NSW GOVERNMENT Justice

Statutory Review

Report on the Statutory Review of the *Vexatious Proceedings Act 2008*

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Executive Summary

0.1 The *Vexatious Proceedings Act 2008* (NSW) (**the Act**) received assent and commenced on 1 December 2008. This Act was developed following a national reform process conducted to develop a nationally consistent approach to managing, and providing relief from, vexatious litigants.

0.2 Vexatious litigants have significant capacity to abuse court processes, undermine the efficacy and effectiveness of the justice system, and cause considerable resource and emotional stress for other parties. The Act seeks to strike a balance between ensuring superior courts of record in New South Wales (**NSW**) have suitable powers to control vexatious litigants, while also preserving the fundamental right of citizens to approach the courts to seek justice in accordance with law, and to defend themselves in criminal proceedings.

0.3 Under section 22 of the Act, the Attorney General is required to review the Act as soon as possible to five years after the date of assent to determine whether the policy objectives of the Act remain valid, and its terms remain appropriate for securing those objectives. The Department of Justice (**the Department**) has undertaken this Review on behalf of the Attorney General, inviting all interested parties to make submissions and consulting directly with key stakeholders.

0.4 The information the Department gathered from submissions and consultations, and our analysis of pertinent case law, indicate that the Act's objectives remain valid, and its terms are generally well suited to achieving those objectives.

0.5 The Department has made nine recommendations for amendments to the Act, which are designed to provide greater clarity about the Act's operation and application. The Department considers that these amendments will help ensure that the justice system in NSW remains accessible, but is also effective, efficient and economical. It is important that judicial processes cannot be misused by a small minority of litigants to the detriment of others.

Recommendations

Recommendation 1

Section 6(d) of the *Vexatious Proceedings Act 2008* be amended to clarify that it involves an objective test, requiring the court to look at the *effect* of the litigant's conduct on the proceedings.

Recommendation 2

The *Vexatious Proceedings Act* 2008 be amended to expressly provide that, for the purposes of determining whether a litigant has frequently instituted or conducted vexatious proceedings, an authorised court can consider both civil and criminal proceedings the litigant has previously instituted or conducted.

Recommendation 3

The *Vexatious Proceedings Act 2008* be amended to provide that, where an authorised court has regard to the past orders of other courts and tribunals, section 91 of the *Evidence Act 1995* does not apply (with the effect that evidence of a decision or a finding of fact of another Australia court or tribunal will not be inadmissible to prove that a litigant has frequently commenced or conducted vexatious proceedings).

Recommendation 4

The *Vexatious Proceedings Act* 2008 be amended to provide that, unless a vexatious proceedings order expressly states otherwise, the order does not prohibit a litigant from making applications in criminal proceedings brought *against* him or her, or from making bail applications.

Recommendation 5

The *Vexatious Proceedings Act 2008* be amended to clarify that all interlocutory and procedural applications in civil proceedings are 'proceedings' for the purpose of vexatious proceedings orders made under section 8, unless the order specifies otherwise.

Recommendation 6

The *Vexatious Proceedings Act 2008* be amended so that an authorised court may refuse an application to vary or set aside an existing vexatious proceedings order if it is not satisfied that the application is materially different to an earlier, unsuccessful application to vary or set aside the same order.

Recommendation 7

The *Vexatious Proceedings Act 2008* be amended to allow an authorised court to decline to consider an application for leave to institute proceedings where it is not satisfied on the papers that the application is materially different to a previous application for leave to institute proceedings that was dismissed as vexatious or for not providing a prima facie ground for the proceedings.

Recommendation 8

The *Vexatious Proceedings Act 2008* be amended to clarify that section 15(2) does not require an appropriate authorised court to hold an oral hearing before dismissing an application for leave to institute proceedings under section 15(1).

Recommendation 9

The *Vexatious Proceedings Act 2008* be amended to clarify that a grant of leave to institute proceedings under section 16 should be taken to include a grant of leave to make any interlocutory applications within those proceedings unless specified otherwise.

1. Introduction

1.1 The *Vexatious Proceedings Act 2008* (**the Act**) provides a mechanism for authorised superior courts of record in NSW to manage litigants who abuse court processes by repeatedly pursuing vexatious legal proceedings.

1.2 The Act was developed following a national reform process conducted through the former Standing Committee of Attorneys General (**SCAG**), which sought to develop a nationally consistent approach to vexatious litigants. The Northern Territory, Queensland, Tasmania and Western Australia have also adopted legislation reflecting the national model developed by SCAG.

1.1 Conduct of the Review

1.3 This Review was conducted under section 22 of the Act. Section 22 provides that the Minister responsible for the Act (the Attorney General) is to review the Act as soon as possible after five years have elapsed since it received assent to determine whether its policy objectives remain valid, and its terms remain appropriate to secure those objectives.

