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Law Reform Committee

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Mr Johan Scheffer MLC
Chair
Parliament of Victoria Law Reform Committee
Parliament House
Spring Street
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Dear Mr Scheffer

Inquiry into Vexatious Litigants

Thank you for your invitation to provide a submission to the Committee's Inquiry. As you will be aware, members of the Supreme Court have been interviewed by Dr Ian Freckelton SC for the purposes of the inquiry. In addition to this, members of the Court have met as a group and discussed some of the broad issues raised by your inquiry.

The attached document provides observations deriving from that discussion. It is hoped that this will be of assistance to the Committee in its deliberations.

Yours sincerely

CHRIS MAXWELL
Acting Chief Justice

VICTORIAN PARLIAMENT LAW REFORM COMMITTEE
INQUIRY INTO VEXATIOUS LITIGANTS

JUNE 2008

INTRODUCTION

Members of the Court's Self-represented Litigants Committee and other interested members of the Court have considered some of the issues raised in the Law Reform Committee's Issues Paper and make the following observations.

These comments do not necessarily reflect the views of individual Judges and Masters or the Court as a whole.

VICTORIA'S VEXATIOUS LITIGANT LAWS

Standing

The current requirement that only the Attorney-General may make application to have a person declared vexatious seems to have limited the number of applications made.

Consideration should be given to a reform which permitted applications to be brought by persons with a sufficient interest, with leave of the Court. For example, a person against whom proceedings were persistently brought by the same individual should be able to seek leave to apply to have the individual declared vexatious. A leave requirement is considered necessary to prevent misuse of such applications.

The Attorney-General's role in bringing applications would still be an important part of his or her function in ensuring the court's process is not abused. This is particularly so where a litigant brings a series of unmeritorious proceedings against different parties rather than targeting a single person or organisation. In those circumstances an individual defendant might not have sufficient interest in bringing an application once their own proceedings were resolved, but an application should nonetheless be brought in the public interest.

There are difficulties with the court having "own motion" power to initiate an application, because of questions of bias in the subsequent determination of the application. Consideration should be given to establishing a referral mechanism, so that the Chief Justice (or an individual judge with direct experience of the litigant in question) can pass on to the Attorney-General copies of decisions where a pattern of abuse of process is identified, leaving it to the Attorney to determine whether to pursue the matter further.

It may be that there is a lack of awareness in the community of the capacity for application to be made by the Attorney-General to have a person declared vexatious, and so matters may not be brought to the Attorney's attention.

Jurisdiction

There was discussion of whether individual jurisdictions (e.g. the County Court or the Victorian Civil and Administrative Tribunal) should be able to make a declaration limited to that jurisdiction. The following matters were raised.

The serious nature of a declaration under s 21 justifies applications being brought in the highest court in the State. The decision of the Supreme Court is capable of binding all other courts and tribunals. There are also practical advantages of having a single forum for applications for leave and a single source of orders. Having more than one source may create uncertainty and confusion.

Creating a jurisdiction in other courts to make declarations limited to their own jurisdiction may simply cause problem litigants to issue proceedings elsewhere, in particular in the Supreme Court. This would require further applications and re-adjudication on the same issue. It is also likely that orders made by lower courts would be appealed to the Supreme Court and ultimately to the Court of Appeal.

It might be more affordable for a defendant (if they are to be permitted to do so) to make application for orders in the court or tribunal where the vexatious proceedings have been brought. A limited order may be sufficient to curtail the actions of the litigant.

Within the context of a system of graduated orders as discussed below, it would be appropriate for other courts and tribunals dealing with proceedings held to be an abuse of process, to have the option to make orders, albeit of a limited nature.

The current test

On an application to have a person declared a vexatious litigant, s 21 of the *Supreme Court Act 1986* does not permit the Court to take account of proceedings brought by that person in the courts of other States and Territories or federal courts, in determining whether the litigant has

habitually, persistently and without reasonable grounds instituted vexatious proceedings.[1] Consideration of such proceedings is confined to the exercise of the discretion to make an order.[2]

There was consensus at the meeting that, in considering whether to declare a person vexatious, the court should be able to take into account proceedings brought in any Australian court. At the same time, an application to have a person declared vexatious should be brought in the most logical and appropriate forum, and not be subject to "forum shopping".

The equivalent provisions in Order 21 of the *Federal Court Rules* permit consideration of proceedings in any other Australian court.[3]

Applications for leave to bring further proceedings

The making of an order under s 21 does not shut the litigant out from bringing proceedings, but requires that leave be obtained before such proceedings are brought. The Court must be satisfied that the proceedings sought to be brought do not constitute an abuse of process.

In some instances, once a person has been declared vexatious they have ceased to attempt to bring further proceedings. In other instances, a number of applications for leave have been brought.[4] Dealing with applications for leave can be time consuming for the court, and that time comes at the expense of other litigants who have not abused court process.

There may be scope to permit applications by declared vexatious litigants for leave to bring proceedings to be determined "on the papers" without an oral hearing. This would enable those applications which are without merit to be dealt with more efficiently. It is noted that this practice is adopted in the courts in England and Wales.

OTHER WAYS TO RESPOND TO VEXATIOUS LITIGANTS

Different models

While a UK statute was the source of the current Victorian provision for declaring vexatious litigants, the courts of England and Wales have utilised their inherent power to develop a range of orders to restrain litigants from continuing to pursue vexatious litigation.

