 'The inherent power of the Court to control the conduct of a proceeding is not affected by these rules'.

[143] *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75 per French CJ, Gummow, Hayne and Crennan JJ at [27].

d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression;[144]

- the categories of abuse of process are not closed;[145] and

- abuse of process extends to proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment'.[146]

The High Court confirmed its disinclination, in *Fostif,* to formulate an 'overarching rule of public policy that would, in effect, bar the prosecution of an action involving an agreement to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation'. The High Court also noted that it did not accept 'that there should be a rule which would bar the prosecution of some actions according to whether the agreement met some standards relating to the degree of control or the amount of the reward the funder might receive under the agreement'.[147] The kinds of conduct summarised above would appear to encompass litigation which had been improperly 'stirred up', depending on the particular fact situation. However, as the NSWLRC noted in its 1994 report cited above at [2.2.2], abuse of process also represents a higher evidentiary bar to meet than maintenance or champerty.

The *Vexatious Proceedings Restriction Act 2002* (WA) provides another possible avenue for a person the target of a legal action funded by a third party. This Act provides that the Supreme Court can stay any proceedings if the Court is satisfied that they constitute 'vexatious proceedings'.[148] The Act defines 'vexatious proceedings' as proceedings:

a) which are an abuse of the process of a Court or a tribunal; or
b) instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose; or
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.[149]

A person against whom vexatious proceedings have been brought may apply to the Court for an order that the proceedings be stayed.[150]

[144] Ibid.

[145] Ibid at [28].

[146] Ibid, citing *Batistatos* (2006) 226 CLR 256 at 267 [14] (footnotes omitted).

[147] Ibid at [29], referring to *Fostif* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [91] and [93].

[148] *Vexatious Proceedings Restriction Act 2002* (WA), s 4(1)(c).

[149] Ibid, s 3.

[150] Ibid, s 4(2)(c)(i).

Another possible course of action to address malicious litigation funded by a third party in the absence of the torts of maintenance and champerty would be the imposition of non-party costs orders by the Court.[151] Such orders are only to be made in exceptional circumstances,[152] and the cases in which such orders have been made 'tend to satisfy at least some, if not a majority, of the following criteria:

- the unsuccessful party to the proceedings was the moving party and not the defendant;
- the source of funds for the litigation was the non-party or its principal;
- the conduct of the litigation was unreasonable or improper;
- the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest, and
- the unsuccessful party was insolvent or could otherwise be described as a person of straw'.[153]

The ethical obligations borne by lawyers, together with the Court's existing powers to control its own processes, may also represent a safeguard against the kinds of abuses sought to be curbed by the torts of maintenance and champerty. In the words of Gummow, Hayne and Crennan JJ in *Fostif:*

> It was said, in *In re Trepca Mines Ltd* (No 2),[154] that "[t]he common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses". Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the Court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the Court and to clients are insufficient to meet the difficulties that are suggested might arise.[155]

A concern with the above possibilities, however, is the difficulty of securing a remedy for a defendant who suffers damage as the result of conduct that would amount to maintenance or champerty. Taking the above example of lawyers' ethical obligations, a subsequent finding that a lawyer had breached their duties under the *Legal Profession Act 2008* (WA) may offer minimal comfort to a party who has been caused damage as a result of malicious litigation. Similarly, a stay of proceedings would also not address any special damages caused by the intermeddling third party.

[151] See *Supreme Court Act 1935* (WA), s 37 and *Rules of the Supreme Court 1971* (WA) Order 66 rule 1.

[152] *Heath v Greenacre Business Park Pty Ltd* [2016] NSWCA 34, cited in C. Bailey, 'A guide to non-party cost orders', *Brief,* September 2017, p. 8, accessed at https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017SEP01-A-guide-to-non-party-cost-orders.pdf.

[153] *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 per Basten JA at [210].

[154] [1963] Ch 199 at 219-220.

[155] *Fostif* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [93].