1.4 The Act received assent in November 2008, and commenced on 1 December 2008.

1.5 Shortly after the Act had been in operation for five years, the Department of Justice commenced this Review on the Attorney General's behalf Appendix A contains further detail about the Review process.

1.2 Policy objectives of the Act

1.6 The Act does not contain any specific provisions which expressly state its policy objectives. The legislation's core objectives were, however, outlined in the Parliamentary Secretary's second reading speech for the Vexatious Proceedings Bill. These are:

- to protect the fundamental right of citizens to approach the courts to seek justice in accordance with law, while also preserving the efficiency of the justice system and shielding other participants in that system from unmeritorious actions,
- to expand the powers of superior courts of record to control vexatious litigants, and
- to maintain the effectiveness and efficiency of, and minimise the expense of accessing, the justice system in NSW.

1.7 The Act attempts to strike a balance between ensuring access to justice on the one hand, and promoting the efficiency of the justice system by protecting parties from unmeritorious proceedings on the other.

1.3 Continued validity of objectives and suitability of terms

1.8 The Department has concluded that the objectives of the Act remain valid. Preserving the efficacy, efficiency and accessibility of the justice system are policy objectives of enduring value, and are of clear benefit to the NSW community. The

Department also considers that, with some minor exceptions, the terms of the Act remain appropriate to achieve those objectives.

1.9 The submissions and comments the Department received from stakeholders also indicated that the Act is generally well supported and operates effectively. Those stakeholders did, however, also suggest that certain provisions within Parts 1 to 3 of the Act could benefit from some minor amendment. The Department has discussed these suggestions and made a number of minor recommendations for amendment to promote the efficacy of the Act, and to simplify and clarify its practical operation.

2. Process and parties

2.1 As discussed briefly in the Introduction, the Act empowers a limited number of courts (on their own motion or on the application of specified applicants) to make vexatious proceedings orders and thereby limit the capacity of relevant litigants to institute or conduct proceedings in NSW where those litigants have frequently instituted or conducted vexatious proceedings in Australia (or have acted in concert with others who have).

2.1 Authorised courts

2.2 Only authorised courts are empowered to make vexatious proceedings orders. Section 3 of the Act defines 'authorised court' to include only two superior courts of record, namely the Supreme Court and the Land and Environment Court.

2.3 Since the Act's commencement, the Supreme Court has made 23 vexatious proceedings orders, while the Land and Environment Court has made two.

2.4 Although only two courts have the power to make vexatious proceedings orders, the Supreme Court can make orders of wide application, including orders that apply to any and all courts and tribunals in NSW. The scope of the orders authorised courts can make is discussed further in Paragraph 3.29 below.

Expanding definition of 'authorised court'

2.1 The submission which the Department received from the President of the NSW Civil and Administrative Tribunal (**NCAT**) suggested that the section 3 definition of 'authorised court' should be expanded. The President suggested that NCAT or the President of NCAT should also be defined as an authorised court, and empowered to make vexatious proceedings orders in relation to NCAT proceedings. This would allow victims of vexatious proceedings within NCAT's jurisdiction to apply directly to NCAT for a vexatious proceedings order, rather than having to apply to the Supreme Court for an order applying to NCAT proceedings.

2.2 The Department has considered the President's suggestion carefully, but has concluded that, at this time, there is insufficient evidence to warrant expanding the list of authorised courts.

2.3 Citizens have a fundamental right to approach judicial and administrative decision-making bodies to seek justice in accordance with law. This right should only be restricted in very limited circumstances, and only on the consideration of superior courts of record.

2.4 NCAT, like other bodies not defined as authorised courts (such as the Local Court and District Court), has some capacity to control its own proceedings. For example, NCAT, and the Local and District Courts, may dismiss proceedings if they are frivolous, vexatious, without substance or have no reasonable prospect of success.[1] This is recognised in section 7 of the Act, which expressly states that the Act does not limit or affect any inherent jurisdiction or any powers that a court or tribunal has (apart from the Act) to restrict vexatious proceedings.

[1] See for example, *Civil and Administrative Tribunal Act 2013* (NSW) s 55, Local Court Rules 2009, rule 4.4; Uniform Civil Procedure Rules 2005, rule 13.4.

2.5 The Department considers that the existing powers which NCAT and other NSW courts and tribunals have to restrict vexatious proceedings, alongside the more limited powers of authorised courts under the Act, are sufficient to allow NSW courts and tribunals to manage vexatious litigants. The Department does not recommend that the list of authorised courts be amended, however, the Department will continue to evaluate the Act's application and efficacy to determine whether an amendment might be needed in the future.

2.2 Applicants for vexatious proceedings orders

2.6 Authorised courts are empowered to make vexatious proceedings orders on their own motion, or on the application of particular applicants (per section 8(4)):

(a) The Attorney General

(b) The Solicitor General

(c) The appropriate registrar for the court

(d) A person against or in relation to whom another person has instituted or conducted vexatious proceedings

(e) A person who, in the opinion of the court (and with leave of the court), has a sufficient interest in the matter.

