



**JEREMY W. RAPKE Q.C.**  
**DIRECTOR OF PUBLIC PROSECUTIONS**  
**VICTORIA**

The Hon Mr Johan Scheffer MLC  
Chair, Inquiry into Vexatious Litigants  
Parliament of Victoria, Law Reform Committee  
Parliament House  
Spring Street  
EAST MELBOURNE  
VIC 3002

27 June 2008

Dear Mr Scheffer,

**INQUIRY INTO VEXATIOUS LITIGANTS**

Thank you for your letter dated 24 April 2008 inviting me to make a submission to the Committee's inquiry into vexatious litigants.

My comments in this regard will be limited to the issue of vexatious litigants who initiate proceedings in the criminal jurisdiction.

In your letter you have referred to the power exercised by me pursuant to s.22 of the Public Prosecutions Act 1994 and you have indicated that the Committee would be assisted by the provision of information about how these proceedings are brought to my attention, the number of times this function is exercised and in what circumstances. You have also indicated that the Committee would be interested in any views I may have about the effectiveness of this provision in dealing with vexatious litigants.

Section 22(1)(b)(ii) provides that the Director of Public Prosecutions may "if the Director considers it desirable to do so":

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

It is immediately obvious that this provision is not directed exclusively or, for that matter, chiefly, at dealing with criminal proceedings brought by vexatious litigants. It is a provision of wider compass and intent.

However, it is fair to say that this provision has become the legislative basis for numerous decisions by Directors of Public Prosecutions in recent years to take over and discontinue criminal proceedings brought by persons for misguided or misconceived motives, or for reasons that may be said to be vexatious.

There are two main ways in which such matters are drawn to my attention:

1. by correspondence received from the defendant(s) to such proceedings; or
2. by correspondence received from the court in which such proceedings have been initiated – usually, the Magistrates' Court of Victoria

The first has been the most usual, but the second is becoming more common.

Matters requiring the exercise of discretion in this respect have occurred at the rate of several per year for the past few years. They are a fairly regular occurrence, but not particularly common. It is noted that many such matters involve persons who have previously been the initiators of such proceedings and who, thereby, may be described as "vexatious litigants".

Well-established criteria have been developed, ensuring that a fair and consistent approach is taken to matters in relation to which a request is made for the DPP to take over and conduct or discontinue criminal proceedings. This policy is followed rigorously to ensure proper and consistent process at all times.

The process is relatively effective in dealing with criminal proceedings initiated by vexatious litigants, but it may put the DPP in a difficult situation from time to time. It is not possible to rationalize a decision made under this provision on the basis that the person is a vexatious litigant. That aspect of the matter is not able to be relied upon in relation to a person who continually files criminal proceedings of dubious merit and legitimacy. All such matters have to be looked at on an individual basis.

The process can, at times, involve a significant diversion of resources, in terms of correspondence, court time and appeal/review/VCAT/FOI procedures.

Overall, I do not see the process as an appropriate or effective way of dealing with litigants who would truly be termed vexatious.

It is, of course, essential that the rights of citizens to bring proceedings is preserved. However, there needs to be an effective way of dealing with people who deliberately and maliciously abuse the criminal process for the purpose of being a nuisance, or who, perhaps, lack the stability or foresight to appreciate that the proceedings repeatedly initiated by them are inappropriate and misconceived.

As regards the broader issue of vexatious litigants and how they are dealt with in Victoria, the current situation is that the Attorney-General can ask the Supreme Court to declare a person a vexatious litigant. This process is seen as involving an important safeguard, whereby a member of the executive branch of government refers the matter to the judicial branch. It is important that there are checks and balances in place in any such process.

My office has in recent times had to deal with a situation where a person, who is the subject of an intervention order that relates to his activities in repeatedly stalking the person who obtained the order, has over a period of several years from time to time repeatedly, and arguably vexatiously, applied to the court for variations of the order. This has led to the victim of his stalking activities being continually dragged back through the court process. This conduct has, in my opinion, rightly been characterized as amounting to "stalking through the courts."

### Submissions

1. It is arguable that the Chief Judge of the County Court and the Chief Magistrate should have the power to declare a person a vexatious litigant, subject to a right of appeal to the Supreme Court, perhaps with a guarantee of provision of financial assistance by Victoria Legal Aid for the cost of such appeal.
2. The effect of such a declaration would be to stay the proceedings where no other order is made in relation to the proceedings.
3. Any such process would have to involve the strongest safeguards. For example, the Chief Magistrate or Chief Judge would have to be required to provide full written reasons for any such decision.
4. There should be a time limit on the right to appeal for such a decision, perhaps 30 days, with capacity to seek leave from a Supreme Court judge to appeal out of

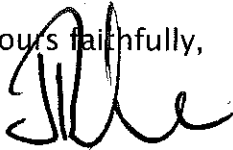
time, but with no absolute right to assistance from Victoria Legal Aid in those circumstances, except perhaps in exceptional circumstances as determined by the Supreme Court.

5. There should be the right to appeal from any decision of the Supreme Court to the Court of Appeal.
6. The Chief Magistrate, the Chief Judge of the County Court should be able to make an appellable declaration that proceedings begun by a person are proceedings brought with the intention of avoiding a vexatious litigant declaration made in respect of a vexatious litigant.
7. There may be situations where it would be appropriate for a vexatious litigant to be required by a court to provide security for costs of the other side in the proceedings, failing which proceedings will be struck out or permanently stayed.
8. The fact of a person being declared a vexatious litigant in another State or in the Commonwealth jurisdiction should be admissible in proceedings in which a vexatious litigant order is being considered, but should not result in such an order being made automatically. The court should be able to take this into account in deciding whether to declare the person a vexatious litigant.
9. Mental health issues are often a pertinent consideration, but it is not the role of the courts to directly involve themselves, other than perhaps by way of seeking to refer persons in obvious need of assistance to appropriate services where such a course is deemed appropriate.
10. Courts and agencies affected by people with mental illnesses who behave vexatiously need to be able to take appropriate action to protect themselves and the public revenue from abuse of legitimate process.
11. This area involves a fine balance, as putting overly restrictive procedures in place could enable abuse of individual's rights in the future. In this respect, to some extent it can be said that a free and open society will and must be prepared to pay a price for that freedom and openness. It involves a careful balancing and weighing up of all of the factors involved.
12. Issues surrounding the Charter of Human Rights and Responsibilities will potentially be of major concern in this respect. Any legislative amendments and provisions will obviously need to be Charter-compliant.

13. Courts given the power to make vexatious litigant determinations and to deal with appeals regarding same should be allowed to consider a broad range of criteria, including –
- a. The way the person has conducted litigation in the past;
  - b. The person's motive for bringing current and past litigation – e.g. to harass or annoy, or to cause delay or detriment.

Should you have any queries or wish to discuss the matter further, please do not hesitate to contact me on 9603 7508, or Peter Byrne of the Policy and Advice Directorate, Office of Public Prosecutions, on 9603 7421.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'JR', written over the text 'Yours faithfully,'.

Jeremy Rapke