5.4 Regulation of litigation funders?

One way in which some possible adverse impacts of abolition of the torts of maintenance and champerty could be mitigated would be by regulation to ensure that any expansion in litigation funding did not come at the expense of consumers. Such regulation could be overarching, by way of a licensing scheme or some equivalent arrangement, or could involve giving the Courts broader powers to, for instance, approve funding agreements.

Presently, the litigation funding industry is 'only lightly regulated'.[156] The existing degree of regulation can be summarised as follows:

- all entities (including litigation funders) which provide financial services with respect to a financial product must comply with requirements under the *Australian Securities and Investments Commission Act 2001* (Cth) which are designed to provide protection for consumers of financial services, including that the provider must not engage in unconscionable conduct;[157]

- where financial services are provided to an individual for personal or domestic services, there is an implied warranty in the contract for the supply of such services that they will be rendered with due care and skill and that the contract will not contain any unfair terms;[158]

- in 2013, the Australian Securities and Investments Commission (ASIC) issued Regulatory Guide 248, which sets out ASIC's 'approach on how a person who provides a financial service can satisfy the obligation to maintain adequate practices and follow certain procedures for managing potential and actual conflicts of interest in relation to a litigation scheme or a proof of debt scheme';[159] and

- the Courts regulate litigation funding on a case-by-case basis by such means as requiring that funding agreements be disclosed to the Court or stating such agreements must include provisions for managing conflicts of interest between funded class members, the solicitor and the litigation funder.[160]

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[156] VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 15.

[157] ALRC, *Integrity, Fairness and Efficiency*, p. 156, citing sections 12CA-12CC of the *Australian Securities and Investments Commission Act 2001* (Cth).

[158] ALRC, *Integrity, Fairness and Efficiency,* p. 156, citing sections 12ED and 12BF-12BM of the *Australian Securities and Investments Commission Act 2001* (Cth).

[159] See ASIC, 'RG 248 Litigation schemes and proof of debt schemes: Managing conflicts of interest', accessed at https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-248-litigation-schemes-and-proof-of-debt-schemes-managing-conflicts-of-interest/. Guide 248 is discussed in ALRC, *Integrity, Fairness and Efficiency*, at pp. 178-183.

[160] ALRC, *Integrity, Fairness and Efficiency*, pp. 156-157. The ALRC also recommended that Regulatory Guide 248 be amended to require that third-party litigation funders that fund representative proceedings report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

In considering possible changes to the regulation of litigation funders, this Discussion Paper is somewhat constrained by the widespread agreement that legislative regulation (such as the implementation of a licensing scheme) is properly a matter for Commonwealth rather than State authorities.[161] However, as discussed below, there are case management measures which could be implemented in the Courts in order to allow for more targeted scrutiny of funding arrangements and greater transparency.

Regulation of litigation funders has been the subject of public discussion for some years. In 2014, the Productivity Commission recommended that the Australian Government 'should establish a licence for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest'. The Productivity Commission also recommended that:

- 'Regulation of the ethical conduct of litigation funders should remain a function of the Courts.
- The licence should require litigation funders to be members of the Financial Ombudsman Scheme.
- Where there are any remaining concerns relating to categories of funded actions, such as securities class actions, these should be addressed directly, through amendments to underlying laws, rather than through any further restrictions on litigation funding'.[162]

More recently, the reports by the ALRC and VLRC referred to throughout this Discussion Paper examined the question of regulation, and their recommendations are addressed below. It should be noted that although these reports are relevant to the present inquiry, their focus is not on the torts of maintenance and champerty, which are referred to only briefly. The purpose of the VLRC report's terms of reference is stated as being 'to ensure that litigants who are seeking to enforce their rights using the services of litigation funders and/or through group proceedings are not exposed to unfair risks or disproportionate cost burdens'.[163]

Similarly, the ALRC's terms of reference require it to have regard to, among other things, 'the importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards'.[164] These concerns are somewhat distinct from the traditional rationale for the torts of maintenance and champerty,

[161] In its recent report the VLRC observed that at least one stakeholder suggested that regulation of litigation funders at a state level might be necessary in the absence of legislative intervention by the Commonwealth. However, the VLRC noted that it had 'reservations about proposals for state-based regulation of litigation funders' and noted that the 'proponents would prefer the industry to be regulated nationally'. See VLRC, *Access to Justice,* pp. 19 and 42.