2.7 A 'person' for the purposes of section 8(4)(d) and (e) includes both natural and legal persons.

2.8 The Department received no submissions suggesting that the list of applications should be amended. To date, 14 of the orders made by the Supreme Court have been made on the application of the Attorney General; seven have been on the application of a private individual or organisation; and two have been made on its own motion. Both the orders made by the Land and Environment Court have been made on the application of a private individual or organisation.

2.9 The Department considers that section 8(4) adequately reflects the parties that have a genuine interest in applying for vexatious proceedings orders. The Department does not recommend any change.

3. Making a vexatious proceedings order

3.1 The most critical operative section of the Act is section 8, 'Making of vexatious proceedings orders'. It provides for the circumstances in which authorised courts may make vexatious proceedings orders based on the conduct of litigants in *past* proceedings; and defines the scope of vexatious proceedings orders which authorised courts can make.

3.2 Both key elements of section 8 depend on the Act's definitions of 'proceedings', 'instituting proceedings' and 'vexatious proceedings', which are defined, respectively, under sections 4, 5 and 6. These provisions have been identified as problematic and the Department makes some recommendations for refinement.

3.1 Defining 'proceedings', 'instituting proceedings' and 'vexatious proceedings'

3.3 Under section 4, 'proceedings' are defined to include:

- any cause, matter, action, suit, trial complaint, inquiry or proceedings of any kind within the jurisdiction of any court or tribunal
- proceedings (including interlocutory proceedings) connected to or incidental to pending proceedings before a court or tribunal
- any challenge to a decision of a court or tribunal.

3.4 While this definition is comprehensive, it is not without ambiguity. The term 'proceedings' is used in a number of contexts in the Act, most relevantly, in evaluating whether the *past* proceedings of a litigant were vexatious proceedings, and in limiting what proceedings a litigant can institute or conduct in the *future*.

3.5 The section 5 definition of 'instituting proceedings' includes a range of actions and applications that can be made in the context of civil proceedings, criminal proceedings, proceedings before a tribunal and appeals.

3.6 Finally, section 6 defines 'vexatious proceedings' to include:

a) proceedings that are an abuse of the process of a court or tribunal,

b) proceedings instituted to harass, annoy, cause delay or detriment, or for another wrongful purpose,

c) proceedings instituted or pursued without reasonable ground, and

d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

Section 6(d): proceedings 'conducted in a way…'

3.7 Section 6(d) has been identified by the courts and stakeholders as problematic for its ambiguity.

3.8 In its 2014 submission, the Crown Solicitor's Office commented that there is some room for doubt on whether section 6(d) involves a subjective or an objective test. Section 6(d) could be interpreted as relating to proceedings that are conducted in a way that is *intended* to harass or annoy, to cause delay or detriment, or achieve another wrongful purpose, or as relating to proceedings that are conducted in a way that *does* harass or annoy, cause delay or detriment, or achieve another wrongful purpose, regardless of the litigant's intent.

3.9 This issue has been considered by the Supreme Court in several cases over recent years, without a definitive decision on whether the section 6(d) imposes a subjective or objective test. In the 2011 case of *Attorney General v Chan* [2011] NSWSC 1315, for example, the Supreme Court considered that section 6(d) was 'concerned with effect and consequence, rather than motive and design',[2] implying an objective test. This interpretation was noted or adopted in the several later Supreme Court cases.[3]

3.10 In the more recent case of *Attorney General v Mahmoud* [2015] NSWSC 899, Rothman J noted:[4]

> … s 6(b) and (d) are conceptually distinct. In s 6(b), the Court needs to be satisfied that the litigant had the requisite subjective intention, motive or state of mind to harass or annoy, to cause delay or detriment or for another wrongful purpose. On the other hand, s 6(d) is primarily concerned with the effect or consequence of the litigant's conduct in proceedings*, regardless of their subjective intention or motive* [emphasis added].

3.11 The issue has also been considered in the Court of Appeal. In *Viavattene v Attorney General* [2015] NSWCA 44, for example, Justice Basten suggested inclusion of the terms 'harass or annoy' in section 6(d) implied some subjective intent on the part of the litigant.[5] Justice Beazley did not consider that this was "necessarily the correct construction" of section 6(d), but said that "there may also be a question whether the descriptor … that describes proceedings conducted in a way so as to 'achieve a wrongful purpose' requires an intentional element" on the part of the litigant.[6]

3.12 The various judgements of the Supreme Court and Court of Appeal leave doubt as to the application of section 6(d). With reference to the central purpose of the Act, and the recommendations of stakeholders, the Department recommends that section 6(d) be amended to clarify that it involves an *objective* test.

