



Department of Justice

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Law Reform Committee

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Mr Johan Scheffer MLC
Chair
Law Reform Committee
Parliament of Victoria

Inquiry into Vexatious Litigants

1. Thank you for the invitation to make a submission to the Law Reform Committee's inquiry into vexatious litigants.
2. There is a large volume of litigation conducted by Victorian prisoners, much of which is litigation against statutory officeholders within the Victorian corrections system such as the Commissioner for Corrections, and prison Governors and officers. While the proportion of this litigation which can be said to be entirely without reasonable grounds or vexatious is relatively small, it can impose significant demands both on the legal resources available to Corrections Victoria, as well as on the time of statutory office-holders and public servants who are involved in defending such litigation.
3. On behalf of Corrections Victoria, I wish to make a brief submission in relation to two of the areas for comment raised in the issues paper:
 - (a) The powers of the Court to control vexatious litigation, and
 - (b) The effect of a vexatious litigant declaration.

The powers of the court to control vexatious litigation

4. The Committee's issues paper raises the question as to whether the Supreme Court or other courts and tribunals should be able to make orders other than the vexatious litigant declaration, in order to control vexatious litigants. One example given is to impose conditions on the right of the person to continue or bring litigation, such as a power to order that the person cannot bring proceedings unless they are legally represented.

5. Corrections Victoria would support specific provision to empower the court to make such orders to control the conduct of litigation, in the case of persons who conduct vexatious litigation. However if such orders are only to be appropriate to control vexatious litigation (which is accepted, given the limitation such a measure imposes on access to the courts), in practice they would probably need to be limited to persons who are already declared to be a vexatious litigant. For that reason, it may be more appropriate to consider giving express powers to the Court to grant any leave to conduct litigation subject to, for example, a requirement that they be legally represented. In this respect, it is noted that the courts already have implied powers to control proceedings which have been used to impose particular conditions on the grant of leave to a vexatious litigant: *Knight v Anderson* (2007)16 VR 532 at 538, where leave was granted subject to several conditions, including a requirement of legal representation. It may be appropriate to give express statutory recognition to these powers to make the grant of leave conditional, whether in the *Supreme Court Act* or the *Rules*.
6. Litigation conducted by a self-represented litigant, including prisoners, can raise a very wide number and range of issues, many of which have little relevance to the ultimate issues in the proceeding, and some of which are grievances which are extraneous to any legal issue which is appropriately before the courts. As a defendant or respondent to such litigation, significant time may nevertheless need to be spent responding to such allegations and materials, before a determination is made that they are indeed irrelevant.
7. Further, in the case of a person who is frequently before the courts, including with cases which lack merit, it may not be immediately evident to a defendant or to the Court from the material presented by a self represented litigant that the facts of the person's complaint do in fact raise a legal issue which should be resolved. Legal representation at an early stage would assist in identifying whether there are such issues raised by a particular factual situation, which can then be the focus of the litigation and hopefully resolved efficiently and quickly. Early representation at the time of bringing a proceeding may also assist a defendant, once it is appreciated that there is a specific legal issue raised for consideration, to resolve the matter to that person's satisfaction without further litigation.

The effect of a vexatious litigant declaration

8. Corrections Victoria is in a position to make observations in response to two questions raised under this heading.
 - (a) Under the current law, a vexatious litigant can apply for leave ex parte (without the court or tribunal hearing from anyone else). Should the Attorney-General, or any other people, be notified when a vexatious litigant seeks leave? What rights should those people have?
 - (b) Does the law make it too easy or too difficult for a vexatious litigant to get leave from a court or tribunal to continue or bring litigation? For example should the vexatious litigant have to show that there are reasonable grounds for the litigation?
9. These issues were raised recently when Julian Knight, a prisoner serving a sentence of life imprisonment, and who was declared a vexatious litigant in October 2004 (*Attorney-General v Knight* [2004] VSC 407), sought leave to bring proceedings against the Commissioner for Corrections.
10. Mr Knight sought leave to bring judicial review proceedings on a range of issues in the Supreme Court of Victoria. Although the application was served ex parte, a judge of the practice Court ordered that the Commissioner for Corrections, as proposed defendant, be served with the originating motion and supporting evidence filed by Mr Knight.

11. The Commissioner formed the view that there was no basis for the relief sought by Mr Knight, and therefore regarded it as appropriate to make submissions opposing the grant of leave. The Commissioner also filed and served evidence intended to:
 - (a) correct some aspects of the evidence filed by Mr Knight which was regarded as incorrect; and
 - (b) provide further factual background as to aspects of the corrections system which were raised by Mr Knight's application, to assist the court in assessing the allegations and relief sought.
12. In addition to the very substantial affidavit filed by Mr Knight in support of the application for leave, in the lead up to the hearing of the application he filed four further affidavits, and three sets of submissions. The preparation for the hearing of the application for leave and the hearing itself (involving two hearing days) became a significant piece of litigation.
13. The matter was resolved with refusal to grant leave to bring proceedings in relation to all but one of Mr Knight's proposed grounds: *Knight v Anderson* (2007) 16 VR 532.
14. It was appropriate for the proposed defendant to be able to make submissions and file material, to make clear that the proposed cause of action (which is of course expressed in the applicant's leave material as attractively as possible), would when the complete and true factual position is known, be doomed to fail or otherwise an abuse of process. However, the fact that in this case the process of hearing the leave application was almost as complex, lengthy and resource consuming as a full hearing of the proposed judicial review proceeding itself was likely to be, does raise questions as to the effectiveness of the vexatious litigant scheme. The potentially lengthy nature of leave proceedings, in combination with the way s 24 of the *Supreme Court Act* in relation to the grant of leave has been interpreted (as discussed below) does raise questions as to the utility of going through the process of having a person declared a vexatious litigant.