[162] Productivity Commission, *Access to Justice Arrangements,* Inquiry Report No. 72, 5 September 2014, Vol 2, Recommendation 18.2, p. 633.

[163] VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. viii.

[164] ALRC, *Integrity, Fairness and Efficiency*, p. 5.

being the need to prevent third parties 'intermeddling with litigation in which the intermeddler has no concern'.[165]

Other issues considered by the ALRC and VLRC are directly relevant to this Discussion Paper. For instance, the VLRC report observed that one of the 'broad themes' of debates about litigation funding is 'the risk of abuse of process, where the process of the Court is used for an improper purpose';[166] a risk which is also sought to be addressed by the torts of maintenance and champerty. Accordingly, the recommendations made by these reports may assist in addressing concerns about the abolition of the torts of maintenance and champerty. These recommendations are considered below.

5.4.1 VLRC Report

Consultation conducted by the VLRC revealed broad support among stakeholders for the Courts to retain a broad discretion in managing class action proceedings. However, this support was 'distinct from, and accompanied by, calls for stronger systemic regulation of the industry itself'.[167] Ultimately the VLRC contended that 'Court procedures cannot, and should not, be seen as a substitute for industry-wide regulation', and concluded that 'the responsibility for regulating the litigation funding industry rests squarely with the Commonwealth Government'.[168] Accordingly, the VLRC recommended that the 'Victorian Government should advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry'.[169]

The VLRC and ALRC diverged on the question of regulation of litigation funders, as discussed below. However, both reports set out a series of proposals to give the Courts more oversight of funded litigation, and both the VLRC and ALRC recommended that the prohibition of contingency fees for lawyers be lifted,[170] which would require collective action due to the current move towards a unified legal profession.[171]

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[165] *Neville v London Express Newspaper Ltd* [1919] AC 368, 382, cited in ALRC, *Integrity, Fairness and Efficiency*, p. 51.

[166] VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 31.

[167] Ibid, p. 17.

[168] Ibid, p. 19.

[169] Ibid, p. 20.

[170] The ALRC recommended that statutes regulating the legal profession should permit solicitors who are acting for the representative plaintiff in representative proceedings to enter into 'percentage-based fee agreements', with certain limitations; see ALRC, *Integrity, Fairness and Efficiency* Recommendation 17. Similarly, the VLRC recommended that the Victorian Attorney-General propose to the Council of Attorneys General that the Council (a) agree in principle that legal practitioners should be permitted to charge contingency fees subject to exceptions and regulation and (b) agree to a strategy to introduce the reform, including the preparation of draft model legislation that regulates the conditions on which contingency fees may be charged and maintains the current ban in areas where contingency fees would be inappropriate; see VLRC, *Access to Justice*, Recommendation 7.

[171] Western Australia has signed an Intergovernmental Agreement with New South Wales and Victoria to join the Legal Profession Uniform Law scheme, and it is planned that the state will join the scheme by 1 July 2020.

Other recommendations made by the VLRC related to the powers of the Courts and could be implemented in Western Australia without the need for action on the part of the Commonwealth or other jurisdictions. These recommendations, which would increase transparency in litigation funded by third parties as well as enhancing the powers of the Court, are set out and briefly discussed below.

At Recommendation 3, the VLRC recommended that 'the Supreme Court should consider amending its practice note on class actions to require the disclosure of litigation funding agreements to the Court and other parties to class actions in similar terms to paragraph [6] of the Federal Court of Australia's practice note on class actions'.[172] The Federal Court's Class Actions Practice Note (GPN-CA) is lengthy and detailed. Paragraph [6] reads as follows:

> **Confidential Disclosure to the Court**
>
> 6.1 Subject to any objection, prior to the first case management hearing the applicant's lawyers shall, on a confidential basis, email the costs agreement and any litigation funding agreement to the associate of the judge presiding over the first case management hearing with both the email and the agreements clearly marked "Confidential for the Court only (per Class Action Practice Note, paragraph 6.1)".
>
> 6.2 The provision of such agreements to the Court may be limited to an example of the standard form of each agreement, and need not include individual variations to the standard forms that might be negotiated with different class members.
>
> 6.3 Subject to any objection, the applicant's lawyers shall email to chambers any updated costs agreement and/or litigation funding agreement on the same confidential basis as soon as practicable after the applicant's lawyer become aware that:
>
> (a) there is a change to the standard form of litigation funding agreement or costs agreement which significantly alters the agreement;
>
> (b) a proceeding not previously subject to a litigation funding agreement becomes subject to such an agreement;
>
> (c) there is a change of the litigation funder funding the proceeding; or
>
> (d) the litigation funder becomes insolvent or otherwise unable or unwilling to continue to provide funding for the proceeding.

[172] VLRC, *Access to Justice – Litigation Funding and Group Proceedings,* Recommendation 3, p. 43. See also Recommendations 4, 5, 6, 13 and 25.

Disclosure of Litigation Funding Agreements to Other Parties

6.4 Subject to any objection, no later than 7 days prior to the first case management hearing, the applicant's lawyers shall file and serve a notice in accordance with the "Notice of Disclosure - Litigation Funding Agreements" together with a copy of the litigation funding agreement. Such disclosure may:

(a) be limited to an example of the standard form of the agreement, and need not include individual variations to the standard form that might be negotiated with different class members;

(b) be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding including, without limitation, information:

(i) as to the budget or estimate of costs for the litigation or the funds available to the applicants, in total or for any step or stage in the proceeding;
(ii) which might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.

6.5 Subject to any objection, the applicant's lawyers shall file and serve an updated Notice of Disclosure (with any appropriate redactions), in the event that the lawyer becomes aware of any of the circumstances set out in paragraph 6.3 above.[173]

The above approach is very comprehensive and allows the Court to scrutinise litigation funding arrangements where relevant, while upholding the confidentiality of these arrangements. Currently, in the absence of a legislative representative proceedings regime, the Supreme Court of Western Australia does not have an equivalent to the Federal Court's GPN-CA. However, in the event that the Civil Procedure (Representative Proceedings) Bill 2019 is passed and comes into operation, it may be appropriate for the Commission to recommend that the Supreme Court of Western Australia consider incorporating the requirements of paragraph [6] of the GPN-CA into any new practice directions it wishes to implement.

The VLRC also gave some consideration to whether disclosure of the involvement of a litigation funder should be required in proceedings other than representative proceedings. It did not however consider that the Court needed to be informed of a funder's involvement 'in every funded case'.[174] Instead, the VLRC recommended at Recommendation 4 that the Supreme Court should also consider 'requiring the plaintiff's lawyers to provide the Court with a copy of the litigation funding agreement whenever a litigation funder is involved *in a proceeding where a number of disputants are represented by an intermediary*. Any funding agreement disclosed to the other party should be able to be redacted to conceal information

[173] J. L. B. Allsop, Chief Justice, Class Actions Practice Note (GPN-CA), 25 October 2016, accessed at https://www.fedCourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca.

[174] VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 39.

which might reasonably be expected to confer a tactical advantage on that party' [emphasis added].[175]

The VLRC's conclusion that the 'fact that a litigation funder is involved in proceedings is not in itself an issue if there is only a single plaintiff'[176] may be doubted by those who support the retention of the torts of maintenance and champerty, and the Commission invites submissions on this point.

The VLRC also recommended at Recommendation 5 that the Supreme Court should consider amending its practice note on class actions to provide that, if a class action is funded by a litigation funder:

a) the representative plaintiff's lawyers should notify class members (whether they are actual or potential clients), in clear terms and as soon as practicable, of any applicable litigation funding charges and any material changes to those charges;
b) the obligation to notify is satisfied if class members have been provided with a document that properly discloses those charges; and
c) failure to meet the obligation to notify may be taken into account by the Court in relation to settlement approval under section 33V of the *Supreme Court Act 1986* (Vic).[177]

This recommendation is directed at safeguarding the interests of class/group members in a representative proceeding, rather than at protecting defendants from ill-motivated funded litigation or safeguarding the Court's processes. It is therefore less directly relevant to the current Discussion Paper than the VLRC recommendations previously considered here. However, it falls within the category of protective measures to address concerns about litigation funding and is therefore relevant to broad questions around the continued relevance of the torts of maintenance and champerty.