3.13 As the Parliamentary Secretary noted in the Vexatious Proceedings Bill's second reading speech, the Bill was designed to counter the 'harm caused to, and costs incurred by, opposing parties and other participants in the justice system *as a result of* persistent litigation by vexatious litigants.' The Bill was directed at curbing the damaging *results* of vexatious litigant on other parties in the justice system; reading section 6(d) as involving an objective test looking at the *results* of a person's conduct, regardless of his or her intent, will best serve that end.

3.14 The Department considers that an objective test this will offer greater certainty to litigants and other parties who may wish to apply for a vexatious proceedings order, and to courts in determining whether a person has previously conducted vexatious proceedings. The Department also expects that this clarification will lead to greater consistency in court decisions on whether to make vexatious proceedings orders.

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[2] See *Attorney General v Chan* [2011] NSWSC 1315, at [33].

[3] See for example, *Pascoe v Liprini* [2011] NSWSC 1483 at 10; *Attorney General v Altaranesi* [2013] NSWSC 63 at [20]; *Attorney General v Viavattene* [2014] NSWSC 327 at 155; *Attorney General v Mahmoud* [2015] NSWSC 899 at 30.

[4] *Attorney General v Mahmoud* [2015] NSWSC 899 at [30].

[5] *Viavattene v Attorney General* [2015] NSWCA 44 at [17]-[18].

[6] *Viavattene v Attorney General* [2015] NSWCA 44 at [4].

Recommendation 1

Section 6(d) of the *Vexatious Proceedings Act 2008* be amended to clarify that it involves an objective test, requiring the court to look at the *effect* of the litigant's conduct on the proceedings.

3.2 'Proceedings' for the purpose of making a vexatious proceedings order

3.15 Under section 8(1), an authorised court may make a vexatious proceedings order where it is satisfied that the relevant litigant has frequently instituted or conducted vexatious proceedings in Australia, or acted in concert with a person who has. In making that determination, section 8(2) provides that the courts may have regard to proceedings instituted or conducted in, and orders made by, any Australian court or tribunal (that is, past proceedings and orders).

3.16 A number of the submissions the Department received indicated that further clarification of what past proceedings a court can consider in determining whether a litigant has 'frequently' instituted or conducted vexatious proceedings is needed. This is needed to give greater certainty to courts, litigants and potential applicants for vexatious proceedings orders about what past conduct can be considered.

Consideration of past criminal proceedings

3.17 Two submissions the Department received suggested that there was some ambiguity about whether an authorised court could, for the purposes of making a vexatious proceedings order, consider both the civil and criminal proceedings in which a litigant had been involved.

3.18 The Chief Justice of the Supreme Court and the Crown Solicitor's Office both noted that the very broad definition of 'proceedings' in section 4 would, on its face, apply to both civil proceedings and criminal proceedings (as well as applications adjunct to criminal proceedings). However, both submissions suggested that, as section 4 does not make any explicit distinction between civil and criminal proceedings, there is room for doubt. If only conduct in past *civil* proceedings can be considered, this may limit the number of litigants against whom vexatious proceedings orders can be made, even where a litigant has frequently conducted criminal proceedings in a vexatious manner.

3.19 The Act's definition of 'instituting proceedings' specifically refers to instituting both civil and criminal proceedings; this definition would be of limited application if 'proceedings' were limited to only civil. In addition, in the second reading speech, the Parliamentary Secretary noted that:

> 'Vexatious litigants abuse court processes by repetitively pursuing frivolous applications, raising spurious defences… and launching unmeritorious appeals [which] impinge on the effectiveness and efficiency of the justice system and make the process more expensive for everyone.'

These abuses of process can equally occur in either civil or criminal proceedings.

3.20 The Bill was designed to 'follow the approach taken in [other] jurisdictions' that had adopted the SCAG national model. Unlike NSW, the legislation in the Northern Territory, Queensland, Tasmania and Western Australia defines 'instituting proceedings' (including both civil and criminal) *before* they define 'proceedings'. The

implication is that the later definition of 'proceedings' should be read to include both civil and criminal.

3.21 The case of *Attorney General v Viavattene* [2014] NSWSC 327 also provides some useful guidance. In that case, the Attorney General sought a vexatious proceedings order prohibiting the defendant from instituting any proceedings in NSW, and staying all proceedings he had already instituted. In considering the application, the Court referred to numerous civil proceedings instituted by the defendant, as well as his conduct in criminal proceedings. In the context of criminal proceedings, this included repeated applications for adjournments, allegations of bias and impropriety, failure to appear, and applications for annulment of orders and convictions subsequently made in the defendant's absence.

3.22 The capacity of authorised courts to have regard to both the past civil and criminal proceedings of litigants for the purpose of determining if they have frequently instituted or conducted vexatious litigation is relatively well established. The Department recommends that the Act be amended to clarify that both past civil and criminal proceedings (and orders made within them) can be considered for the purposes of section 8(1) and 8(2).