The orders developed by the courts under the inherent power to prevent abuse of court process commenced with *Grepe v Loam* (1887) 37 Ch D 168, but

[1] *Attorney-General for the State of Victoria v Weston* [2004] VSC 314 [9]
[2] *Attorney-General for the State of Victoria v Moran* [2008] VSC 159 [53]
[3] This rule was amended to its current form following a recommendation that such a reform be considered by Sackville J in a decision of *Ramsey v Skyring* (1999) 164 ALR 78.
[4] See *Phillip Morris and Anor v Lindsey* [2006] VSCA 21

have been developed and expanded more recently in *Ebert v Venvil* [2004] Ch 484 and *Bhamjee v Forsdick* [2004] 1 WLR 88. Following these decisions, the types of orders which may be made are now more fully described in Practice Direction 3c issued under rule 3.11 of the Civil Procedure Rules. The types of orders which are made are:

- A limited civil restraint order
  - The court may make such an order where a party has made 2 or more applications which are totally without merit;
  - The order has the effect of restraining the party from making further applications within that proceeding unless leave is obtained;
  - Applications for leave to bring proceedings are determined on the papers, as are any applications for leave to appeal.
- An extended civil restraint order
  - The court may make such an order where a party has persistently issued claims or made applications which are totally without merit
  - The order has the effect of restraining the party from issuing claims or making further applications concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made unless leave is obtained;
  - Applications for leave to bring proceedings are determined on the papers, as are any applications for leave to appeal;
  - The orders may be made by courts at different levels, however the restraint only extends to the court where it was made and courts below it in the hierarchy;
  - The orders may run for a maximum of 2 years at a time.
- A general civil restraint order
  - The court may make such an order where a party persists in issuing claims or making applications which are totally without merit in circumstances where an extended civil restraint order would not be sufficient;
  - The order has the effect of restraining the party from issuing any claim or making any application unless leave is obtained;
  - Applications for leave to bring proceedings are determined on the papers, as are any applications for leave to appeal;
  - The orders may run for a maximum of 2 years at a time.

Applications for these orders are not limited to the Attorney-General and may be made by a party or others threatened with litigation. The orders are more

limited in scope and/or duration than the orders available under statute, however they have a lower threshold test.

A statutory system of graduated orders, similar to those developed in the United Kingdom, could provide a more flexible regime for dealing with litigation constituting an abuse of process.

Consideration should be given to empowering the court, where a claim has been dismissed as an abuse of process, to make a further order that the party is not to make any further applications against the particular defendant(s) without leave of the court. Such a provision would allow some relief to be provided at an early stage to persons subjected to vexatious litigation.

Mental health issues

Particular difficulty is encountered where the litigant appears to be suffering from an untreated mental illness or personality disorder. Sometimes the judicial officer becomes concerned that the person's growing frustration with court processes might lead to self-harm or violence towards court officials.

There are limited options available to address what may be an underlying cause of vexatious litigation. In some cases litigants have been referred to VCAT's guardianship list. In others the Public Advocate has been contacted. In extreme cases, powers under the *Mental Health Act 1986* may be available. From press reports it appears a system of court referral for mental health treatment is being considered in New South Wales.

This is a complex issue which is not easily dealt with, but would warrant the Committee's close attention.

McKenzie Friends

Unrepresented litigants are sometime encouraged by non-parties to raise certain types of arguments which are without merit. They seek to have such people appear for them or assist them as a "McKenzie friend". The Court can be placed in a difficult position where the proposed McKenzie friend or representative is not considered an appropriate person. Where the litigant is from a non-English speaking background, or is inarticulate or unprepared to represent themselves, to refuse leave may effectively deny them any representation.

Practical strategies to address this situation may include making available through the SRL Co-ordinator and other court staff a plain-English statement (or a translated version) of the principles related to representation and McKenzie friends.[5] This would be a way of managing the expectations of

[5] Perhaps drawing on the material in County Court publication *Self-represented Parties: A Trial Management Guide for the Judiciary*

unrepresented litigants that other people will be permitted to appear or assist them.

Fee Waiver

Consideration should be given to the provisions governing the waiver of court fees. Some litigants are currently able to bring multiple unmeritorious applications at no cost, simply by obtaining a fee waiver.

The Prothonotary currently determines fee waivers on the basis of financial hardship under s 129(3) of the *Supreme Court Act 1986*. The information available to the Prothonotary is limited (an affidavit by the applicant) and has on occasion been contradicted by material which comes to light subsequently in court. While the waiver is discretionary, the Prothonotary is not in a position to investigate the merits of the application for waiver.

One option for reform would be to provide the Prothonotary with an option to refer a fee waiver application to the Court where there was a question as to the bona fides of the financial hardship claim or where there was a reasonable suspicion that the proceeding in question might be an abuse of process. A provision in the Federal Court permits deferral of the fee for a period of time where there is an urgency to the filing of the documents.[6] This allows more time to determine the fee waiver issue.

Consideration could also be given to a power to revoke fee waivers, or prevent further fee waivers, where information subsequently comes to light showing that a waiver is not justified.

[6] *Federal Court Regulations 2004* (Cth) r 10