Similarly, Recommendation 6 proposes that 'the Supreme Court should consider amending its class action practice note to require the representative plaintiff's lawyers in funded class actions to provide to the Court, when the writ for the proceeding is filed, a brief Funding Information Summary Statement that accurately sets out litigation funding charges and key conditions in a simplified form, for publication on the Supreme Court's website'.[178]

The VLRC also recommended that at Recommendation 24 that Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to provide the Court with specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to be

[175] Ibid, p. 44.

[176] Ibid, p. 39.

[177] Ibid, p. 48.

[178] Ibid, p. 49.

deducted from settlement amounts to ensure that they are fair and reasonable. This recommendation is more likely to be contentious as it involves intervention in private contractual relationships.

However the VLRC considered that its recommendation would formalise and extend an existing practice given that recent Federal Court decisions suggested that, as part of settlement approval, the Court has the power to vary the amount paid to a litigation funder to ensure that it is fair and reasonable. The VLRC cited *Money Max Int Pty Ltd v QBE Insurance Group Ltd,* in which the Federal Court concluded that Court supervision of the funding fee is appropriate given that:

- the funding fee is generally the largest single deduction from the class members' recoveries;
- information asymmetry exists between the litigation funder and class members in relation to the costs and risks of the action;
- for some class members, the only chance to obtain legal redress is through a class action; and
- class members often have a limited or non-existent ability to negotiate the funding fee.[179]

The VLRC considered that it would be appropriate to give the Supreme Court of Victoria an explicit power to review and vary costs in order to remove any doubts about the source of the Court's power to do so. The VLRC concluded that although some stakeholders disagreed with Recommendation 24 above as it would reduce the certainty of litigation funders' contracts, these concerns had been adequately addressed in recent decisions.[180]

Finally, the VLRC recommended at Recommendation 25 that the Supreme Court should consider amending its practice note on class actions to provide guidance for the appointment of an independent costs expert by the Court to assist in the assessment of legal costs and litigation funding fees. This should take into account the guidelines contained in the Federal Court practice note on class actions relating to the use of costs experts. The VLRC observed that the 'appointment of legal costs experts in large class actions is widely seen as desirable'.[181] However, presently costs experts are usually appointed by the law firm whose costs are being assessed,[182] and the VLRC considered that a 'costs expert should be appointed by the Court to underpin, and to demonstrate to class members, the importance of [the expert's] independence'.[183]

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[179] Ibid, p. 121, citing *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) FCR 191 per Murphy, Gleeson and Beach JJ at [208].

[180] VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 122. The VLRC cited *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) FCR 191.

[181] VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 123.

[182] Ibid, p. 124.

[183] Ibid, p. 125.

5.4.2 ALRC Report

In its Final Report, the ALRC noted that while it had initially supported a licence regime, and although licensing of litigation funders had been strongly supported in the submissions it received on the topic, it had determined that such a regime was unnecessary.

The ALRC noted that the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry had 'set out in great detail the failures of…the Australian financial services licensing regime to protect consumers of financial services in a meaningful way'. Any recommendation for licensing of litigation funders would therefore be made 'in circumstances where the existing licensing regime has been revealed to have manifest limitations and is likely to be subject to a protracted process of reform'.[184]

More specifically, the ALRC also expressed concern about potential unintended consequences of a regulatory scheme in this context. The report noted that there is a tension 'between the perceived need for a licensing regime to ensure that litigation funders have the ability to meet their financial obligations (to indemnify the plaintiff in the event of an adverse costs order and to meet their commitment to fund the plaintiff's lawyer) and manage the conflicts that are inherent in any funding agreement, and the risk that a licensing regime may unnecessarily stifle competition amongst funders and thus artificially inflate the cost of funding'.[185] The report concluded that the ALRC's recommendations 'would achieve at least the same level of consumer protection without the regulatory burden of a licensing regime'.[186]

These recommendations, which were designed to support improved Court oversight of litigation funders, are set out and discussed briefly below.