Recommendation 2

The *Vexatious Proceedings Act* 2008 be amended to expressly provide that, for the purposes of determining whether a litigant has frequently instituted or conducted vexatious proceedings, an authorised court can consider both civil and criminal proceedings the litigant has previously instituted or conducted.

Orders made by Australian courts and tribunals

3.23 Section 91 of the *Evidence Act 1995* (NSW) (**the Evidence Act**) prevents earlier decisions or findings of fact from being admitted to prove the existing of a fact in later proceedings and provides:

> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

3.24 Recent Supreme Court decisions have highlighted that the phrasing of section 8(1) and (2) (which allow authorised courts to 'have regard' to the orders of other courts and tribunals for the purpose of determining if a litigant has frequently instituted or conducted vexatious proceedings) is potentially inconsistent with section 91 of the Evidence Act.

3.25 One of the clearest indications that a person has previously instituted or conducted vexatious proceedings is a determination to this effect by the court or tribunal before which those proceedings were instituted or conducted. However, as Justice Simpson observed in *Attorney General v Martin* [2015] NSWSC 1372, despite the wording of section 8(2) this is prohibited by section 91 of the Evidence Act.

3.26 Section 91 of the Evidence Act has the effect that an authorised court must make its own determination as to whether each earlier proceedings instituted or conducted

by a litigant were vexatious proceedings. Requiring authorised courts to effectively re-evaluate whether each and every prior proceedings were vexatious could be extremely time-consuming and labour intensive. This would be contrary to the objects of the Act, which are to reduce the time and resource pressures vexatious litigants can cause to the courts and others.

3.27 The Department considers that an amendment to the Act excluding section 91 of the Evidence Act for the purposes of allowing authorised courts to have regard to, but not revisit, the orders of any Australian court or tribunal is warranted and will ultimately promote the objects of the Act.

3.28 The Department acknowledges that excluding section 91 of the Evidence Act could be perceived as adversely affecting litigants' procedural fairness. However, the Department considers that there are sufficient safeguards to protect procedural fairness already within the Act. An authorised court can only make a vexatious proceedings order where a litigant has 'frequently' instituted or conducted vexatious proceedings, with the effect that one or two earlier adverse orders will be highly unlikely to lead to an order curtailing a litigant's access to justice. In addition, allowing an authorised court to have regard to past orders does not *compel* it to do so, nor to accept or follow those orders. The court must still be make its own evaluation as to whether it is satisfied the litigant has frequently instituted or conducted vexatious proceedings.

Recommendation 3

The *Vexatious Proceedings Act 2008* be amended to provide that, where an authorised court has regard to the past orders of other courts and tribunals, section 91 of the *Evidence Act 1995* does not apply (with the effect that evidence of a decision or a finding of fact of another Australia court or tribunal will not be inadmissible to prove that a litigant has frequently commenced or conducted vexatious proceedings).

3.3 'Proceedings' for the purpose of a vexatious proceedings order's scope

3.29 Section 8(7) and 8(8) of the Act set out the scope of the orders that can be made by the Supreme Court and the Land and Environment Court where they are satisfied that a litigant has frequently instituted or conducted vexatious proceedings.

3.30 The Supreme Court has the power to make orders of wide application (sometimes referred to as 'blanket' orders). This includes orders staying all or part of any current proceedings in any NSW court or tribunal to which the litigant is a party; orders prohibiting the litigant from instituting any proceedings in any NSW court or tribunal; and any other orders the Court considers appropriate in relation to that litigant.

3.31 The scope of the orders that can be made by the Land and Environment Court is more limited, and is confined only to proceedings before that particular court. More specifically, the Land and Environment Court may make orders staying all or part of any proceedings the litigant has commenced before it; orders prohibiting the litigant from commencing any proceedings before it; and any other orders it considers appropriate with respect to the proceedings by that litigant in the Land and Environment Court.

3.32 Submissions received from a number of stakeholders suggested that the scope of the orders that authorised courts can make under section 8(7) and (8), when read in

conjunction with the section 4 definition of 'proceedings', would benefit from further clarification.

Application of orders to criminal proceedings

3.33 As a number of stakeholders and recent case law has observed,[7] a blanket order made by the Supreme Court under section 8(7), or certain orders made by the Land and Environment Court under section 8(8), could arguably restrict the rights and freedoms of a person who is subject to a vexatious proceedings order in criminal proceedings against him or her. More specifically, in any criminal proceedings brought against him or her, a litigant subject an order of wide application may be prevented from applying for bail, seeking a stay, applying to vacate a trial date, making procedural applications relating to prosecution, or appealing against a conviction (irrespective of whether the order was made in relation to his or her conduct in civil proceeding only).

3.34 There is a fundamental distinction between restricting the capacity of people to bring unmeritorious civil proceedings against others, and restricting their capacity to defend criminal charges brought against them. Preserving the rights of individuals to fully defend criminal charges against them, and to apply for bail while any such charges are being prosecuted, is essential (noting also that section 73(1) of the *Bail Act 2013* already provides that a court may refuse to hear a bail application if it considers the application is frivolous or vexatious, without substance, or has no reasonable prospect of success).