Section 21(4) and its interpretation

15. Section 21(4) of the *Supreme Court Act* provides relevantly that "Leave must not be given unless the Court, ... is satisfied that the proceedings are not or will not be an abuse of the process of the Court...". Unlike many other jurisdictions, the section does not require anything further as to the basis for or the merit of the proceedings. In other States, the Court must be positively satisfied of two things before granting leave: first, that the proceedings are not an abuse of process but also that there is prima facie basis for the proceedings. For example, s 84(4) of the *Supreme Court Act 1972* (NSW) provides that leave to bring or continue proceedings is not to be granted to a vexatious litigant "... unless the Court is satisfied that the proceedings are not an abuse of process and that there is prima facie ground for the proceedings". The provisions in other jurisdictions are Order 63 r 6 of the former *High Court Rules 1952* (Cth); Order 21 rule 5 of the *Federal Court Rules*; and section 11(1) of the *Vexatious Litigants Act 1981* (Qld). The English legislation (*Supreme Court Act 1981*, section 42) requires that there are reasonable grounds for the proceedings.
16. The Court of Appeal in *Phillip Morris Ltd v Attorney-General for the State of Victoria* (2006) 14 VR 538 had confirmed, in the context of the grant of leave under s 21(4), that a proceeding must be "foredoomed to fail" before it will be considered an abuse of process. The Court held that reasonable grounds or reasonable prospects of success did not form part of the assessment whether a proceeding was an abuse of process: at [85] per Maxwell P (with whom Ormiston and Eames JJA agreed on this issue: [116], [152]).
17. In those jurisdictions requiring that the Court be satisfied of a prima facie case there is, therefore, a greater threshold for a vexatious litigant before leave can be granted.

18. In *Knight v Anderson* it was submitted for the Commissioner that the fact that a proposed proceeding has no reasonable grounds, or reasonable prospects of success, even if not relevant to the threshold question of whether a proceeding is an abuse of process, should be taken into account as discretionary factors which may warrant the refusal of leave.
19. The rationale behind this submission is that the law already provides that a litigant may not bring proceedings which are an abuse of process. Any proceeding which is an abuse of process may be stayed regardless of whether the plaintiff is a vexatious litigant or not (see Rule 23.01 of the *Supreme Court General Civil Procedure Rules*).
20. However, this submission was rejected by the Court in *Knight v Anderson*. The result is, it is suggested, that the current requirement for a vexatious litigant to obtain leave to bring proceedings adds nothing to the legal requirements imposed on every litigant who brings proceedings. The requirement appears to serve little purpose except to reverse the onus of proof – that is, the vexatious litigant must establish that the proceeding is not an abuse of process in order to obtain leave, whereas in other cases a defendant who is seeking to have proceedings issued by an “ordinary” litigant stayed as an abuse of process bears the onus of establishing that it is an abuse.
21. As a consequence, the requirement of leave does not prevent a vexatious litigant bringing proceedings are not “foredoomed to fail”, but nevertheless have no reasonable grounds to support them and are likely to fail.
22. It is suggested that it would be appropriate to make the legislation in Victoria consistent with that of other jurisdictions by adding a requirement that the court is satisfied that there is a prima facie case or that there are reasonable grounds for bringing the proceeding.

Balancing rights and interests

23. The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) protects the right to a fair hearing (see section 24). The purpose of the right to a fair hearing is to ensure the proper administration of justice. This right is concerned with procedural fairness (that is, the right of a party to be heard and to respond to any allegations made against them, and the requirement that the court or tribunal be unbiased, independent and impartial) rather than the substantive fairness of a decision or judgment of a court or tribunal (that is, the merits of the decision).
24. The Charter also provides that a human right may also be subject to reasonable limits (see section 7). Reasonable limitation requires the balancing of rights of an individual with the need to protect the broader public interest. It is therefore noted that any new measures must achieve an appropriate balance between the right to a fair hearing and the desire to protect the public (who may be respondents to vexatious litigation) and the operation of the justice system (the operation of which may be impaired if vexatious litigation is uncontrolled). This may be achieved by increasing the effectiveness of current legislative provisions in dealing with vexatious litigants.
25. It is suggested that currently the law in Victoria may not achieve the right balance in providing protection to the justice system and other parties from vexatious litigation. The declaration of a person as a vexatious litigant in the first instance involves a judicial determination, made on the basis of a careful assessment of their past conduct, that they have habitually, persistently, and without reasonable ground instituted vexatious proceedings. The broader public interest, including access to justice and the effective operation of the justice system, may be served by stricter control over any proceedings instigated by such a litigant than apply to the population generally.

26. The inclusion of a requirement that the court must be satisfied there is a prima facie case or there are reasonable grounds for bringing a proceeding would not prevent any application based on reasonable grounds from being heard but may represent such a control.

If you have any queries please do not hesitate to contact me or Ms Nafsika Sahinidis on 8684 6595.

Yours sincerely



JAN SHUARD
Acting Commissioner