The ALRC recommended at Recommendation 11 that Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the Part that establishes the Commonwealth's representative proceedings regime) should be amended to prohibit a solicitor acting for the representative plaintiff, whose action is funded in accordance with a Court approved third-party litigation funding agreement, from seeking to recover any unpaid legal fees from the representative plaintiff or group members.[187]

The ALRC observed that this recommendation would place the onus on a representative party's solicitor to ensure that the funder has sufficient resources to meet the solicitor's costs

[184] ALRC, *Integrity, Fairness and Efficiency,* p. 162.

[185] Ibid, p. 30.

[186] Ibid, p. 162.

[187] Ibid, p. 163.

and disbursements, and protect the representative party and group members from any liability to pay costs in the event that the funder fails.[188]

The ALRC recommended at Recommendation 12 that Part IVA of the *Federal Court of Australia Act 1976* should be amended to include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.[189] The ALRC noted that many of the submissions it received supported a licensing regime for litigation funders as a means to address the limitations of security for costs from a respondent's perspective; however it ultimately determined that improvements to the security for costs regime would be preferable to a licensing scheme.[190]

The ALRC considered that one such improvement would be providing for a statutory presumption that third-party litigators will provide security for costs, so that the respondent need not bear the onus of satisfying the Court that security should be provided. This improvement is contained in the first part of Recommendation 12. The second part of Recommendation 12 responds to concerns raised in submissions to the ALRC that the types of security being provided by funders are in some instances less secure than a bank guarantee, requiring costs to enforce.[191] Given the relevance of concerns about potential unfairness to respondents in funded proceedings to the torts of maintenance and champerty, the Commission invites submissions on this point.

The ALRC recommended at Recommendation 13 that sections 37N and 43 of the *Federal Court of Australia Act 1976* (Cth) should be amended to expressly empower the Court to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by section 37M.[192] This section provides that the overarching purpose of the civil practice and procedure provisions of the *Federal Court of Australia Act 1976* (Cth) is to facilitate the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible.[193] The overarching purpose includes the following objectives:

- the just determination of all proceedings before the Court;
- the efficient use of the judicial and administrative resources available for the purposes of the Court;
- the efficient disposal of the Court's overall caseload;
- the disposal of all proceedings in a timely manner; and

[188] Ibid.

[189] Ibid.

[190] Ibid, pp. 160-161.

[191] Ibid, pp. 164-165.

[192] Ibid, p. 165.

[193] *Federal Court of Australia Act 1976* (Cth), s 37M(1)(a) and (b).

- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.[194]

There is no equivalent of section 37M in the *Supreme Court Act 1935* (WA). However, there would seem to be merit in clarifying that the Court is able to award costs against parties or funders who frustrate the Court's ability to achieve the above objectives. Provisions of this nature would complement the Court's ability to guard against abuse of its processes.

The ALRC recommended at Recommendation 14 that Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;
- the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
- Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Court.[195]

The ALRC observed that this recommendation was limited to class actions, reflecting the distinct role the Court has in such actions of protecting the interests of all class members.[196]

As with the VLRC's Recommendation 24, discussed at [5.4.1] above, this recommendation involves direct intervention in private contractual arrangements. The ALRC noted however that such intervention was 'consistent with the unique protective jurisdiction that the Courts have with respect to class actions, the historic limitations on third-party litigation funding, and the residual limits of funding arrangements that could be considered contrary to public policy or otherwise illegal within the meaning of section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) and its equivalent provisions in other states and territories'.[197] The Commission agrees that there is merit in exploring this recommendation.

Recommendation 1, in which the ALRC proposed that Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that all representative proceedings are initiated as open class actions,[198] is also relevant to the present matter. This is because the ALRC observed that the relevant recommendation 'is primarily directed at ensuring that the

[194] Ibid, s 37M(2)(a)-(e).

[195] ALRC, *Integrity, Fairness and Efficiency,* p. 169.