3.35 The Department recognise that some litigants do conduct criminal proceedings in a vexatious manner, and may make vexatious applications in those proceedings that constitute an abuse of process, are designed to delay, harass or annoy, or are pursued without reasonable grounds.[8] Authorised courts do need some control over vexatious litigants' behaviour in those proceedings, as the Act envisages (see the discussion of sections 4 and 5 in Paragraph 3.1 above).

3.36 The Department recommends that the Act be amended to specify that vexatious proceedings orders only apply to criminal proceedings brought *against* a vexatious litigant, and bail applications associated with such proceedings, if this is explicitly stated in the order. Where no such specification is made, but a vexatious litigant later acts vexatiously in criminal proceedings, it would be open to the authorised court to vary an order to include criminal proceedings, whether on its own motion, or on the application of an authorised applicant, in accordance with section 9, discussed at Paragraph 4.1 below.

Recommendation 4

The *Vexatious Proceedings Act 2008* be amended to provide that, unless it expressly states otherwise, a vexatious proceedings order does not prohibit a litigant from making applications in criminal proceedings brought *against* him or her, or from making bail applications.

[7] See *Viavattene v Attorney General* [2014] NSWCA 218 at [7], [11]; *Attorney General (NSW) v Potier* [2014] NSWSC 118 at [217]-[220].

[8] See for example *Viavattene v Attorney General* [2014] NSWCA 218; *Attorney General v Potier* [2014] NSWSC 118 at [81]-[196].

Application of orders to interlocutory and procedural applications

3.37 The Law Society of NSW submitted that section 4 does not clearly specify whether all interlocutory and procedural applications are 'proceedings' for the purposes of the Act. This affects whether such applications are or can be prohibited under section 8(7) and 8(8) orders, and, therefore, whether a litigant subject to an order must make a formal application for leave under section 14 (discussed at Paragraph 4.5 below) every time he or she seeks to file an interlocutory and procedural application.

3.38 A vexatious litigant has significant capacity to divert court resources with persistent interlocutory and procedural applications. Excluding these applications from the definition of 'proceedings' for the purpose of section 8(7) and 8(8) orders would therefore leave an clear avenue open to vexatious litigants to continue to abuse the time and resources of the courts, contrary to the objects of the Act.

3.39 The Department recommends that the Act be amended to clarify that vexatious proceedings orders apply to all interlocutory and procedural applications in civil proceedings unless otherwise specified.

Recommendation 5

The *Vexatious Proceedings Act 2008* be amended to clarify that all interlocutory and procedural applications in civil proceedings are 'proceedings' for the purpose of vexatious proceedings orders made under section 8, unless specified otherwise.

4. Applications to vary or set aside orders, and for leave to institute proceedings

4.1 Applications to vary or set aside

4.1 Section 9 of the Act provides that an authorised court may vary or set aside a vexatious proceedings order on its own motion, on the application of the person subject to the order, or on the application of any of the applicants authorised to seek orders under section 8(4) (discussed at Paragraph 2.2 above).

4.2 The Act does not set out the procedural requirements for how a section 9 application to vary or set aside an order is to be made or determined, however, nor limit the number of times an applicant can make such an application.

4.3 The submission of the Chief Justice of the Supreme Court suggested that, without any limitations on how many applications vexatious litigants can make to have orders against them varied or set aside, section 9 is open to abuse. That submission also suggested that section 9 applications may be misused by vexatious litigants as a way to avoid the more onerous process for applying for leave to institute proceedings under Part 3 (discussed at Paragraph 4.5 below).

4.4 To avoid misuse of section 9, the Department recommends that the Act be amended to provide that an authorised court may refuse an application to vary or set aside an existing vexatious proceedings order if it is not satisfied that the relevant application is materially different to an earlier section 9 application that has already been refused. This will ensure that vexatious litigants cannot persistently and vexatiously use section 9 to expand their capacity to institute or conduct proceedings, and thereby divert the resources of the court.

Recommendation 6

The *Vexatious Proceedings Act 2008* be amended so that an authorised court may refuse an application to vary or set aside an existing vexatious proceedings order if it is not satisfied that the application is materially different to an earlier, unsuccessful application to vary or set aside the same order.

4.2 Applications for leave

4.5 Section 14(1) and 14(2) provide that a person who is subject to a vexatious proceedings order, or acting in concert with a person who is, may apply to an appropriate authorised court for leave to institute proceedings that would otherwise be prohibited under the order. Under section 14(3), any leave application must include an affidavit that:

- lists all previous leave applications (including any made under earlier, repealed legislation addressing vexatious proceedings)
- lists all proceedings the applicant has instituted in Australia
- discloses all facts material to the application, whether supporting or adverse to the application, that are known to the applicant.