[196] Ibid, p. 170.

[197] Ibid, pp. 171-172.

[198] Ibid, p. 90.

class action regime does not require potential group members to sign up with a lawyer or funder in order to participate'.[199] The Full Federal Court has found that the current scheme in Part IVA of the *Federal Court of Australia Act 1976* (Cth) allows for the bringing of representative proceedings on a 'closed class' as well as an 'open class' basis – that is, the representative party can expressly bring the claim on behalf of only some of the persons who have claims against the respondent, including by limiting the class by reference to an agreement with a litigation funder.[200] The federal scheme in effect gives the judiciary the discretion to assess the appropriateness of the class description and allow or disallow a closed class group depending on the facts of the case.[201]

Two other recommendations are also relevant but require Commonwealth rather than State action. Recommendation 15 proposes the amendment of the Australian Securities Investments Commission *Regulatory Guide 248* to require that third-party litigation funders that fund representative proceedings report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.[202] Recommendation 16 proposes that Regulation 5C.11.01 of the *Corporations Regulations 2001* (Cth) be amended to include 'law firm financing and 'portfolio funding' within the definition of a '*litigation funding scheme*'.[203] These recommendations both appear to have merit, but as they cannot be actioned by the Western Australian Government the Commission does not propose to consider them.

As with the VLRC recommendations outlined above, it would be possible for Western Australia to adopt any or all of these proposals regardless of whether action is taken to abolish the torts of maintenance and champerty. However, if these torts *are* abolished, proposals to require closer scrutiny of funding arrangements – or to support a licensing scheme at a federal level – may reassure those who view the torts as a means of addressing concerns about the potential for conflicts of interest in litigation funding arrangements.

Question 6
Should Western Australia advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry?

[199] Ibid, p. 94.

[200] The Full Federal Court found that a closed class group was permitted by the wording of section 33C(1) of the *Federal Court of Australia Act 1976* (Cth) in that 'a proceeding may be commenced by one or more of those persons as representing *some or all of them*' [emphasis added]; see *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

[201] This scheme is replicated in the Civil Procedure (Representative Proceedings) Bill 2019 which is currently before the Western Australian Parliament; see cl. 6(2).

[202] ALRC, *Integrity, Fairness and Efficiency*, p. 181.

[203] Ibid, p. 183.

Question 7

In light of the recommendations of the Victorian Law Reform Commission, should the Western Australian Government:

- Recommend that the Supreme Court consider implementing a requirement that litigation funding agreements be disclosed to the Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's practice note on class actions? (VLRC Recommendation 3)

- Recommend that the Supreme Court consider requiring the plaintiff's lawyers to provide the Court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary? (VLRC Recommendation 4)

- Recommend that the Supreme Court consider requiring that, where a representative proceeding is funded by a litigation funder:

    - the representative party's lawyers should notify group members (whether they are actual or potential clients), in clear terms and as soon as practicable, of any applicable litigation funding charges and any material changes to those charges; and
    - the obligation to notify is satisfied if group members have been provided with a document that properly discloses those charges; and
    - failure to meet the obligation to notify may be taken into account by the Court in relation to settlement approval? (VLRC Recommendation 5)

- Legislate to provide the Supreme Court with specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to be deducted from settlement amounts to ensure they are fair and reasonable? (VLRC Recommendation 24)

- Recommend that the Supreme Court consider providing guidance for the appointment of an independent costs expert by the Court to assist in the assessment of legal costs and litigation funding fees? (VLRC Recommendation 25)

Question 8

In light of the recommendations of the Australian Law Reform Commission, should the Western Australian Government:

- Legislate to provide a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form enforceable in Australia? (ALRC Recommendation 12)

- Legislate to provide the Court with an express power to award costs against third-party litigation funders and insurers who fail to comply with the Court's overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible? (ALRC Recommendation 13)

- Legislate to provide that:

    - third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;
    - the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
    - third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
    - Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Court? (ALRC Recommendation 14, which has some overlap with VLRC Recommendation 24).