4.6 Upon receipt of a section 14 application, the authorised court must either dismiss the application under section 15, or grant it under section 16.

4.7 Section 15(1) states that the court *must* dismiss a leave application to institute proceedings if it considers that:

- the affidavit does not comply with the requirements of section 14, or
- the proceedings the applicant wants to institute are vexatious proceedings, or
- there is no prima facie ground for the proceedings.

4.8 Section 15(2) provides that an application may be dismissed even if the applicant 'does not appear at the hearing' of the application.

4.9 Under section 16, before an application can be granted, the court must order the applicant to serve a copy of the application and affidavit on any relevant person, and give all interested parties an opportunity to be heard. Relevant persons include:

- anyone against whom the person proposes to institute proceedings,
- the Attorney General,
- the Solicitor General, and
- anyone who applied for the original order.

4.10 Several stakeholders submitted that the sections 14, 15 and 16 may not suitably promote the objectives of the Act, and require further clarification, as these provisions themselves are open to vexatious abuse to the detriment of courts and other parties.

Materially identical applications

4.11 As with section 9, the Act does not provide clear guidance on the process or conditions for making and considering section 14 applications,[9] nor the number of section 14 applications a vexatious litigant can make. The Chief Justice referred to one particular vexatious litigant who had made at least 36 section 14 applications after a vexatious proceedings order was made against the litigant.

4.12 Without any limitation on the number of section 14 applications a vexatious litigant can make, there is potentially for vexatious litigants to persistently make frivolous or vexations section 14 applications, to the significant time and resource detriment of the courts. The Department agrees that some limitation or process to manage misuse of section 14 is warranted, and would ultimately help promote the objectives of the Act. Specifically, the Department recommends that the Act be amended to allow an authorised court to refuse to consider a section 14 application where the court is not satisfied on the papers that the application is materially different from an earlier section 14 application from the same applicant that was dismissed.

4.13 A similar process exists under the Victorian *Vexatious Proceedings Act 2014*. Under that Act, the court registrar may refuse to accept a leave application if he or she is

[9] See *Bar-Mordecai v Attorney General; Bar-Mordecai v State of New South Wales* [2012] NSWCA 207 at [50].

not 'satisfied that the application is materially different from a previous application made by the applicant',[10] and a court may dismiss an application if it is not satisfied that the application is materially different to a previous application made by the relevant applicant[11]

Recommendation 7

The *Vexatious Proceedings Act 2008* be amended to allow an authorised court to decline to consider an application for leave to institute proceedings where it is not satisfied on the papers that the application is materially different to a previous application for leave to institute proceedings that was dismissed as vexatious or for not providing a prima facie ground for the proceedings.

Dismissing applications

4.14 Several stakeholders submitted that the current wording of section 15(2) ('at the hearing') indicates that an authorised court is required to hold a hearing before it can dismiss any application for leave, even if the application must be dismissed under section 15(1). If this were indeed required, courts would potentially have to hold numerous hearings to dismiss plainly unmeritorious applications that must, but way of section 15(1) be dismissed. This would be a waste of the courts' time and resources, and would be counterproductive.

4.15 This issue has been raised in a number of recent cases. In *Bar-Mordecai v Attorney General; Bar-Mordecai v State of New South Wales* [2012] NSWCA 207,[12] the Chief Justice of the Supreme Court submitted that it is essential that authorised courts be able to dismiss section 14 applications in accordance with section 15(1) without a hearing. Similarly, Leeming JA observed in the later *Application by Bar-Mordecai* [2013] NSWSC 1908, concerning the same vexatious litigant, that:

> "The premise of these provisions is that a Court has taken the extraordinary step of denying a person the ordinary right to commence litigation. That step will only have been taken if there has been a demonstrated history of abusing the processes of the Court. That being the inevitable background to, and context for, s.15, there is no good reason to require the Court in every case, even where it appears that the Court must dismiss the application, first to hear orally from the applicant."

4.16 The Department agrees that section 15(2) could be read as implying that a hearing has to be held in relation to every section 14 application, whether or not the application must be dismissed for failing to comply with the conditions of section 15(1). The Department does not consider that this was the intended application of the section, however.

4.17 Requiring courts to hold hearings for all applications - even those that are unmeritorious and must be dismissed under section 15(1) - is plainly contrary to the objects of the Act, and would necessarily involve further strain on court resources. It is also inconsistent with section 16(1) and section 16(4), which provide that:

[10] *Vexatious Proceedings Act 2014* (Vic) s 57.

[11] *Vexatious Proceedings Act 2014* (Vic) s 58.

[12] *Bar-Mordecai v Attorney General; Bar-Mordecai v State of New South Wales* [2012] NSWCA 207 at [53].