Questions 7 and 8 above specifically invite feedback on particular recommendations made by the VLRC and ALRC on the basis of their more direct relevance to the torts of maintenance and champerty and their potential to address concerns about abolishing these torts. Stakeholders are however welcome to make comment on other proposals made by the VLRC and ALRC that are considered useful in this context.

5.4.3 Common fund orders

Both the ALRC and VLRC also recommended that the Federal Court and Supreme Court of Victoria be given an express legislative power to make common fund orders,[204] which are orders made in a representative proceeding that 'typically require all members of a class to contribute equally to the legal and litigation funding costs of the proceedings regardless of whether the class member signed a funding agreement'.[205] The ability to make such orders is relevant to a number of the ALRC's and VLRC's other recommendations, including those relating to the regulation of litigation funders by the Courts such as ALRC Recommendation 14 and VLRC Recommendation 24.

It should be noted that the High Court of Australia is presently considering whether, in the absence of an express legislative power to do so, the New South Wales Supreme Court currently has the legal (and, where exercising federal jurisdiction, the constitutional) power to make common fund orders.[206] At the time of writing the High Court has not yet handed down its decision, which will be directly relevant to other legislative representative proceedings regimes elsewhere in Australia.

[204] See ALRC, *Integrity, Fairness and Efficiency,* p. 96, and VLRC, *Access to Justice – Litigation Funding and Group Proceedings,* p. 68.

[205] ALRC, *Integrity, Fairness and Efficiency,* p. 96.

[206] *BMW Australia Ltd v. Brewster & Anor* (Case No. S152/2019).

6. CONCLUSION

This Discussion Paper has briefly set out the history of the torts of maintenance and champerty and the rationale behind these torts, and examined arguments about their continued relevance today. The Discussion Paper has posed a series of questions about possible courses of action open to the Western Australian Government. The Law Reform Commission of Western Australia would welcome submissions that address the questions as set out in this Discussion Paper, or any related matters.

List of discussion questions

1. Should Western Australia abolish the torts of maintenance and champerty?

2. Should Western Australia legislate to clarify that the mere fact of a funding agreement does not constitute an abuse of process, while otherwise leaving the torts of champerty and maintenance in place?

3. Should Western Australia abolish the torts of maintenance and champerty while preserving 'any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal'?

4. Should Western Australia attempt to codify the torts of maintenance and champerty, in the interests of clarity?

5. Should Western Australia leave the torts of maintenance and champerty as they are?

6. Should Western Australia advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry?

7. In light of the recommendations of the Victorian Law Reform Commission, should the Western Australian Government:

   - Recommend that the Supreme Court consider implementing a requirement that litigation funding agreements be disclosed to the Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's practice note on class actions? (VLRC Recommendation 3)

   - Recommend that the Supreme Court consider requiring the plaintiff's lawyers to provide the Court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary? (VLRC Recommendation 4)

   - Recommend that the Supreme Court consider requiring that, where a representative proceeding is funded by a litigation funder:

     - the representative party's lawyers should notify group members (whether they are actual or potential clients), in clear terms and as soon as practicable, of any applicable litigation funding charges and any material changes to those charges; and
     - the obligation to notify is satisfied if group members have been provided with a document that properly discloses those charges; and
     - failure to meet the obligation to notify may be taken into account by the Court in relation to settlement approval? (VLRC Recommendation 5)

   - Legislate to provide the Supreme Court with specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to be deducted from settlement amounts to ensure they are fair and reasonable? (VLRC Recommendation 24)

   - Recommend that the Supreme Court consider providing guidance for the appointment of an independent costs expert by the Court to assist in the assessment of legal costs and litigation funding fees? (VLRC Recommendation 25)

8. In light of the recommendations of the Australian Law Reform Commission, should the Western Australian Government:

    - Legislate to provide a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form enforceable in Australia? (ALRC Recommendation 12)

    - Legislate to provide the Court with an express power to award costs against third-party litigation funders and insurers who fail to comply with the Court's overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible? (ALRC Recommendation 13)

    - Legislate to provide that:

        - third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;
        - the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
        - third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
        - Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Court? (ALRC Recommendation 14, which has some overlap with VLRC Recommendation 24).