> (1) 'Before an appropriate authorised court *grants* an application made under section 14… it must: … (b) give the applicant and each relevant person an opportunity to be heard at the hearing' [emphasis added]; and
>
> (4) 'That the court may grant leave *only if it is satisfied that*: (a) the proceedings are not vexatious proceedings, and (b) there are one or more prima facie grounds for the proceedings' [emphasis added].

4.18 Section 16(1) is phrased to the effect that an oral hearing is only required before an authorised court *grants* an application for leave (rather than in all cases). However, section 15(1) and section 16(4) have the effect that leave *cannot* be granted if the proceedings are vexatious or there is no prima facie ground for the proceedings. If these essential requirements are not met, there can be no prospect of the court granting the application, and therefore no requirement for an oral hearing.

4.19 The Department recommends that section 15 be amended to make clear that, where a section 14 application must be dismissed under section 15(1), the court is not required to hold an oral hearing prior to dismissal.

Recommendation 8

The *Vexatious Proceedings Act 2008* be amended to clarify that section 15(2) does not require an appropriate authorised court to hold an oral hearing before dismissing an application for leave to institute proceedings under section 15(1).

Granting applications

4.20 The Department has considered the issue of whether a grant of leave to commence certain proceeding should be taken to include a grant of leave to make any interlocutory and procedural applications associated with those proceedings. This issue has also arisen in case law.

4.21 In the case of *Bar-Mordecai v Attorney General; Bar-Mordecai v State of New South Wales* [2012] NSWCA 207, the plaintiff was subject to a vexatious proceedings order prohibiting him from instituting proceedings, but had been granted leave to institute these particular proceedings. In that case, the Court of Appeal considered whether his application for an order for discovery within those proceedings was prohibited under the vexatious proceedings order.

4.22 The Court of Appeal held that, although the vexatious proceedings order would prohibit interlocutory applications that amounted to *initiating* proceedings without leave, it would not prohibit *routine* applications within proceedings for which leave had already been granted. Justice Basten noted that interpreting an order as prohibiting such routine applications within authorised proceedings would:

> "…transfer much of the case management from the trial court to the Supreme Court and could lead to constant interruption of trials for the institution of applications for leave in the Supreme Court… It would tend to disrupt the orderly administration of justice and derogate from the overriding objective of just, quick and cheap resolution of the real issues in dispute."[13]

4.23 The *Bar-Mordecai* judgement did not give a clear indication of how to distinguish initiating interlocutory applications, and routine interlocutory applications, although

[13] *Bar-Mordecai v Attorney General; Bar-Mordecai v State of New South Wales* [2012] NSWCA 207 at [32].

Justice Basten provided some useful examples of what might constitute initiating interlocutory applications. These included: applications to join a new party to existing proceedings; application to introduce into an existing pleading a substantially new cause of action based facts different to hose already pleaded; and an application to remove proceedings from one court or tribunal to another.[14]

4.24 The Department considers that it would be impractical and disruptive to proceedings if a vexatious litigant, having obtained leave to institute proceedings, had to obtain further leave to make each and every interlocutory application that might be made within those proceedings. The Department therefore recommends that, unless otherwise specified, grants of leave to commence proceedings should be taken to include leave to make any interlocutory and procedural applications associated with those proceedings.

Recommendation 9

The *Vexatious Proceedings Act 2008* be amended to clarify that a grant of leave to institute proceedings under section 16 should be taken to include a grant of leave to make any interlocutory applications within those proceedings unless specified otherwise.

[14] *Bar-Mordecai v Attorney General; Bar-Mordecai v State of New South Wales* [2012] NSWCA 207 at [34].

Appendix A

Conduct of the Review

In April 2014, the Department advised on its website and in the *Sydney Morning Herald* that the Review was underway and invited interested stakeholders to make submission. The Department also sent consultation letters to key stakeholders, directly inviting to make written submissions about the Act's operation. Those stakeholders were:

- Chief Justice, Supreme Court of NSW
- Chief Judge, Land and Environment Court of NSW
- Chief Judge, District Court of NSW
- Chief Magistrate, Local Court of NSW
- President, NSW Civil and Administrative Tribunal
- President, Industrial Court
- President, Workers Compensation Commission
- President, Law Society of NSW
- President, NSW Bar Association
- Legal Aid NSW
- NSW Crown Solicitor's Office

The deadline for submissions was 16 May 2014, however, the Department also accepted submissions received after this date.

Noting that the Act deals with a specialised area of the legal system, the Department did not receive a large number of submissions.

Stakeholders that made submissions were invited to review and make comments on a preliminary draft of the report in early 2015. Their comments were incorporated into later drafts of the report.

The Department of the Premier and Cabinet, the Chief Justice of the Supreme Court, the Chief Judge of the Land and Environment Court, the Chief Judge of the District Court, the Chief Magistrate of the Local Court, the President of the NSW Civil and Administrative Tribunal, the Crown Solicitor's Office, the Law Society of NSW and the NSW Bar Association were invited to review and make comments on a draft of the report in April 2017.